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

Appeal from
the Circuit Court for the Second Judicial District of Panola County,
Civil Case No. CV1998-177BP2 (Hon. L. Joseph L. Lee, Special Circuit Judge)

BRIEF OF DANNY HOLLAND, PLAINTIFF-APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28 of the Mississippi Rules of Appellate Procedure the undersigned counsel for the Appellant, Danny Holland, certifies that the following persons and entities have an interest in the outcome of this proceeding:

APPELLANT:

Danny R. Holland
164 Oak Acres Road
Batesville, Mississippi 38606 ..... Appellant

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APPELLEE:

Renasant Bank, f/k/a Peoples Bank & Trust ..... Appellee

Scott R. Hendrix (MS # [redacted]
L. Bradley Dillard (MS #10114)
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Stephen M. Corban (MS [redacted]
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TRIAL JUDGES:

Honorable L. Joseph Lee
Mississippi Court of Appeals,
District 4, Place 2, Presiding Judge ..... Special Circuit Judge

Honorable Robert Kenneth Coleman
Retired Circuit Judge, District 3 ..... Previous Special Circuit Judge

Honorable Andrew C. Baker
Circuit Judge, District 17 ..... Previous Presiding Circuit Judge

THIS, the 25th day of April, 2008.

ROBERT Q. WHITWELL (MS [redacted]
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

RULES:

STATUTES:

OTHER:

STATEMENT REGARDING ORAL ARGUMENT

Danny Holland, Appellant, acting pursuant to Rule 34(b), Miss.R.App.P., makes this statement regarding oral argument, to-wit:

The fact issues present in this civil action are intricate and complex. The deposition testimony of Danny Holland, alone, fills an eight-volume transcript. Oral argument will assist the Court in understanding the nature of this litigation and the pertinent facts.

This action also involves the appropriate application of the principle of waiver espoused in *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904 (Miss. 1935), and applied in other cases.[1] The trial court, by granting summary judgment on the basis of the doctrine of waiver and/or ratification, effectively ruled that matters beyond the scope of a renewal note were waived and/or ratified by its execution. This action gives this Court an opportunity to announce how broadly the waiver/ratification doctrine may be applied. Oral argument will assist this Court in evaluating whether that doctrine has application in situations similar to the instant case.

* * * * * *

[1] *Gay* was cited as controlling in as well as in *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).

I. STATEMENT OF THE ISSUES

The parties to this action are Danny Holland, the Plaintiff below and the Appellant herein, and Renasant Bank (f/k/a The Peoples Bank & Trust Company), the Defendant below and the Appellee herein. Danny Holland may hereinafter be referred to simply as "Holland," while Renasant Bank may hereinafter be referred to simply as "the Bank."

Danny Holland would provide the following statement of issues:

ISSUE I: The trial court erred in granting the Bank's motion for summary judgment because genuine issues of material fact relating to the Bank's negligence, bad faith, and breach of its fiduciary duty are present in this case and such fact issues may only be resolved by a jury.

ISSUE II: The trial judge erred in ruling that Danny Holland had waived his claims (and/or ratified the Bank's actions) because at least some of Holland's claims against the Bank fall outside of the work-out agreement (*i.e.*, the renewal note); therefore, the waiver/ratification rule cannot be applied to those claims.

ISSUE III: The successor trial judge erred in granting the Bank's motion for reconsideration of the Bank's motion for summary judgment which had formerly been denied earlier in the proceedings by an earlier order from the previous trial judge.

ISSUE IV: The Bank waived its claims made in its motion for reconsideration; therefore, the motion should have been denied.

ISSUE V: The trial court erred in granting the Bank's motion for summary judgment because other genuine issues of material fact relating to the Bank's actions are present in this case and such fact issues may only be resolved by a jury.

* * * * * *

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS

Danny Holland, as Plaintiff, commenced this action by filing his complaint in the Circuit Court for the Second Judicial District of Panola County on November 20, 1998, and naming The Peoples Bank & Trust Company of Tupelo, Mississippi as the sole and only defendant.[2] Holland's complaint asserts various claims for negligence, negligent misrepresentations, fraudulent misrepresentations, breach of fiduciary duties, and breach of implied covenants of good faith and fair dealing. It seeks a judgment against the Bank for $5,000,000.00 in compensatory damages, as well as other damages. [CP 1-184; RE 56-239] The Bank filed its answer on December 18, 1998. [CP 185-94; RE 240-49] Holland amended his complaint on July 7, 1999. [CP 231-32; RE 250-51] The Bank answered the amended complaint on July 12, 1992. [CP 233-35; RE 252-55]

Notably, the Bank affirmatively raised the defense of waiver and/or ratification. [CP 188-89; RE 243-44]

After extensive discovery was conducted, the Bank filed a motion for summary judgment on June 13, 2005, [CP 237-39; RE 256-58] and Holland filed a written response to the Bank's motion.[3] [CP 448-53; RE 272-77] The Mississippi Supreme Court appointed Senior Status Judge Robert Kenneth Coleman to preside over the civil action.[4] [CP 404; RE 406] Judge Coleman conducted a

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[2]The Peoples Bank & Trust Company now operates under the name "Renasant Bank."

[3]The great bulk of the record in this civil action (the Clerk's Papers constitute 1,024 pages) is comprised of exhibits (documents, excerpts from depositions, *etc.*) submitted by both parties relative to the Bank's summary judgment motion.

[4]Andrew C. Baker, Ann H. Lamar, and Robert P. Chamberlin, Circuit Court Judges for the Seventeenth (17th) Circuit Court District, signed a joint *Order of Recusal* on July 11, 2005. [CP 402-03; RE 404-05]

hearing on the Bank's summary judgment motion on December 13, 2005; [RE 10-55] and by order dated February 24, 2006, Judge Coleman denied the Bank's motion. [CP 964; RE 9]

After its motion for summary judgment was denied by Judge Coleman, the Bank sought an interlocutory appeal, but this Court denied that appeal on March 29, 2006.[5] [CP 965; RE 407] Subsequently, Judge Coleman removed himself from the case due to personal reasons, and (on January 8, 2007) L. Joseph Lee, a Presiding Judge of the Mississippi Court of Appeals, was appointed to preside over the case. [CP 969; RE 410]

Following the appointment of Judge Lee, the Bank (on July 19, 2007) filed the *Defendant's Motion for Reconsideration of Order Denying Summary Judgment*. [CP 978-86; RE 419-27] Judge Lee (on October 9, 2007) entered an order granting the Bank's motion for summary judgment. [CP 1013-16; RE 5-8] Danny Holland then filed his *Notice of Appeal* (on November 8, 2007). [CP 1021-22; RE 428-29]

* * *

B. DISPOSITION IN THE COURT BELOW

The Bank's motion for summary judgment was granted on October 9, 2007. [CP 1013-16: RE 5-8]

The Bank filed its *Motion for Summary Judgment, or Alternatively, for Partial Summary Judgment* on June 13, 2005 [CP 237-39: RE 256-58], in which it made the following allegations:

1. That Danny Holland's negligence claims fail as a matter of law.

2. That Danny Holland's allegations of oral promises by the Bank fail as a matter of law because:

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[5]The petition for interlocutory appeal was docketed as Case Number 2006-M-00436 before the Supreme Court of Mississippi.

a. They are barred by the parol evidence rule;
b. Holland failed to establish the material terms of any oral contract;
c. Lack of consideration; and,
d. Holland's claims are based on promises made by a loan officer whom Holland knew lacked apparent or actual authority.

3. That Danny Holland's claims against the Bank are barred by the doctrines of ratification and waiver.

4. That Danny Holland did not establish that any misconduct by the Bank caused him any damages.

After the Bank filed its summary judgment motion, both parties submitted briefs, exhibits, and deposition excerpts in support of their relative positions.[6] Judge Coleman heard oral argument on the motion (on December 13, 2005) [RE 10-55], and thereafter (on March 3, 2006) entered his order denying the Bank's motion. [CP 964; RE 9]

Following the appointment of Judge Lee to hear the case, the Bank (on July 19, 2007) filed the *Defendant's Motion for Reconsideration of Order Denying Summary Judgment* [CP 978-986; RE 419-27], attaching as an exhibit to it a *Statement of Trial Court in Support of Interlocutory Appeal Pursuant to M.R.A.P. 5(b)* which had been signed by Judge Coleman on March 28, 2006. [CP 983-986; RE 424-27] That statement contains this language:

> Although Renasant raised a number of arguments in its Motion for Summary Judgment, in response to Holland's allegations, at least two (2) arguments asserted by Renasant are legal, rather than factual, in nature. Specifically, 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/or omissions and Holland's alleged damages. If Renasant is correct, either argument would be dispositive of all claims in this cause.

[CP 984; RE 425]

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[6]Again, the great bulk of the record in this civil action (the Clerk's Papers constitute 1,024 pages) is comprised of exhibits (documents, excerpts from depositions, etc.) submitted by both parties relative to the Bank's summary judgment motion.

On October 9, 2007, Judge Lee entered an order granting the Bank's motion for summary judgment. [CP 1013-16; RE 5-8] Judge Lee stated that Holland had brought "suit against the Bank alleging negligence, fraudulent misrepresentation and breach of a fiduciary relationship." [CP 1013; RE 5] Judge Lee held that:

> Holland accuses the bank of negligent misrepresentation in regards to [the Bank's] alleged promise to lend him money. A promise to lend money is not a past or present existing fact and "the promise of future conduct is, as a matter of law, not such a representation as will support recovery under a theory of negligent misrepresentation." [Citations omitted.] Thus, Holland's claim of negligent misrepresentation fails.

[CP 1014-15; RE 6-7]

Judge Lee's order also stated that Holland had alleged the Bank had "breached an oral promise to lend Holland money beyond the terms of the contract," that "Holland's claim fails because written contracts cannot be varied by prior oral agreements," and that "[a]ny parole [*sic*] evidence Holland would submit to vary the written contract terms is inadmissible." [CP 1015; RE 7]

Judge Lee's order appears to adopt an argument advanced by the Bank that "work-out agreements and amendments to his promissory notes" which were executed by Holland constitute a waiver of any claims Holland may have against the Bank. [CP 1015; RE 7] Finally, Judge Lee's order states that "throughout the entirety of this litigation, Holland has failed to produce any documentation to support" his claim that the Bank's "refusal to extend the loan ultimately resulted in losses to his cotton and farming business." [CP 1015; RE 7]

Following entry of Judge Lee's order (entered on October 9, 2007), Holland filed his *Notice of Appeal* on November 8, 2007. [CP 1021-22; RE 428-29]

* * * * * *

C. STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

Danny Holland sold a parcel of real property located in Lafayette County on May 9, 1996; the transaction was closed at the office of attorney Kay Cobb in Oxford and the net proceeds from this sale totaled $237,558.87.[7] [CP 472-578; RE 295, 350] Because the sale of this property was intended to be a part of a "deferred tax free exchange" under §1031(a)(3) of the Internal Revenue Code, William H. McKenzie, III, a long, sitting Municipal Court Judge and experienced, competent, real estate attorney in Batesville, Mississippi, acting according to the Bank's and Holland's instructions and agreement, prepared escrow and exchange documents pursuant to which the Bank would act as the escrow agent and which provided, in pertinent part, as follows:

> 5.
>
> ***In the event Holland has not located replacement property or is unable to finalize the purchase of replacement property*** within the 45 day identification period or the 180 day tax return due date ... ***then the Escrow Agent shall pay any escrowed funds then remaining to Holland*** whereupon this escrow agreement shall terminate.

[CP 570-76; RE 342-48] (Emphasis added)

After closing the sale, Kay Cobb wrote a letter (dated May 9, 1996) addressed to William E. Jeffreys, III, at the Bank, which stated, in pertinent part, as follows:

> Enclosed you will find my trust account check #1401 in the amount of $237,558.87 which represents the entire net proceeds from the sale of his Lafayette County farm (425 acres, more or less) by Danny Holland to my clients .... 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.

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[7]The Lafayette County property is known as the "Yocona Bottom" farm or property. The replacement property Holland intended to be included in the §1031 exchange is known as the "Long Branch" farm or property, and Holland had executed a purchase contract and deposited $30,000.00 earnest money for Long Branch. When property held for productive use in a trade or business, or for investment, is exchanged for property of like kind that is also to be held either for productive use in a trade or business, or for investment, the taxes or credits normally associated with any gain or loss can be deferred under §1031(a)(3) of the Internal Revenue Code (*i.e.*, 26 U.S.C. §1031). See, *e.g.*, *Callicutt v. Professional Services of Potts Camp, Inc.*, 974 So.2d 216 (Miss. 2007).

> Also enclosed is a Release of Deeds of Trust which I have prepared for you to use to release all encumbrances which Peoples Bank has against this property. ....

[CP 570; RE 342]

Kay Cobb testified in a sworn deposition that although her involvement was limited to closing the Yocona Bottom sale for her clients, her "understanding of the big picture" was that in order to complete the §1031 exchange "they would need to escrow (the sale proceeds) until they got the replacement property." [CP 564, 802; RE 339, 397] Cobb's trust account check (check #1401, in the amount of $237,558.87) which was dated May 9, 1996, and which was delivered to the Bank on that day. However, it was not deposited by the Bank until May 22, 1996. [CP 565, 802, 578; RE 340, 397, 350] Meanwhile, on May 10, 1996, the Bank cancelled the deeds of trust it had recently taken on Holland's Yocona Bottom property. [CP 565, 802, 568-69; RE 340, 397]

It is extremely significant to note that when Holland sold his Yocona Bottom property to Kay Cobb's clients, the Bank immediately cancelled the deeds of trust it held on the property even though the Bank did nothing with Cobb's $237,000.00 check for almost two weeks![8] Again, the $237,000.00 represented Holland's proceeds from the sale of the Lafayette County property, and Holland intended to avoid capital gains taxes on this money; this is the very reason Cobb delivered the check to the Bank so the money could be escrowed until Holland closed on the Long Branch farm he had located for the §1031 exchange. Thus, this $237,000.00 was Danny Holland's money – representing his equity from the Yocona Bottom sale, and if the §1031 exchange was not completed, Holland would be taxed on the capital gain. It is obvious that the Bank did not consider the $237,000.00 to be its money. Otherwise, it would have deposited the check before releasing its

[8]In order to simply the language of this brief, throughout this brief (unless otherwise indicated) the figure of $237,000.00 will be used to refer to the actual amount of $237,558.87, which was the net proceeds from the sale of Holland's Yocona Bottom County property.

deeds of trust on May 10, 1996. Instead, the Bank did not deposit the check into any account for almost two weeks (*i.e.*, from May 9, 1996, until May 22, 1996).

In sworn deposition testimony, Corky Springfield, an executive vice-president and central region manager for the Bank, denied having knowledge of any escrow agreement relating to the proceeds from the sale of Holland's Lafayette County property [CP 810; RE 398], when in truth, the escrow/exchange documents were sitting in the Bank's vault along with Holland's $237,000.00 check. Springfield admitted that the Bank held that check from Kay Cobb in the Bank's vault for thirteen (13) days prior to depositing it. [CP 811; RE 399] When the Bank finally did deposit the check, Springfield testified that the $237,000.00 was applied to one of Holland's notes (note number 8062) held by the Bank. [CP 811; RE 399] Springfield testified that he 'believed' all of Holland's holdings were "cross-collateralized" and stated "that's how it should have been done." [CP 812; RE 400] Even though Holland was present at the Bank on May 23, 1996, and met face-to-face with Springfield, Springfield testified that he did not advise or notify Holland that the $237,000.00 had not been escrowed but had, in fact, been applied to Holland's loans (which occurred on May 22, 1996). [CP 813; RE 401] Springfield also testified that neither he nor anyone else at the Bank made any effort to advise or notify Holland that the Bank was not holding the $237,000.00 in trust despite the earlier representations to Holland that it was doing so. [CP 813; RE 401]

The reasonable inference which may be drawn from Springfield's testimony reinforces the belief by all (at least prior to its conversion by the Bank) that the $237,000.00 net proceeds from the sale of the Yocona Bottom property was Danny Holland's money and not that of the Bank. Had the Bank intended this money to represent its interest in the Lafayette County property, it would have deposited the $237,000.00 check before releasing the deeds of trust, as opposed to immediately releasing the deeds of trust on the Lafayette County property and then holding the check for almost

two full weeks before ultimately applying the money to one of Holland's other loans. In doing that, the Bank misappropriated cash which belonged to Holland, and at a time and under circumstances when Holland had the right to decide where and how the money would be deposited and applied. By analogy, the Bank's action (*i.e.*, applying the money to one of Holland's notes) was effectively the same thing as if Holland had deposited the $237,000.00 into his personal checking account and the Bank had then transferred the money from Holland's checking account to apply the money to one of Holland's notes without Holland's knowledge or approval of the transfer. When the Bank took the $237,000.00 away from Holland, none of Holland's notes were due or in default; therefore, ***the bank had no right of set-off!***

Judge Lee's statement that Holland "eventually defaulted" on his loans to the Bank is misleading on this issue. [CP 1013; RE 5] When the Bank misappropriated Holland's funds from escrow on May 22, 1996, Holland's loans were less than thirty (30) days old and were neither due nor in default. In granting summary judgment, Judge Lee ignored that the Bank's misappropriation of the $237,000.00 was the initiating event of the cascading failure of Holland's cotton and farming businesses which ultimately devastated Holland's financial position. Accordingly, it was the Bank's misconduct that put Holland in default.

Danny Holland's ill-fated relationship with the Bank began early in 1996 when Holland, who was engaged in livestock and crop farming operations, went to the People's Bank and Trust Company branch in Coffeeville and obtained a cattle loan through William Jeffreys, the vice-president in charge of the Coffeeville branch.[9] [CP 378; RE 264] Upon making the cattle loan, Jeffreys, on behalf of the Bank, solicited all of Holland's banking business; Holland's business

[9]The Coffeeville branch of The Peoples Bank and Trust was originally a branch of the Bank of Water Valley; the Bank of Water Valley subsequently merged with The Peoples Bank and Trust. [CP 377].

interests, in addition to the livestock and crop farming operations, included Holland's cotton brokerage business, Danny R. Holland & Company. [CP 512-14; RE 305-07]

In February 1996 Holland decided to transfer all of his banking business to the Bank, and he represented to the Bank assets valued at $2,261.910.00, debt in the amount of $1,010,235.00, and a positive net worth of $1,251,675.00. [CP 497; RE 299] Holland stated he needed $238,926.00 to pay off certain debts, plus an operating line of credit ("LOC") of $500,000.00, for a total of $738,926.00. [CP 497; RE 299] This would have left Holland with a positive net worth of $512,749.00. Holland submitted financial information to the Bank, including land, equipment, and livestock appraisals, profit and loss statements for Holland's cotton company, and prior years' tax returns. Those tax returns reflected that Holland earned approximately $450,000.00 per year from the cotton business, and the profit and loss statements revealed $250,000.00 available for margin calls. Copies of the financial documentation Holland submitted to the Bank are attached to Holland's complaint. [CP 6-184; RE 56-239]

Holland fully advised the Bank (through its vice-president, William Jeffreys) of the workings of his business, and especially his cotton business, and Holland provided the Bank with a schedule detailing the nature and extent of his hedge account dealings. [CP 455, 457-60, 466, 514, 544-45; RE 279, 281-84, 291, 307, 331-32] Holland informed the Bank (through Jeffreys) that Holland would need a LOC up to as much as $700,000.00 by May 1996 if the market price of cotton dropped below $0.80 a pound. [CP 460; RE 284] Holland explained that the additional $200,000.00 (above the normal $500,000.00 operating LOC) was sufficient, under Holland's business system and the contracts with his farmer-clients, to maintain the cotton company's market position to certain farmer-client, specific price-points whereupon Holland's farmer-clients would have to put up their own margin money to remain in the market. If the farmer-clients chose not to stay in the market, their

contracts would be sold, thereby ending the exposure of both Holland and the client-farmer in a systematic and orderly fashion [CP 460, 465; RE 284, 290], as opposed to the chaotic and devastating ending that the Bank caused. Unfortunately, the Bank never understood Holland's business system. In any event, the Bank (acting through Jeffreys) repeatedly assured Holland that the funds (*i.e.*, the $200,000.00 above the normal operating LOC of $500,000.00) 'would not be a problem.' [CP 460; RE 284]

William Jeffreys handled the loan application process for Holland, and Jeffreys' omissions, misrepresentations, negligence, breach of fiduciary duties and other actions directly caused, or at least proximately contributed to the rapid demise of Danny Holland's business interests, which are traceable to the Bank's misappropriation of the $237,000.00 net proceeds from the sale of Holland's Lafayette County property. Jeffreys, who completed the blank loan applications for Holland, failed to complete those applications either accurately or consistent with Holland's instructions. [CP 378, 519; RE 264, 309] Together with his immediate supervisor, Corky Springfield, Jeffreys presented their version of Holland's loan proposal to the Bank's board, but what Jeffreys and Springfield submitted to the board materially differed from what Holland had requested and from what Jeffreys had assured Holland that Holland would be able to receive. [CP 519-21; RE 309-11] Jeffreys would later lamely testify that his reason for failing to inform Holland of the difference between what Holland was seeking and what was actually submitted to the Bank's board because "I did not have the authority to turn the loan down." [CP 521; RE 311]

The proposal Jeffreys and Springfield submitted to the Bank's board did not include any provision for an additional LOC of $200,000.00 for Holland above the normal operating LOC of $500,000.00; Jeffreys, however, continued to misrepresent to Holland and other third parties that the additional $200,000.00 LOC was "no problem." [CP 546; RE 333] Jeffreys never told Holland that

Holland's requested $700,000.00 LOC had not been approved by the Bank's board, and Jeffreys' silence led Holland to believe that the additional $200,000.00 LOC would be available. [CP 461, 463, 465, 467; RE 285, 287, 289, 292]

The loan package between Holland and the Bank was to close on April 29, 1996, and when Holland reviewed the loan documents at closing he was alarmed to find the loan package provided a LOC of only $500,000.00. That package also failed to contain financing for Holland's land-swap, and the interest rate was not fixed but was tied to the prime rate and was for a shorter term than Holland had requested. [CP 379-83, 519-32; RE 265-69, 309-22] Jeffreys response to Holland's objections to the loan documents was to tell Holland that the loan documents had already been prepared and it would be too much trouble to change them. Jeffreys made matters worse by misrepresenting to Holland that the items Holland found missing from the documentation had already been approved by the board and that there was "no problem." [CP 454-69; RE 278-94] Jeffreys told Holland that if Holland would close the loan, the Bank would provide the additional $200,000.00 LOC for the cotton business.

Further, Jeffreys agreed that the Bank would act as the §1031 escrow/exchange agent for Holland, thereby giving rise to the Bank's fiduciary duties owed Holland here. [CP 469, 522, 535-38; RE 294, 312, 323-26] Danny Holland relied on Jeffreys' misrepresentations and executed the loan package with the Bank on April 29, 1996. He signed the Bank's loan documents as prepared. [CP 487; RE 296]

Corroboration of the Bank's fiduciary obligations is found through the actions and writings of attorneys William "Bill" McKenzie and Kay Cobb as indicated previously herein. Pursuant to William Jeffreys' instructions at the April 29th closing at McKenzie's office, Bill McKenzie prepared the exchange and escrow agreements for the Yocona Bottom/Long Branch §1031 exchange and sent

copies of those documents for execution to Kay Cobb and Jeffreys a couple of days in advance of the closing of the Yocona Bottom farm sale to Cobb's clients on May 9, 1996. The escrow agreement that Jeffreys instructed Bill McKenzie to prepare included a provision that if Holland was "unable to finalize the purchase of replacement property . . ., then the Escrow Agent (the Bank) shall pay any escrowed funds then remaining to Holland . . . ." [CP 576; RE 348]

On May 9, 1996, Holland went to attorney Kay Cobb's office in Oxford to sign closing papers for the Yocona Bottom sale. Cobb had the net sale proceeds hand-delivered to Jeffreys by May 10th, at which time Jeffreys executed a release of the Bank's deeds of trust. Not only did Kay Cobb verbally express to Holland her understanding and awareness of the Bank's agreement to the §1031 escrow and exchange, she also corroborated it by her letter to Jeffreys, which expressed her "understanding that this sum will go into a special escrow account there at your bank . . . ." [CP 570; RE 342]

The above excerpts are consistent with the Bank's acceptance of a fiduciary role with Holland, which logically explains why Holland believed that he could use the Yocona Bottom sale proceeds that the Bank told him would be held in escrow to pay margin calls after the Bank eventually denied his additional $200,000.00 LOC on May 22nd. It also supports why Holland instructed Jeffreys to use the escrow funds for that purpose, and is consistent with Jeffreys' response to Holland on May 22nd that Jeffreys would use the escrowed funds to pay the margin calls. In light of McKenzie's documents and Cobb's letter, how can the Bank under these circumstances, in good faith and clear conscience, deny the existence of its escrow and fiduciary duties to Holland?

Holland and Jeffreys rode together to Springfield's office in Tupelo on May 13, 1996, where they discussed the additional $200,000.00 LOC as well as Holland's §1031 land-swap. Holland was again assured by Jeffreys that the additional $200,000.00 LOC would be available. [CP 474-79; RE

430-35] On the morning of May 22, 1996 (which, obviously, is less than thirty days after Holland had signed the Bank's loan documents on April 29, 1996), Holland sent Jeffreys instructions to wire certain funds to certain brokerage houses to cover margin calls related to Holland's cotton business. [CP 479; RE 435] The Bank, however, failed to pay the margin calls for Holland as he had instructed, and Holland was informed by the Bank, for the first time, that the additional $200,000.00 LOC (which Jeffreys had assured Holland was available) would not be provided. [CP 479; RE 435]

Knowing that the margin calls had to be covered, Holland instructed Jeffreys to apply the $237,000.00 (which was being held in escrow for the §1031 land-swap) to cover the margin calls. [CP 479: RE 435] Holland testified:

> Q ... you talked to Mr. Jeffreys and he told you that the additional funding would not be provided.
>
> A. Uh-huh.
>
> Q. Did you ask him why?
>
> A. Yes. And he said the bank just was not going to make it. That's exactly what he said. And that's when I told him, I said, well, William, I have no other choice – you know, I'm going to have to pay capital gains on the – escrow agreement, but I said I have no choice. I said, I will have to forfeit my $30,000, or whatever I have got up, but I've got to pay this margin call. And I asked him to take the funds out of the escrow agreement – out of the escrow agreement and fund the margin.
>
> Q. Okay. And I think you have told me he said he would do that?
>
> A. Yes.

[CP 480; RE 436]

Even though Jeffreys told Holland he would take the $237,000.00 and use it to pay the margin calls, Jeffreys did not do this. Holland called Jeffreys the following day to find out why the Bank had not wired money to the brokerage firms to cover the margin calls, but Holland was directed

to discuss the matter with Springfield. After numerous futile attempts to contact Springfield, Springfield's secretary finally broke the news to Holland that the Bank had taken the entire $237,000.00 and applied the money to one of Holland's notes that was neither due nor in default! [CP 479-80, 529, 557-58, 578, 637, 646; RE 435-36, 319, 336-37, 350, 395, 396]

This act of self-dealing by the Bank was not only done without informing or consulting Danny Holland, but it was contrary to express instructions Holland had earlier given Jeffreys. Rather than use Holland's money to pay his margin calls, the Bank converted those funds to its own use and then later denied ever receiving the escrow agreement. This denial occurred even though Jeffreys admitted that Kay Cobb had delivered the escrow agreement to the Bank along with her $237,000.00 trust account check. [CP 383, 528, 556-57; RE 269, 318, 335-36]

This above self-dealing by the Bank is also an obvious breach of a fiduciary duty, and it struck a devastating blow to Holland's business and financial interests. When the Bank did not provide Holland with the additional $200,000.00 LOC necessary for Holland's cotton business as the Bank had represented it would do, and when the Bank failed to apply the $237,000.00 as Holland had directed and as Jeffreys said he would do, checks Holland had written to his farmer-clients and to the brokerage houses bounced, which caused the brokerage houses to abruptly close Holland's accounts and prevented Holland from systematically withdrawing his farmer-clients from the cotton market. Because the Bank's actions had left Holland desperate for liquid cash to salvage his cotton business, Holland was forced to sell cattle which served as collateral for the Bank. [CP 505-08: RE 301-04] Although the sale of 413-head of cattle by Holland on May 29, 1996, netted Holland

$103,935.74, this amount was well below his needs. [CP 506-07; RE 302-03] Holland met with the Bank on June 3, 1996, and informed the Bank of the sale of the pledged cattle.[10] [CP 506; RE 302]

Because of the Bank's wrongful actions, Holland was forced to liquidate most of his assets, he suffered substantial economic losses and other damages. [CP 489-90, 579-611; RE 297-98, 351-82] When the Bank then began attempts to take possession of Holland's assets (such as cattle, farm equipment, *etc.*); Holland hired Oxford attorney Scot Spragins to negotiate with the Bank on his behalf. After several meetings between the two parties, a work-out agreement was reached whereby Holland's notes would be extended and the Bank would not make further attempts to take possession of Holland's assets. Spragins testified in a sworn deposition:

> ... I made it clear to ... the bank ... that if you believe Danny [Holland], then he would have had a lender liability action against The Peoples Bank. And I had told [the Bank] that I had referred [Holland] to attorneys at the time, and that we had made proposals which, on the work-out basis, that would eliminate the issue of lender liability.
>
> And the bank laughed at us and said that we're not concerned about anything like this, in no uncertain terms, and it's going to be our way or the highway. And if you want to sue us, you can sue us. We'll just deal with that later.
>
> And, you know, I got this [written agreement from the Bank]. And I'm sure I looked to see if there was any waiver of these type – those type of claims set forth in there. And that's what I would have been concerned about on behalf of Danny [Holland], you know. And there wasn't. And it was my understanding that this was this, and if he was going to sue the bank for lender liability, then more power to him, in the bank's words.

[CP 617; RE 383]

Holland, acting upon the advice of his attorney (*i.e.*, Scot Spragins), and the Bank entered into a written agreement on October 21, 1996, whereby Holland's loans were re-worked and Holland

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[10]Notably, the date of the cattle sale (*i.e.*, May 29, 1996) was Memorial Day Monday; the Bank was closed on this holiday and it was not possible for Holland to reach any of the Bank's officials that day.

executed a series of promissory notes renewing his prior notes with the Bank. Clearly absent from the agreement was any language whereby Holland would waive any right to assert any cause of action against the Bank which may have arisen from the Bank's previous actions. Holland eventually satisfied all of his notes with the Bank, and, in the process, was able to mitigate the damages he sustained as a result of the Bank's wrongful actions. We remind the Court here that Judge Lee's Order stated that Holland was in default. [CP 1013; RE 5] This statement is simply not true.

Danny Holland brought this civil action against the Bank based upon its actions (and the actions of its agents, Jeffreys and Springfield) as described above. Holland's complaint and amended complaint against the Bank assert claims for negligence, negligent misrepresentations, fraudulent misrepresentations, breach of fiduciary duties, and breach of implied covenants of good faith and fair dealing. [CP 1-5; RE 56-60]

Floyd McGehee (a retired banker who had reviewed both read and heard live deposition testimony of other witnesses, and who had reviewed documentary evidence in the case), testified in a sworn deposition that the Bank's actions (*i.e.*, not escrowing the $237,000.00 and then applying the $237,000.00 to Holland's other loans without advising or informing Holland of this action) constituted bad faith. [CP 838; RE 402] Specifically, McGehee testified "[i]f the bank ... received a letter along with the checks saying they were to be put in escrow funds, then ... if the bank wasn't in agreement to that there should have been some kind of inquiry made ...." [CP 838; RE 402] McGehee testified that, at the very least, the Bank "... should have talked to Mr. Holland personally about the money, to see if there were some other arrangements could be worked out, and what they were going to do with the funds, rather than just apply them and not – not even bothering to tell him." [CP 838; RE 402] McGehee noted in his deposition testimony that Holland learned what the

Bank had done with the $237,000.00 from a secretary at the Bank, and not from one of the Bank's officers. [CP 838; RE 402] McGehee testified that because Holland was under the impression that the $237,000.00 would be escrowed by the Bank and held for Holland's future use in another transaction, the Bank acted in bad faith when it took the money and applied it to Holland's other loans. [CP 838: RE 402] McGehee testified that the $237,000.00 was applied to loans which were neither due or in default, specifically pointing out that the loans had only recently been made to Holland and that "the maturity date was some point in the future, way past this approximately 30 days." [CP 839; RE 403][11]

William Jeffreys gave sworn deposition testimony that he had solicited Holland's business for the Bank and that in February 1996 Holland had submitted documents to the Bank which reflected that Holland had a net worth of $2,348,114.44, and that Holland was seeking a loan package in the amount of $1,779,000.00. [CP 518; RE 308]

Jeffreys testified under oath that "to my knowledge" he never saw the proposed escrow agreement, though it was mailed to him by Bill McKenzie. [CP 627; RE 384]; and despite his acknowledgment that Kay Cobb brought "some documents with – with the check" when it was delivered to the Bank. [CP 523; RE 313]. This Court should question how Jeffreys, under oath, could deny any knowledge of the proposed escrow agreement although he instructed William McKenzie to prepare it, and in light of the language contained in Kay Cobb's May 9, 1996, letter which was addressed to him at the Bank, and stated, *inter alia*, that the $237,558.87 represented by Cobb's check for that amount would be placed "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."

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[11]The loans had been closed on April 29, 1996. [CP 549; RE 334]

[CP 524; RE 314] However, Jeffreys admitted that he placed the check in the Bank's vault, and that he advised Springfield that he had placed the check there. [CP 527; RE 317] Jeffreys also admitted that at some point after the sale of the Lafayette County property (which occurred on May 9, 1996), Holland called Jeffreys at the Bank and informed him that Holland needed the $237,000.00, which was supposed to have been held in escrow, to pay margin calls in Holland's cotton business. However, rather than make the $237,000.00 available to Holland, the check had simply been held in the Bank's vault – not deposited – until May 22, 1996, when the Bank applied the funds to Holland's other loans which were neither due or in default. [CP 390; RE 270] Later, Jeffreys gave seemingly contradictory testimony:

> Q. ... I'm asking you was Danny [Holland] saying, whatever the amount was, that he was needing money to pay farmers, that they'd called for their cotton and they wanted to be paid and he needed a check to give them. He called you or the bank requesting, where is my deposit of $237,000?
>
> A. It wasn't – to my knowledge, Danny never called requesting the Lafayette property be released for margin calls.

[CP 394; RE 271]

Danny Holland testified in his sworn deposition that $200,000.00 would have been sufficient to have covered his cash needs for the margin calls in May and June of 1996. [CP 348; RE 260] Holland testified that approximately $137,000.00 would have been sufficient to cover the margin calls, and, because he could not obtain funds from the Bank, Holland resorted to selling "[c]ollateralized cows" which raised approximately $103,000.00 that he applied to pay margin calls. [CP 347-48; RE 259-60] The $103,000.00 was insufficient, but Holland testified unequivocally that had the $237,000.00 been available he would have been able to meet his obligations and could have remained in the market, thereby avoiding his subsequent financial set backs (the $237,000.00 would

have been a full $100,000.00 in excess of what Holland stated he had needed at the time). [CP 349; RE 261]

Richard Lee DeVoe, an Oxford C.P.A., testified he had examined Holland's records and noted that the Holland's cotton business had earned approximately $425,000.00 in 1995, but that because of Holland's inability to meet the margin calls in 1996 the company's income dropped to approximately $41,000.00. [CP 367; RE 262] DeVoe submitted a written analysis of Holland's financial situation, which, in pertinent part, stated:

> Danny Holland started in the cotton business part time in 1977. ... The business was changed to Danny R. Holland and Co., Inc in 1995. These businesses are referred to as "the Cotton Company" .... The Cotton Company was the primary source of income for [Danny Holland and his family]. The Cotton Company continued to grow until the 1996/1997 cotton year. At this time the Cotton Company took a catastrophic down turn. The catastrophic down turn was a direct result of not being able to pay farmers their money after The Cotton Company had closed their positions in the market. Once news of this inability to pay hit the street it snowballed until The Cotton Company was forced to beg just to keep going. ... Danny's reputation in this business was ruined. ... He has yet to recover from the catastrophic events that caused the downfall of the Cotton Company.

[CP 590; RE 361] DeVoe's report states:

> It is without a doubt that the downfall of the Cotton Company was its inability to pay farmers after it had closed their positions in the market. This drove a business that could consistently produce net income of over $250,000 a year down to a mere $41,000.

[CP 601; RE 372]

As previously noted, the Bank moved for summary judgment, which was initially denied by Judge Coleman but which was subsequently granted by Judge Lee after Judge Coleman removed himself from the case. Following entry of Judge Lee's order on October 9, 2007, Holland filed his *Notice of Appeal* on November 8, 2007. [CP 1021-22; RE 428-29]

* * * * * *

III. SUMMARY OF THE ARGUMENT

A. BREACH OF FIDUCIARY DUTY

Danny Holland's complaint states a claim against the Bank for breach of its fiduciary duty by misappropriating Holland's escrow funds (*i.e.*, the net proceeds from the sale of Holland's Yocona Bottom farm in Lafayette County) and applying those funds toward notes held by the Bank (notes which were neither due or in default) instead of following Holland's instructions to use the funds to pay margin calls relating to Holland's cotton business. The order granting summary judgment in favor of the Bank is completely silent with regard to Holland's breach of fiduciary duty claim against the Bank.

Whether a fiduciary relationship exists between two parties, such as between Danny Holland and the Bank here, is a question of fact which may only be determined by a jury. *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 150 (Miss. 1998) A fiduciary relationship may arise between two parties in a commercial relationship. *Risk v. Risher*, 197 Miss. 155, 19 So.2d 484, 486-87 (Miss. 1944) The transaction which gives rise to the fiduciary relationship between Danny Holland and the Bank grew out of the Bank's role as the escrow agent for Holland's §1031 land-swap, one which completely fell outside any debtor-creditor relationship which existed between Holland and the Bank. Holland had designated the Bank as the escrow agent, and a $237,000.00 check was delivered to the Bank. Holland placed his trust and confidence in the integrity and fidelity of the Bank, and the Bank had a fiduciary duty not to act in any manner which was antagonistic to Holland's interests; however, the Bank, acting contrary to explicit and specific instructions from Holland and without informing him of its proposed actions to the contrary, misappropriated the $237,000.00 for its own benefit and to the financial detriment of Holland. The evidence in this case demonstrates that there was a duty, and a breach of the duty, by the Bank. The Bank's failure to use the $237,000.00 to pay

margin calls as instructed by Holland triggered the catastrophic devastation of Holland's business and financial interests. Thus, the breach of the Bank's duty is the proximate cause of Holland's business and financial losses.

Although Holland and the Bank entered into a work-out agreement on other loans, the transactions related to the Bank's misappropriation of the $237,000.00 are not included in the work-out agreement, and therefore were not waived and/or ratified. The order granting summary judgment in favor of the Bank states that Holland had waived his claims against the Bank. Because this is a misstatement of both the facts and the law applicable to the case at hand, the order granting summary judgment should be reversed.

* * *

B. THE DOCTRINE OF THE LAW OF THE CASE

The Bank's motion for reconsideration was filed seventeen (17) months after Judge Coleman entered the order denying the Bank's motion for summary judgment, and eleven (11) months after the Supreme Court, *en banc*, had denied the Bank's interlocutory appeal, and that an order setting the case for trial (entered on March 15, 2007) had been entered, and both parties thereafter invested substantial time and money in anticipation of trial by taking additional depositions (and especially expert witness depositions) with the attendant costs of the experts' fees, deposition transcript costs, travel expenses, *etc*. Where a party has justifiably and detrimentally relied upon a predecessor judge's ruling, a successor judge should not vacated the prior ruling. "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." *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 266-67 (Miss. 1999)

* * *

C. THE BANK WAIVED THE CLAIMS MADE IN THE MOTION FOR RECONSIDERATION

Judge Lee was appointed as the successor judge to Judge Coleman on January 8, 2007, yet the Bank did not file or bring its motion for reconsideration before Judge Lee until over six months later (on July 19, 2007), a date which was over seventeen (17) months after the motion had initially been denied. The Bank was, at best, dilatory in presenting its claims to Judge Lee, and the Bank's delay and continued, active participation in the litigation should be held to constitute a waiver by the Bank of the claims it sought to raise in the motion for reconsideration. *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007)

* * *

D. OTHER REMAINING UNRESOLVED QUESTIONS OF FACT

When Judge Coleman entered his order denying the Bank's summary judgment motion, the court file in the case *sub judice* already included almost 1,000 pages of motions, briefs, exhibits, and deposition excerpts. Judge Coleman obviously determined that genuine issues of material fact were present which warranted a full trial. Judge Coleman recognized that "a full exposition of the facts may result in a triable issue or is warranted in the interest of justice." The Bank, in its motion for reconsideration presented to Judge Lee, argued that the *Statement of Trial Court in Support of Interlocutory Appeal Pursuant to M.R.A.P. 5(b)* is "inconsistent" with Judge Coleman's order denying summary judgment. The *Statement* includes the following language: "... at least two (2) arguments asserted by [the Bank] are legal, rather than factual, in nature." One of these arguments is that Holland's claims are barred by "the doctrines of waiver/ratification." Holland's claims related to the Bank's misappropriation of the $237,000.00 net proceeds from the sale of his Yocona Bottom farm lie outside the scope of any renewal note and, therefore, these claims do not fall within "the doctrines of waiver/ratification." If the Bank asserts otherwise, then an obvious question of fact

exists and summary judgment cannot be granted. It would be a question for a jury to determine whether the work-out agreement was so broad as to include claims related to the Yocona Bottom farm, which was sold and which was not subject to any additional financing.

The second "legal, rather than factual" issue mentioned in the *Statement of Trial Court in Support of Interlocutory Appeal Pursuant to M.R.A.P. 5(b)* is that "Holland has failed to demonstrate any causal connection between [the Bank's] alleged actions ... and Holland's alleged damages." This statement is plain wrong. Not only did Holland and his C.P.A. both testify that the Bank's actions caused severe financial damages, other damage proof was offered by the following experts: Brian Pray (losses related to real estate); Ray Gilmer (losses related to horses); Dr. Tom Rice and Dr. Charles Forrest (losses related to crops). These witnesses' values are included in DeVoe's report.

When the Bank misappropriated the $237,000.00 net proceeds from the sale of the Yocona Bottom property, Holland was unable to cover the margin calls in his cotton business. The proximate result was the precipitous closure of his accounts, which severely damaged his business and all but destroyed his business reputation. Also, whether Holland's business losses are causally related to the Bank's action is a question of fact to be determined by a jury, and it is completely improper for a court in a summary judgment proceeding to make any determination whether one thing has "any causal connection" to another due to this being a fact question. *Glover v. Jackson State University*, 968 So.2d 1267 (Miss. 2007)

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IV. ARGUMENT

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

Summary judgment procedure is provided for under Rule 56, Miss.R.Civ.P. Rule 56(c) provides in pertinent part:

> [Summary judgment] shall be rendered forthwith 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.

The official comment to Rule 56 states:

> 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. Given this function, the court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists, rather than for the purpose of resolving that issue. Similarly, although the summary judgment procedure is well adapted to expose sham claims and defenses, ***it cannot be used to deprive a litigant of a full trial of genuine fact issues***.

(Emphasis added.)

This Court applies a *de novo* standard of review when reviewing a trial court's decision to grant summary judgment. See, *e.g.*, *Franklin County Memorial Hospital v. Mississippi Farm Bureau Mutual Insurance Co.*, 975 So.2d 872, 874 (Miss. 2008), and *Callicutt v. Professional Services of Potts Camp, Inc.*, 974 So.2d 216, 218-219 (Miss. 2007).

Based upon its repeated rulings, the Mississippi Supreme Court recognizes that summary judgment should 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)

The burden of persuasion is upon the party seeking summary judgment, and the burden is heavy. 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*, 880 So.2d 1047, 1050 (Miss. 2004) (*quoting Palmer v. Anderson Infirmary Benevolent Association*, 656 So.2d 790, 794 (Miss. 1995)). "This Court does not favor summary judgment. It is a powerful tool that should be used sparingly by the trial judge." *Bailey v. Wheatley Estates Corporation,* 829 So.2d 1278, 1282 (Miss. App. 2002)

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, in its view, 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)

Finally, "[i]f there is to be error at the trial level it should be in denying summary judgment and in favor of a full live trial. *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)

* * *

B. BREACH OF FIDUCIARY DUTY

Danny Holland's complaint (at ¶ 4) states a claim against the Bank for breach of its fiduciary duty by misappropriating Holland's escrow funds (*i.e.*, the net proceeds from the sale of Holland's farm in Lafayette County) and applying the funds toward notes held by the Bank, but which were neither due nor in default, instead of following Holland's instructions to use the funds to pay margin calls relating to Holland's cotton business. [CP 1-2; RE 56-67] Judge Lee's order granting summary

judgment in favor of the Bank is completely silent with regard to Holland's breach of fiduciary claims. [CP 1013-16; RE 5-8]

Whether a fiduciary relationship exists between two parties, such as the one between Danny Holland and the Bank here, is a question of fact which may only be determined by a jury. See, *e.g.*, *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144, 150 (Miss. 1998); *Peoples Bank and Trust Co. v. Cermack*, 658 So.2d 1352, 1358 (Miss. 1995); *Lowery v. Guaranty Bank and Trust Co.*, 592 So.2d 79, 85 (Miss. 1991); and *Carter Equipment Co. v. John Deere Industrial Equipment Co.*, 681 F.2d 386, 390 (5th Cir. 1982)

A fiduciary relationship may arise between two parties in a commercial relationship:

> In *Trice v. Comstock*, 8 Cir., 121 F. 620, 61 L.R.A. 176, 57 C. C. A. 646, the Court said: "Wherever one person is placed in such a relation to another by the act or consent of that other, or by the act of a third person, or of the law, that he becomes interested for him, or interested with him, in any subject of property or business, he is in such a fiduciary relation with him that he is prohibited from acquiring rights in that subject antagonistic to the person with whose interests he has become associated."

Risk v. Risher, 197 Miss. 155, 19 So.2d 484, 486-87 (Miss. 1944). See also *Carter Equipment Co.*, 681 F.2d at 390 (5th Cir. 1982) (quoting *Parker v. Lewis Grocer Co.*, 246 Miss. 873, 153 So.2d 261 (1963) in applying Mississippi law).

In addressing those contexts in which a fiduciary relationship might arise, the Mississippi Supreme Court has stated:

> "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.... A fiduciary relationship may arise in a legal, moral, domestic, or personal context, where there appears "on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed." [Citations omitted.] Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that

> he would normally exercise in entering into a transaction with a stranger. [Citations omitted.]

Lowery, 592 So.2d at 83 (Miss. 1991). See also *Cermack*, 658 So.2d at 1358-1359 (Miss. 1995) (quoting *Lowery*).

This Court has also stated:

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. The basis of this relationship need not be legal; it may be moral, domestic, or personal. Nor is the law concerned with the source of such relationship. These principles are universally affirmed by courts.

Hopewell Enterprises, Inc. v. Trustmark National Bank, 680 So.2d 812, 816 (Miss. 1996).

Three factors that this Court analyzes in determining whether a fiduciary relationship arises in a commercial transaction are whether: (1) the parties have "shared goals" in the other's commercial activity; (2) one party justifiably places trust or confidence in the integrity and fidelity of the other; and, (3) the trusted party has effective control over the other party.[12] See *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002). See also *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d at 151 (citing *Carter Equipment Co.*, 681 F.2d at 390, and *Cermack*, 658 So.2d at 1359).

The Bank will, undoubtedly, claim that a fiduciary relationship does not exist in a commercial loan transaction, and that, ordinarily, a bank does not owe a fiduciary relationship to its

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[12]The Fifth Circuit, in *Carter Equipment Co.*, 681 F.2d at 391, observed:

> 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.

debtor. See, *e.g.*, *Gupta*, 838 So.2d at 216; *Hopewell Enterprises, Inc.*, 680 So.2d at 816; and *Cermack*, 658 So.2d at 1358.

However, the transaction that took Holland's and the Bank's relationship beyond a mere debtor-creditor existence, and transformed it into one of a fiduciary nature was the Bank's acceptance to act as the escrow/exchange agent for Holland's §1031 land-swap, a role which completely fell outside any debtor-creditor relationship which existed between Holland and the Bank.[13] After Holland had designated the Bank as the escrow agent, Kay Cobb delivered the $237,000.00 check representing the net proceeds from the sale of Holland's Lafayette County property to the Bank to be held in escrow. In doing this, Holland placed his trust and confidence in the integrity and fidelity of the Bank. Once the escrow documents and $237,000.00 check were delivered to the Bank, the Bank resulting fiduciary obligations with respect to those funds were, at the very least, to not put its interests over Danny Holland's or to act in any manner which was antagonistic to Holland's. See, *e.g.*, *Risk*, *Lowery*, and *Hopewell*.

The Bank, upon receipt of Kay Cobb's $237,000.00 trust account check, did not act with integrity or fidelity toward Holland. First, the Bank did nothing with the check for almost two weeks; then the Bank engaged in self-dealing and misappropriated the $237,000.00 for its own purposes and in contradiction to explicit and specific instructions from Holland. Also, the Bank

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[13]By making the Bank the escrow agent, Holland demonstrated "trust or confidence ... in the integrity and fidelity" of the Bank, which is demonstrative of the "mutual or shared purposes" existing between Holland and the Bank and indicative of the fiduciary relationship existing between the Bank and Holland. See *Carter Equipment Co.*, 681 F.2d at 391 (5th Cir. 1982) (citing *Arnott v. American Oil Co.*, 609 F.2d 873 (8th Cir.), *cert. denied*, 446 U.S. 918, 100 S.Ct. 1852, 64 L.Ed.2d 272 (1979).

grossly failed to inform Holland of its proposed actions.[14] If the Bank did not consider itself Holland's fiduciary here, why did it not affirmatively reply to Kay Cobb, Bill McKenzie and Danny Holland to inform that their position and understandings were incorrect? Instead, the Bank found itself professing ignorance of any escrow arrangement and denying that it had the corroborating escrow documents. The Bank's silence, and subsequent cover-up, speak volumes on this issue. The evidence in this case clearly and convincingly demonstrates that there was a fiduciary duty and a breach of that duty by the Bank.[15]

The evidence presented below also demonstrates that the failure of the Bank to use the escrowed funds to pay the margin calls, as directed by Holland, caused the brokerage houses to abruptly and precipitously close Holland's accounts and destroyed the trust Holland had developed with his farmer-clients. The Bank's failure to use the $237,000.00 to pay the margin calls as instructed by Holland initiated the sudden downfall and devastation of Holland's business and financial interests. Thus, the breach of the Bank's duty is the proximate cause, or at least, a proximate contributing cause of Holland's business and financial losses.

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[14]Holland's loan package with the Bank was closed on April 29, 1996, and the Bank took the $237,000.00 on May 22, 1996, less than thirty days after the loan package was closed. While it is true that, under the "set-off" principle, the Bank may have had a right to apply the $237,000.00 to notes it held from Holland if the notes had been due or in default, at the time the Bank misappropriated the $237,000.00, Holland's notes were neither due or in default. See, *e.g.*, *Union Planters National Bank, N.A. v. Jetton*, 856 So.2d 674, 678 (Miss. App. 2003) (The "set-off" principle gives financial institutions the ability to apply a debtor's deposit to payment of his debt then due.").

[15]Of course, for the Bank to be held liable to Holland, Holland must show the following: (1) the Bank owed a duty to Holland; (2) the Bank breached that duty; and (3) the Bank's breach of that duty was the cause of Holland's alleged damages. See, *e.g.*, *Callicutt*, 974 So.2d at 221, and *Holliday v. Pizza Inn, Inc.*, 659 So.2d 860, 864 (Miss. 1995).

Danny Holland would submit that the Bank's conduct in holding the $237,000.00 check for almost two weeks, and then misappropriating the funds without informing him of its action, is the very essence of "bad faith" under Mississippi law:

> "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is consistent with justified expectations of the other party. The breach of good faith is bad faith characterized by some conduct which violates standards of decency, fairness or reasonableness." [Citation omitted.] Bad faith, in turn, requires a showing of more than bad judgment or negligence; rather, "bad faith" implies some conscious wrongdoing "because of dishonest purpose or moral obliquity." [Citations omitted.]

McDaniel v. Citizens Bank, 937 So.2d 26, 29 (Miss. App. 2006).

Whether the Bank's actions with regard to its handling of the $237,000.00 violated standards of decency, fairness, reasonableness, or were morally oblique is a question of fact that should be determined by a jury.

As previously discussed, in the October 9, 2007, order granting summary judgment, Judge Lee stated that Danny Holland brought "suit against the Bank alleging negligence, fraudulent misrepresentation and breach of a fiduciary relationship." [CP 1013; RE 5] However, Judge Lee's order granting summary judgment in favor of the Bank is completely silent with regard to Holland's breach of fiduciary duty claim. The only portion of Judge Lee's opinion which could possibly be applicable is the following language, to-wit:

> The Bank contends that, by executing the work-out agreements and amendments to his promissory notes, Holland waived or ratified any cause of action he may have had against the Bank. Only after Holland paid off his notes did he file a complaint. In *Austin Development. Co. v. Bank of Meridian*, 569 So.2d 1209 (Miss. 1990), the supreme court [*sic*] upheld summary judgment in favor of the Bank finding that the debtor waived any claims against the Bank by executing renewal notes. *See also Citizens National Bank v. Waltman*, 344 So.2d 725 (Miss. 1977) (holding execution of renewal note waives any known factual defenses available under prior note); *Gay v. First National Bank*, 172 Miss. 681, 160 So.2d 904, 905 (1935) (duty of party to inquire as to possible defenses before executing renewal note).

[CP 1014; RE 6]

The principle that renewal of a note constitutes a waiver by the debtor of any defenses the debtor could raise in an action to collect upon the note was articulated by the Mississippi Supreme Court in *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904 (Miss. 1935). In *Gay*, the bank sued its debtor to collect on a note; the original note had been made in August 1929 but had been subsequently renewed several times until March 1933, when litigation began. As a defense, the debtor alleged facts that indicated the original note should have been fully paid in March 1930; however, because the debtor had repeatedly renewed the note, the Mississippi Supreme Court ruled the debtor had waived this defense, stating:

> Where a party has full knowledge of all defenses to a note and executes a new note payable at a future date, he then waives all his defenses and becomes obligated to pay the new note. [Citation omitted.] And where the facts and circumstances are such that 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 full knowledge 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 fail to do so he is as much bound as if he had actual knowledge of all the facts. [Citation omitted.]

Gay, 160 So. at 905.

Thus, the rule in Mississippi is that execution of a new note, or a renewal of a note, constitutes a waiver of defenses to the note, and the debtor is obligated to pay the note. This rule, with a citation to *Gay*, has been applied in the following cases, to-wit: *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). However, waiver and ratification were found to be inapplicable defenses

in a action based on a litany of serious wrongful conduct of bank employees. *First American National Bank of Iuka v. Mitchell*, 359 So.2d 1376, 1378 (Miss. 1978)

The principles espoused in *Gay* and its progeny have no application to the facts of the case *sub judice*. While it is true that Danny Holland and the Bank entered into a work-out agreement (on October 21, 1996), the transactions related to the sale of Holland's Lafayette County farm and the misappropriation of the $237,000.00 net proceeds from that transaction by the Bank ***are not included in the work-out agreement***, because the Yocona Bottom property had been sold to a third party and was not subject to any further financing by the Bank. [CP 148-56; RE 203-11] The only claims which can be subject to waiver and/or ratification upon renewal of a note are those which are related to that note, and it logically follows that claims which lie outside of the renewal note, or which are unrelated to it, cannot be waived and/or ratified by the renewal. The very language of the agreement between Holland and the Bank states (at ¶ 15) 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" of the agreement. [CP 155; RE 210] If the Bank wishes to claim that its conduct here – misappropriating the $237,000.00 net proceeds from the sale of Holland's Yocona Bottom farm – was covered (i.e., that Holland waived his cause of action against the Bank) by the execution of the work-out agreement, then Holland would submit that this becomes a question of fact for which summary judgment is not appropriate.

If Judge Lee, in his order granting summary judgment to the Bank, intended to hold that the execution of the work-out agreement between Holland and the Bank waived and/or ratified ***any*** cause of action Holland had against the Bank, including claims which were not included in the work-out agreement, then such a ruling is based upon a misapplication of the law. It would, however, appear to be more likely that Judge Lee's ruling overlooked the fact that the Yocona Bottom

transaction (and the Bank's misappropriation of the $237,000.00 net proceeds from that sale) was not included or covered by the work-out agreement, and it is instead based upon a mistake of fact. In either case, Judge Lee was in error in granting summary judgment on Holland's breach of fiduciary duty claims. The order granting summary judgment to the Bank should be reversed, and this case should be submitted for trial before a jury.

* * *

C. THE DOCTRINE OF THE LAW OF THE CASE

Judge Coleman entered his order denying the Bank's motion for summary judgment on February 24, 2006. [CP 964; RE 9] The Bank then sought interlocutory appeal, which was denied in an order entered on March 29, 2006. [CP 965; RE 407] The Bank then sought reconsideration of the denial of its interlocutory appeal, and the Bank's motion for reconsideration was heard *en banc* and then denied on June 16, 2006. [CP 967; RE 408] On October 12, 2006, Judge Coleman asked to be removed from the case. [CP 968; RE 409] Judge Lee was appointed to preside over the case on January 8, 2007. [CP 969; RE 410] Judge Lee, on March 15, 2007, entered an order setting the case for trial (to commence on March 3, 2008). [CP 976-77; RE 411-12] The Bank filed the *Defendant's Motion for Reconsideration of Order Denying Summary Judgment* on July 19, 2007. [CP 978-86; RE419-27]

Thus, the Bank's motion for reconsideration was filed seventeen (17) months after Judge Coleman entered the order, and eleven (11) months after the Supreme Court, *en banc*, had denied the Bank's interlocutory appeal. Meanwhile, following Judge Lee's order (entered on March 15, 2007) setting the case for trial, both parties continued to invest substantial time and money in anticipation of trial, including, but not limited to, depositions (specifically including expert

witnesses), experts' fees, deposition transcripts, travel expenses, and other expenses). [CP 970-75; RE 413-18]

Procedurally, it was error for Judge Lee to entertain the Bank's motion for reconsideration seventeen (17) months after Judge Coleman had denied the Bank's original motion, and eleven (11) months after the Supreme Court, *en banc*, had denied interlocutory appeal. Notably, the Bank did not file a second (or new) motion for summary judgment based upon new facts which were developed through discovery following Judge Coleman's denial of the Bank's original motion; rather, the Bank sought "reconsideration" based upon ***the same set of facts*** upon which Judge Coleman had previously ruled. [CP 978-86; RE 419-27] The Bank's motion for reconsideration falls within the provisions of Rule 60(b), Miss.R.Civ.P., and the only part of Rule 60(b) which appears to apply is sub-paragraph (6), which allows reconsideration for "any other reason justifying relief from the judgment." However, relief under Rule 60(b)(6) is reserved for those instances when "exceptional and compelling circumstances" exist. *Hartford Underwriters Insurance Co. v. Williams*, 936 So.2d 888, 893-94 (Miss. 2006) (citing *Sartain v. White*, 588 So.2d 204, 212 (Miss. 1991)).

Exceptional and compelling circumstances did not exist below so as to permit Judge Lee to set aside Judge Coleman's order denying the Bank's motion for summary judgment. The issues raised in the Bank's motion for reconsideration were briefed and argued at length by both parties pursuant to the Bank's original motion before Judge Coleman. Whatever purposes motions for reconsideration are intended to serve, they definitely should not be vehicles for rehashing prior arguments that have already been rejected; it should not be supposed that the purpose of a motion for reconsideration "is intended to give an unhappy litigant one additional chance to sway the judge." *Atkins v. Marathon LeTourneau Company*, 130 F.R.D. 625, 626 (S.D. Miss. 1990).

Judge Lee, in his order granting the Bank's motion for reconsideration, states:

> This Court recognizes that, as a general rule, successor judges are precluded from overruling orders on the merits or judgments of their predecessors. *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 268 (Miss. 1999). However, a denial of summary judgment is not a final judgment on the merits nor is it binding upon successor courts. *Id.* at 268 (citing *Great Southern National Bank v. Minter*, 590 So.2d 129, 133, 135 (Miss. 1991). The supreme court [*sic*] in *Mauck* stated "[a]t the point of final decision on the merits [the chancellor] was duty bound to apply the law to the record then before the court, regardless of any prior ruling denying summary judgment." *Mauck*, 741 So.2d at 268-69.

[CP 1014; RE 6]

The portion of the *Mauck* decision cited by Judge Lee centers on a discussion of whether parties in *Mauck* had violated Rule 1.07 of the Mississippi Uniform Chancery Court Rules; as such, this language does not apply to the instant action. Judge Lee, however, overlooked that portion of the *Mauck* decision that does have particular significance here, which is its discussion of the doctrine of the law of the case, to-wit:

> As we have explained on several occasions:
>
> > The doctrine of the law of the case is similar to that of former adjudication, 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***. This principle expresses the practice of courts generally to refuse to reopen what has previously been decided. It is founded on public policy and the interests of orderly and consistent judicial procedure.
>
> *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, 1019 (Miss. 1997) (quoting *Simpson v. State Farm Fire & Casualty Co.*, 564 So.2d 1374, 1376 (Miss. 1990) (quoting *Mississippi College v. May*, 241 Miss. 359, 366, 128 So.2d 557, 558 (1961)). The doctrine is not a principle of substantive law but a good rule of practice and " '... is of special significance as applied to questions of law as distinguished from decisions on questions of fact.' " *Goldsby v. State*, 240 Miss. 647, 664, 123 So.2d 429, 434 (1960) (quoting 21 C.J.S., *Courts*, §195). See also *Florida Gas Exploration Co. v. Searcy*, 385 So.2d 1293, 1295 (Miss. 1980).

Mauck, 741 So.2d at 266-267 (emphasis added).

Between the entry of Judge Coleman's order denying the Bank's motion for summary judgment and the entry of Judge Lee's order granting the same motion (upon the Bank's motion for reconsideration), the facts of this case did not change. In other words, a "similarity of facts" remained in the case. Had there been any change of facts, Judge Lee would have been duty-bound to have denied the motion for summary judgment, since such a factual resolution is solely within the province of a jury. Therefore, the issues raised by the Bank in its original motion for summary judgment and in the Bank's motion for reconsideration are entirely questions of law, and the doctrine of the law of the case must have been applied. Judge Lee erred by overlooking the doctrine of the law of the case when he granted the Bank's motion for summary judgment.

It should be remembered that the Bank's motion for reconsideration was filed seventeen (17) months after Judge Coleman entered the order denying the Bank's motion for summary judgment, and eleven (11) months after the Supreme Court, *en banc*, denied the Bank's interlocutory appeal, and that an order setting the case for trial had been entered on March 15, 2007. Both parties thereafter invested substantial time and money in anticipation of trial by taking additional depositions, especially expert witness depositions, with the attendant costs of the experts' fees, transcript costs, travel expenses, *etc.* Where a party has justifiably and detrimentally relied upon a predecessor judge's ruling, a successor judge should not vacate it. See, *e.g.*, *Franklin v. Franklin ex rel. Phillips*, 858 So.2d 110 (Miss. 2003).

* * *

D. THE BANK WAIVED THE CLAIMS MADE IN THE MOTION FOR RECONSIDERATION

Judge Lee was appointed as the successor judge to Judge Coleman on January 8, 2007, yet the Bank did not file or bring its motion for reconsideration before Judge Lee until over six months

later (on July 19, 2007), a date which was, again, over seventeen (17) months after the motion had initially been denied. [CP 969, 978; RE 9, 419] The Bank was, at best, dilatory in presenting its claims to Judge Lee, and its attendant delay should be held to constitute a waiver by the Bank of the claims it sought to have reconsidered. See, *e.g.*, *East Mississippi State Hospital v. Adams*, 947 So.2d 887 (Miss. 2007) (failure to timely pursue affirmative defense, together with active participation in litigation, served as a waiver of the affirmative defense); *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 181 (Miss. 2006) ("... absent extreme and unusual circumstances ... an eight month unjustified delay in the assertion and pursuit of any affirmative defense or other right which, if timely pursued, could serve to terminate the litigation, coupled with active participation in the litigation process, constitutes waiver as a matter of law."); and *Pass Termite and Pest Control v. Walker*, 904 So.2d 1030 (Miss. 2004) (affirmative defense of arbitration waived by delay in moving for arbitration).

* * *

E. OTHER REMAINING UNRESOLVED QUESTIONS OF FACT

The Bank acted improperly, in bad faith, bordering on fraud, in the manner it processed and administered Danny Holland's loans and financial package. In its motion for summary judgment, the Bank mischaracterized Danny Holland's claims by grouping them as "oral promises" related the Bank's assurances of the availability of the additional $200,000.00 LOC for Holland's cotton business, and the Bank's assurances regarding financing for acquisition of the Long Branch farm (which would have completed the §1031 land-swap initiated when Holland sold his Yocona Bottom farm). The Bank, in support of its summary judgment motion, argued that Holland's negligence claims, and allegations of "oral promises" by the Bank, fail as a matter of law because: such claims are barred by the parol evidence rule; Holland failed to establish the material terms of any oral

contract; lack of consideration; and Holland knew Jeffreys lacked apparent or actual authority. The Bank also argued that Holland did not establish that any misconduct by the Bank caused him any damages. Judge Lee's order, which grants the Bank's summary judgment motion on the basis of wavier and/or ratification, fails to fully address these other issues.

Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and the other says the opposite, and the burden of demonstrating the non-existence of genuine issues of fact is on the moving party; furthermore, the non-moving party is given the benefit of the doubt and as well as all favorable inferences that may reasonably drawn from the evidence. See, *e.g.*, *Callicutt*, 974 So.2d at 225 (Miss. 2007); *Williamson ex rel. Williamson v. Keith*, 786 So.2d 390, 393 (Miss. 2001) (quoting *Heigle v. Heigle*, 771 So.2d 341, 345 (Miss. 2000)); and *Dailey v. Methodist Medical Center*, 790 So.2d 903, 915-16 (Miss. App. 2001).

In deciding a summary judgment motion, it is not the function of the trial court to try the issues raised; rather, it should only determine whether there are issues to be tried, with all evidence viewed in the light most favorable to the non-moving party; thus, in this case if Danny Holland could have proceeded to trial under any reasonable set of facts, the Bank's motion should have been denied (or, stated, differently, the Bank's summary judgment motion should have been overruled unless the trial court found, ***beyond a reasonable doubt***, that Holland would have been unable to prove ***any set of facts*** to support his claims). See *e.g.*, *Palmer v. Anderson Infirmary Benevolent Association,* 656 So.2d 790, 794 (Miss. 1995) (and the cases cited therein). Furthermore, as has previously noted, *supra*, the Mississippi Supreme 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, in its view,***

> ***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).

Minter, 590 So.2d at 135 (Miss. 1991) (emphasis added)

When Judge Coleman entered his order denying the Bank's summary judgment motion, the trial court file below already included almost 1,000 pages of motions, briefs, exhibits, and deposition excerpts. Judge Coleman obviously determined that genuine issues of material fact were present which warranted a full trial; or, at the very least, Judge Coleman recognized that "a full exposition of the facts may result in a triable issue or is warranted in the interest of justice." The Bank, in its motion for reconsideration before Judge Lee, argued that the *Statement of Trial Court in Support of Interlocutory Appeal Pursuant to M.R.A.P. 5(b)* is "inconsistent" with Judge Coleman's order denying summary judgment. [CP 978-86; RE 419-27] The *Statement* (which the Bank's counsel drafted) includes the following language: "... at least two (2) arguments asserted by [the Bank] are legal, rather than factual, in nature." One of these arguments is that Holland's claims are barred by "the doctrines of waiver/ratification." As has been previously demonstrated in this brief, *supra*, Holland's claims related to the Bank's misappropriation of the $237,000.00 net proceeds from the sale of his Yocona Bottom farm lie outside the scope of any renewal note and, therefore, these claims do not fail within "the doctrines of waiver/ratification." If the Bank asserts otherwise, then an obvious question of fact exists and summary judgment cannot be granted: it would be a question for a jury to determine whether the work-out agreement was so broad as to include claims related to the Yocona Bottom farm, which was sold and not subject to any additional financing.

The second "legal, rather than factual" issue mentioned in the *Statement of Trial Court in Support of Interlocutory Appeal Pursuant to M.R.A.P. 5(b)* is that "Holland has failed to demonstrate any causal connection between [the Bank's] alleged actions ... and Holland's alleged damages." [CP

984; RE 425] This statement is just wrong, for two obvious reasons. First, both Danny Holland and Richard DeVoe have testified that the Bank's actions caused severe financial damages; for example, when the Bank misappropriated the $237,000.00 net proceeds from the sale of the Yocona Bottom property, Holland was unable to cover the margin calls in his cotton business, resulting in the total closure of his accounts which severely damaged his business and which all but destroyed his business reputation. Second, whether Holland's business losses are causally related to the Bank's action is a ***question of fact to be determined by a jury***. It is improper for a court in a summary judgment proceeding to make any determination whether one thing has "any causal connection" to another, because "causal connection" is a fact question. *Glover v. Jackson State University*, 968 So.2d at 1277 The order granting summary judgment should be reversed.

* * * * * *

V. CONCLUSION

Virtually all of the events giving rise to this action occurred between February and the end of May in 1996. Holland closed his loans with the Bank on April 29, 1996, and less than thirty (30) days later, the Bank effectively put him out of business when it denied him additional funds and then misappropriated Holland's $237,000.00 from escrow. After throwing Danny Holland overboard, the Bank then applied its mishandled funds to one of the notes that it held, and it was a note of Holland's that was neither due nor in default.

Judge Lee's grant of summary judgment below was based on his misapprehension of the facts and misapplication of the law. Danny Holland's complaint states a claim against the Bank for breach of its fiduciary duty due to its earlier described self-dealing and misappropriation of Holland's escrow funds from the sale of his Yocona Bottom farm, but Judge Lee's order granting summary judgment to the Bank is completely silent with regard to Holland's breach of a fiduciary duty claims

against the Bank. Also, whether a fiduciary relationship existed between Danny Holland and the Bank in this case is a question of fact which may only be determined by a jury for which summary judgment is not appropriate. The evidence in this case, taken in a light most favorable to Danny Holland, demonstrates that there was a duty, and a breach of the duty, by the Bank, which set in motion a series of events, the logical and proximate consequence of which was to ultimately devastate Holland's business and financial holdings. Further, the transactions related to the Bank's breach of fiduciary duties are not included in the work-out agreement, and, therefore, were not waived and/or ratified by the renewal notes. Based on the doctrine of the law of the case that had already been established, Judge Lee's grant of summary judgment is also improper, and Judge Coleman's denial of summary judgment should not have been reconsidered. By not filing or bringing its motion for reconsideration before Judge Lee until over six months after he took over the case, and over seventeen (17) months after its summary judgment motion had initially been denied, the Bank should be deemed to have waived the claims it sought to have reconsidered. Lastly, it was improper to resolve multiple, disputed, material fact issues that were presented during the summary judgment proceedings below, whose existence obviate summary judgment and necessitate jury determination.

For all of the reasons set forth hereinabove, this Court should reverse the order granting summary judgment in favor of the Bank and remand this case for a full trial on the merits on all issues.

RESPECTFULLY SUBMITTED, this, the 25th day of April, 2008.

DANNY HOLLAND
Plaintiff-Appellant

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CERTIFICATE OF SERVICE

I, Robert Q. Whitwell, attorney for Plaintiff, Danny Holland, hereby certify that I have this day served a true and correct copy of the above and foregoing *Brief of Danny Holland, Plaintiff-Appellant* to the following named persons by placing same in the United States Mail, postage prepaid, addressed to them as follows:

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THIS, the 25th day of April, 2008.

ROBERT Q. WHITWELL