IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CASE NO. 2010-CA-00037

KELSEY RUSHING AND
YUMEKA RUSHING — **PLAINTIFFS/ APPELLANTS**

VS.

TRUSTMARK NATIONAL BANK — **DEFENDANT/APPELLEE**

On Appeal from the Circuit Court of Hinds County, Mississippi
First Judicial District
Case No. 251-08-366CIV

BRIEF OF APPELLEE TRUSTMARK NATIONAL BANK

(Oral Argument Not Requested)

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Kelsey Rushing, Appellant;
2. Yumeka Rushing, Appellant;
3. Tommie L. Stingley, Jr., Esq., Frascogna Courtney, PLLC, Counsel for Appellant;
4. Trustmark National Bank, Appellee;
5. Christopher A. Shapley, Esq., William Trey Jones, III, Esq., Christopher R. Fontan, Esq., Brunini Grantham Grower & Hewes, PLLC, Counsel for Appellee;
6. Louie Hale, Co-Defendant;
7. John L. Hale, d/b/a Hale Construction, Co-Defendant;
8. Lamar Shumaker, d/b/a Shumaker Properties, Inc., Co-Defendant;
9. Anselm McLaurin, Esq., Counsel for Lamar Shumaker, d/b/a Shumaker Properties, Inc.; and

10. Honorable W. Swan Yerger; Hinds County Circuit Court Judge.

Dated, this the 24th day of November, 2010.

Chris Shapley

Christopher A. Shapley

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I. STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Mississippi Rule of Appellate Procedure 34, Appellee Trustmark National Bank does not seek oral argument. The issues presented in this appeal are clear and have been previously and authoritatively decided. Furthermore, the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

II. STATEMENT OF THE ISSUES

A. Whether the trial court correctly granted Trustmark National Bank's ("Trustmark") motion for summary judgment because the Appellants Kelsey and Yumeka Rushing (collectively, "the Rushings") waived any claims against Trustmark by executing renewal and/or new loan documents with knowledge of the underlying facts giving rise to their cause of action.

B. Whether Trustmark is entitled to judgment as a matter of law for additional and alternative reasons, even if the trial court's finding of waiver was erroneous.

III. STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

The Rushings—two licensed attorneys—borrowed money from Trustmark in order to fund a construction project for a new home. The Rushings' loan from Trustmark was a line of credit on which the Rushings authorized Trustmark to disperse periodic payments as construction progressed. The Rushings hired a local contractor to build their home, and the Rushings claim that the construction was defective. The Rushings allege that Trustmark should have supervised the construction project in a fiduciary capacity and protected them from the faulty construction by what they refer to as a "rogue builder." The Rushings sought to saddle Trustmark with heightened duties that it never assumed contractually or otherwise and which are not appropriate for a lender.

Specifically, the Rushings claim that Trustmark failed to monitor, verify and inspect work for them before remitting construction draws to the Rushings' builder.

On May 8, 2009, the Rushings filed suit in Hinds County Circuit Court against Trustmark and their builder—Louie Hale, John Hale d/b/a Hale Construction, and Lamar Shumaker d/b/a Shumaker Properties.[1] [R. at 4-13][2]. The Rushings' claims against Trustmark included breach of fiduciary duty, breach of contract, negligence, fraud, detrimental reliance and civil conspiracy. After discovery, Trustmark filed its Motion for Summary Judgment, or in the Alternative, for Declaratory Relief.[3] [R. at 110-337]. The Rushings filed a written response to Trustmark's summary judgment motion on September 21, 2009. [R. at 359-533].

On November 12, 2009, the trial judge entered his Order granting Trustmark's Motion for Summary Judgment. (R.E. 1). Though Trustmark premised its Motion on several grounds, the trial court found it necessary to consider only Trustmark's first argument related to waiver, "as it is dispositive of the issues" in the case. (R.E. 1 at 568). Specifically, the trial judge held that "pursuant to long-standing Mississippi law, the [Rushings] waived any potential claim they may have had against Trustmark, when they continued to renew their loan agreement with Trustmark, despite the [Rushings'] awareness of the cause(s) of action they intended to pursue against Trustmark." (R.E. 1 at 569).

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[1] Trustmark answered the Complaint on July 11, 2008. [R. at 14-29]. Lamar Shumaker filed his separate answer on September 9, 2008. [R. at 36-39]. Despite multiple extensions, the Rushings never completed service of process on John Hale. Louie Hale failed to respond to the Complaint following service of process and an Entry of Default was entered against him. [R. at 33].

[2] Throughout Trustmark's Brief, citations to the record on appeal will be shown as follows: to the clerk's papers as "R.___", and to the record excerpts as "R.E.___".

[3] In its Motion for Summary Judgment, Trustmark requested that the Court grant declaratory relief on its contention that the parties had contractually agreed to a bench trial. On October 5, 2009, the Rushings stipulated to this point. In its Response to Trustmark's summary judgment motion, the Rushings also voluntarily dismissed their claims of fraud and civil conspiracy against Trustmark.

Based on the trial court's Order, the parties moved for entry of a final judgment, which was entered on November 17, 2009. (R.E. 2). The Rushings filed their Notice of Appeal from the final judgment on December 16, 2009. [R. at 572-573].

B. Factual Summary

The Rushings—both licensed, practicing attorneys—purchased a parcel of land in Madison in 2002. [R. at 125-127, 130-132, 181, 192-193] (R.E. 4). Shortly thereafter, the Rushings began searching for a builder to construct a home on the lot. [R. at 130-132, 192-193] (R.E. 4). After interviewing at least two other builders as part of this process, the Rushings approached Louie Hale, who they believed was doing work as a framer for Shumaker Properties, Inc. [R. at 182-184, 193-194] (R.E. 4). After comparing the bids submitted by each of these prospective builders, the Rushings elected in 2002 to hire Louie Hale, and his son John, to build their home—based primarily on the fact that the Hales' bid was considerably lower than the other two. [R. at 135-136, 195, 197] (R.E. 4). Trustmark had no involvement in the Rushings' selection of the Hales. [R. at 197] (R.E. 4).

Once they hired the Hales, the Rushings began applying for construction financing. [R. at 137-142, 202-204] (R.E. 4). After meeting with and being rejected by numerous banks, the Rushings were referred to Trustmark by John Hale. [R. at 145, 203-204] (R.E. 4). The Rushings contacted Trustmark in November 2004 through Carl Sandberg, Trustmark's Vice-President of Residential Lending ("Sandberg"). [R. at 145, 203-205] (R.E. 4). The Rushings were not Trustmark customers and did not have an account with the bank. [R. at 145, 199-200, 210] (R.E. 4).

The Rushings closed their construction loan with Trustmark on December 24, 2004. [R. at 146, 206] (R.E. 4). The Rushings, Sandberg, Sandberg's assistant, and the Hales were all present at the loan closing. [R. at 146, 207] (R.E. 4). At the closing, the Rushings and the Hales executed

their formal Building Contract for the construction of the home. [R. at 146, 240-241] (R.E. 4). The Rushings also executed their written loan agreement with Trustmark. [R. at 147-148, 207-208] (R.E. 3).

Also at the closing, the Rushings and Sandberg discussed how the parties would comply with the loan agreement. [R. at 148, 209] (R.E. 4). The Rushings' loan was a line of credit, meaning that the Rushings had a set amount available at the bank and various amounts could be "drawn" off of the line to pay for work as it progressed on the construction. [R. at 148-149] (R.E. 3, 4). At the closing, the Rushings authorized Trustmark to deal directly with the builder and pay draws to the Hales as the builder submitted requests for payment. [R. at 150, 211] (R.E. 4). There are no written agreements or documents that imposed on Trustmark any duty to verify the construction work as it progressed.

The Hales began building the Rushings' home in January 2005 and continued construction on the residence until May 2005.[4] [R. at 155-157] (R.E. 4). As work progressed on the construction over these five months, a total of five draws were made to the Hales from the Rushings' construction line of credit. [R. at 226] (R.E. 4). Shortly after each draw was paid to the Hales, Trustmark would send a copy of the checks and/or verification of each draw payment in the mail to the Rushings. [R. at 158, 213-215, 252-253] (R.E. 4). The Rushings never voiced an objection upon receiving any of these draw verifications. [R. at 158, 215] (R.E. 4).

In May/June 2005, the Rushings contacted Sandberg and Trustmark to alert the bank that they had stopped work on their construction due to alleged construction deficiencies they were

[4] The Rushings admit that during this time frame, between the two of them, they visited the construction site "practically everyday." [R. at 155].

experiencing with the Hales. [R. at 159-160, 216-217] (R.E. 4). After this notification, Trustmark did not remit any further draws to the Hales from the Rushings' line of credit.

The Rushings subsequently met with Sandberg to discuss issues concerning their construction loan. [R. at 160-161, 218-223] (R.E. 4). At that time, the Rushings already believed Trustmark had acted wrongfully and "knew" that eventually they were going to file suit against Trustmark. [R. at 162, 229-230] (R.E. 4).

The Rushings and the Hales later terminated their relationship, and the Rushings eventually filed a complaint against the Hales and Shumaker Properties with the Mississippi Board of Contractors. [R. at 143-144, 163] (R.E. 4). The Rushings subsequently hired Slaughter Construction to complete construction of their home, which included repairing deficient work performed by the Hales. [R. at 163] (R.E. 4).

To complete the construction of their home, the Rushings both renewed their original construction loan and borrowed additional money from Trustmark between June 2005 and April 2006. [R. at 164-165, 228, 234] (R.E. 4, 5). Specifically, the timeline of events occurred as follows:

- December 12, 2004: Plaintiffs close construction loan with Trustmark
- May/June 2005: Plaintiffs stop construction work on home; Plaintiffs meet with Trustmark, confront Trustmark about alleged wrongdoing with the draws and admit that, at this point, they "knew" they were going to sue Trustmark
- June 22, 2005: Plaintiffs execute first renewal of construction loan
- December 19, 2005: Plaintiffs execute second renewal of construction loan
- December 29, 2005: Plaintiffs obtain additional advance
- March 20, 2006: Plaintiffs execute third renewal of construction loan
- April 3, 2006: Plaintiffs obtain second additional advance

Again, it is undisputed that prior to the time of these renewals and extensions of their loan/line of credit, the Rushings already believed that Trustmark had committed wrongdoing that would serve as the basis for a lawsuit.[5] In fact, the Rushings expressly testified that:

> **Q:** All right. So after you went in and met with Mr. Sandberg and expressed your concerns to him and realized that you believe[d] that the bank had paid money for work it had not done and potentially did other things improperly, you did maintain your relationship with the bank and later renew your loan with them, correct?
>
> **A:** I didn't have a choice . . . .

(R.E. 4 at 564). The Rushings further testified that:

> **Q:** After you met with Mr. Sandberg, you meet with Trustmark, you believe he paid money for work that's not been done, you believe they've done other things improperly, you still renewed your loan twice with Trustmark National Bank, you renewed your construction loan; isn't that correct?
>
> **A:** It's correct that I had to mitigate my damages and try to get the house finished.
>
> **Q:** Okay. You didn't go to another bank to get that funding, you stayed with Trustmark, didn't you?
>
> **A:** I did.

(R.E. 4 at 565).

The construction on the Rushings' home was completed in mid-2006, and in late April/early May 2006, the Rushings paid off their construction loan with Trustmark in full.

IV. SUMMARY OF THE ARGUMENT

The trial court correctly granted Trustmark's motion for summary judgment because the Rushings waived all of their claims when they extended and expanded their loan with Trustmark—with knowledge of the underlying facts giving rise to their cause of action against

[5] The Rushings admit this point in their Brief. *See* Appellant's Brief at 9.

Trustmark. The Mississippi Supreme Court and Mississippi Court of Appeals have repeatedly held that such actions on the part of the borrower constitute a waiver of any claims against the lender. The Rushings' attempt to muddy this clear and established rule of law through manufactured and irrelevant distinctions is insufficient to create any basis to disturb the lower court's ruling. The Rushings' waiver of their claims is dispositive of this appeal, and the trial court's judgment should be affirmed on this basis alone.

Additionally, the undisputed facts show that Trustmark fully complied with all duties it owed to the Rushings under the written loan agreement. Moreover, each of the Rushings' separate and remaining claims for breach of contract, negligence, breach of fiduciary duty and detrimental reliance are deficient as a matter of law. While the trial court did not rely on these separate deficiencies in granting summary judgment, this appellate court is justified in also affirming the grant of summary judgment for these reasons. For each and all of these reasons, Trustmark was entitled to summary judgment pursuant to Mississippi Rule of Civil Procedure 56©. Accordingly, the trial court's judgment should be affirmed.

V. ARGUMENT

A. Standard of Review

The standard for reviewing the granting or denying of summary judgment is the same standard as is employed by the trial court under Rule 56(c). *Wininger v. Ameristar Casino, Inc.*, 760 So.2d 1, 3 (Miss. Ct. App. 1999). This Court conducts de novo review of orders granting or denying summary judgment and looks at all the evidentiary matters before it. *Id.* The rule in Mississippi is that summary judgments shall be entered by a trial judge "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." *See Doe v.* Stegall, 900 So.2d 363, 365-366 (Miss. 2003) (citing MRCP 56(c)). If, in this view, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. *Wininger*, 760 So.2d at 3.

To withstand a motion for summary judgment, the plaintiffs must come forward with "significant probative evidence to support each essential element of . . . [their] claims . . . ." *Mallery v. Taylor*, 805 So.2d 613, 620 (Miss. Ct. App. 2002). No such evidence exists in this case. The Rushings' "[c]onclusory allegations, bare assertions, and speculations do not suffice" to defeat Trustmark's motion for summary judgment. *Id.* at 620; *Stuckey v. The Provident Bank*, 912 So.2d 859, 865 (Miss. 2005). The trial court correctly granted Trustmark's motion because the record in this case, taken as a whole, could not lead any rational trier of fact to find for the Plaintiffs on their claims. *See Lampley v. United States*, 17 F.Supp.2d 609, 613 (N.D. Miss. 1998).

B. The Trial Court Correctly Ruled that the Rushings Waived Their Claims by Executing New and Renewal Loan Documents with Knowledge of the Facts Underlying Their Claims Against Trustmark.

The trial court correctly ruled that the Rushings waived all of their claims against Trustmark. The case law from the Mississippi Supreme Court and the Mississippi Court of Appeals on the "waiver" doctrine stands for one basic proposition: where a borrower has knowledge of the facts giving rise to a claim of wrongdoing against a lender in relation to a contract (i.e., breach of contract, misrepresentation, etc.), the borrower cannot affirm the contract and continue to accept the benefits of contract and then complain about the alleged wrongdoing at a later date. *See Gay v. First National* Bank, 172 Miss. 681, 160 So. 904 (Miss. 1935); *Citizens National Bank v. Waltman*, 344 So.2d 725, 727-28 (Miss. 1977); *Austin Dev. Co. v. Bank of Meridian (Branch of Great S. Nat'l Bank)*, 569 So.2d 1209, 1213 (Miss. 1990); *Holland v. Peoples Bank & Trust Company*, 3 So.3d 94, 103 (Miss. 2008); *Knox v. BancorpSouth Bank*, 37 So.3d 1257, 1261-62 (Miss. Ct. App. 2010). The

Mississippi Supreme Court and Court of Appeals have held on multiple occasions that, by renewing or re-executing a loan agreement with knowledge of the facts constituting a cause of action against the lender, the borrower waives all defenses and causes of action that he had against the bank. *Gay*, 160 So. at 905; *Waltman*, 344 So.2d at 728; *Austin* 569 So.2d at 1213; *Holland*, 3 So.3d at 103; *Knox*, 37 So.3d at 1262. Moreover, the Mississippi Supreme Court has applied this doctrine in cases in which the borrower, just as this case, accused the lender of a variety of tortious behavior. *Waltman*, 344 So.2d at 728; *Austin* 569 So.2d at 1213; *Holland*, 3 So.3d at 103; *Knox*, 37 So.3d at 1262.

The Mississippi Supreme Court and Court of Appeals have applied this "waiver" principle in a number of different circumstances. For example, in *Gay*, the lender filed the initial suit against the borrower to collect on an unpaid account. 160 So. at 905. During the lawsuit, the borrower claimed that the bank committed wrongdoing in the handling of the account. *Id.* The Supreme Court held that, because the borrower knew of the bank's alleged wrongdoing and still executed multiple renewals of his contract with the bank, the borrower waived these claims of wrongdoing. *Id.*

In *Waltman*, a borrower alleged that her lending bank was liable for fraud, tortious coercion and negligence. 344 So.2d at 727. The Mississippi Supreme Court held that it did not even need to address the merits of the plaintiffs' claims, as it "reached the inescapable conclusion that by executing the last renewal note . . . with full knowledge of the surrounding circumstances, [the plaintiff] ***waived any cause of action she might have had against the Bank***." *Id.*

Similarly, in *Austin*, two borrowers challenged a trial court's ruling that they had waived all claims they had against their bank for negligence and other liability. 569 So.2d at 1211-12. Affirming the lower court's ruling, the Mississippi Supreme Court explained that the plaintiffs were aware of their cause of action against the bank but then still later executed renewals of their loans

with the bank. *Id.* at 1213. Accordingly, the borrowers had waived ***"any . . . cause of action that [they] had against the bank."*** *Id.* (emphasis added).

The doctrine of waiver set forth in *Gay, Austin* and *Waltman* is not a new concept. The Mississippi Supreme Court has defined "waiver" as "an ***election*** of the party to forgo some advantage which he might have, ***at his option***, insisted upon." *See Vicksburg Waterworks Co. v. J.M Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302, 309 (1905) (emphasis added). In Mississippi, this waiver/election can be expressed, or it can be inferred from the actions and conduct of the parties. *See Brent Towing v. Scott Petroleum Corporation*, 735 So.2d 355, 359 (Miss. 1999). In fact, the Supreme Court emphasized that "where a contracting party, with knowledge of a breach by the other party, receives money in the performance of a contract, he will be held to have waived the breach." *Id.* (citing 17A Am. Jur. 2d *Contracts* §663).

Mississippi's federal courts have also followed this same "waiver" principle set forth by the Mississippi Supreme Court and Court of Appeals. *See Henley v. American Reliable Insurance Company*, 2002 WL 31051003, at *2 (N.D. Miss. Aug. 23, 2002); *see also, In Re Little*, 126 B.R. 861, 868-869 (Bankr. N.D. Miss. 1991) (dismissing lender liability claims against the bank). In *Henley*, three individual borrowers entered into various loan contracts, and they alleged the defendant committed fraud, negligence and misrepresentation which lead the borrowers to purchase credit life insurance. 2002 WL 31051003, at *1. In granting summary judgment to the lenders, the federal trial court ruled that the plaintiffs waived any claims of fraud or other misconduct when they renewed their loans with the lenders. *Id.* (citing *Austin, inter alia*).

The Rushings executed their original construction loan/line of credit in December 2004. As early as June 2005, the Rushings believed that they had claims against Trustmark in connection with their construction. [R. at 162, 229-230] (R.E. 4). Specifically, the Plaintiffs admitted in their

depositions that they "knew" at that point that they were going to "have to" sue Trustmark over what they believed was the bank's misconduct with the construction. [R. at 162, 229-230] (R.E. 4). Yet, despite this knowledge, the Rushings later executed multiple renewals of their construction loan in June 2005, December 2005 and March 2006. [R. at 164-165, 228, 234] (R.E. 4, 5). Additionally, the Rushings later obtained from Trustmark additional advances related to the line of credit in December 2005 and April 2006. [R. at 164-165, 228, 234] (R.E. 4, 5).

In their depositions, the Rushings testified that:

> **Q:** All right. So after you went in and met with Mr. Sandberg and expressed your concerns to him and realized that you believe[d] that the bank had paid money for work it had not done and potentially did other things improperly, you did maintain your relationship with the bank and later renew your loan with them, correct?
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> **A:** I did.

(R.E. 4 at 565). By renewing, extending and expanding the scope of their December 2004 loan/line of credit with Trustmark—with undisputed knowledge of the facts constituting their cause of action against their lender, the Rushings waived "any cause of action [they] might have had against the Bank." *Austin*, 569 So.2d at 1213; *Waltman*, 344 So.2d at 727.

The Rushings do not dispute that they knew the facts underlying their claims of wrongdoing against Trustmark at the time they renewed and expanded their line of credit with Trustmark. Instead, in their Brief, the Rushings try to cloud this clear rule of law to create an issue of fact where none exists. Primarily, the Rushings argue that the rule of waiver only applies to situations in which a plaintiff is asserting a defense or a counterclaim in response to a collection claim from a lender. *See* Appellant's Brief at 15, 17. This is an erroneous interpretation of the case law, as the prior holdings of the Mississippi Supreme Court have rejected such a holding. *See, e.g., Austin*, 561 So.2d at 1213; *Holland*, 3 So.3d at 103. For example, in *Austin*, the Supreme Court affirmed the lower court ruling that expressly rejected this argument and stated that the debtor "legally waived any defense to the notes ***and any possible causes of action otherwise available to*** the [debtors] against [the lender] arising from the facts and circumstances known to the [debtors] at the times the renewal notes were executed and the interest was paid . . . ." 569 So.2d at 1211. The Rushings specifically cite this language in their own brief. *See* Appellant's Brief at 14.

The Mississippi Supreme Court further affirmed this "waiver" doctrine in a more recent holding. *Holland*, 3 So.3d at 94. In *Holland*, a borrower filed suit against his lender, alleging claims of negligence, fraud and breach of fiduciary duty. 3 So.3d at 97. The Supreme Court affirmed the trial court's grant of summary judgment in favor of the lender. Relying on *Austin*, the Court held that, by renewing his promissory notes with knowledge his lender's supposed wrongdoing, the borrower "waived not only defenses to the notes but any possible causes of action otherwise available" to him, including a negligence claim. *Id.* at 103.

The Mississippi Court of Appeals again affirmed the waiver principle with its recent ruling in *Knox v. BancorpSouth Bank*, 37 So.3d 1257, 1261-62 (Miss. Ct. App. 2010). In *Knox*, a borrower filed a suit against a lender, alleging claims of breach of contract, tortious breach of contract,

promissory estoppel, equitable estoppel and infliction of mental anguish—all stemming from the borrower's execution of a line of credit with the bank. In affirming the trial court's grant of summary judgment in favor of the lender, the Court of Appeals cited *Austin* in holding that the borrower had waived "his claim to any ***cause of action that he had against BancorpSouth***." *Id.* at 1262. Like *Waltman, Austin* and *Holland*, the borrower's claims were not raised as a defense or counterclaim, and the Court of Appeals still applied the clear "waiver" rule. *Id.* The Rushings' argument that the rule of waiver only applies to situations in which a plaintiff is asserting a defense or a counterclaim in response to a claim from a lender is simply without merit, as nowhere in *Austin* or in any other decision has the Mississippi Supreme Court limited this waiver rule to "defenses or counterclaims."

The Rushings also argue that Trustmark's alleged knowledge that they were eventually going to have to extend and expand their loan defeats waiver. *See* Appellant's Brief at 15-16. This is another attempt by the Rushings to manufacture some distinction in the case law that does not exist. This Court has never even suggested that the lender's knowledge of a possible renewal is relevant to this issue. What Trustmark allegedly knew or did not know is immaterial to the issue, as even a casual reading of the precedent makes clear. *See Austin*, 569 So.2d at 1209.

Next, the Rushings allege that the trial court's holding is inappropriate because it is "too harsh." *See* Appellant's Brief at 17. In support of this contention, the Rushings allege that they had to obtain, extend and expand their line of credit with Trustmark in order to finish the construction on their home. The Mississippi Supreme Court previously addressed the potential "harshness" of the waiver rule, and held that it was not a factor to be considered by the judiciary. Specifically, the Supreme Court expressly rejected this argument in *Austin*, where the borrowers alleged that the court's application of the "waiver" rule was too "rigid," as that they were faced with "financial ruin"

if they did not renew the note. 569 So.2d at 1212. Likewise, the Mississippi Court of Appeals has ignored the alleged financial constraints of the borrower in strictly applying the waiver rule. *See Knox*, 37 So.3d at 1261 (Court of Appeals disregarded borrowers claims that he was "coerced" into renewing the note because he would have faced "financial disaster").

The Rushings also argue that the "waiver" doctrine requires the presence of an "adverse position on the indebtedness" between the parties. Appellant's Brief at 17-18. This is another distinction created by the Rushings' counsel, but with no support in the case law. In fact, the Rushings' did not cite one case in support of this so called distinction. And, in any event, the parties in this case clearly ***were*** in an "adverse position on the indebtedness." The Rushings owed a debt on their loan to Trustmark, and they claim that Trustmark wrongfully increased and incurred indebtedness on that loan.

In another weak attempt to overcome the overwhelming precedent from the Mississippi Supreme Court and Court of Appeals on this "waiver" issue, the Rushings place their reliance in the case of *First American National Bank of Iuka v. Mitchell*, 359 So.2d 1376 (Miss. 1978) (overruled and criticized on multiple grounds concerning faulty jury instructions and incorrect standard for duty between mortgagor/mortgagee). *Mitchell* is inapplicable to the situation at bar for a multitude of reasons. In *Mitchell*, the plaintiffs sued their lender because their mortgage officer attempted to defraud the borrowers into selling their property to a friend. Importantly, there was no indication in *Mitchell* that the borrowers had any knowledge of the facts underlying their cause of action at the time they executed the revision agreements extending their notes with the bank. *Id.* The Court in *Mitchell* also failed to provide any substantive analysis on the "waiver" issue. *Id.* at 1378. Moreover, *Mitchell* was decided prior to *Austin, Holland,* and all other subsequent cases. Indeed, *Mitchell* has never been cited or applied by any court in analyzing the principle of waiver.

The trial court correctly held that the waiver issue was dispositive of this entire case because the Rushings waived all of their claims against Trustmark. As a result, all of the alleged "disputed questions of fact" asserted by the Rushings in their brief are red-herrings and irrelevant. They waived their claims. The case law in Mississippi could not be more clear. When a borrower has knowledge of the facts constituting a cause of action against the lender and then subsequently renews or re-executes his/her loan agreement with that lender, the borrower has "legally waived any defense to the notes ***and any possible causes of action otherwise available to*** the [debtors] against [the lender] arising from the facts and circumstances known to the [debtors] at the times the renewal notes were executed." *See Austin*, 569 So.2d at 1213 (emphasis added); *see also, Waltman*, 344 So.2d at 727-28 (Miss. 1977); *Holland*, 3 So.3d at 103, *Knox*, 37 So.3d at 1262. The Court need perform no further analysis of this case and should affirm the trial court's Order granting Trustmark summary judgment on this basis alone.

C. Trustmark is Entitled to Judgment as a Matter of Law Regarding Each of the Rushings' Separate Claims.

Each of the Rushings separate claims in this case are separately deficient as a matter of law for their own reasons. While the trial court did not rely on these individualized deficiencies in granting summary judgment, this Court is justified in also affirming the grant of summary judgment for these reasons. "An appellate court may affirm a trial court if the correct result is reached, even if the trial court reached the result for the wrong reason." *Methodist Hosp. of Hattiesburg, Inc. v. Richardson*, 909 So.2d 1066, 1070 (Miss. 2005). In fact, the Supreme Court has held that "the appellate court does not have to affirm a decision on a Rule 56 motion for the same reasons that persuaded the court below to grant the motion. On the contrary, it can find another ground for concluding that the movant is entitled to judgment as a matter of law and ignore any erroneous basis

that the [lower court] may have employed." *Brocato v. Miss. Publishers Corp.*, 503 So.2d 241, 244 (Miss. 1987).

i. As a construction lender, Trustmark did not owe the Plaintiffs any duties separate and apart from the written loan agreement, Trustmark complied with that agreement and Trustmark is thus entitled to summary judgment.

In their lawsuit, the Rushings sought damages relating to deficiencies in the initial construction of their home by the Hales. However, since they are unable to recover these damages from the proper party the Rushings tried to reach the deep pockets of their lender. This is a familiar tactic by numerous plaintiffs around the country. Courts are unwilling to shift this responsibility to the lender, holding that the role of the bank in the construction process is generally limited to that of a normal moneylender. *See, e.g., Mustaqeem-Graydon v. SunTrust Bank*, 573 S.E. 2d 455 (Ga. Ct. App. 2002); *Goodman v. Pate Construction, Inc.*, 451 A.2d 464 (Pa. Super. 1982); *Butts v. Atlanta Federal Savings & Loan Association*, 262 S.E. 2d 230 (Ga. Ct. App. 1979). In examining cases in which borrowers file suit against their construction lenders, courts look to the written loan agreement between the parties and impose liability only where contractual provisions justify the imposition of a duty upon the lender and the lender breaches that contractual duty. *See, e.g., Mustaqeem-Graydon*, 573 S.E. 2d at 455 (court held that lender complied with contract and was not liable for negligence disbursement of funds, fraud or negligent misrepresentation); *Casey v. Hibernia Corp.*, 709 So.2d 933 (La. Ct. App. 4th Cir. 1998) (no cause of action where borrowers failed to show existence of written agreement obligating lender to monitor construction of house); *Manstream v. U.S. Dept. of Agriculture*, 649 F.Supp. 874 (M.D. Ala. 1986) (absent contractual obligation, lender had no duty to inspect construction for benefit of borrowers); *Butts*, 262 S.E. 2d at 230 (court held that written contract controlled and any oral statements were inadmissible to vary the terms of the

contract); *Blackwell v. Midland Federal Sav. & Loan Association*, 284 P.2d 1060 (Colo. 1955) (borrowers had no cause of action against lender where contract imposed no duty on lender to inspect construction).

In this case, the Rushings claim that Trustmark failed in its duties to properly monitor, verify and inspect work for them before paying construction draws to their builder.[6] However, the Rushings had a written loan agreement with Trustmark establishing the rights and duties of the parties and **none of these duties alleged by the Rushings are contained within the written loan agreement**. [R. at 167-169] (R.E. 3). It is uniformly held that lenders generally conduct construction inspections for their own benefit, and there is no extra-contractual obligation by the lender to inspect for the benefit of the borrower. *See, e.g., Waller v. Economic & Community Development Dept.*, 603 S.E. 2d 442 (Ga. Ct. App. 2004) (court held that lenders customarily conduct inspections for their own benefit and not for the benefit of the borrower, and a cause of action based on deficient inspections will not lie); *Butts*, 262 S.E. 2d at 230; *Pate Construction*, 451 A.2d at 154-55. *Rice v. First Federal Savings and Loan Association*, 207 So.2d 22 (Fla. App. 2d Dist. 1968). Trustmark conducts its own inspections on property for which it grants construction loans (i.e., the construction of the Rushings' residence) for its own benefit; as a method of monitoring its collateral. [R. at 264]. Indeed, the written loan agreement expresses the purpose of these inspections in that Trustmark reserves the right to "enter upon the Real Property at all reasonable times to attend to [Trustmark]'s interests and to inspect the Real Property . . . ." (R.E. 3).

[6] In their Complaint, the Rushing briefly allege that Trustmark wrongfully remitted draws to the Hales without their "consent and/or foreknowledge." [R. at 258]. However, the Rushings admitted in their depositions that they fully understood that Trustmark was to deal directly with the builder regarding draws, and that the Rushings would **not** need to give any consent prior to each draw. [R. at 152] (R.E. 4). Moreover, Trustmark's actions are not inconsistent with the written loan contract, and the Rushings have failed to provide any evidence establishing that they would not have paid the Hales in the same manner as Trustmark did. After all, the Rushings were fully aware that the Hales were receiving these draws during the process and never raised an objection. [R. at 158, 213-215] (R.E. 4).

The Rushings claim that Trustmark's duties to monitor, verify and inspect the construction for their benefit are based on some alleged oral representations made by Sandberg at the closing of the original loan. [R. at 256, 258, 261]. As stated above, the Rushings cannot saddle Trustmark with duties it did not assume in the written loan agreement. *See, e.g., Mustaqeem-Graydon*, 573 S.E. 2d at 455; *Hibernia Corp.*, 709 So.2d at 933; *Manstream*, 649 F.Supp. at 874; *Butts*, 262 S.E. 2d at 230; *Blackwell*, 284 P.2d at 1060. Furthermore, under Mississippi law, a presumption exists that the loan agreement signed by the Rushings was fully integrated. *See Benchmark Healthcare Center v. Cain*, 912 So.2d 175, 183 (Miss. 2005); *Hoerner v. First National Bank of Jackson,* 254 So.2d 754, 759 (Miss. 1971). In other words, as a matter of law, the loan agreement executed by the Rushings represents the final understanding between Trustmark and the Rushings. Therefore, any alleged oral representations made by Trustmark that are not contained in the unambiguous terms of the loan agreement cannot be received by this court to vary or alter the terms of the written contract. *Cain*, 912 So. at 183; *Hoerner*, 254 So.2d at 759.

Moreover, the Rushings signed a loan agreement that specifically stated that ***"[w]hat is written in this [agreement] and in the Related Documents is [the Rushings]'s entire agreement with [Trustmark] concerning matters covered by this [agreement]*** (emphasis added)." (R.E. 3). The loan agreement also contains a "no oral modification clause," which states that, "[t]o be effective, any change or amendment to this [agreement] must be in writing and must be signed by whoever will be bound or obligated by the change or amendment." (R.E. 3). For all these reasons, these alleged oral statements made by Sandberg are completely immaterial.

Trustmark fully complied with the terms and conditions of the written contract between the parties. Any alleged oral representations made are irrelevant. Accordingly, for this additional reason, all of the Rushings' claims fail as a matter of law, and the trial court's grant of summary judgment should be affirmed.

ii. Each of the Rushings' separate claims is deficient as a matter of law and should be dismissed.

Additionally, if this Court goes further and examines the individual claims raised by the Rushings, summary judgment was still appropriate. When judged separately, each of the Rushings' claims against the bank are deficient as a matter of law.

1. Trustmark did not owe a fiduciary duty to the Rushings.

Trustmark was not, nor had it ever been in a fiduciary relationship with the Rushings. It is well settled Mississippi law that "a bank does not have a fiduciary duty to its debtors . . . ." *See Peoples Bank & Trust Co. v. Cermack*, 658 So.2d 1352, 1358 (Miss. 1995) (overruled on other grounds). The Mississippi Supreme Court has held that an arms length business transaction involving a normal debtor-creditor relationship does not establish a fiduciary relationship. *See Burgess v. Bankplus*, 830 So.2d 1223, 1227-28 (Miss. 2002); *General Motors Acceptance Corp. v. Baymon*, 732 So.2d 262, 270 (Miss. 1999); *Hopewell Enterprises, Inc. v. Trustmark National Bank*, 680 So.2d 812, 816 (Miss. 1996); *Cermack*, 658 So.2d at 1358.

Clearly, the Rushings are under the mistaken impression that Trustmark owed it a heightened, fiduciary obligation in this matter. They admitted as much in their depositions, wherein they expressly alleged on *no less than six separate occasions* that Trustmark had "fiduciary" duties to them. [R. at 151, 201, 212, 232, 237, 239] (R.E. 4). They are wrong. The party asserting the existence of a fiduciary relationship bears the burden of proving its existence by clear and convincing evidence. *AmSouth Bank v. Gupta*, 838 So.2d 205 (Miss. 2002). There is no evidence present in the record which can change the fact that the relationship between the Rushings and Trustmark was merely an arms-length banking transaction. The Rushings have failed to meet their burden of establishing that Trustmark even owed them a fiduciary duty, and thus their claim fails as a matter of law.

2. The Rushings' breach of contract claim is deficient in numerous respects and requires dismissal as a matter of law.

The Rushings presented no evidence that Trustmark failed to comply with the terms and conditions of the written loan agreement. Instead, the Rushings sought to expand Trustmark's contractual duties based on alleged oral statements made by Trustmark's employee. The Rushings admit that they base their claims on oral statements supposedly made by Sandberg—not based on any signed, written statements that are contractually required to be binding on the bank. For the many reasons already explained, the alleged oral statements cannot expand Trustmark's obligations beyond those expressed in the written loan agreement.

It should also be pointed out that the representations allegedly made by Sandberg clearly do not rise to the level of an enforceable, contractual agreement. There was no contractual consideration for these supposed representations. *Iuka Guaranty Bank v. Beard*, 658 So.2d 1367, 1372 (Miss. 1995). Moreover, these statements by a loan officer are clearly too vague and indefinite to constitute a contractual obligation to which the parties mutually assented. *See Hopewell Enterprises*, 680 So.2d at 819 (no requisite "meeting of the minds" occurred when an alleged oral promise lacked standard contract terms). There is no record evidence that Trustmark breached the written construction loan agreement, and therefore the Rushings' breach of contract claim fails as a matter of law.

3. Each of the Rushings' tort claims is deficient in numerous respects and requires dismissal as a matter of law.

a. The tort claims should be dismissed because they are duplicative of the breach of contract claim.

A complaint "does not necessarily state two causes of action because the facts allegedly show liability both in contract and in tort, where the alleged negligent conduct was the same conduct that . . . constituted the breach of contract." See 1A C.J.S. Actions §190. Mississippi law is uniform

in holding that when tort allegations "add[] nothing which would give rise to a cause of action apart from the basic claim for breach of contract . . . [they are] duplicative and . . . should be dismissed" on that basis alone. *Furr Mktg., Inc. v. Orval Kent Food Co., Inc.*, 682 F.Supp. 884, 886 (S.D. Miss. 1988); *see also, Campbell v. Jackson Business Forms Co.*, 841 F.Supp. 772, 775 (S.D. Miss. 1994); *Oxford Mall Co. v. K&B Miss. Corp.*, 737 F.Supp. 962, 967 (S.D. Miss. 1990) (dismissing tort claims because "these tort claims are in actuality nothing more than a reiteration of the breach of contract claims"). Where plaintiffs have a written contract, related oral negotiations and representations interwoven with that contract cannot supply the basis for separate tort claims. *See Parker v. McCaskey Register Co.*, 171 So. 337, 339-40 (Miss. 1936) (holding that a "contract . . . reduced to writing . . . is the exclusive agreement of the parties and all verbal representations and negotiations antedating . . . the contract are merged therein and are not subject to proof changing or contradicting the meaning of the instrument." (emphasis added)).

The Rushings admit that their tort claims are duplicative of the breach of contract claim. [R. at 166-179] (R.E. 4). They also admit that they have no different or independent injury or damages for their breach of contract claim and for their tort claims. [R. at 171] (R.E. 4). It is clear that the Rushings' tort claims "add nothing" to the basic breach of contract claim, are duplicative and fail as a matter of law.

b. The Rushings' negligence claim is deficient and requires dismissal as a matter of law.

The Rushings' primary obligation for the negligence claim is to demonstrate that Trustmark breached a duty owed to the Rushings, and the question of whether a duty exists is a question of law for the court. *Enterprise v. Bardin*, 8 So.3d 866 (Miss. 2009). As explained above, Trustmark did not owe any common law negligence duties as alleged by the Rushings separate and apart from the duties spelled out in written loan agreement. *Butts*, 262 S.E. 2d at 230. The written contract sets

forth the parameters of the duties in this context, and this Court should not create and place new duties on the lender. *Enterprise*, 8 So.3d at 871. The mere allegations of a duty by the Rushings clearly does not create an issue of material fact to defeat summary judgment. *Id.*

c. The Rushings' detrimental reliance claim is deficient in numerous respects and requires dismissal as a matter of law.

The Rushings also allege that they relied to their detriment on the alleged oral statements made by Sandberg. [R. at 261-262]. First, as already explained, the loan agreement executed by the Rushings represents the final understanding between Trustmark and the Rushings, and any alleged oral representations made by Trustmark that are not contained in the unambiguous terms of the loan agreement cannot be received by this court to vary or alter the terms of the written contract. *Cain*, 912 So. at 183; *Hoerner*, 254 So.2d at 759; *see also*, *Mustaqeem-Graydon*, 573 S.E. 2d at 455; *Butts*, 262 S.E. 2d at 230.

Moreover, the Rushings also admitted that they did not act in reliance upon Sandberg's alleged comments, because these statements did not cause them to alter or change their position or any planned actions in any way. [R. at 153-154] (R.E. 4). Additionally, the Rushings directly contradict their own allegation, as they admitted in their depositions that they had no evidence that Sandberg had any intention for them to rely on any alleged representations. [R. at 173-175] (R.E. 4). Finally, the Rushings' reliance on the alleged vague and indefinite statements—as opposed to relying on the unambiguous terms of their written loan agreement—was clearly unreasonable as a matter of law.

VI. CONCLUSION

The Rushings had a bad experience with their builder and improperly tried to hold the deep-pocketed lender responsible. The trial court correctly granted Trustmark's motion for summary judgment because the Rushings waived all of their claims. In any event, the undisputed facts show

CERTIFICATE OF SERVICE

I, Christopher A. Shapley, hereby certify that I mailed a copy of this Brief of Appellee Trustmark National Bank to the following:

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