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

KELSEY RUSHING AND YUMEKA RUSHING — **APPELLANTS**

VS.

TRUSTMARK NATIONAL BANK — **APPELLEE**

APPEAL FROM THE CIRCUIT COURT
OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
Case No. 251-08-366 CIV

REPLY BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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I. REBUTTAL

In their original brief, the Plaintiffs discussed extensively the facts and law concerning their cause. In addition, the Plaintiffs also provided an in-depth analysis of the issues before this Honorable Court, which the Plaintiffs believe show clearly that genuine issues of material fact exist that were erroneously excluded by the trial court.

The Plaintiffs will not restate the facts or repeat their arguments, but will briefly respond to the brief of the Appellee to include a rebuttal of the factual misstatements set forth by the Bank in its brief and the case law relied upon by the Bank.

A. REBUTTAL OF THE BANK'S FACTUAL ACCOUNTS

In the Appellee's Brief, the Bank continues to ignore the official comment to Rule 56, which provides in pertinent part that "[s]imilarly, 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." Fed. R. Civ. P. 56. This rule is firmly embedded in Mississippi civil procedural jurisprudence and is instructional and applicable to the Rushings' position. In that regard, the Bank also ignores the sworn deposition testimony and the documents produced in this case when it argues that "conclusory allegations, bare assertions, and speculations" were made by the Rushings. (Appellee's Brief at 8). In fact, the Bank admits in its own brief that from the beginning to the end of the whole transaction the Rushings were victims of misconduct. (Appellee's Brief at 11). Yet, the Bank concludes that it did nothing wrong and that it has no responsibility for the improper payment of the Rushings' loan proceeds for work not completed and for gross substandard work.

The Bank's actions and omissions, which gave rise to the Plaintiffs' complaint,

constituted an egregious violation of a duty of fairness. In an attempt to represent to the Court that the Plaintiffs were not the victims of compulsory actions, the Bank in its brief, argue that the Plaintiffs "[voluntarily] authorized [the Bank] to disburse periodic payments as construction progressed." (Appellee's Brief at 4). However, a review of the evidence in the record shows that this statement is erroneous. In spite of repeated attempts by the Bank's counsel during the Plaintiffs' depositions to cause the Plaintiffs to say that they had a choice, the Plaintiffs maintained their sworn testimony that the Bank's representative, Carl Sandberg did not give them a choice in how the funds would be disbursed to the contractor and that the whole inspection and payment process would be administered by Sandberg. Moreover, the Bank violated its own policy when Sandberg failed to give the Rushings a choice. [R. at 386-386, 390, 428-430].[1]

Similarly, the Bank clearly misstates the facts in alleging that no documents exist which imposed on the Bank any duty to verify the construction work as it progressed. The Bank had a duty to verify the construction work before handing over the Plaintiffs' loan money to the contractor—a duty the Bank insisted at the loan closing that it performs. The Bank has not refuted that it conducted inspections using the inspection document created and promulgated by it. In addition, the Plaintiffs were charged a fee by the Bank for the inspections that were to be conducted by the Bank. [R. at 388-390, 468-473].[2] The Bank's inspection document, when viewed together with the requisite inspection fee in the light most favorable to the Plaintiffs, imposes a fiduciary duty concerning the proper management of the

[1] Please also see the Record at 427 regarding the objections interposed by counsel for the Plaintiffs to protest and stop the improper interrogation by the Bank's counsel concerning this issue.

Plaintiffs' loan—a loan made by the Bank. It is manifestly unfair for the Bank on the one hand to charge a fee for inspections and demand that it handle the whole process for inspection and payment of loan proceeds, and then on the other hand assert that the Bank is immune from any liability for paying the contractor for work not completed and for work that was improperly done. In this connection, it is noteworthy to reiterate the fact that prior to the Plaintiffs' transaction, the Bank had entered into a similar transaction that was on-going with the same contractor involving another homeowner. *Please see* Appellants' Brief at 6.

B. REBUTTAL OF BANK'S ARGUMENT

1. Rebuttal of Authorities Cited by Bank for the Standard of Review for Summary Judgment

The Bank makes a general reference to several Mississippi cases and one Federal case from the United States District Court in the northern district. The Bank cites *Wininger v. Ameristar Casino, Inc.*, 760 So.2d 1, 3 (Miss. Ct. App. 1999), as its first legal authority. While the Bank correctly states that the Court "conducts de novo review of orders granting or denying summary judgment and looks at all the evidentiary matters before it," the Bank fails to cite a pertinent part of the standard for review. (Appellee's Brief at 7). The Bank ignored the part that provides that it is well settled that "[i]ssues 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 another says the opposite." *Id.* (citing *Franklin v. Thompson*, 722 So.2d 688 ¶ 8 (Miss. 1998)). This case also provides instruction for the trial courts when they are presented with a motion for summary judgment: "[t]he trial court should deny a

[2] The Bank's Sandberg admitted in sworn testimony that the inspections which were conducted provided the foundation for the payments the Bank made to the contractor.

motion for summary judgment unless the trial court concludes beyond any reasonable doubt that the plaintiff would be unable to prove any facts to support his/her claim." *Wininger*, 760 So.2d at 3, (¶ 6). (citing *Franklin v. Thompson*, 722 So.2d at 691 (¶ 9); *Yowell v. James Harkins Builder, Inc.*, 645 So.2d 1340, 1343 (Miss.1994)). It is clear that the trial court's order, granting summary judgment against the Rushings and in favor of the Bank, failed to comply with this standard. [R. 567-569]. Similarly, the Bank cannot take comfort in *Doe v. Stegall*, 900 So.2d 363 (Miss. Ct. App. 2003)[3]. In *Stegall*, the Court of Appeals reversed and remanded the Hinds County Circuit Court's summary judgment that was in favor of the owners and managers of the apartment complex. In its discussion of the standard of review of a lower court's summary judgment decision, the Court of Appeals explained that "[i]t is standard practice that 'summary judgment, in whole or in part, should be granted with great caution.'" *Id* at 366 (citing *Brown v. Credit Ctr. Inc.*, 444 So.2d 358, 363 (Miss.1983)).

Next, the Bank cites the case of *Mallery v. Taylor*, 805 So.2d 613 (Miss. Ct. App. 2002). In *Mallery*, the Court of Appeals reviewed an appeal involving claims made under the Mississippi Tort Claims Act and 42 U.S.C., Section 1983, which required the Court to evaluate the appeal according to the substantive federal law concerning Section 1983 as interpreted by the United States Supreme Court. In that case, the Court found no evidence existed to establish a Section 1983 "culpable state of mind" or "deliberate indifference" claim. *Id* at 620-621 (¶¶ 12, 13). Unlike that case, the Bank in their brief and the trial court in its order in granting summary judgment, totally rely on the waiver doctrine without any consideration of all of the facts and evidence of the cause. The record contained substantial

[3] The Bank's brief cites this case as a Mississippi Supreme Court case, but it is a case

evidence that was sufficient for the trial court to deny summary judgment. For example, during the Bank's own sworn deposition testimony, it admitted that it made payments to the contractor after its own inspector would report the status of completion of the various stages of the construction. [R. 468-473]. Further, with respect to the waiver doctrine, the Bank also gave sworn testimony that the initial loan made to the Rushings was never intended to be permanent financing and that the Bank knew beforehand that the loan would have to be extended or renewed during the construction of the Rushings' home. It is clear that the waiver doctrine as applied by the trial court was in error. [R. 473-476].

The Bank's citation to *Stuckey v. The Provident Bank*, 912 So.2d 859 (Miss. 2005) is also not an appropriate reference in this matter. In *Stuckey*, the State Supreme Court was asked to determine whether a sworn complaint constituted evidence on material issues so as to create triable issues, which would provide grounds for denial of a motion for summary judgment. *Id* at 863-864 (¶ 7). In addition, the non-movants in *Stuckey* failed to serve a response to the motion for summary judgment filed against them. *Id* at 868 (¶ 19). Again, unlike that case, the Hinds County Circuit Court Judge had before him, at the time of the hearing on the Bank's motion for summary judgment, the complaint, the answer, excerpts of transcripts of depositions conducted by both the Rushings and the Bank, and other pleadings, including the Rushings' response in opposition to the motion for summary judgment. [R. 359-556].

Finally, the Bank mistakenly relies on one sentence contained in the case of *Lampley v. United States*, 17 F.Supp.2d 609, 613 (N.D.Miss. 1998). (Appellee's Brief at 8).

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published by the Court of Appeals for Mississippi.

In *Lampley*, the Federal District Court considered the United States motion to dismiss, or in the alternative for summary judgment on the plaintiffs lawsuit to quiet and confirm title in real property in Winston County, Mississippi. There, a deed of trust was executed and filed in favor of the United States on that property and the plaintiffs also sued to enjoin foreclosure by the United States on the property. The Federal District Court analyzed the conveyance documents and debt instruments to include a review of the amount of the indebtedness and extent of the lien held by the United States on its route to granting the motion for summary judgment. This case, however, is not supportive of the Bank's position because the Hinds County Circuit Court Judge, in his order, focused exclusively on the waiver issue so he did not examine the record to determine whether the record, taken as a whole, could not lead a rational trier of fact to find that there was no genuine issue of material fact for trial.

2. Rebuttal of Authorities Cited by Bank on Whether the Rushings Waived Their Claims when They Executed Certain Renewal and New Loan Documents

The waiver doctrine provides that "[w]here 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." *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904, 905 (Miss. 1935). The Bank cites *Gay* and certain subsequent cases, in support of the Bank's argument. (Appellee's Brief at 8).

The waiver doctrine, as explained in all of those cases, is not applicable to the Rushings' cause. The non-applicability of this doctrine was fully discussed in the Appellants' Brief, but the following is provided as a brief response to the Appellee's Brief.

First, in each of the cases relied upon by the Bank, the plaintiff(s) filed suit to either

avoid payment of notes for permanent financing or to stay collection actions filed against the plaintiff(s). In other words, the plaintiff(s) were in adverse positions with the defendant(s) concerning the payment of the indebtedness. For example, in *Holland v. Peoples Bank & Trust Co.*, 3 So.3d 94 (Miss. 2008), the plaintiff defaulted on his loans before suit was filed. Similarly, in *Knox v. BancorpSouth Bank*, 37 So.3d 1257 (Miss. Ct. App. 2010), the plaintiff was in an adverse position with the defendant because the defendant did not make a certain loan to the plaintiff that was purportedly promised after the defendant determined that the plaintiff's creditworthiness was not sufficient. It is clear that the Bank, in its brief, is attempting to downplay the importance of these distinguishing facts that are present in all of the cases upon which it relies. The Bank, however, is wrong.

Second, the Rushings did not have the benefit of a long-term relationship with the Bank. In *Knox*, one of the reasons for the Court of Appeals' application of the waiver doctrine was the fact that the plaintiff had a ten-year business relationship with the defendant. *Id* at 1262 (¶ 14). In addition, at time of the loan closing and subsequent transactions, the Rushings had no experience with real estate development and finance transactions. For these reasons, the Rushings were not aware of the consequences surrounding their execution of renewal debt instruments.

In that connection and as explained in the Appellants' Brief at 15, the Rushings' initial loan was an interim construction loan based upon the cost estimates. The Bank argues erroneously that this issue is immaterial to the Rushings' cause, because it is clear that the Rushings initial "note was simply designed to serve only as a financial tool to underwrite the first six-months of the construction." *Please see* Appellants' Brief at 16. In other words, the

Rushings' renewal notes were not the type of "new notes" described in *Citizens National Bank v. Waltman*, 344 So.2d 725 (Miss. 1977); *Austin Development Co. Inc. v. Bank of Meridian (Branch of Great Southern National Bank)*, 569 So.2d 1209 (Miss. 1990); and *Holland v. Peoples Bank & Trust Co.*, 3 So.3d 94, (Miss. 2008)—the cases relied upon by the Hinds County Circuit Court.

In an obvious attempt to force the waiver doctrine to fit within the distinguishable framework of facts embodying the Rushings' cause, the Bank cites *Vicksburg Waterworks Co. v. J. M. Guffy Petroleum Co.*, 86 Miss. 60, 38 So. 302 (1905). That case, however, does not support the Bank's argument—it undermines it for the following reasons. First, the Bank misstates the definition of waiver as provided by this Court in that case and the waiver language appears to be dictum as it was not the focus of the Court's opinion. Second, this case does not affirmatively define waiver as set forth in the cases relied upon by the Hinds County Circuit Court. More importantly, the Bank overlooks or ignores this Court's extensive discussion concerning the making of a contract, which is where the Court placed its focus. The Court explains thoroughly that when analyzing the rights and duties of parties to a contract, the intention of the parties is the paramount consideration:

> Let us put ourselves in the place of those parties when they were negotiating this contract, and see exactly what they did . . . . Proposals were made on the one hand and accepted on the other. . . .
>
> What was the consideration for which the Vicksburg Waterworks Company and the other Vicksburg corporations agreed to furnish the tank site and right of way to appellee? Was it the intrinsic value of the paper and ink which was to be the evidence of the contract to be executed on or before January 1st? That would be to say that the skins are for what we raise fruits; that we gather nuts for their shells. Appellant contracted for a financial benefit, the profit in the use of oil as fuel instead of coal. . . .

> There is no law or precedent that prevents parties from putting a part only of a contract in writing. . . The rule that a written contract cannot be varied by parol evidence has no reference to the making of a contract. . . Where the original agreement is partly in writing and partly verbal, the rule which rejects parol evidence in respect to the written contract has no application. . . We must construe this writing so as to give effect to the intent of the parties as it appears there and what their intent was is plain.

Id at 305-306.

Applying the reasoning of the *Vicksburg Waterworks Co.* opinion to the Rushing's cause, it is unrefuted that the Bank's representative, Carl Sandberg required the Rushings to submit to him the contractor's *building contract* at the loan closing. The contractor was also present at the loan closing and Sandberg instructed the Rushings that he would handle the withdrawal of the money from the loan fund and pay the contractor based upon the requisitions filed by the contractor and the inspections conducted by the Bank. The contractor also promised to keep the Rushings duly informed. Additionally, as explained previously, the Rushings were charged an inspection fee by the Bank. Referencing the inquiry made by this Court in *Vicksburg Waterworks Co.*, what was the consideration for which the Rushings agreed to pay back the loan, which included the requisite inspection fee? The only logical conclusion is that the Rushings contracted for the benefit of the proper use of the loan money for the proper construction of the home. In that connection, what reason would it be for the Bank to make inspections before it disburses construction money other than to insure that the Bank is paying for quality work? It is clear that the minds of the parties had met and they agreed that the construction would be made properly and that payments would be duly made by the Bank as stages of the construction were completed. Leaving aside the fact that the Bank's promissory note does not contain a "total integration

clause", the Bank cannot repudiate its duty concerning the proper use of the loan funds.

In that connection, the Bank's reference to *Brent Towing v. Scott Petroleum Corporation*, 735 So.2d 355, 359 (Miss. 1999) is inappropriate. The facts in *Brent Towing* are totally dissimilar to the case at bar. In addition, the parties in *Brent Towing* were in an adverse position because after the appellee vendor initiated foreclosure proceedings against the appellant purchaser for failure to make the final payment for the property sold by the vendor, the purchaser filed suit against the vendor.

Similarly, the facts of the *Henley v. American Reliable Insurance Company*, 2002 WL 31051003 (N.D. Miss. August 23, 2002) and *In Re Little*, 126 B. R. 861, (Bankr. N. D. Miss. 1991), are distinguishable from the facts in the instant case. In *Henley*, the plaintiffs elected to purchase insurance from the defendants even though the signed loan documents and subsequently signed renewal loan documents "plainly" set forth that the plaintiffs were not required to purchase insurance from the Defendants. Please see *Henley*, 2002 WL 31051003, at *2. Conversely, the Rushings were not afforded written notice that the Bank would not be responsible for its improper disbursement of the loan funds to the contractor. Based upon the particular factual circumstances surrounding the proceedings of the loan closing which were held at the offices of the Bank and the relationship of the Bank and the contractor, the Rushings justifiably placed their confidence and trust in the Bank to properly administer the Rushings' account involving the construction of the Rushings' home. *In Re Little*, the Federal District Court did not support the debtors' position because the debtors did not present any claims against the creditor in their original plan and amended plan of reorganization before the plans were confirmed by order of the United States Bankruptcy

Court. The Bankruptcy Court held that the plaintiffs' state court action was barred on res judicata grounds and under the doctrines of equitable and judicial estoppel. The waiver doctrine was mentioned in this case, but it is clear that the Bankruptcy Court's focus was on the debtors' lack of full disclosure in their plans of reorganization. With further respect to the waiver doctrine, the debtors in *In Re Little*, unlike the Rushings, were in an adverse position concerning the payment of indebtedness. Please see *In Re Little*, 126 B.R. at 863-864.

Under the Bank's analysis of this whole controversy, the Rushings should have abandoned the construction of their home after the initial construction loan ended and saddled with a huge debt for a home that was not completed. *Please also* see the Record at 543. As a matter of public policy, banks should not be allowed to take unfair advantage of the relationship of trust that banks have with borrowers. To do so would not only be contrary to existing Mississippi case law, but would also provide banks the ability to severely exploit borrowers and deprive the borrowers of any civil recourse against such misconduct. *Please see* Appellants Brief at 19.[4]

3. Rebuttal of Authorities Cited by Bank on Whether there are Other Disputed Questions of Fact Concerning the Plaintiffs' Claims

The Bank cites numerous cases, but cited no case law that supports the Hinds County Circuit Court's order granting summary judgment exclusively on the waiver doctrine without regard to the other disputed fact issues. *Methodist Hosp. of Hattiesburg, Inc. v. Richardson*, 909 So.2d 1066, 1070 (Miss. 2005), is cited to suggest that this Court should affirm the trial

[4] Please see *Federal Land Bank v. Collom*, 201 Miss. 266, 28 So.2d 126, 127 (1946). This case was cited in the Appellants' Brief at 19. No response is provided to the case in Appellee's Brief.

court's order even if it was based upon the wrong grounds. That case is not on point with the instant case because there, the Court did not agree with the creation of a "new species of plaintiff." *Id.* The Rushings have not presented any new class of parties, but object to the trial court's erroneous application of the waiver doctrine and total disregard of the other genuine issues of disputed material facts. Interestingly enough, the *Richardson* case cited by the Bank reiterates the long-standing rule that trial courts must adhere to in their consideration of motions for summary judgment—there must be a determination of whether or not there are genuine issues of material facts before moving to the determination of whether the moving party is entitled to a judgment as a matter of law. The Bank cites, *Brocato v. Mississippi Publishers Corp.*, 503 So.2d at 241, 245 (Miss. 1987), for support but the Bank seems to argue that a determination of whether genuine issues of material facts exist is not necessary prior to deciding whether a party is entitled to a judgment as a matter of law.

Next, the Bank, unable to cite any Mississippi legal authorities to support its "deep pocket lender" argument, turns to other jurisdictions in an effort to oppose the other disputed questions of fact that were before the Hinds County Circuit Court. The Bank cites *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); and *Butts v. Atlanta Federal Savings & Loan Association*, 262 S.E. 2d 230 (Ga. Ct. App. 1979) in its attempt to argue that the "role of the bank in the construction process is generally limited to that of a normal moneylender." (Appellee's Brief at 16). The three cases from the other jurisdictions,

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Similarly, no response is provided in Appellee's Brief to *Great Southern Nat. Bank v. Minter*, 590

however, are not on point with the Rushings' cause. In each of those cases, the court made a thorough analysis of the evidence including sworn deposition testimony in order to determine that there were no genuine issues of material facts. The Hinds County Circuit Court made no such analysis. Further, in *Butts,* the Court of Appeals of Georgia affirmed the trial court's summary judgment decision because of the following facts: the lender's oral promises were made *prior to* the signing of the loan agreement; the lender did *not* have a close business relationship with the developer; and the plaintiffs had signed several disbursement requests *before* the lender paid them. *Id.* 262 S.E. 2d at 232. In direct contrast, the record shows in the Rushings' case that the Bank's oral inspection assurances were made after the promissory note was signed; the Bank's representative Carl Sandberg enjoyed a pre-existing and current business relationship with the builder; and the Rushings never signed any disbursement requests prior to payment by the Bank. [R. 374, 377-379, 385, 391, 408, 428, 466-467].

The cases of *Casey v. Hibernia Corp.*, 709 So.2d 933 (La. Ct. App. 4th Cir. 1998) and *Manstream v. U. S. Dept. of Agriculture*, 649 F. Supp. 874 (M.D. Ala. 1986), cited by the Bank are also not on point because in both cases, the courts made their determination primarily on the grounds that the plaintiffs' claims were barred under certain statutes. No assertions are in the record of the instant case concerning any statutory bar to the Rushings' cause.

The Colorado State case cited by the Bank is also factually distinguishable from the case before this Court. In *Blackwell v. Midland Federal Sav. & Loan Association*, 284 P.2d 1060 (Colo. 1955), the plaintiffs' claims failed because prior to filing a lawsuit, they had

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So.2d 129, 135 (Miss. 1991), also cited at 19 of Appellants' Brief.

approved the construction of their residence, signed a release, and entered and remained in occupancy for nearly six years. Similarly, *Waller v. Economic & Community Development Dept.*, 603 S. E. 2d 442 (Ga. Ct. App. 2004) and *Rice v. First Federal Savings and Loan Association*, 207 So.2d 22 (Fla. App. 2d Dist. 1968), are not factually or legally relevant. In *Waller*, a contract specifically exempted the defendant from any liability and in *Rice*, the plaintiffs were in an adverse position with the defendant because the plaintiffs counterclaimed for damages when the defendant sued for foreclosure on the plaintiffs' mortgage. A later case decided by the District Court of Appeals of Florida, however, contained facts which are similar to the facts of the Rushings' case. Please see *First National Bank and Trust Company of the Treasurer Coast v. Pack*, 789 So.2d 411 (Fla. App. 2d Dist. 2001). In *Pack*, the court stated that a fiduciary relationship may be either express or implied and specific factual circumstances surrounding the transaction and relationship of the parties can constitute the basis for a fiduciary relationship implied in law. *Id* at 414. The court explained that if a bank knows or has reason to know that borrowers are placing their trust and confidence in the bank and is relying on the bank so to counsel and inform them, a fiduciary relationship exists. *Id* at 415. Like the assurances made by the Bank's Carl Sandberg that the Bank had worked with the Hales in the past and that they did good work, the court found that the bank representative stated that "First National" had an excellent relationship with the builder, "Floridian Homes" and that "Floridian Homes" was a "quality company". *Id* at 413; *See also* [R. 377-379, 408]. The court affirmed the lower court's finding that the defendant had breached its fiduciary duty based upon the actions of the parties in that the plaintiffs placed their confidence and trust in the defendant and that trust

was accepted by the defendant. *Id* at 415-416.

On page 18 of the Appellee's Brief, the Bank asserts that "... under Mississippi law, a presumption exists that the loan agreement signed by the Rushings was fully integrated." *Benchmark Healthcare Center v. Cain*, 912 So.2d 175 (Miss. 2005) and *Hoerner v. First National Bank of Jackson*, 254 So.2d 754 (Miss. 1971), are the cases cited by the Bank in this regard, but these cases do not support the Bank's argument. The Bank either ignores or fails to recognize the fact that the Hinds County Circuit Court did not go beyond the waiver doctrine to examine the various claims contained in the Rushing's complaint. The trial courts in *Cain* and *Hoerner*, considered all of the evidence including sworn testimony before rendering a decision. In contrast, the Hinds County Circuit Court never made a determination as to whether genuine issues of material facts exist regarding (1) whether the debt instruments signed by the Rushings contained unambiguous terms, (2) whether the deed of trust and promissory notes have full or partial integration provisions, or (3) whether the intention of the parties were clear. In that connection, the Bank misstates the "[a]mendments" provision contained in the Bank's deed of trust. [R. 248]. Moreover, while the deed of trust provides definitions of several terms, it does not define the term "inspection" and "any ambiguity or vagueness in the Bank's debt instruments should be construed more strictly against the Bank. [R. 248-249]. *Please see Henry v. Moore*, 9 So.3d 1146, 1154 (Miss. Ct. App. 2008). The representations of Carl Sandberg and the understanding of the Rushings are, therefore, relevant and necessary for a just determination of this whole matter. In the interest of justice, the trial court should have determined whether there were other disputed issues of fact.

With reference to the Bank's denial of the existence of a fiduciary duty to the Rushings, the same weakness is clearly recognizable. In contrast to the trial court in the instant case, the trial courts in the cases cited by the Bank on page 19 of its brief considered all of the facts and evidence before reaching a decision. Moreover, each case points out that a fiduciary relationship can exist due to informal relations involving one person's trust in or reliance upon another. The record shows that the Rushings reposed trust in the Bank's Carl Sandberg. [R. 385-389, 408, 428-430, 466-467].

On the issue of breach of contract by the Bank, the Rushings explained in their original brief the manner in which the Bank represented that it would verify the work completed by the builder before his disbursement request would be approved for processing and payment. *Please see* Appellants' Brief at 22-23. Not only was there a "meeting of the minds" at the loan closing, but the Bank's inspection fee form and monitoring report form were made a part of the contractual documents. According to the definition of "Related Documents" contained in the Bank's deed of trust, "all other instruments, agreements and documents" are part of the written agreements. [R. 249]. And, with reference to the issue of consideration, the Rushings tendered a fee for the verification work that the Bank said that it would perform. In addition, the Rushings suffered a legal detriment from the Bank's disbursement of loan funds to the builder for substandard work and work not completed. The legal detriment can clearly be found in the fact that the Rushings were forced to incur additional indebtedness that would not have been necessary but for the Bank's wrongful disbursement of the loan funds. Accordingly, the Bank's reliance upon *Iuka Guaranty Bank v. Beard*, 658 So.2d 1367 (Miss. 1995) and *Hopewell Enterprises v. Trustmark Bank*, 680

So.2d 812 (Miss. 1996) is misplaced.

The Bank's whole argument concerning the Rushings' tort claims is clearly wrong under the prevailing case law in Mississippi. On page 21 of its brief, the Bank cites three cases from the United States District Court in the Southern District of Mississippi and one 1936 case from the Supreme Court of Mississippi on the issue of whether the Rushings' tort claims are duplicative of the breach of contract claim. The Bank fails however, to describe how the holdings in those cases apply to the claims and the facts of the case at hand. The Rushings stated a claim of negligence against the Bank, which includes allegations that the Bank "had a duty to the Plaintiffs to ensure that the funds from the construction loan were used for their intended purposes" and "the duty was breached by allowing the builder/contractor to take draws without the consent and/or foreknowledge of the Plaintiffs." [R. 7-8]. The Rushings' breach of contract claim against the Bank states that the Bank breached the contract because it did not adhere to the provisions of the agreement concerning the payments to be made to the contractor at the required stages of completion and failed to properly inspect the construction to insure that no payments were being made for work not completed. [R. 11]. The Rushings also made a claim for punitive damages. [R. 12]. In *Natchez Regional Medical Center v. Quorum Health Resources*, LLC, 2010 WL 3324955 (S.D. Miss.), the court held that since Mississippi recognizes a tortuous breach of contract claim and since the plaintiff stated a claim of negligence containing specific factual matter together with a claim for punitive damages, the claim should not be dismissed (in spite of the inclusion of a breach of contract claim). *Id* at *5 and *6. In, *IHP Industrial, Inc. v. Permalert, Esp.*, 947 F. Supp. 257 (S.D. Miss. 1996) the court held that "unlike the plaintiff

in *Furr*, IHP has not alleged a willful breach of the contract, and thus a separate claim . . . which includes a request for punitive damages is not duplicative . . . ." *Id* at 261. Therefore, *Natchez Regional Medical Center* and *IHP Industrial, Inc.*, in contrast to the cases cited by the Bank, would appear to be applicable to the case *sub judice*. In addition, the Bank's reference to *Parker v. McCaskey Register Co.*, 177 Miss. 347, 171 So. 337 (Miss. 1936), is significantly misleading because the Bank ignores the indispensable part of the Court's instruction, which is as follows: "A contract . . . which is *not ambiguous* on its face . . . all verbal . . . *antedating*. . . ." *Id* at 339. (emphasis added). The Hinds County Circuit Court never made the requisite determination as to whether or not the loan documents contained any ambiguous terms.

The issue of damages was thoroughly briefed by the Rushings in their original brief. *Please see* Appellants' Brief at 24-27. In addition, the Rushings did not admit that any claims were duplicative. Kelsey Rushing stated that "the damages are the damages" in this case. The only reasonable inference that can be made from that statement is that the damages are those that are being claimed in the lawsuit, compensatory and punitive. Moreover, a substantial part of Mr. Rushing's testimony lends support to the claim for punitive damages. [R. 176-179].

As discussed above, the Bank has not provided adequate support of its argument in opposition to the Rushings' claims for negligence and the issue of detrimental reliance was discussed extensively in the Appellants' Brief at 23-24.[5] Further, the Hinds County Circuit

[5]The Bank also cites *Enterprise v. Bardin*, 8 So.3d 866 (Miss. 2009) and *Butts*, 262 S.E. 2d at 230 to aid its argument that the negligence claim is deficient. As explained above, the *Butts* case is not applicable to the case at hand based upon its facts and in *Enterprise*, this Court clearly pointed out

Court did not make any determination as to whether or not the terms of any written agreement were unambiguous and parol evidence was not applicable. In addition, according to the statements made by the Bank on page 22 of its brief, the Bank misconstrues the deposition testimony of Kelsey Rushing concerning the issue of detrimental reliance. Moreover, the Rushings explained in sworn deposition testimony how they relied upon the representations of the Bank's Carl Sandberg concerning the management of the whole disbursement request and payment process. [R. 377-379, 386-390,408]. Unfortunately for the Rushings, Sandberg did not disclose that the Bank had a policy which would have allowed the Rushings to actually participate in the authorization procedure of the disbursement request and payment process from the beginning to the end of the construction period. [R. 386].

II. CONCLUSION

Based upon the reasons set forth herein and in the Appellants' Brief, the Rushings are entitled to a trial on the merits. The Rushings did not waive their claims under the waiver doctrine due to the distinguishing facts of their case and when the facts and evidence surrounding the Rushings' claims are viewed in a light most favorable to the Rushings, this Court should reverse the lower court's judgment and remand this case for a trial on the merits.

Respectfully submitted,

Kelsey Rushing and Yumeka Rushing
Plaintiff-Appellants

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that the plaintiff misstated the duty that was set forth in state statutory law. Accordingly, those cases are not on point with the case at bar.

By: _____
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CERTIFICATE OF SERVICE

I, Tom L. Stingley, attorney for Appellants, Kelsey Rushing and Yumeka Rushing, certify that I have this day caused to be served a true and correct copy of the Reply Brief of Appellants, by either Hand Delivery or by United States mail with postage prepaid, on the following persons at these addresses:

The Honorable W. Swan Yerger
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SO CERTIFIED this the 11TH day of January 2011.

_____
Tom L. Stingley

RULE 56. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counter-claim, or cross-claim, or to obtain a declaratory judgment may, at any time after the expiration of thirty days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counter-claim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least ten days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought 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. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered on the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When

a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Costs to Prevailing Party When Summary Judgment Denied. If summary judgment is denied the court shall award to the prevailing party the reasonable expenses incurred in attending the hearing of the motion and may, if it finds that the motion is without reasonable cause, award attorneys' fees.

Comment

The purpose of Rule 56 is to expedite the determination of actions on their merits and eliminate unmeritorious claims or defenses without the necessity of a full trial.

Rule 56 permits any party to a civil action to move for a summary judgment on a claim, counter-claim, or cross-claim when he believes that there is no genuine issue of material fact and that he is entitled to prevail as a matter of law. The motion may be directed toward all or part of a claim or defense and it may be made on the basis of the pleadings or other portions of the record, or it may be supported by affidavits and other outside material. Thus, the motion for a summary judgment challenges the very existence or legal sufficiency of the claim or defense to which it is addressed; in effect, the moving party takes the position that he is entitled to prevail

as a matter of law because his opponent has no valid claim for relief or defense to the action, as the case may be.

Rule 56 provides the means by which a party may pierce the allegations in the pleadings and obtain relief by introducing outside evidence showing that there are no fact issues that need to be tried. The rule should operate to prevent the system of extremely simple pleadings from shielding claimants without real claims or defendants without real defenses; in addition to providing an effective means of summary action in clear cases, it serves as an instrument of discovery in calling forth quickly the disclosure on the merits of either a claim or defense on pain of loss of the case for failure to do so. In this connection the rule may be utilized to separate formal from substantial issues, eliminate improper assertions, determine what, if any, issues of fact are present for the jury to determine, and make it possible for the court to render a judgment on the law when no disputed facts are found to exist.

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.

Rule 56 is not a dilatory or technical procedure; it affects the substantive rights of litigants. A summary judgment motion goes to the merits of the case and, because it does not simply raise a matter in abatement, a granted motion operates to merge or bar the cause of action for purposes of res judicata. A litigant cannot amend as a matter of right under Rule 15(a) after a summary judgment has been rendered against him.

It is important to distinguish the motion for summary judgment under Rule 56 from the motion to dismiss under Rule 12(b), the motion for a judgment on the pleadings under Rule 12(c), or motion for a directed verdict permitted by Rule 50.

A motion under Rule 12(b) usually raises a matter of abatement and a dismissal for any of the reasons listed in that rule will not prevent the claim from being reasserted once the defect is remedied. Thus a motion to dismiss for lack of subject matter or personal jurisdiction, improper venue, insufficiency of process or service of process, or failure to join a party under

Rule 19, only contemplates dismissal of that proceeding and is not a judgment on the merits for either party. Similarly, although a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted is addressed to the claim itself, the movant merely is asserting that the pleading to which the motion is directed does not sufficiently state a claim for relief; unless the motion is converted into one for summary judgment as permitted by the last sentence of Rule 12(b), it does not challenge the actual existence of a meritorious claim.

A motion for judgment on the pleadings, Rule 12(c), is an assertion that the moving party is entitled to a judgment on the face of all the pleadings; consideration of the motion only entails an examination of the sufficiency of the pleadings.

In contrast, a summary judgment motion is based on the pleadings and any affidavits, depositions, and other forms of evidence relative to the merits of the challenged claim or defense that are available at the time the motion is made. The movant under Rule 56 is asserting that on the basis of the record as it then exists, there is no genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law. The directed verdict motion, which rests on the same theory as a Rule 56 motion, is made either after plaintiff has presented his evidence at trial or after both parties have completed their evidence; it claims that there is no question of fact worthy of being sent to the jury and that the moving party is entitled, as a matter of law, to have a judgment on the merits entered in his favor.

A Rule 12(c) motion can be made only after the pleadings are closed, whereas a Rule 56 motion always may be made by defendant before answering and under certain circumstances may be made by plaintiff before the responsive pleading is interposed. Second, a motion for judgment on the pleadings is restricted to the content of the pleading, so that simply by denying one or more of the factual allegations in the complaint or interposing an affirmative defense, defendant may prevent a judgment from being entered under Rule 12(c), since a genuine issue will appear to exist and the case cannot be resolved as a matter of law on the pleadings.

Subsections (b) and (h) are intended to deter abuses of the summary judgment practice. Thus, the trial court may impose sanctions for improper use of summary judgment and shall, in all cases, award expenses to the party who successfully defends against a motion for summary judgment.

For detailed discussions of Federal Rule 56, after which MRCP 56 is patterned, *See* 10 Wright & Miller, *Federal Practice and Procedure*, Civil §§ 2711-2742 (1973); 6 Moore's Federal Practice ¶¶ 56.01-.26 (1970); C. Wright, Federal Courts § 99 (3d ed. 1976); *See* also *Comment*,

Procedural Reform in Mississippi: A Current Analysis, 47 Miss.L.J. 33, 63 (1976).