IN THE SUPREME COURT OF MISSISSIPPI

KELSEY RUSHING and
YUMEKA RUSHING — **APPELLANTS**

VS. — **NO. 2010-CA-00037**

TRUSTMARK NATIONAL BANK — **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28 of the *Mississippi Rules of Appellate Procedure*, 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, Plaintiff/Appellant
2. Yumeka Rushing, Plaintiff/Appellant
3. Trustmark National Bank, Defendant/Appellee
4. Louie Hale, Defendant
5. John L. Hale d/b/a Hale Construction, Defendant
6. Lamar Shumaker d/b/a Shumaker Properties, Inc., Defendant
7. Christopher A. Shapely, Attorney for Defendant/Appellee, of the law firm of BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
8. William Trey Jones, III, Attorney for Defendant/Appellee, of the law firm of BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
9. Christopher R. Fontan, Attorney for Defendant/Appellee, of the law firm of BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
10. Tommie L. Stingley, Jr., Attorney for Plaintiffs/Appellants, is of counsel with the law firm of FRASCOGNA COURTNEY, PLLC. The members of said firm are X. M. Frascogna, Jr., and Richard A. Courtney; and other attorneys associated

with said firm are Shawnassey H. Britt, X. M. Frascogna, III, J. Frederick Ahrend, Brandt D. Howell, Kamel L. King, and R. Scanlon Fraley.

11. The Honorable W. Swan Yerger, Circuit Court Judge
Hinds County, Mississippi, First Judicial District 7
District 1, Senior Judge

This the 27th day of August, 2010.

ATTORNEYS FOR APPELLANT
TOMMIE L. STINGLEY, JR., MSB #[redacted]
FRASCOGNA COURTNEY, PLLC
4400 Old Canton Road, Suite 220
Post Office Box 23126
Jackson, Mississippi 39225-3126
Telephone: (601) 987-3000

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STATEMENT ON ORAL ARGUMENT

Pursuant to Rule 34(b) of the *Mississippi Rules of Appellate Procedure*, Kelsey Rushing and Yumeka Rushing, the Appellants herein, respectfully submit the following statement concerning the need for oral argument, to-wit:

The trial court rendered a summary judgment solely on the grounds that the Rushings waived their claims when they executed loan documents for additional funding that was needed to complete the construction on their home. The claims contained in this civil actions are numerous and oral argument will be helpful to the Court in determining whether or not the facts surrounding the reasons for the Rushings' execution of additional notes and instruments was properly applied by the trial court.

I. STATEMENT OF THE ISSUES

The Plaintiffs below and Appellants herein are Kelsey Rushings and Yemeka Rushing. They are referred to herein sometimes as "the Rushings" and sometimes as "the Plaintiffs". The Defendant below and Appellee herein is Trustmark National Bank. It is referred to herein as "the Bank".

The Rushings present the following issues for review by the Court:

I. The lower court erred in granting the Bank's motion for summary judgment because genuine issues of material facts exist concerning the Bank's actions in this cause, which must be decided by the trier of fact.

II. The lower court erred in finding that the Rushings waived their claims when they executed renewal and new loan documents.

III. The lower court erred in granting the summary judgment because other disputed questions of fact exist, which can only be decided by the trier of fact.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The Bank makes construction loans covering residential housing through its Residential Construction Lending Department. Carl Sandberg is Vice-President and Commercial Relationship Manager of that department of the Bank. [RE. 6, 264] The Plaintiffs were referred to Sandberg by the builder who bided for the construction work of a new home on the Plaintiffs' land. [RE. 203-204] Sandberg, under the authority of the Bank, made an interim construction loan to the Plaintiffs for that construction. At the loan closing, Sandberg instructed the Plaintiffs as to the manner in which the Bank would handle the line of credit to be extended, the inspections that the Bank would conduct, and the verification the Bank would complete before the Bank would disburse loan proceeds to the builder. [RE. 206, 214, 386-388] After construction work had been on-going for five months, the Plaintiffs were informed by the local homeowner's association that there were problems with construction of the home. The Plaintiffs informed the builder of the problems and halted construction on the home. [RE. 7, 216-217] The Plaintiffs also contacted Mr. Sandberg to request that he stop all payments to the builder. [RE. 7, 219, 222] The Plaintiffs were also informed by Madison County government inspectors that the construction will fail mandatory construction standards if major corrections were not made. [RE. 537-538] The builder subsequently informed the Plaintiffs that he was going to quit work on the new construction to cut his losses. [RE. 7] In order to complete construction of their home in a proper manner, the Plaintiffs hired another builder and were required to extend their initial construction line of credit and obtain additional lines of credit from the Bank. [RE. 7, 538] The Plaintiffs obtained a permanent mortgage with another financial institution to pay off the lines of credit with the Bank. After the Plaintiffs determined the extent of

their damages, which resulted from the disbursement of funds by Carl Sandberg and the Bank to the original builder without insuring that the construction work was properly performed or completed, they sued the Bank and the builder. [RE. 12, 235-237, 408-412, 537-538].

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE LOWER COURT

On May 8, 2008, the Rushings' Complaint was filed in the Circuit Court of the First Judicial District of Hinds County, Mississippi and named as defendants, Trustmark National Bank, Louie Hale, John L. Hale d/b/a Hale Construction, Lamar Shumaker d/b/a Shumaker Properties, Inc. and John Does 1-10. The Rushings seek recovery from the Bank on the grounds of negligence, breach of fiduciary duty, fraud, civil conspiracy, breach of contract, and detrimental reliance. The Rushings seek damages from Louie Hale, John L. Hale d/b/a Hale Construction and Lamar Shumaker d/b/a Shumaker Properties, Inc., on the grounds of negligence, fraud, civil conspiracy, vicarious liability, and breach of contract.[1] The Rushings pray for an entry of judgment awarding them $500,000.00 in compensatory damages and $1,000,000.00 in punitive damages as well as attorney's fees and other damages. [RE. 4-13, 359-362, 534-555] The Bank filed its answer on July 11, 2008. [RE. 14-29]. Lamar Shumaker filed his separate answer on September 9, 2008. [RE. 36-39] The Rushings made several attempts to serve the Summons and Complaint upon John L. Hale, but were not able to locate him. Louie Hale failed to answer the Complaint after the Summons and Complaint was served upon him and an Entry of Default was made against him. [RE. 30-35].

After extensive discovery was conducted by the Bank and the Rushings, the Bank filed a motion for summary judgment or in the alternative for declaratory Relief on August 28, 2009. [RE.

[1]After the completion of discovery and in response to the Bank's *Motion for Summary Judgment or in the alternative, for Declaratory Relief*, the Plaintiffs voluntarily dismissed their claims of fraud and civil conspiracy that were contained in the Complaint.

110-110-122, 338-358] The Bank made the following allegations in its motion:

1. The Rushings waived their claims against the Bank when they executed renewals of the of their construction loan and obtained new money from the Bank;
2. The Rushings' claims against the Bank are time-barred;
3. The Bank, as a construction lender did not owe the Rushings any duties separate and apart from its written loan agreement to which it complied.
4. The Rushings' claims should be dismissed on the grounds that damages were not established with reasonably certainty.
5. The Rushings' separate claims are deficient as a matter of law on the following grounds:
    a. The Bank did not owe a fiduciary duty to the Plaintiffs;
    b. The Rushings' breach of contract claim is deficient;
    c. The Rushings' tort claims are deficient and should be dismissed on the following grounds;
        (i) The tort claims are duplicative of the breach of contract claim;
        (ii) The negligence claim is deficient;
        (iii) The detrimental reliance claim is deficient;
        (iv) Sufficient evidence has not been produced for the claim of fraud against the Bank; and
        (v) Sufficient evidence has not been produced to advance a

claim of civil conspiracy against the Bank.

6. The Bank asserted in the alternative that if its motion is denied the cause should be tried as a bench trial because the Plaintiffs executed loan instruments that contain waivers of the right to a jury trial.

The Rushings filed a written response to the Bank's motion on September 21, 2009. [RE. 359-362, 534-555] The Rushings and the Bank filed briefs and exhibits including excerpts of deposition transcripts and written discovery responses in support of their relative positions. On October 5, 2009, the Bank and the Rushings stipulated that the cause should be tried by the Court as a bench trial. On this same day, Circuit Court Judge W. Swan Yerger heard oral argument on the Bank's motion and by order dated, November 13, 2009, granted the Bank's motion solely on the Bank's first argument which contends that the Plaintiffs waived any cause of action that the Plaintiffs may have had against the Bank when the Plaintiffs executed renewal notes and additional notes for the additional loan they needed. [RE. 567-571] After entry of Judge Yerger's *Final Judgment* on November 17, 2009, the Rushings filed their *Notice of Appeal* on December 16, 2009. [RE. 570-573]

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

Kelsey Rushing and Yumeka Rushing purchased a lot in the Panther Creek subdivision in 2002. Soon after the purchase, the Rushings began to speak to a few builders about constructing a family home on the lot for them and their daugther. The Rushings are practicing attorneys with Kelsey Rushing having since been appointed as the Municipal Judge for Canton, Mississippi, but neither attorney had previously purchased or constructed a home and they were not knowledgeable about mortgages, construction loans and the particular legalities associated with real estate finance

and related commercial transactions. [RE. 370-72, 418-20]

Yumeka Rushing testified in a sworn deposition that she and Kelsey Rushing sought construction financing from the Bank's officer, Carl Sandberg because of the recommendation of John Hale. [RE. 377] The Rushings became acquainted with John Hale and his relative, Louie Hale in 2002 as the result of Yumeka Rushing's visits to her mother's home located in the Windward Bluff subdivision in Brandon, Mississippi. [RE. 365, 367-68] Yumeka Rushing learned that Shumaker Properties built the residential structures in Windward Bluff and during one of those visits to her mother's home, she left a note with a building crew at the subdivision for the builder to contact her about building a home for the Rushings. Within a few days, Louie Hale met with Yumeka Rushing while she was visiting her mother and identified himself as a representative of Shumaker Properties. [RE. 367-68, 535] Subsequently, under the name of Shumaker Properties Louie Hale submitted a construction estimate to build the family home and the Rushings accepted the proposal from Shumaker Properties as the lowest bid. [RE. 377] The next step for the Rushings involved getting construction financing but due to financial reasons they waited for two years after accepting the bid from Louie Hale and Shumaker Properties before seeking help from lenders. When they did make application with several banks, they were unsuccessful until they met the Bank's Carl Sandberg in November, 2004. [RE. 377-78, 424]

Acting on the advice of John Hale, Yumeka Rushing made contact with Carl Sandberg on either October or November of 2004 by telephone to schedule a meeting with him. Shortly thereafter, the Rushings met with Sandberg in his office. Sandberg represented that he [the Bank] was working with the Hales on another house and that the Hales did good work. [RE. 377-79, 408] The Rushings submitted a loan application package to Carl Sandberg that consisted of copies of the

same documents that they had already put together for the other banks that had denied their loan application. [RE. 378-79, 426] Those documents included the builder's license belonging to Shumaker Properties furnished by John Hale and the cost estimate submitted by Louie Hale on behalf of Shumaker Properties. Upon review of the package, Sandberg, on behalf of the Bank, assured the Rushings that he would get the loan application package approved. [RE. 374-75, 378]

Sandberg did, in fact, obtain approval of the Rushings' loan application and held the closing of the loan on December 24, 2004 in his office. At the closing the Rushings met with Sandberg, John Hale, and Louie Hale. [RE. 380-81, 427] Sandberg had the Rushings to execute and deliver several documents including a Building Contract involving John Hale in order to complete the closing on their initial construction loan in the amount of $420,282.50. [RE. 374, 421, 426, 459-460, 465-66, 482-85] After handling the loan closing, Sandberg had the Rushings and the Hales to remain in his office to discuss the manner in which the financial draws would be managed. Sandberg explained that the Bank would implement a process for the Rushings' construction loan that the Bank has followed in the past with other construction loans involving John Hale as the builder. That process is that after the builder makes a request for a draw, the Bank would complete a bank verification procedure and disburse funds directly to the builder's account with the Bank, based upon analysis of the work completed. The Rushings agreed that the Bank would function in this fiduciary role for the proper disbursement of the loan proceeds. [RE. 385-89,428-30, 466-67] Corroboration of this agreement and the Rushings' reliance upon the Bank's role is also found in the Rushings payment of an inspection fee required by the Bank. [RE. 388]

John and Louie Hale began construction of the Rushings' family home in the following month, which was January 2005. [RE. 391] As the work on the home progressed, the Bank issued

draw checks to the Hales, which were deposited directly into the account of the Hales. The Bank made five or more of these deposits of draw checks. The Rushings occasionally received copies of the draw checks from the Bank by mail. [RE. 391, 431-32] On or about May 31, 2005, the President of the Homeowners Association for the Rushings' subdivision contacted the Rushings to voice concerns about serious problems with the construction of the house. [RE. 394, 432] As a result, Yumeka Rushing contacted Madison County government offices to schedule a county inspection. [RE. 396-97, 406-07, 413] The Rushings paid for the independent inspection conducted by the Madison County inspectors, which proved to be money well spent. [RE. 396, 406-07, 413] The Madison County government officials informed the Rushings that the present state of construction of the home would fail mandatory county inspections. It was pointed out that to fix the problems the Rushings would have to at least tear off the roof construction and they may have to tear down the entire structure down to the slab. [RE. 396, 406-07, 413, 440]

Alarmed by these findings, the Rushings stopped all work on the construction of their home and contacted Sandberg at the Bank. The Rushings informed Sandberg of the problems and asked Sandberg to make no further payments to the Hales. [RE. 394-97, 432, 434] Meanwhile, on or about June 1, 2005, Louie Hale contacted Yumeka Rushing by telephone and stated that he wanted to quit work on the home construction and cut his losses. The Rushings subsequently held several telephonic and in person discussions with Sandberg concerning the constructions problems and the payments made by the Bank to the Hales. They explained to Sandberg that he had paid out loan money for substandard work and for work that had not been completed. Yumeka Rushing testified during her sworn deposition that at one of the meetings with Sandberg, the Rushings asked Sandberg for an accounting, but Sandberg presented nothing but a draw sheet and stated that "he might have

been generous with the last draw" (that he deposited into the builder's account at the Bank). [RE. 394-403, 432-441] Also during this meeting Sandberg checked the balance remaining in the Hales' checking account with the Bank and informed the Rushing that 80 to 90 percent of the draw transferred into the Hales account from the Rushings' line of credit was still in the Hales' account. [RE. 376, 401-02, 434] Upon hearing this information the Rushings asked Sandberg to stop payment of the draw from the Hales' account due to the construction problems and the realization that the money would be needed to correct the construction deficiencies as pointed out by the Madison County inspectors. But, Sandberg refused. [RE. 186]

At this point, because the Hales had not completed the work on the home and because the Hales were paid for defective construction, incomplete work, and materials that were not furnished, the Rushings were forced to extend that initial construction line of credit from the Bank and obtain additional lines of credit from the Bank in order to prevent a total lose on the home and hire another builder to make repairs and complete the construction of their new home. [RE. 404-05, 409, 442, 445-46] Therefore, the Rushings executed additional promissory notes with the Bank on December 29, 2005 and on April 3, 2006. [RE. 495-508, 564-65]

The Rushings hired Slaughter's Residential Design to complete the construction. The construction of the Rushings' home was completed during the middle part of 2006. The Plaintiffs' permanent mortgage with another financial institution in the sum of $645,000.00 was used to pay off the lines of credit that were owed to the Bank. [RE. 446-47, 509-13][2]

The Rushings filed this suit against the Bank based upon the Bank's actions and omissions

[2]The Rushings closed the loan on the permanent mortgage in April, 2006. Trustmark Bank's account summaries showing the amount owed on the extended and new notes are part of the record excerpts. [RE. 514-17]

and the actions and omissions of its agent, Carl Sandberg. The complaint, which also names the Hales as additional defendants, asserts various claims against the Bank including breach of contract, breach of fiduciary duty, negligence, fraud, detrimental reliance and civil conspiracy. [RE. 518-527][3]

As previously noted, the Bank moved for summary judgment on several grounds. On November 12, 2009, Hinds County Circuit Court Judge W. Swan Yerger granted summary judgment for the Bank on the grounds that the Rushings waived any potential claim they may have had against the Bank when "they continued to renew their loan agreement with Trustmark, despite the Plaintiffs' awareness of the cause(s) of action they intended to pursue against Trustmark." The trial court found that the "Plaintiffs' waiver is dispositive" and it was unnecessary to consider any additional arguments presented by the parties.

III. SUMMARY OF THE ARGUMENT

An applicant for a summary judgment cannot prevail unless it can be shown that there are no genuine issues of material facts in the case and the applicant is entitled to judgment as a matter of law. In the instant case, the Rushings presented summary judgment evidence to show that there were several disputed fact questions that could only be decided by a trier of fact. More specifically, the Rushings offered evidence of sworn deposition testimony as well as supporting documents to show that they did not waive their claims against the Bank. In that connection, the Rushings presented sufficient evidence to prove that the facts of their case are clearly distinguishable from the facts of *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904 (Miss. 1935) and its progeny. This Court

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[3]As described above, the claims of fraud and civil conspiracy were dismissed on September 21, 2009. [RE. 359]

has recognized such distinctions in the past and held that the cases, as relied upon by the trial court in the case, *sub juice*, are not applicable. In contrast to the facts of the cases cited by the trial court, the Rushings' claims were not asserted as defenses to a note or in reaction to a collection action by a lender or creditor. In addition, the Rushings were never in an adverse position to the Bank with respect to payment of their indebtedness to the Bank.

Further, there were other disputed questions of fact regarding other claims made by the Rushings, which the trial court completely ignored in considering the Bank's motion for summary judgment. This Court has found that justice is the criterion that the trial courts should adhere to when considering a motion for summary judgment and this criterion contemplates that the lower courts should sufficiently explore all of the facts in a case.

The trial court did not view the evidence in a light most favorable to the Rushings and erroneously granted the Bank's motion for summary judgment.

IV. ARGUMENT

A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

In repeated holdings, this Court has instructed trial courts that applications for summary judgment cannot survive under Rule 56(c) of the *Mississippi Rules of Civil Procedure* unless the moving party can prove that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Please see *Erby v. North Mississippi Med. Ctr.*, 654 So. 2d 495, 499 (Miss. 1995) and *Short v. Columbus Rubber and Gasket Co.*, 535 So.2d 61, 63-64 (Miss. 1988). The official comment to Rule 56 states:

> A motion for summary judgment lies only when there is no genuine issue of material fact; *summary judgment is not a substitute for the trial of disputed fact issues*. Accordingly, the court cannot try issues of fact on a Rule 56 motion; it may only determine whether there are issues to be tried. Given this

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

(Emphasis added)

In determining whether there is a disputed issue of material fact that precludes summary judgment, the trial court was obligated to consider all evidence in the light most favorable to Kelsey Rushing and Yumeka Rushing, as the non-movants and they were to be given the benefit of every reasonable doubt. Please see *Murphree v. Federal Insurance Co.*, 707 So. 2d 553, 529 (Miss. 1997); *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993); and, *Spartan Foods Sys., Inc. v. American Nat'l Ins. Co.*, 582 So. 2d 399, 402 (Miss. 1991). It is not permissible for the trial court to allow the Bank to rely on conclusory or self-serving statements to meet their burden of proof. Rather, the Bank is required to demonstrate an absence of a genuine factual dispute by producing credible and supportive evidence of significant and probative value. Only if the Bank met its burden were the Rushings required to respond by summary judgment proof to show a genuine issue of material fact. Please see *Thomas v. Columbia Group*, LLC, 969 So.2d 849, 852 (Miss. 2007); *Quay v. Crawford*, 788 So. 2d 76, 81 (Miss.App. 2001); *Farragut v. Massey*, 612 So. 2d 325, 331 (Miss. 1992); and, *Smith v. City of West Point*, 475 So. 2d 816, 819 (Miss. 1985). The Rushings produced substantial evidence including transcripts of sworn deposition testimony to prove the existence of genuine issues of material facts. Accordingly, the trial court was required to view the Bank's motion for summary judgment with great skepticism and if the trial court was to err, it should have erred on the side of the Rushings and denied the Bank's motion. Please see *Hudgins v. Pensacola Const. Co., Inc.*, 630 So. 2d 992, 933 (Miss. 1994); *Stegall v. WTWV, Inc.*, 609 So. 2d 348, 350 (Miss. 1992); and, *Nichols v.*

Tri-State Brick and Tile, 608 So. 2d 324 (Miss. 1992).

As explained below, this case before the Court is a case in which the trial court should have denied the motion for summary judgment.

B. DID THE TRIAL COURT ERR IN FINDING THAT THE RUSHINGS WAIVED THEIR CLAIMS WHEN THEY EXECUTED RENEWAL AND NEW LOAN DOCUMENTS?

The trial court relied on *Austin Development Co. Inc., v. Bank of Meridian (Branch of Great Southern National Bank)*, 569 So.2d 1209 (Miss. 1990) and *Citizens National Bank v. Waltman*, 344 So.2d 725 (Miss. 1977) as its support in granting the Bank's motion for summary judgment on the basis that the Rushings waived their causes of action against the Bank when they executed additional loan instruments for additional financial assistance. [RE. 568] The Mississippi Supreme Court explained this waiver rule in a case published during the years of the Great Depression. That case is *Gay v. First National Bank*, 172 Miss. 681, 160 So. 904 (Miss. 1935). In *Gay*, First National Bank sued Gay for a debt on a $600 note he executed in August 1929 to purchase timber. Gay asserted that he and this bank agreed that as a consideration of making the note, the lumber coming from the timber would be invoiced through this bank and that the bank would deduct forty percent (40%) of the net proceeds and credited to a stumpage account to satisfy the note. The bank claimed, however that the agreement with Gay provided that funds in the stumpage account could be credited to any of the other debts Gay had with this bank. Thus, when the stumpage account was closed in March 1930, there was a balance due on the $600 note, even though an adequate amount of money had been collected to retire the note. Gay knew that sufficient funds had been collected by this bank to pay the note in full, but did nothing about it and for the next three years, executed numerous renewals of notes for the balance owed on the original $660 note. Moreover, Gay did not raise his defense until

March 1933 when he executed the last renewal and the lawsuit was filed against him to collect the balance that was due. The Court stated 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." Please see *Gay*, 160 So. at 905. (Emphasis added)

The Court applied this rule in the *Austin* and *Waltman* cases. Like in *Gay*, the *Austin* case involved a collection lawsuit filed by the creditor, Bank of Meridian against the debtor, Austin, on a promissory note after Austin defaulted on the note. When Austin made the promissory note for $50,000, he had existing indebtedness with this bank in the sum of approximately $400,000. For that reason, the bank requested additional collateral, which Austin provided in the form of a letter of credit drawn on Valley View Bank. Austin renewed the note for the original loan from the Bank of Meridian on five (5) occasions. When the bank filed its action to collect on Austin's note when he failed to pay it, Austin asserted negligence on the part of the Bank of Meridian as a defense to the payment of the note. In his counterclaim, Austin based the cause of action on the bank's failure to timely call upon the letter of credit that expired at the Valley View Bank. The letter of credit that was given as Austin's collateral had been pledged before any renewals of the note occurred. The trial court granted the Bank of Meridian's motion for summary judgment and this Court agreed. The Court held that the debtor ". . . legally waived any *defense to the notes* and any *possible causes of action* otherwise available to the defendants against plaintiff arising from the facts and circumstances *known to the defendants at the times the renewal notes were* executed and the interest was paid . . ." *Austin*, 569 So.2d at 1211 (Emphasis added)

In *Waltman* the Court articulated the waiver of defense to a non-payment of a note doctrine explained in *Gay*. The Court stated that the "execution of a renewal note with full knowledge of the

facts constituting a *defense* to the original note waives that *defense* as to the renewal." *Waltman*, 344 So.2d at 728 (Emphasis added)

In the case *sub judice*, however, the trial court erred because of the distinguishing aspects of the facts of the case. First, in both *Austin* and *Waltman*, the commercial transactions involved permanent financing and the claims of the debtors were asserted as defenses to the payment of notes at issue. In the instant case, the Rushings' claims are not asserted as defenses to paying the Bank's notes, but are for the separate damages brought about by the Bank's actions and omissions. In fact, the Rushings obtained permanent financing through another lender, which paid the Rushings' total indebtedness owed to the Bank. [RE. 478-80] In that connection, the initial transaction that the Bank entered into with the Rushings on December 24, 2004, was an interim construction loan for the estimated cost of constructing their home. [RE. 459-63] The promissory note which was executed for this construction loan provides in express terms that the transaction is a "straight line of credit" for a period of six months. [RE. 484-85] The note also expressly states that the Rushings ". . . promise to pay . . . the principle amount of Four Hundred Twenty Thousand Two Hundred Eighty-two and 50/100 dollars ($420, 282.50) or so much as may be outstanding, together with interest. . ." [RE. 484] It is significant to note that Sandberg, the Bank's agent, admitted in a sworn deposition that the construction of the Rushings' home was not expected to be completed within the six-month term of the initial construction loan. Instead, Sandberg expected that the construction would probably take one (1) year and that the Rushings' line of credit, like most of these transactions, would have to be renewed. [RE. 474-77] Sandberg testified:

> Q. What were -- when the note was initially approved, the intent was to have built the house in six months?
>
> A. No.

Q. What stage – well, let me back up. The permanent financing that you had talked about, it was supposed to have taken place when? Do you know?

A. When the house was finished.

Q. Okay. Did you have some type of guideline for that?

A. I don't know what you mean by guidelines for what?

Q. For when the house was to be finished and permanent financing would be –

A. I mean, there's really no way to tell. If I remember correctly, the contract, I think it said 12 months. But, again, the thing to keep in mind, you're dealing with construction. You're dealing with weather. There's really just no way to tell. I mean, everything has just has to be an estimate. Cost, timeframe, because we can get into a period where it rains for three or four weeks straight. It could delay everything. Does that make sense?

Q. It does. It does. I was just wondering why it's a six-month note as opposed to a nine-month note or a three-month note.

A. Oh, I'm sorry. That's just the way we did it. That's just the way we did individual construction loans. We just did them on a six-month basis.

Q. And then if it needs renewing, you'd just renew it?

A. Certainly.

Q. That was not an indication that you believe the house would be finished in six months?

A. In no way.

[RE. 474-75]

Thus, the Bank knew beforehand that the initial note would mature before the Rushings' home would be completed and the note was simply designed to serve only as a financial tool to underwrite the first six-months of the construction. Support for this truism is found in the fact that less than forty-three percent (43%) of the principal amount of the credit line had been drawn upon at the time the initial construction loan matured. Accordingly, as explained by Sandberg, the credit line

was then extended in accordance with the customary practice of the Bank for this type of interim loan assistance.

All of these facts point to the most glaring distinction of the Rushings' cause, which the trial court ignored in granting summary judgment for the Bank. The waiver rule applied in *Gay* and its progeny dealt with plaintiffs or debtors who were alleging causes of actions as either defenses to paying the notes for permanent financing or as reactions to collection actions filed against them. In total dissimilarity with the debtors in *Gay*, *Austin*, and *Waltman*, it is unrefuted that the Rushings executed renewals of an interim construction loan that the Bank knew would be renewed. For this reason, the trial court's application of the waiver rule as explained in those cases is too harsh as it overlooked the clear distinguishing factors which exist in the Rushings' case. The Rushings did not file a lawsuit or counterclaim to avoid paying a debt or to reclaim property on which a bank foreclosed. In other words, in all of the cases cited by the trial court in support of its granting summary judgment on the waiver issue, the debtors and the creditors were in adverse positions concerning the payment of the notes, which is a pivotal fact that does not exist in the present case. For example, the last case cited by the trial court, which is *Holland v. Peoples Bank & Trust Co.*, 3 So.3d 94, 103 (Miss. 2008), is not applicable. There the plaintiff-debtor, before he subsequently filed suit against Peoples Bank & Trust Company, had entered into a workout agreement with said bank to extend loans for additional time to pay down the debt on the loans after the bank determined that Holland had defaulted on the terms of his loans. It appears clear then that the parties' adverse position on the payment of indebtedness is the distinguishing point in all of those cases, which formed the basis for the Court's rejection of the debtors' arguments under the waiver doctrine. The Hinds County Circuit Court erred when it found that the "[Rushings'] waiver is dispositive."

Instead, the trial court should have asked, based upon the pleadings and discovery responses including depositions on file, as to the issue of waiver: Were the note renewals and additional notes made by the Rushings factually similar to the adverse position issues that are common in *Gay* and its progeny? The obvious answer would have properly been: No. In *First American Nat. Bank of Iuka v. Mitchell,* 359 So.2d 1376, (Miss. 1978), this Court concisely held that the rigid application of the waiver doctrine is impermissible:

> We find no merit to the argument of FANB that the Mitchells by executing a revision agreement on November 25, 1974, which extended their note to November 15, 1975, thereby waived their right of action against FANB. Reliance upon Citizens National Bank v. Waltman, 344 So.2d 725 (Miss. 1977) is misplaced because that case and others relied upon are factually distinguishable from the instant case.

Mitchell, 359 So.2d at 1378[4]

The Hinds County Circuit Court had before it other distinguishing facts that are noteworthy of mention. The Rushings obtained two (2) additional lines of credit from the Bank when the initial credit line turned out to be insufficient to finish the construction of their home. These new lines of credit were necessitated by the problems caused by the Bank's failure to properly inspect and the payment to the contractor for work that was not done or so poorly done that the construction had to be torn down and redone by another builder. The significance of these facts is that those lines of credit were not extensions or renewals of the initial line of credit, but were subsequent, separate lines of credit needed by the Rushings to complete the work on their new home. Moreover, those new notes are exactly what the Bank had contemplated. The Bank, through Sandberg, never intended to enter into a permanent mortgagor-mortgagee relationship with the Rushings during the construction

[4] *Mitchell* was overruled by this Court in *C & C Trucking Co. v. Smith*, 612 So.2d 1092, 1105-06 (Miss. 1992) on the issue of the assessment of punitive damages.

of their home. [RE. 461] In fact, the only payments ever made to the Bank during construction were interest payments for extension of the construction lines of credit. The permanent financing came about from another lender, as previously mentioned. [RE. 478-80]

Besides recognizing the distinguishing aspects of the cases concerning the waiver rule, this Court has held that banks should not be allowed to abuse the relationship of trust that they have with borrowers. Please see *Federal Land Bank v. Collom*, 201 Miss. 266, 28 So.2d 126, 127 (1946). In that connection, since the Rushings were not adverse to the Bank with respect to the payment of the interim construction loan, the trial court erred when it allowed the Bank to impermissibly use the waiver rule as a shield. Even if the waiver rule had some applicability here, the trial court should have denied the motion for summary judgment. Please see *Mitchell*, 359 So.2d at 1380 ("The court . . . accurately notes that banks are seeking people's trust and confidence and therefore may owe clients a high degree of care. We hold . . . that [the bank] at least owed its mortgagors . . . a duty of fairness which it violated".) In other words, justice is the criterion that should guide the trial court when it is presented with a motion for summary judgment and the motion should be denied when the interest of justice is served by that denial. Please see *Great Southern Nat. Bank v. Minter*, 590 So.2d 129, 135 (Miss. 1991).

Based upon all the facts of the Rushings' case and all of the foregoing reasons, this Court should reverse the summary judgment of the trial court and remand this case for trial.

C. OTHER DISPUTED QUESTIONS OF FACT

In *Minter*, 590 So.2d at 135, this Court found the facts of that case were not sufficiently explored by the lower court. As explained above, the Rushings' claims against the Bank involve negligence, breach of fiduciary duty, breach of contract, and detrimental reliance. In granting the

Bank's motion for summary judgment, the trial court ignored all of the genuine issues of material facts surrounding these claims.

1. Breach of Fiduciary Duty Owed to the Rushings

The Rushings' claim of breach of fiduciary duty is based upon the Bank's using loan proceeds to pay draws submitted by the Hales without properly inspecting and verifying whether or not the Hales had actually performed the work and used the materials for which the draws were made. The claim is also based upon the Bank's refusal to rectify this problem when it was first notified about this problem with the loan. This Court set forth a three-part test to determine whether or not a fiduciary relationship arises between a lender and a borrower. The Court examines whether: (1) the parties have shared goals in each other's commercial activities; (2) one of the parties places justifiable confidence or trust in the other party's fidelity; and, (3) the trusted party exercises effective control over the other party. Please see *AmSouth Bank v. Gupta*, 838 So.2d 205, 216 (Miss. 2002).

The Bank's contention that no fiduciary relationship arose between the Bank and the Rushings is erroneous for the following reasons. Both the Bank and the Rushings had shared goals relative to the construction of the Rushings' home and the attendant repayment of the money loaned together with interest pursuant to the initial line of credit. With reference to the second factor of the *Gupa* test, it was clearly established at the lower court level that the Rushings placed justifiable confidence and trust in the Bank for inspection of the construction of the Rushings' home to insure that the construction was not defective and that the requisite work and materials on which payments were based had been duly completed before any part of the loan proceeds were disbursed to the builder. The record is saturated with evidence that the Rushings did, in fact, rely on the Bank to

fulfill that duty as follows:

(a) The Bank required the Rushings to pay an inspection fee to the Bank [RE. 388, 384];

(b) Upon execution of the Bank's commercial transactional documents for closing the initial line of credit in December 2004, the Bank's Sandberg presented an inspection sheet to the Rushings and represented that the Bank would make inspections of the construction and that all payments made after the first draw would be made to the builder by the Bank based upon completed work [RE. 382-88]; and

(c) The Rushings were never offered the opportunity to approve or consent to this payment procedure and the Rushings were not offered the option of paying the builder themselves using the line of credit. [RE. 383-87, 389-90, 392]

Having no prior experience with commercial transactions dealing with construction loans and mortgages of any kind, the Rushings were forced to place their trust in the Bank, as represented by Sandberg, to inspect and only pay for work completed in accordance with the requisite standards.

The fact that the Bank has effective control over the Rushings insofar as the construction loan is concerned is corroborated by the foregoing facts. After it closed the loan, the Bank, through, Sandberg essentially dictated to the Rushings that the Bank would control the payment of the builder's draws as it oversaw the construction progress. No other options for payment to the builder were offered by the Bank. Of special note is the technique used by the Bank to issue these instructions. They were presented during the course and completion of the loan closing with the builders present—the same builder who directed the Rushings to seek loan assistance from the Bank.

The trial court erred when it did not consider whether or not the *Gupta* factors were applicable to the cause here. This Court has stated that a determination of whether a fiduciary relationship exists between two parties is a question of fact and the plaintiff should be afforded a trial on this issue. Please see *Smith v. Franklin Custodian Fund, Inc.*, 726 So.2d 144, 150 (Miss. 1998).

2. Breach of Contract by the Bank

The Rushings also asserted the claim of breach of contract on the grounds that the Bank breached the contract entered into with the Rushings. The claim involves the Bank's failure to properly inspect the construction of the house to insure that the work was being completed properly and at the requisite stages before the builder's draws were approved and processed—all of which resulted in significant damages to the Rushings.

On December 2004, the Rushings were required to sign a number of documents associated with the loan agreement entered into for the line of credit. Among the transactional documents was a "Disclosure Statement", which provided for the prepayment of a construction inspection fee. [RE. 486] During the loan closing process administered by the Bank, the Bank's Sandberg discussed the Bank's procedure for payment of the builder's draws which consisted of the Bank's use of its inspection sheet during inspections made by the Bank at the home construction site to confirm that the work was completed properly that would be the basis for the payments to the builder. [RE. 385-89, 428-30, 466-67, 530-34]

The Rushings, therefore, assert that the Bank's documents concerning the inspection fee form and the inspection monitoring report form, as corroborated by the representations made by Sandberg, clearly show that the Bank entered into a contractual obligation to only pay for actual work properly done. Unfortunately for the Rushings, the Bank failed to perform under this agreement. The Bank

has argued that Sandberg did not make such representations, but the Rushings gave sworn deposition testimony in support of their claim. [RE. 385-88, 428-30] Under the rulings of this Court, "[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." Please see *Buchanan v. Ameristar Casino Vicksburg,* 957 So.2d 969, 976 (Miss. 2007). Since a question of fact exists on the breach of contract issue, the trial court should have denied the Bank's motion for summary judgment.

3. Negligence Claim

The Rushings negligence claim is also predicated upon the Bank's wrongful handling of the draws in connection with the inspection of the construction work. [RE. 7-8] The Bank had a duty to the Rushings to make certain that the proceeds of the interim construction loan were used for their intended purposes, but the Bank breached that duty by failing to properly inspect and verify the work of the builder before approving the builder's draws and paying the builder. And, the Bank failed to obtain the consent or foreknowledge of the Rushings prior to completing the transactions with the builder. The Bank's breach was the proximate cause of the damages that resulted to the Rushings. The Bank has argued that it did not owe the Rushings any common law negligence duties separate and apart from the duties set out in the written loan agreement. As discussed above, however, the Bank is liable for negligence as described by this Court under the *Gupta* test. Again, the trial court should have allowed this issue to go to the trier of fact.

4. Detrimental Reliance

The Rushings presented evidence to the trial court concerning this claim. As referenced hereinabove, the Bank's Sandberg made certain representations to the Rushings

concerning the Bank's commitment to the proper management of the builder's draws and the verification of the builder's representation that the requisite construction was done. These representations were made during and following the loan closing by Sandberg with the intent that the Rushings would rely on the representation. Sandberg's representations were material and the Rushings justifiably relied on them. The Bank, through Sandberg, failed to use ordinary care in making its representations and honoring those representations. As the result of the Rushings' reliance on the Bank's representations, the Rushings suffered financial losses and other damages. [RE. 385-89] This Court has stated that since banks are seeking the trust and confidence of people in making such representations, the banks owe clients a "high degree of care." Please see *Mitchell*, 359 So.2d at 1380. Whether or not there is sufficient proof that the Rushings justifiably relied upon the statements made by Sandberg during and after the loan closing is another disputed question of fact that should be determined by the trier of fact. [RE. 466-67]

5. Damages

Because of the Bank's actions and omissions, the Rushings were forced to increase their level of indebtedness and hire another contractor to rehabilitate the construction that was done by the Hales and complete the requisite new work on the home as well. At the point the Rushings discovered the problems concerning the Hales' work and the payment of the draws to the Hales, it was virtually impossible for the Rushings to have any reasonable knowledge of the total damages that they would suffer. Those damages would involve all actual costs associated with the construction defects including the expense of tearing down a portion of the home and the rebuilding of the defective portions. And, because this whole rehabilitation activity involved work that had already been paid for, but not performed, and materials paid for, but not supplied, the Rushings were

left with only one viable option.

The only reasonable choice available to the Rushings was to mitigate their damages and prevent a total loss by obtaining new money to continue the construction. After the construction of their home was completed the Rushings were in a position to determine the extent of their damages and in due course they made that determination. At the trial court level, the Bank did not assert and cannot make an argument in good faith that the Rushings have not suffered any damages. In attempting to circumvent the clear causal connection between its conduct and the damages associated with the reconstruction of the Rushings' home, the Bank has asserted the damages of the Rushings' are too speculative without a showing of reasonable certainty. According to the decisions of this Court, the Bank's assertion on this issue is erroneous. Please see *Warren v. Derivaux*, 996 So.2d 729, 737 (Miss. 2008) ("Where it is reasonably certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery or prevent a jury decision awarding damages . . . [and] . . . [w]hen loss is realized, but the 'extent of the injury and the amount of damage are not capable of exact and accurate proof,' damages may be awarded if the evidence lays 'a foundation which will enable the trier of fact to 'make a fair and reasonable estimate of the amount of damage.") (Citations omitted). Furthermore, the Bank cannot escape liability on the grounds the Rushings may not have a perfect measure of damages. Please see *J. K. v. R. K.*, 30 So.3d 290 (Miss. 2009). (Citations omitted).

Moreover, this Court has stated that when negligent construction and breach of contract occurs, a party is entitled to recover an amount in damages that reasonably places the party in the same position the party would have had but for said wrongful conduct. Please see *Harrison v. McMillan,* 826 So.2d 756 (Miss. 2002) (Citations omitted) and *Fred's Stores of Miss., Inc. v. M & H*

Drugs, Inc., 725 So.2d 902, 918 (Miss. 1998). According to the evidence here, the parties anticipated that the total cost of the land and construction of the Rushings' family home would be approximately $420,282.50. This amount constituted the total amount of the initial line of credit obtained from the Bank. [RE. 453-55, 456-58, 459-63, 484, 528] Due to the defective construction and the Bank's payment for the defective construction work and materials not provided, the Rushings financed the sum of $625,000.00 in their permanent financing with another lender to pay for all of the indebtedness owed to the Bank. [RE. 478-81] The Rushings gave sworn deposition testimony in support of their claim that the difference between the initial line of credit and the permanent financing amounts to the range of actual damages. [RE. 410-12, 447-48] In further support of their damages claim, the Rushings produced the cost estimate of Slaughter Construction, who is the building contractor that was hired to complete the Rushings' home shortly after they discovered the construction defects and the payments to the Hales for work not completed and materials not provided. [RE. 404-07, 492-94] The Slaughter Construction Company, therefore, provided an estimated cost for completion of the construction of slightly over $319,000.00, which included the costs of tearing off and redoing the defective portions of the home. In addition, that cost estimate was an increase cost that was over and above the nearly $200,000.00 that the Bank disbursed to the Hales for uncompleted work and defective work plus materials that had not been provided. The Rushings' financial losses were also gleaned from the Bank's own documents, which were corroborated by the admissions of the Bank's corporate designee, Sandberg in his sworn deposition testimony. It was shown that the Bank paid the Hales for forty-three percent (43%) of the work and materials listed on the Bank's inspection form while a subsequent inspection by a Bank inspector revealed that only thirty-eight percent (38%) of the work had actually been completed.

Those payments by the Bank were made before the Rushings had any notice that there was a problem with the construction by the Hales. All of these facts provide a firm foundation for a trier of fact to make a fair and reasonable estimate of the amount of damages suffered by the Rushings. This whole issue of damages and the causal connection between the Bank's conduct and the losses suffered by the Rushings is unquestionably a disputed fact question. Therefore, this issue should have been considered by the trial court and the summary judgment should be reversed.

V. CONCLUSION

Contrary to the trial court's finding, the Rushings did not waive their claims against the Bank when they executed renewal and new notes. The cases cited and relied upon by the Court do not support the summary judgment because those cases are factually distinguishable from the case *sub judice*. The Rushings were not in an adverse position to the Bank insofar as payment of the initial construction loan was concerned and therefore, did not file their complaint as a defense to a note or in response to a collection action. Moreover, the construction loan and its transactional documents as prepared by the Bank were intended from the very beginning to constitute an interim transaction only. The Rushings clearly established that when the evidence is viewed in a light most favorable to the Rushings, the Rushings have not waived their claims, which were timely asserted and contain ascertainable damages that are reasonable in view of the facts of their cause. The trial court, therefore, should not have ruled that the Bank was entitled to judgment as a matter of law.

In addition, the trial court ignored the other claims of the Rushings even though sufficient evidence was produced which created a genuine issue of material fact as to whether: (1) certain duties were owed to the Rushings by the Bank; (2) the Bank breached its contract with the Rushings; (3) the Rushings suffered damages because they relied on the representations of the Bank to their

detriment; and, (4) the Bank's conduct negligently caused the Rushings to suffer damages.

Accordingly, the grant of summary judgment in favor of the Bank was erroneous. This Court should reverse the judgment and remand this case for a trial on the merits.

VI. APPLICATION FOR ATTORNEY'S FEES

It is respectfully submitted that the Rushings are entitled to recover a sum for attorney's fees associated with this appeal.

Respectfully submitted,

Kelsey Rushing and Yumeka Rushing
Plaintiff-Appellants

By: FRASCOGNA COURTNEY, PLLC

By: _____

TOM L. STINGLEY, MSB #[redacted]
FRASCOGNA COURTNEY, PLLC
4400 Old Canton Road, Suite 220
Post Office Box 23126
Jackson, Mississippi 39225-3126
Telephone: 601-987-3000
Facsimile: 601-987-3001

CERTIFICATE OF SERVICE

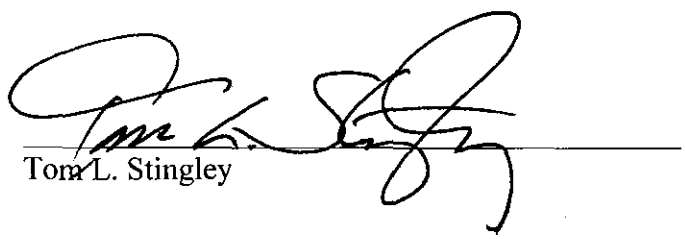
I, Tom L. Stingley, attorney for Appellants, Kelsey Rushing and Yumeka Rushing, certify that I have this day caused to be served a true and correct copy of the Brief of Appellants, by either Hand Delivery or by United States mail with postage prepaid, on the following persons at these addresses:

Christopher A. Shapely, Esq.
William Trey Jones. III, Esq.
Christopher R. Fontan, Esq.
BRUNINI, GRANTHAM, GROWER & HEWES, PLLC
Post Office Box 119
Jackson, Mississippi 39205

Anselm J. McLaurin, Esq.
McLAURIN & McLAURIN
Post Office Box 220
Brandon, Mississippi 39043

The Honorable W. Swan Yerger
Circuit Court Judge
Hinds County, Mississippi
District 7
Post Office Box 22711
Jackson, Mississippi 39225

SO CERTIFIED this the 27th day of August 2010.



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).