IN THE SUPREME COURT OF MISSISSIPPI

NATIONAL BANK OF COMMERCE and
NBC CAPITAL CORPORATION — APPELLANTS

VS. — NO. 2007-CA-01659 and 2007-CA-01749

JUSTIN SHELTON — APPELLEE

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

An Appeal From the Circuit Court of Lowndes County, Mississippi

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) 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. Their representations are made in order that the Justices of the Supreme Court and/or the Justices of the Court of Appeals may evaluate possible disqualification or recusal.

1. National Bank of Commerce - Appellant
2. NBC Capital Corporation - Appellant
3. Justin Shelton - Appellee
4. H. Russell Rogers - Attorney for Appellants
5. John R. Reeves - Attorney for Appellee
6. J. Justin King - Attorney for Appellee
7. W. J. Shonny Shelton - Third Party Defendant in lower court action
8. Hon. James T. Kitchens, Jr., Circuit Court Judge
9. Mississippi Bankers Association - *Amicus Curiae*

10. E. Barney Robinson, III, - Attorney for Mississippi Bankers Association

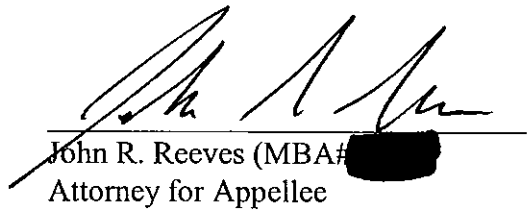

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TABLE OF CONTENTS

Page(s)

Certificate of Interested Persons ii

Table of Contents iv

Table of Authorities v

Statement of the Issues 1

Statement of the Case 2

Summary of the Argument 4

Argument 5

I. Summary Judgment Standard 5

II. The Trial Court Correctly Applied Miss. Code Ann. §75-4A-204 7

III. The Trial Court Correctly Addressed the Obligations Between Justin Shelton and Appellants 9

IV. The Trial Court Did Not Commit Error with Reference to Miss. Code Ann. Sections 75-4A-505 or 15-1-49 9

V. The Trial Was Correct to Not Follow Credit Lyonnais New York Branch v. Koval, 745 So.2d 837 (Miss. 1999). (This Issue Having Been Addressed in the Mississippi Bankers Association Brief *Amicus Curiae*) 10

VI. The Trial Court Erred by Failing to Award Justin Interest from the Date He Notified the Bank of the Unauthorized Transfers 11

Conclusion 12

Certificate of Service 13

TABLE OF AUTHORITIES

Page(s)

Supreme Court Cases

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) 5

5th Circuit Cases

Dickey v. Baptist Memorial Hospital-North MS, 146 F.3d 262, 267 (5th Cir. 1998) 6

Mississippi State Cases

Burnham v. Tapp, 508 So.2d 1072, 1074 (Miss. 1987) 6

Credit Lyonnais New York Branch v. Koval, 745 So.2d 837 (Miss. 1999) 1, 10, 11

East Mississippi Sate Hospital v. Adams, 947 So.2d 887 (Miss. 2007) 9

Hurst v. Southwest Miss. Legal Services Corp., 610 So. 2d 374, 383 (Miss. 1992) 5

Mink v. Andrew Jackson Cas. Ins. Co., 537 So.2d 431, 433 (Miss. 1988) 5

Miss. Credit Ctr., Inc. v. Horton, 926 So.2d 167 (Miss. 2006) 9. 10

Nationwide Mutual inc. Co. v. Garriga, 636 So. 2d 658, 661 (Miss. 1994) 5

Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So.2d 790, 794 (Miss. 1995) 5

Webb v. Jackson, 583 So.2d 946, 949 (Miss. 1991) 5

Mississippi Statutes

Miss. Code Ann. §15-1-49 ..... 1, 9, 10

Miss. Code Ann. §75-4A-103 ..... 7, 9

Miss. Code Ann. §75-4A-204 ..... 1, 7, 8, 10

Miss. Code Ann. § 75-4A-205 7

Miss. Code Ann. § 75-4A-305 11

Miss. Code Ann. § 75-4A-505 ..... 1, 9, 10

Mississippi Court Rules

MRCP 8 10

MRCP 56 ..... 5, 6

STATEMENT OF THE ISSUES

1. The trial court correctly applied Miss. Code Ann. §75-4A-204.

2. The trial court correctly addressed the obligations between Justin Shelton (Justin) and Appellants.

3. The trial court did not commit error with reference to Miss. Code Ann. Sections 75-4A-505 or 15-1-49.

4. The trial was correct to not follow Credit Lyonnais New York Branch v. Koval, 745 So.2d 837 (Miss. 1999). (This issue having been addressed in the Mississippi Bankers Association Brief *Amicus Curiae*).

5. The trial court erred by failing to award Justin interest from the date he notified the bank of the unauthorized transfers.

STATEMENT OF THE CASE

Justin opened individual checking account number 01-70202245 on September 2, 1995, requesting that his monthly bank statements be mailed to Justin International, P.O. Box 2748, Columbus, Mississippi, a company he owns. (Clerk's Papers, p. 26).

On October 21 and 28, 1999, Susan T. Noland (Susan), a bookkeeper for Justin International, issued paychecks to W.J. Sonny Shelton (Sonny) for $373.75 each. When Susan deposited those check she inadvertently listed Justin's account number on the deposit slips and this resulted in Sonny's checks being credited to Justin's account. (Clerk's Papers, p. 26).

When Susan discovered the errors she contacted Mr. Bill Brigham at the bank, explained the errors and requested that the funds be transferred from Justin's account into Sonny's account. Ms Evelyn Elliot of the bank processed the transfer of the funds from Justin's account into Sonny's account. (Clerk's Papers, p. 26).

Without Justin's authority or approval, someone at the bank erroneously programed the bank's computer to continuously process transfers of $747.50 from Justin's account to Sonny's account around the eighth day of each month. A total of $49,335 in unauthorized withdrawals were taken from Justin's account. (Clerk's Papers, p. 79).

When he learned of the unauthorized withdrawals, Justin notified the bank and the bank terminated the unauthorized withdrawals but credited back to Justin's account only the transfer of funds for April, 2005. (Clerk's Papers, p. 79).

Justin filed his Amended Complaint on September 9, 2005, alleging negligence, gross negligence, and breach of fiduciary duty because of the bank's unauthorized withdrawals from his account. (Clerk's Papers, p. 7).

National Bank of Commerce and NBC Capital Corporation (Appellants) filed thier motion for summary judgment on July 20, 2006. (Clerk's Papers, p. 25). Justin filed his motion for summary judgment on October 19, 2006. (Clerk's Papers p. 78). Both motions were heard on November 13, 2006. (T.). An order denying defendants' (Appellants) motion for summary judgment was entered on March 29, 2007. (Clerk's Papers, p. 153). An order denying defendants' motion for reconsideration was entered on August 21, 2007 (Clerk's Papers, p. 181). Appellants filed thier notice of appeal on September 19, 2007. (Clerk's Papers, p. 297). The Judgment in favor of plaintiff against defendants was entered on September 20, 2007. (Clerk's Papers, p. 307). Appellants filed their appeal from the September 20, 2007, judgment on October 1, 2007. (Clerk's Papers, p. 315). Justin filed his cross-appeal on October 22, 2007. (Clerk's Papers, p. 324).

SUMMARY OF THE ARGUMENT

The appellants set forth several alleged assignments of error. They are incorrect. The trial court erred only in one respect: Failing to award Justin interest from the date he notified the bank of the unauthorized transfers. This court should reverse and render that part of trial court judgment which fails to award Justin interest. In all other respects, the judgment should be affirmed.

ARGUMENT

I. Summary Judgment Standard

A party moving for summary judgment on any issue bears the initial burden of demonstrating the absence of a material fact through "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any." MRCP 56 (c); Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); Hurst v. Southwest Miss. Legal Services Corp., 610 So. 2d 374, 383 (Miss. 1992). "A fact is material if it tends to resolve any of the issues properly raised by the parties." Webb v. Jackson, 583 So.2d 946, 949 (Miss. 1991) quoting Mink v. Andrew Jackson Cas. Ins. Co., 537 So.2d 431, 433 (Miss. 1988). The court can grant a summary judgment only where, viewing the evidence before the court in the light most favorable to the non-movant, the movant establishes that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. MRCP 56 (c); Nationwide Mutual inc. Co. v. Garriga, 636 So. 2d 658, 661 (Miss. 1994).

A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. MRCP 56(c). A fact is material if it "tends to resolve any of the issues properly raised by the parties." Palmer v. Anderson Infirmary Benevolent Ass'n, 656 So.2d 790, 794 (Miss. 1995).

MRCP 56 reads in pertinent part:

> **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 of 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.

MRCP 56 (Rev. 2003). The comment to the rule reads:

> ... 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 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.

Comment to MRCP 56 (Rev. 2003). The comment further reads:

> A motion for summary judgment lies only where there is no genuine issue of material fact; ....

Id. The comment goes on to read:

> ... 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 records as it then exits, there is not genuine issue as to any material fact and that he is entitled to a judgment on the merits as a matter of law.

Id.

If a defendant seeks summary judgment the plaintiff must make a showing that affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough." Dickey v. Baptist Memorial Hospital-North MS, 146 F.3d 262, 267 (5th Cir. 1998) citing Burnham v. Tapp, 508 So.2d 1072, 1074 (Miss. 1987).

II. The Trial Court Correctly Applied Miss. Code Ann. §75-4A-204.

The trial court correctly applied Miss. Code Ann. §75-4A-204. The appellants assert that Mississippi Code § 75-4A-205 controls in this matter. The appellants contend that Justin is the "sender" and "originator" and that National Bank of Commerce is the "receiving Bank." The appellants are incorrect. Mississippi Code § 75-4A-205(b) reads:

> If (i) the **sender** of an erroneous **payment order** described in subsection (a) is not obligated to pay all or part of the order, and (ii) the sender receives notification from the receiving bank that the order was accepted by the bank or that the sender's account was debited with respect to the order, the sender has a duty to exercise ordinary care, on the basis of information available to the sender, to discover the error with respect to the order and to advise the bank of the relevant facts within a reasonable time, not exceeding ninety (90) days after the bank's notification was received by the sender. If the bank proves that the sender failed to perform that duty, the sender is liable to the bank for the loss the bank proves it incurred as result of the failure, but the liability of the sender may not exceed the amount of the sender's order.

(Emphasis added).

The word "sender" is defined in Miss. Code Ann. §75-4A-103(a)(b): sender "means the person giving the instruction to the receiving bank." Miss. Code Ann. §75-4A-103(a) defines payment order as "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary ...."

Justin is not a "sender" as defined by the statute because Justin did not give any instruction to the bank to continuously withdraw $747.50 per month from his account. For that reason, Miss. Code Ann. § 75-4A-205 is inapplicable.

Miss. Code Ann. § 75-4A-204 does apply. It reads:

> (a) If a receiving bank accepts a payment order issued in the name of its customer as a sender which is (i) **not authorized and not effective** as the order of the customer under Section 74-4A-202, or (ii) not enforceable, in whole or in part, against the customer under Section 75-4A-203, **the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount** calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding ninety (90) days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section.
>
> (b) Reasonable time under subsection (a) may be fixed by agreement as stated in Section 75-1-204(1), but **the obligation of a receiving bank to refund payment as stated in subsection (a) may not otherwise be varied by agreement.**

(Emphasis added).

Here, it is undisputed that the initial transfer of funds (reverse credits) were authorized. It is also undisputed that money continued to be transferred from Justin's account to Sonny's account *beyond* the authorized transfers. It is undisputed that these withdrawals were not effective payment orders because they were *not authorized* by Justin.

The appellants admitted that the payments were not authorized and in doing so admitted their negligence. This, coupled with the clear and well established provisions of 75-4A-204, entitle Justin to a full refund plus interest.

III. The Trial Court Correctly Addressed the Obligations Between Justin Shelton and Appellants.

The appellants incorrectly state that the obligations between Justin and the appellants were not correctly addressed. The appellants vehemently declares that this was a matter of a sender's erroneous payment order. The appellants are incorrect. "Sender," defined in Miss. Code Ann. §75-4A-103(a)(b), "means the person giving the instruction to the receiving bank." Miss. Code Ann. §75-4A-103(a) defines payment order as "an instruction of a sender to a receiving bank, transmitted orally, electronically, or in writing to pay, or to cause another bank to pay, a fixed or determinable amount of money to a beneficiary ...." Justin was not a "sender" as defined by statute. Justin did not authorize the bank to withdraw $747.50 per month from his personal account. Nothing in the record indicates that this ever occurred.

Both parties' motions for summary judgment were brought on for hearing on November 13, 2006. The court considered the parties' written motions and arguments of counsel. The court correctly considered the obligations between Justin and the Appellants.

IV. The Trial Court Did Not Commit Error with Reference to Miss. Code Ann. Sections 75-4A-505 or 15-1-49.

The appellants raised the defense of statute of limitations in their answer but never set a hearing on the defense. The supreme court has held that "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other matter or right which would serve to terminate or stay the litigation coupled with active participation in the litigation process will ordinarily serve as a waiver." Miss. Credit Ctr., Inc. v. Horton, 926 So.2d 167 (Miss. 2006) and East Mississippi Sate Hospital v. Adams, 947 So.2d 887 (Miss. 2007). To pursue an

affirmative defense means to plead it, bring it to the court's attention and request a hearing. Horton, at 181. The appellants failed to due this.

Statute of limitations is one of the affirmative defenses listed in MRCP 8(c). The appellants filed their answer and affirmative defenses on September 30, 2005. (Clerk's Papers, p. 12). They did not actively and timely push this "defense" to a hearing. The record shows that the appellants never filed a motion to dismiss based on the statute of limitations.

Notwithstanding the above argument, Miss. Code Ann. § 75-4A-505 reads in pertinent part: "If a receiving bank has received payment from its customer with respect to a payment order issued in the name of the customer **as sender** and accepted by the bank ...." (Emphasis added). As explained herein, Justin is not a "sender" as defined by the statute because Justin did not give any instruction to the bank to continuously withdraw $747.50 per month from his account. For that reason, Miss. Code Ann. § 75-4A-505 is inapplicable. Miss. Code Ann. §15-1-49 is also inapplicable as Miss. Code Ann. § 75-4A-204 provides that "the obligation of a receiving bank to refund payments ... may not otherwise be varied ..."

The Appellants' argument that the trial court erred with respect to Miss. Code Ann. Sections 75-4a-505 or 15-1-49 is incorrect.

V. The Trial Was Correct to Not Follow Credit Lyonnais New York Branch V. Koval, 745 So.2d 837 (Miss. 1999). (This Issue Having Been Addressed in the Mississippi Bankers Association Brief *Amicus Curiae*).

Appellants and the Mississippi Bankers Association incorrectly assert that the holding in Credit Lyonnais New York Branch V. Koval, 745 So.2d 837 (Miss. 1999), should have been followed by the trial court. This is incorrect. The Koval court dealt with a situation in which "a beneficiary receives money to which he is entitled and has no knowledge that the money was

erroneously wired." That is not the case here. Here, Justin was not a beneficiary in any sense of the word. He received no benefit from any action taken by the appellants. The reliance on the Koval decision is misplaced.

VI. The Trial Court Erred by Failing to Award Justin Interest from the Date He Notified the Bank of the Unauthorized Transfers.

Miss. Code Ann. § 75-4A-305 reads in relevant part:

> (b) If execution of a payment order by a receiving bank in breach of Section 75-4A-302 results in ... (iii) issuance of a payment order that does not comply with the terms of the payment order of the originator, **the bank is liable to the originator for its expenses in the funds transfer and for incidental expenses and interest losses,** to the extent not covered by subsection (a), resulting from the improper execution. Except as provided in subsection (c), additional damages are not recoverable.
>
> ....
>
> (e) Reasonable attorney's fees are recoverable if demand for compensation under subsection (a)or (b) is made and refused before an action is brought on the claim ....

The payments by appellants were in breach of their obligations to Justin. They are therefore liable for interest and attorney's fees. Justin is entitled to interest on $2,242.50 of the $49,335 from the date of their receipt of Justin's notification of the unauthorized transfers, January 2005, until the date of refund.

CONCLUSION

This court should reverse and render that part of trial court judgment which fails to award Justin interest and affirm as to the remainder of the judgment. All other portions of the judgement should be affirmed.

Respectfully submitted,
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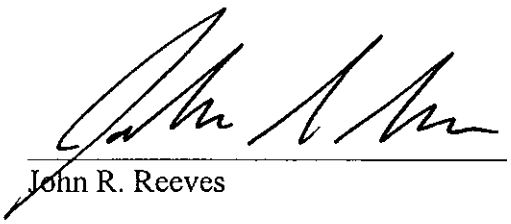

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