

BRIEF OF THE APPELLANTS

IN THE
SUPREME COURT OF MISSISSIPPI

APPEAL NO.

2007-CA-01659

2007-CA-01749

NATIONAL BANK OF COMMERCE
AND
NBC CAPITAL CORPORATION

DEFENDANTS-APPELLANTS

VS,

JUSTIN SHELTON,

PLAINTIFF-APPELLEE

APPEAL FROM THE CIRCUIT COURT OF
LOWNDES COUNTY, MISSISSIPPI
HONORABLE JAMES T. KITCHENS, JR.
CIRCUIT COURT JUDGE

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ORAL ARGUMENT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

NATIONAL BANK OF COMMERCE
AND NBC CAPITAL CORPORATION

DEFENDANTS-APPELLANTS

VS

APPEAL NO. 2007-CA-01659
APPEAL NO. 1007-CA-01749

JUSTIN SHELTON

PLAINTIFF-APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons/entities have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualification or refusal.

1. Justin Shelton - Plaintiff/Appellee
2. National Bank of Commerce and NBC Capital Corporation (Now operating as Cadence Bank, N.A. and Cadence Financial Corporation) -Defendants/Appellants
3. W. J. Sonny Shelton - Third Party Defendant



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APPELLANTS STATEMENT OF ISSUES PRESENTED FOR REVIEW

(1) Whether the trial court erred in applying §75-4A-204 to the facts and circumstances of this case rather than §75-4A-205.

(2) Whether the trial court erred in failing to apply the contractual obligations flowing between Justin Shelton and National Bank of Commerce as set forth in the Deposit Account Contract dated October 2, 1995.

(3) Whether the trial court committed plain error by failing to apply the one year statute of repose set forth in Title 75 (§75-4A-505) or the general three year statute of limitations in §15-1-49.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case involves a complaint for damages brought by Justin Shelton against National Bank of Commerce and NBC Capital Corporation (hereafter collectively "NBC") alleging negligence resulting in the continued transfer of funds from the account of Justin Shelton to the account of W. J. "Sonny" Shelton.

B. COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW

On September 9, 2005 Justin Shelton ("Shelton") filed his amended complaint against NBC seeking recovery of \$49,335.00 for the alleged unauthorized transfer of funds from the account of Shelton to the account of W. J. "Sonny" Shelton. After obtaining leave to file a Third Party Complaint against Sonny Shelton, NBC filed its Answer and Affirmative Defenses admitting that the transfer of funds had occurred, but denying liability beyond the Ninety (90) day account review period set forth in 75-4A-205(b) MCA 1972 as Amended. NBC also filed its Third Party Complaint against Sonny Shelton for the recovery of any amount ultimately awarded by the Court in favor of Justin Shelton. W. J. "Sonny" Shelton responded to the Third Party Complaint and admitted his liability for any amount ultimately awarded in favor of Justin Shelton.

On July 20, 2006 NBC filed its Motion for Summary Judgment. On October 19, 2006 Shelton filed his Motion for Summary Judgment. On March 29, 2007 the Court denied the NBC Motion for Summary Judgment but entered no ruling on the Shelton Motion for Summary Judgment. On April 5, 2007 NBC filed a motion asking the Court

to reconsider its order denying the NBC Motion for Summary Judgment. By order of the Court, oral argument on both the NBC Motion to Reconsider and the Plaintiffs Motion for Summary Judgment were set for August 7, 2007. On August 21, 2007 the Court denied the NBC Motion to Reconsider but did not rule on the Shelton Motion for Summary Judgment. On September 19, 2007, NBC appealed the Courts denial of its Motion for Summary Judgment and from the Order Overruling and Denying Defendants Motion to Reconsider. On September 20, 2007 an order dated September 11, 2007 granting Judgment in favor of Shelton was entered assessing total damages in the amount of \$54,611.73 consisting of the initial demand for damages in the amount of \$49,335.00; interest in the amount of \$44.23; and attorneys fees in the amount of \$5,232.50. On October 1, 2007 NBC appealed the Courts Entry of Judgment in favor of Shelton.

C. STATEMENT OF RELEVANT FACTS

1. On October 2, 1995 Justin Shelton established and individual checking account with what was then First Federal Bank for Savings, Columbus, Mississippi.
(R-16 & 17)
2. The Deposit Account Contract Agreement dated October 2, 1995, between Justin Shelton and First Federal Bank for Savings, Columbus, Mississippi (predecessor to National Bank of Commerce) required Justin Shelton to notify NBC of any "problem" within sixty (60) days from the date of his receipt of each monthly bank statement. (R-16 & 17)

3. From and after October 2, 1995 Justin Shelton received his monthly bank statements generated for account # 01-702-02245 at the address of P. O. Box 2428, Columbus, Mississippi 39704. (R-39)
4. Consistently, upon receipt of his monthly bank statements Justin Shelton failed to review such said statements. (R-40)
5. On October 21, 1999 Justin International issued Check # 10662 in the amount of \$373.75 Payable to Sonny Shelton. (R-47)
6. On October 22, 1999 the Justin International Check # 10662 was deposited into the Justin Shelton account with NBC rather than the Sonny Shelton account. (R-47)
7. On October 28, 1999 Justin International issued Check # 10679 in the amount of \$373.75 payable to Sonny Shelton. (R-49)
8. On October 29, 1999 the Justin International Check # 10679 payable to Sonny Shelton was deposited into the Justin Shelton account with NBC rather than the Sonny Shelton account. (R-49)
9. On December 8, 1999 NBC was notified by Susan T. Nolan, acting on behalf of Justin Shelton, of the deposit error and requested that the funds inadvertently deposited into the account of Justin Shelton be transferred to the account of Sonny Shelton. (R-56 & RE-27)
10. Upon notification of the deposit error and the authorized request to re-transfer the funds from the account of Justin Shelton to the account of Sonny Shelton,

NBC, utilizing the appropriate security procedure (R-34, R-63 & R-64), entered a funds transfer debiting the account of Justin Shelton for the two deposits, each in the amount of \$373.75 and transferring them to the account of Sonny Shelton.

(R-48)

11. As a result of a computer entry error, the authorized funds transfer from the account of Justin Shelton to the Account of Sonny Shelton was duplicated each month thereafter. (R-96)
12. Justin Shelton did not review his monthly bank statement or notify NBC of the funds transfer error until April, 2005 at which time the funds transfers were discontinued. (R-52)
13. The banks loss in this case was a direct result of Sheltons failure to notify the bank of the funds transfer error as set forth in §75-4A-205(b)(ii). (R-23 and R-24)

Dec. 1999 → Apr 05

SUMMARY OF ARGUMENT

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF §75-4A-204 MCA 1972 TO THE FACTS AND CIRCUMSTANCES OF THIS CASE RATHER THAN §75-4A-205 MCA 1972.

§75-4A-204 MCA 1972 dealing with the unauthorized transfer of funds is only applicable when the alleged transfer was (i) not authorized and not effective as the order of the customer under §75-4A-202, or (ii) not enforceable, in whole or in part, against the customer under §75-4A-203.

Justin Shelton admitted and his attorney of record stipulated during oral argument that the initial funds transfer from the account of Justin Shelton with NBC to the Sonny Shelton account with NBC were authorized. This admission and stipulation clearly established Justin Shelton as a "sender" as defined under §75-4A-202 MCA 1972 as amended, thus requiring that any inquiry into damages flowing from NBC to Justin Shelton be controlled by §75-4A-205 MCA 1972 as Amended.

II. THE TRIAL COURT ERRED IN FAILING TO APPLY THE ACCOUNT CONTRACT AGREEMENT EXISTING BETWEEN JUSTIN SHELTON AND NATIONAL BANK OF COMMERCE.

The Deposit Account Contract Agreement existing between Justin Shelton and National Bank of Commerce obligated Justin Shelton to review his monthly bank statement and to notify NBC within sixty (60) days of any account error.

III. WHETHER TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO APPLY THE ONE YEAR STATUTE OF REPOSE SET FORTH IN TITLE 75 (§75-4A-505) OR THE GENERAL THREE YEAR STATUTE OF LIMITATIONS IN §15-1-49.

In reaching its decision to grant Summary Judgment in favor of Shelton, the Court calculated and awarded the total amount of the erroneous transfers ignoring not only the provisions of §75-4A-205, but also the one year statute of repose set forth in §75-4A-505.

In light of the applicable one year statute of repose, the maximum amount of damages awarded by the Court to Justin Shelton should have been limited to \$9,090.00, representing twelve (12) months of funds transfer at \$747.50 per month.

Should the Court determine that §75-4A-505 is not the appropriate statute of repose, at the very least the trial court should have applied §15-1-49 calculating the damages to be awarded to the Plaintiff.

ARGUMENT

I. THE TRIAL COURT ERRED IN ITS APPLICATION OF §75-4A-204 MCA 1972 TO THE FACTS AND CIRCUMSTANCES OF THIS CASE RATHER THAN §75-4A-205 MCA 1972.

In order to properly apply Article 4A of the Uniform Commercial Code, it is first necessary to understand the relationship and identity of each party.

Since this is a single bank transaction, Justin Shelton as the account customer is also referred to as the "originator" and "sender". National Bank of Commerce, as it pertains to this transaction, is both the originator's bank and the "receiving bank" (§75-4A-103, §75-4A-104, Benders Uniform Commercial Code Service, Volume 2A, §17.02[2]).

Miss. Code Ann. §75-4A-204 is not applicable to this case. In order for §75-4A-204 to apply, Shelton would have to prove that the receiving bank (here NBC) accepted a payment order issued in the name of its customer as sender (Shelton), which is (I) not authorized and not effective as the order of the customer under §75-4A-202. It has been admitted by Shelton and stipulated by counsel for Shelton initial order for the transfer of funds from the Justin Shelton account to the W. J. "Sonny" Shelton account was authorized by Shelton. (R-56 & RE-27)

Specifically, during oral argument before the trial Court on November 13, 2006 counsel for Shelton made the following representation to the Court:

Paragraph by Mr. Reeves: All right. Thank you Judge. In this instance, what happened is, Sonny Shelton works for Justin and his

lawyer is correct. Justins' secretary made payroll checks one day and simply deposited Sonnys' check into Justins' account. She did that two times, ok. And that is not in dispute.

When they found out about it, when it was discovered, the secretary, with his authority, did go down and authorize that that should be corrected, but that's all she that's right she authorized. (RE-27)

Justin Shelton also stipulated that the transfer of funds from his account to the account of W. J. "Sonny" Shelton was made pursuant to an agreed upon security procedure. (R-48)

Further distinguishing §75-4A-204 from §75-4A-205 the official Commercial Code Comments to §75-4A-204 in West Annotated Mississippi Code states:

§4A-204 is designed to encourage a customer to promptly notify the receiving bank that it has accepted an unauthorized payment order. Since cases of unauthorized payment orders will almost always involve fraud, the banks remedy is normally to recover from the beneficiary of the unauthorized order, if the beneficiary was a party to the fraud.

Having clearly established Shelton as a "sender" as defined by §75-4A-202, the trial Court should have ignored the statutory provisions of §75-4A-204 and applied §75-4A-205 to the facts and circumstances of this case.

The trial Court in denying the NBC Motion For Summary Judgment and granting judgment in favor of Shelton, found that even though the initial transfer of funds was authorized, the subsequent transfer of funds "constituted an unauthorized payment order" as defined in §75-4A-204. If that finding is correct under the circumstances present in this case, one should ask under what possible circumstances would §75-4A-205(a) ever apply.

Surprisingly, a computer search through West Law and Hawklard UCC failed to turn up any reported cases specifically dealing with facts similar to this case. Research did reveal a number of references to §75-4A-204 and §75-4A-205, including several areas of comment set forth in 10 Am Jur 2nd Banks and Financial Institutions.

§812 (**Erroneous Payment Orders**) of 10 Am Jur 2nd Banks and Financial Institutions sets out the respective liabilities between sender (Shelton) and receiving bank (NBC) and provides:

If an accepted payment order was transmitted pursuant to a security procedure for the detection of error and the payment order either ... was an erroneously transmitted duplicate of a payment order previously sent by the sender, the following rules apply:

If (i) the sender of an erroneous payment order of any type described above is not obligated to pay all or part of the order, and (ii) the sender (Shelton) receives notification from the receiving bank that the order was accepted by the bank or that the senders account was debited with respect to the order, the sender has a duty to exercise ordinary care on the basis of the 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 90 days after the banks 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 a result of the failure, but the liability of the sender may not exceed the amount of the senders order.

Clearly, the threshold issue for the application of §75-4A-205 is whether or not the initial transmission of payment was authorized, followed by "an erroneously transmitted duplicate".

It has been admitted by Shelton that he failed to review his bank statements, which were timely provided to him and did not notify the bank within the required Ninety (90) day period. (R-12)

It has also been clearly established by NBC (as admitted by Sonny Shelton) that the loss suffered by NBC resulted directly from Sheltons failure to notify the bank of the funds transfer error as required by §75-4A-205(b)(ii). (R-23 & R-24)

In light of the §4A provisions applicable to this case, Sheltons Motion For Summary Judgment should have been denied and the NBC Motion for Summary Judgment should have been granted.

II. THE TRIAL COURT ERRED IN FAILING TO APPLY THE ACCOUNT CONTRACT AGREEMENT EXISTING BETWEEN JUSTIN SHELTON AND NATIONAL BANK OF COMMERCE.

In addition to the provisions of Article 4A of the Uniform Commercial Code (and to the extent that Article 4A does not apply to this case), the Trial Court should have recognized and enforced the contractual agreement existing between Justin Shelton and NBC as established by the Deposit Account Contract dated October 2, 1995. In accordance with the clear and unambiguous language set forth in the deposit contract agreement, damages to Justin Shelton should have been limited to the Sixty (60) day review period provided by the contract agreements. See *Union Planters Bank National Association v. Rogers*, 444 So. 2d 358, 362 (Miss. 2005).

III. THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO APPLY THE ONE YEAR STATUTE OF REPOSE SET FORTH IN TITLE 75 (§75-4A-505) OR THE GENERAL THREE YEAR STATUTE OF LIMITATIONS IN §15-1-49.

In its Answer and Affirmative Defenses filed September 30, 2005, NBC specifically asserted in its Fifth Defense that "In addition to provisions set forth in Title 75 of the Mississippi Uniform Commercial Code, the claim of Justin Shelton is further barred by the applicable three year statute of limitations".

Should this court determine that damages are due Plaintiff beyond the amount of \$2,242.50 representing the amount accruing during the Ninety (90) day review period provided by §75-4A-205, this Court should recognize the one year statute of repose set forth in §75-4A-505 "Preclusion of Objection to Debit of Customer's Account" which provides:

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, and the customer received notification reasonably identifying the order, the customer is precluded from asserting that the bank is not entitled to retain the payment unless the customer notifies the bank of the customer's objection to the payment within one (1) year after the notification was received by the customer.

Appellants would submit that the trial court committed plain error in failing to apply the one year statute of repose set forth in §75-4A-550. As this court pointed out in Bailey v. Al-Mefty, 807 So. 2d 1203, 1206 (Miss. 2001) "Statutory interpretation is a question of law and we also review questions of law de novo. As such we are not required to defer to the trial courts judgment or ruling." The court went on to reverse the granting of summary judgment based on the trial courts improper interpretation of the

applicable statute of limitations.

§4A-505 is also jurisdictional. In the New York case of *Mendes Regatos v. North Fork Bank*, 431 F.3d 394, 399 (N.Y. 2005) the 2nd Circuit Court of Appeals certified to the Court of Appeals of New York the question "Can the one-year statute of repose established by New York U.C.C. Article 4-A-505 be varied by agreement?" In its response, the Court of Appeals of New York at page 632 of its opinion held:

The period of repose in §4-A-505 is essentially a jurisdictional attribute of the "rights and obligations" contained in UCC 4-A-204(1). *Regatos v. Northfork Bank*, 838 N.E. 2d 629, 633 [N.Y. 2005])

As this court held in *Mississippi Municipal Liability Plan v. Jordan*, 863 So. 2d 934, 942-943 (Miss. 2003) "jurisdiction is a question of law that we review de novo". *K.M.K. v. S.L.M. ex rel. J.H.*, 775 So. 2d 115,117 (Miss. 2000)

Should this court determine that the §75-4A-505 one-year statute of repose is inapplicable, then at the very least the three year general statute set forth in §15-1-49 should be applied.

In the case the trial court not only failed to apply the applicable statute of limitations, but in granting summary judgment for the Plaintiff failed to even mention or explain why.

CONCLUSION

It is well settled that when reviewing the grant of summary judgment, the appellant courts apply a de novo standard of review. *Brown v. Credit Center, Inc.*, 444 So. 2D 358 (Miss. 1983).

It is also well settled that statutory interpretations and jurisdiction are questions of law which are reviewed de novo by the appellant courts.

In this case we start out with two competing statutes with regard to funds transfer executed by NBC from the account of Shelton. §75-4A-204, offered by Shelton ignores the qualifying language set forth in subparagraph (a) which obligates the court to first find that the payment order accepted by the receiving bank was not authorized by the sender.

§75-4A-205 specifically applies to circumstances involving the transmittal of a duplicate payment and requires 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 banks notification was receive by sender. In this case it is clear that Shelton received his monthly bank statements to the address he provided to NBC and simply failed at any time during an almost six year period to review his bank statements and notify NBC of the error. This delay clearly prevented NBC from limited its loss or being able to recover the transmitted funds from the beneficiary.

Although unlikely, should this court determine that Article 4A does not apply, NBC urges enforcement of the Deposit Account Contract.

Should the court determine that Shelton is entitled to a recovery from NBC beyond the ninety (90) day review period provided by §75-4A-205, the maximum amount of recovery should be limited to a twelve (12) month period as set forth in §75-4A-505.

CERTIFICATE OF SERVICE

The undersigned attorney of record for the Defendants-Appellants, National Bank of Commerce and NBC Capital Corporation does hereby certify that he has this day mailed, postage prepaid, a true and correct copy of the foregoing Brief of the Appellants to the following:

Honorable James T. Kitchens
Sixteenth District Circuit Court Judge
P. O. Box 1387
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Presiding Judge

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SO CERTIFIED on this the 25th day of April, 2008.



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