IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BEACON PROPERTIES, LLC	**PLAINTIFF/APPELLANT**
V.	**NO. 2008-CA-00608**
BANK OF THE SOUTH	**DEFENDANT/APPELLEE**

APPELLEE'S BRIEF

ORAL ARGUMENT REQUESTED

ON APPEAL FROM THE
CIRCUIT COURT
OF COPIAH COUNTY, MISSISSIPPI
CIVIL ACTION NO.: 2005-0028

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CERTIFICATE OF INTERESTED PERSONS

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 Mississippi Supreme Court and/or the Judges of the Mississippi Court of Appeals may evaluate possible disqualifications and/or recusal.

Beacon Properties, LLC Michael T. Jaques, Esq. Attorney at Law 196 Charmant Place, Suite 1 Ridgeland, MS 39157 *Attorney for Plaintiff, Beacon Properties, LLC*	Appellant Attorney for Beacon Properties
David Case	Member of Beacon Properties, LLC
Bank of the South C. Paige Herring, Esq. Scott, Sullivan, Streetman & Fox, P.C. Post Office Box 13847 Jackson, MS 39236-3847	Appellee Attorney for Appellee Bank of the South
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Respectfully submitted,

C. Paige Herring

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NATURE OF PROCEEDINGS

This case was initiated by Beacon Properties (hereinafter sometimes referred to as "Beacon"), LLC David Case on May 12, 2004 against the Bank of the South (hereinafter sometimes referred to as "Bank"), Cause Number 2004-0351.[RE. 1][1] On or about January 1, 2005, Beacon, David Case, and Case Realty, Inc. filed a suit against Billy F. Traxler, Individually and as the Custodian, Guardian and/or Next Friend of the minor, Jason L. Traxler, Jason L. Traxler Individually and as Beneficiary of the Custodianship, by and through his Custodian, Guardian, and/or Next Friend Billy Traxler and the Custodianship of Jason L. Traxler, a Minor, by and through its Custodian, Billy F. Traxler which was filed under Cause Number 2005-0028.[2] [R. Vol. 1, P.3] By order, the Court consolidated the two cases on August 5, 2005. [RE. 2].

On October 17, 2005, the combined plaintiffs filed their amended their Complaint against Bank of the South, Billy Traxler, and Jason Traxler. The sum of that Complaint cited numerous breaches of duties, conversion, fraud, misrepresentation, negligence and violation of Miss. Code Ann. § 75-3-420. [R. 12.] Discovery and depositions ensued.

In late 2007, the Plaintiffs (Beacon, Properties, David Case and Case Realty, Inc.) and the Traxlers settled their claims. Consequently, Plaintiff amended its Complaint again which placed the parties in the positions they currently occupy. The allegations of the Second Amended Complaint were essentially the same but for the parties were now only Beacon and the Bank.

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[1]Appellee has adopted the designations of Appellant with regard to Trial Court Record Excerpts, Trial Excerpts and Record excerpts as "R. xx," "T. xx," and "RE xx,"respectively.

[2]Jason Traxler was the actual member of Beacon Properties via the Mississippi Uniform Transfers to Minors Act. The fact that the LLC sued its own member(s) without authorization (each party owned 50% of the LLC) has always been an oddity in this litigation as such actions are not permitted under Miss. Code Ann. § 79-29-305. *See also* [T. 458, 474, 503-505].

Over the course of the case, both parties defended their positions and argued the case vociferously. Both parties filed motions for summary judgment and the Court, on two occasions, denied these motions citing the need to resolve outstanding factual issues. The case was subsequently tried in January of 2008 with a verdict being rendered on behalf of the Defendant. [R. 750.] Thereafter, Plaintiff filed post-trial motions which were denied. [R. 803.] Plaintiff then appealed to this Court.[R. 872.]

STATEMENT REGARDING ORAL ARGUMENT

The issues in this matter have been fully briefed. Nevertheless, Defendant believes that oral argument would be helpful and requests same.

STATEMENT OF THE ISSUES

A. There was sufficient factual evidence at the pre-trial stage to create a question the ownership of or rights to the money represented by the settlement check which required the jury to determine the issue.

B. The Court's denial of various Plaintiff jury instructions was proper as they did not allow for a jury determination of check ownership under the facts of the case.

C. The issue of check ownership was properly before the Jury.

D. There was no error with regard to the giving of an apparent authority instruction.

E. Mitigation of damages was an issue properly before the Court.

F. There was no error in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial.

STATEMENT OF THE FACTS

David C. Case and Steven H. Smith formed Beacon Properties, L.L.C. on May 12, 1999. [T. 144.] This limited liability company was established in order to facilitate the acquisition of approximately 11± acres of industrial property located off Beasley Road in Jackson, Mississippi. *Id.* Subsequent to the formation of Beacon Properties, L.L.C., the subject Beasley Road Property was purchased by Beacon Properties, L.L.C. *Id.*

On September 24, 2001, Steven H. Smith and Billy F. Traxler, as custodian for Jason L. Traxler under the Mississippi Uniform Transfers to Minors Act, with the signatory consent of David Case, a member of Beacon Properties, L.L.C., entered into an Agreement whereby Smith's interest in Beacon Properties L.L.C. was purchased by Billy Traxler, as custodian for Jason L. Traxler. T. 147-48. At the time of this Agreement, Beacon Properties, L.L.C. already owned The Beasley Road Property.

Beacon Properties, L.L.C. selected Bank of the South for their loan based on the lending history and relationship Billy F. Traxler had with the bank. [T. 450.] David C. Case had never conducted business with Bank of the South prior to this loan, and, by his own admission, it was Billy Traxler's relationship with the Bank that led Beacon Properties, L.L.C. to Bank of the South for purposes of requesting a loan. *Id.*

On November 27, 2002, Beacon Properties L.L.C. entered into a multipurpose Note and Security Agreement with Bank of the South. *See* Plaintiff's Trial Exhibit 5. David C. Case and Billy F. Traxler, custodian for Jason L. Traxler, entered into the Note on behalf of Beacon Properties, which was in the amount of $150,036.00. *Id.* Said loan was scheduled to mature on May 26, 2003, and it was secured by unlimited individual guarantees of Billy

Traxler and David C. Case along with a deed of trust for the remaining portion of the Beasley Road Property owned by Beacon Properties, L.L.C. *Id.* [3]

On April 18, 2003, Billy F. Traxler reduced loan number 187666 by 50 percent through his payment of principle and interest in the amount of $79,201.95, which was then due. *See* Defendant's Exhibit 1, trial court record. The loan was thereafter renewed by Beacon Properties, L.L.C. in the amount of $75,036.00. *See* Plaintiff's Trial Exhibit 5. Subsequent to this note's renewal, Beacon Properties, L.L.C. placed the remaining portion of the Beasley Road Property on the market for sale.

Prior to closing the sale (and due to the uncertainty in Billy and Jason Traxler's schedules which could potentially render them unavailable on the date of the sale), David C. Case and Jason L. Traxler, through Billy Traxler, as his custodian, entered into a Resolution which allowed Case to execute all necessary documents to effect the sale of the Beasley Road Property on behalf of Beacon. *See* Plaintiff's Trial Exhibit 16. At the time the Resolution was executed on November 28, 2003, the property had already been placed on the market, a sales contract had been entered into, and the closing date had already been set. However, despite the uncertainty in his business schedule and the Resolution which had been duly entered into, Billy Traxler was nevertheless available on the date of the closing, which was January 23, 2004, as he and Case accompanied one another to the closing. *See* R. vol. 1, p. 16, Plaintiffs' *Amended Complaint*, paragraph 12.

Also before the closing, Case and the Traxlers met to discuss the division of proceeds. [R. 460-63.] At that time, the parties agreed that the proceeds would be divided with Case taking a commission on the sale, having his share (the remaining principal and interest) of

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[3]As such, at the time of this loan with Bank of the South, Beacon Properties, L.L.C. owned only 7.725 acres of the property, which forms the substance of the deed of trust in favor of Bank of the South that partially secured loan number 187666.

the Bank's loan paid off and the remainder going to the Traxlers as repayment for their earlier loan payment and to repay them for their prior work on improving the land and obtaining a higher price for the land. *Id.*

The Beasley Road Property was sold to Trisler Landscape Management, Inc. for $325,000.00. *See* Plaintiff's Trial Exhibit 4. Out of the sale proceeds, two drafts were issued to Beacon Properties, L.L.C., one made payable to Bank of the South in the amount of $76,857.84 and the other to Beacon Properties, L.L.C. in the amount of $208,526.92. *See* Plaintiff's Trial Exhibit 3 and 1, respectively.

On January 26, 2004, Jason Traxler went to the Bank with these two checks. He gave the Bank the $76,857.84 draft payable to Bank of the South was to finally and completely pay off loan number 187666. [T. 382.] Further, the draft made payable to Beacon Properties, L.L.C. in the amount of $208,526.92 was also presented to Bank of the South by Jason L. Traxler. Id. This draft was processed by Bank of the South according to the directions of Billy and/or Jason Traxler, members of Beacon Properties. [T. 385.] David Case also provided notice to Bank of the South through Laura Westmoreland, Vice President, that Traxler would be processing this check in the coming days. [T. 414-15.]

As a result of this transaction, which occurred on January 26, 2004, David C. Case brought suit against Bank of the South for conversion and other related claims. Bank of the South was never notified by anyone or any entity of any alleged problems with the processing of the $208,526.92 draft until after the initial Complaint was filed on May 12, 2004, approximately 4 months later.

SUMMARY OF THE ARGUMENT

The argument in this case is fairly simple. There was a large amount of testimony which indicated that the two primary partners in Beacon, Case and the Traxlers, had, prior to the sale of the sole asset of Beacon, agreed upon a splitting of the proceeds from that sale following the payoff of the loan owed to the Bank (hereinafter sometimes referred to as "surplus check"). There was also testimony that this agreement, while not being specifically delineated, was confirmed by both sides with employees at the Bank. After the surplus check was presented to the Bank, nothing happened for approximately four (4) months until the Bank was sued without ever being advised of a problem.

While Plaintiff contends that the UCC controls and that no factual inquiry need be performed, the Defendant would show that these heavy layers of factual inquiry had to be resolved. The central issue is whether Beacon had any remaining interest in the surplus check given the agreement between Case and the Traxlers. An agreement that the check was to belong to the Traxlers would have terminated the rights of Beacon to the surplus check, terminated Beacon's standing to sue for those proceeds, and given the necessary authorization to the Traxlers to utilize the check as they saw fit. Any processing abnormality would have been technical in nature, but, without rights to the funds, Beacon would not have an objection as it had no claim to the funds. In short, if an agreement had occurred between Case and the Traxlers with respect to the check, Beacon has no argument. In order to resolve the question, a jury had to determine the initial issue of "ownership" of the instrument, the surplus check because that was a fact in dispute. Once this factual question was resolved, then the operation of law, especially the UCC, can then be applied if necessary. As the verdict was returned for the Bank, it must logically flow that the Jury found that there was such an agreement, and Plaintiff's appeal is without merit.

ARGUMENT

A. There was sufficient factual evidence at the pre-trial stage to create a question the ownership of or rights to the money represented by the settlement check which required the jury to determine the issue.

In its first two arguments, Plaintiff claims that the Court erred in not granting summary judgment or partial summary judgment prior to trial. In large part, Plaintiff focuses upon the fact that the check was made payable to "Beacon Properties, LLC" and no other. This fact has never been disputed. However, it is, likewise, uncontroverted that ownership or rights to funds represented by an instrument may be conveyed to a third-party in a multiplicity of ways.

Under Mississippi law, the party moving for *Summary Judgment* bears the initial responsibility of informing the Court of the basis for its Motion and identifying those portions of the record in the case which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. vs. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The movant, however, need not support the *Motion for Summary Judgment* with materials that negate the opponents claim. *Id.* As to issues on which the nonmoving party has the burden of proof, the nonmoving party must "make a showing sufficient to establish the existence of elements essential to his case." *Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc.*, 873 So.2d 103, 107 (Miss. 2004) (citing *Cothern v. Vickers, Inc.*, 759 So.2d 1241, 145 (Miss. 2000)). The nonmoving party must then go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Kerr-McGee Corp. v. Maranatha Faith Ctr., Inc.*, 873 So.2d 103, 107 (Miss. 2004). In other words, a simple denial to a *Motion for Summary Judgment* is not enough to create an issue of fact. The opposing party, in order to defeat a motion for summary judgment, must

provide more than general allegations; specific facts showing that material issues of fact exist are required. *Brooks v. Roberts*, 882 So.2d 229, 232 (Miss. 2004) (citing *Bowie v. Monfort Jones Mem'l Hosp.*, 861 So.2d 1037, 1040-41 (Miss. 2003)). In ruling on a summary judgment, all "evidence must be viewed in the light most favorable to the party against whom the motion is made." *Pride Oil Co. v. Tommy Brooks Oil Co.*, 761 So.2d 187, 190 (Miss. 2000); citing *Hernandez v. Vickery Chevrolet-Oldsmobile*, 652 So.2d 179, 181 (Miss. 1995). A "nonmovant should be given the benefit of every reasonable doubt." *Id. See also Hust v. Forrest General Hosp.*, 762 So.2d 298 (Miss. 2000); *citing Rosen v. Gulf Shores, Inc.*, 610 So.2d 366, 368 (Miss. 1992).

Undersigned counsel came into the case relatively late in proceedings and was unavailable for the round of arguments presented at the first summary judgment hearings. However, in the second summary judgment proceedings, it became clear to counsel that summary judgment was not possible because there were facts, material facts, that were in dispute.

For example, it was established by stipulation that there were two members of Beacon at the time of the sale of the Beasley Road Property, 50% Case and 50% Traxler. Further, the operating agreement dictated what profits or monies are due to each member of Beacon. However, these could be overridden by agreement of the parties. The Traxlers said that there was an agreement to their ownership of the surplus check. [R. vol. 5, p 669-72]. Case obviously disagreed.[4]

Such questions, viewed in the light most favorable to the nonmoving party warrant denial of a summary judgment. The conflict of facts and claims to ownership involving

[4]This is without taking into account the testimony of Olier and Westmoreland (that was appended to Defendant's Motions and Responses to Motions which was contradictory to the claims of Case. [R. vol. 1, p 119 - vol. 2, p. 210.]

the two members of Beacon necessitated the resolution of that issue at trial and not at the summary judgment stage because, as stated above, ownership or entitlement to enforce is a threshhold issue that had to be decided before resolving any remaining legal issues. Given these opposing facts and that this was a jury trial, Judge Patrick properly exercised restraint and presented this issue to the Jury for its findings. This was a fact in dispute that could only be resolved by the factfinder, the Jury. Consequently, there was no error to deny either side's respective summary judgment issues.

B. The Court's denial of various Plaintiff jury instructions was proper as they did not allow for a jury determination of check ownership under the facts of the case.

Plaintiff's first trial-related issue is directed towards the refusal of several jury instructions which, Plaintiff claims, impeded its ability advance its theory of the case. In a vacuum, Plaintiff's jury instructions are generally accurate statements of the law. However, the Plaintiff's instructions did not accurately reflect the evidence adduced at trial and were properly excluded.

There are a litany of cases which state that jury instructions are proper when the instructions, read together, "accurately state the applicable rules of law under the facts of [the] case." *Boyd Construction Company v. Bilbro*, 210 So.2d 637, 640 (Miss 1968); *Murphy v. State*, 798 So.2d 609, (Miss. App. 2001). "[A] court may refuse an instruction which incorrectly states the law, is covered fairly elsewhere in the instructions, or is without foundation in the evidence." *Colburn v. State*, 990 So.2d 206, 216 (Miss. App. 2008).

In its brief, Plaintiff cites error to the Court by refusing to grant its instructions P-8, P-12, P 13 and P-16. Plaintiff contends that these were issues of law and not fact that did not need to be resolved by the Jury. However, Plaintiff still ignores the facts and

circumstances surrounding the rights to the check. As has been previously stated, there was conflicting testimony with regard to the facts of the case. A focal point of that testimony was that, by agreement, the funds represented by the check were given to satisfy various debts owed to the Traxlers by Beacon and/or Case. Given that testimony, Plaintiff's instructions were peremptory as they foreclosed any agreement on transfer or negotiation or authorization to allow the Traxlers to have dominion over the funds represented by the surplus check. By removing the possibility that the Traxlers were properly in possession of the check when they presented the check to Bank of the South, Plaintiff erred in providing jury instructions that did not accurately state the rule of law with regard to the case or invaded the province of the jury with regard to determining ownership of the funds at issue. Therefore, the Trial Court properly excluded the instructions. The Trial Court did properly allow the jury to determine ownership of the funds represented by the surplus check which was the threshhold issue that had to be determined. That issue was determined in favor of the Bank, and, by extension, the Traxlers.

C. The issue of check ownership was properly before the Jury.

Plaintiff contends that the Jury should have been precluded from determining title of the check. However, this was a central issue throughout this litigation. From the beginning, there was a contest over whether the Traxlers had a right to the funds via the surplus check. Plaintiff mistakenly believed that, if it and Case settled with the Traxlers, the issue would be resolved. That settlement cannot undo the facts and agreements made years before which are relevant here.

If one assumes that an agreement was made between Case and the Traxlers that the Traxlers were to have the check, then neither Case nor Beacon has standing to challenge

how the surplus check was processed.[5] There is no "holder" issue, be it "in due course" or otherwise. There is no breach of any duty, fiduciary or otherwise, by anyone. However, in order to determine if there was an error in allowing the Jury to determine these factual issues, one must look to see if there was testimony that was sufficient to place the issues in question.

At least three witnesses testified as to the ownership of the funds represented by the check in question. There was testimony by Ralph Olier regarding representations made to him that Billy Traxler had invested a significant amount of money in the property. [T. 264.] David Case had no money in the deal. [T. 273.] He also testified that the relationship between the Bank and Traxler was the sole determinant as to whether the deal would be done. [T. 266.] It was based upon Mr. Traxler's 22 year relationship with the Bank. [T. 267.] Case told Olier that he would get whatever Billy gave him. [T. 275, also 313.] Olier believed that Traxler was 100% entitled to the funds of the surplus check given the representations made to him in front of Mr. Case. [T. 311.]

Additionally, there was testimony from Laura Westmoreland that supported the contention that the surplus check had been conveyed to Traxler. A few days before the sale, she was contacted by Case who was requesting payoff information. [T. 403.] Case then told her that Traxler would be coming by to pay off the loan and other loans following the closing of the sale. *Id.* When Traxler sent his son into the Bank to bring the payoff and the surplus checks, Traxler confirmed, via telephone, his rights to the check and how he wished that check to be utilized. [T. 385.] However, Westmoreland knew that Traxler was going to pay off some of his loans following the sale of the property prior to the actual sale from

[5]This issue was clearly decided by the Jury in the Traxlers' favor.

conversations that they had. [T. 402, 414-15.] Obviously, Traxler would be doing so with money and that money would be coming from the sale of the property.

Finally, there was testimony from Billy Traxler himself who confirmed ownership over the proceeds represented by the check. Billy testified that it was his money because he had performed work on the site that had not been paid, he had made a personal payment on the outstanding loan of Beacon, he had allowed Case to get a commission on the sale of the property despite being a partner in Beacon, and so on. [T. 456, 463, 468]; *see also* Defendant's Exhibit 1. He testified that they met to discuss these issues at a Wendy's on Highway 80 and that Case had agreed that Traxler would have the proceeds of the check in consideration for the foregoing. [T. 460-462.] The monies represented by the surplus check belonged to Traxler. [T. 466.] The funds were paid to him with the agreement of Case. *Id.* Traxler admitted that he told his son to go to the Bank and how he wished the check used. [T. 468-9.] According to him, "the bank didn't do anything wrong." [T. 469.] He also testified that he had authority to endorse the check from Mr. Case. [T. 477.] He also confirmed the discussion with Westmoreland as she has testified. [T. 468.]

Without rehashing Plaintiff's argument, Plaintiff denied the agreement with Traxler as to the ownership of the check. Plaintiff denies all of the foregoing and claims that the check was taken by Traxler without his authorization [T. 173-74] and that he did nothing to stop Traxler because he "was pretty confident that the only thing that he could do legally with the check was to put it in the Beacon Properties checking account." [T. 174 and 186.] However, Case is and was not as unsophisticated as he may seem.

The Jury was also presented with additional information that weighed upon his credibility. Plaintiff, on direct, discussed his prior career as an FDIC assistant bank

examiner. [T. 140-42.] He also talked about his years of work in private banks. [T. 142-43.] He discussed his experience in real estate and in the sales of property. [T. 144-45.]

The foregoing facts were used to build Case's credibility, but they returned to his detriment when it came to his post-closing activities. First, Case was forced to admit that he did absolutely nothing when the check was taken from his portfolio. [T. 173-74.] Second, he was forced to admit that he had received a commission which bolstered Traxlers' claims as to the pre-closing agreement. [T. 220-21.] Third, Case admitted the Traxlers, via their company Central Digging, had done a lot of improvements to the property. [T. 222-23.] Fourth, Plaintiff never asked for the check back. [T. 225.] Fifth, Plaintiff never reported the check as being stolen to the closing attorney, the bank upon whom the check was drawn, Bank of the South, the FDIC or any local authorities. [T. 238-40.] Despite his vast knowledge as to how banks operate, can reverse transactions or take other actions to protect his rights, Case, who by now was operating Beacon without consent of his other 50% shareholder, did nothing. [T. 236.][6]

Therefore, with all of the foregoing in mind, we are still left with the initial factual question, was there an agreement that the check was to be given to the Traxlers via an agreement with Case? Plaintiff would have the Court disregard these facts simply on the basis that the check was written to Beacon. There is clearly sufficient evidence upon which the Jury can base a determination in favor of the Bank. In this case, the Jury clearly determined that an agreement had been made that the proceeds of the surplus check were to have been the property of the Traxlers and the Jury found in favor of the Bank.

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[6]Case never consulted with the Traxlers regarding Beacon filing suit against the Bank or the Traxlers which was in violation of the agreement. Apparently, when the agreement works for Case, he claims it and when it does not, he ignores it. See T. 458, 474, 503-505.

D. There was no error with regard to the giving of an apparent authority instruction.

A review of the allegations of the Complaint include Defendant was entitled to an apparent authority defense under the facts of this case. [R. vol. 4, p 460-69.] The claims alleged therein encompass conversion under the Miss. Code Ann. § 75-3-240, negligence, gross negligence, punitive damages, constructive trust, unjust enrichment. *Id.* Apparent authority applies in most if not all of these because of the claims alleged and the facts of the case.

As stated above, the Plaintiff continually ignores the adverse testimony/evidence that is related to this case. There was threshhold issue that had to be addressed dealt with the apparent, if not actual authority, of the Traxlers to conduct the transaction at issue. *Delta Chemical and Petroleum, Inc., v. Citizens Bank of Byhalia, Mississippi*, 790 So.2d 862, 874 (Miss. App. 2001). The issues of apparent authority, once resolved, would have logically dictated further action on legal issues such as UCC conversion, entitled to enforce language, and other issues. However, the threshhold issue, the most important factual issue in dispute, was that of authority.

The Plaintiff's burden in this case was not so straight-forward because there were factual circumstances that were outside the course and scope of simple UCC determinations. There was testimony and evidence, as stated above, which created questions of fact as to whether the Traxlers had the right or authority, apparent or otherwise, to utilize the check as they wished. The Plaintiff asserts that under the UCC, that there is a essentially strict liability standard. However, given the facts of this case, this cannot be so because the facts do not lend themselves to such.

The UCC has absolutely no clause that deals with the circumstance wherein the only two (2) members of an LLC communicate to a bank that a check that is being presented by one of those members is the member's property and that he can do with that money what they will. The UCC does not have a clause that deals with a factual inquiries into the authority of parties. The UCC does not delve into what to do when one party tries to benefit at the expense of another after agreeing to a division of sale proceeds. Like other laws, statutes and regulations, the UCC is drafted in a vacuum, however, there is an expectation that it will be construed with the application of other relevant facts and law to achieve the ends of justice.

In this case, there was one prominent issue that had to be resolved prior to any UCC inquiry was that of the authority of the Traxlers. The use of these defenses were relevant because there were numerous grounds of relief sought in the Complaint. However, the issue of authority was also crucial because the actions of Case and the Traxlers had a critical part to play in the reliance the Bank placed upon the representations of Beacon Properties' via its members.

Apparent authority requires a showing of "(1) acts or conduct on the part of the principal indicating the agent's authority, (2) reasonable reliance on those acts, and (3) a detrimental change in position as a result of such reliance." *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1181 (Miss. 1990). There was ample testimony to support a finding that the Traxlers acted with consent and authorization of Beacon Properties.[7] Likewise, there was testimony that would have supported that the Bank, based upon that representation, acted in a way that, given an adverse ruling, would have been detrimental as a result of these representations and its reliance thereupon. These actions, contrary to

[7]Including, but not limited to the discussions of Case and Traxler with the Bank.

the actions cited in the *Delta Chemical* case and *Hancock Bank v. Ensenat,* 819 So.2d 3 (Ct. App. 2001), (both cited by the Plaintiff), provide ample evidence of the authority of the Traxlers that was given by the principal (Beacon Properties - via David Case and the Traxlers) to use the surplus check to Traxlers' own ends.[8] This crucial distinction is what mandates that the Court resolve the issue of authority as a primary inquiry. The allegations of the Plaintiff in arguing that no such defenses should have been allowed is clearly not based in the facts of this case or reality. Given the testimony presented, the Court was correct, if not justified, in allowing these defenses to be presented and not providing these instructions to the jury.

Likewise, the issue of reasonable commercial standards and good faith provides a defense as the Bank's actions were made in reliance upon the representations of the members of the Beacon. To hold otherwise and bar the presentation of these defenses in light of that testimony would have been to unfairly hamper the defense of the case. As these defenses were supported by the evidence, there can be no error in permitting the instructions on authority.

E. Mitigation of damages was an issue properly before the Court.

Given the unique facts of this case and claims of the Plaintiff, mitigation of damages was a proper issue before the Court. As stated above, this case essentially revolves around Case versus the Traxlers. Case contends that the Bank injected itself into the dispute when it accepted the surplus check. The Bank has asserted, and, in its response, Beacon admitted that it had a duty to mitigate its damages. However, Beacon contends that its loss was certain once the alleged conversion occurred. This belies the truth.

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[8]In *Hancock Bank v. Ensenat,* 819 So.2d 3, 12 (Ct. App. 2001), the Court of Appeals noted that, under § 75-3-240, the "measure of liability would be less if the plaintiff did not own the entire instrument." In this case, there is evidence that the Plaintiff owned nothing following the agreement of Case and the Traxlers.

Under Mississippi Law, "a jury instruction may not be given unless it is supported by some evidentiary basis in the record." *Herring v. Poirrier*, 797 So.2d 797, 806 (Miss. 2000); *citing Perry v. State*, 637 So.2d 871, 877 (Miss. 1994) and *Gayle v. State*, 743 So.2d 392, 401 (Miss. App. 1999). The next question is whether testimony would support the failure to mitigate issue.

David Case knew that the check had been processed by the Bank "about a week" after the closing. [T. 235.] Case knew that transactions could be reversed. [T. 236.] Despite that, he never contacted the bank. [T. 235.] He never did anything until, four months later, Plaintiff and Case sued the bank. [T. 238.[9]]

Plaintiff then conveniently omits testimony from its brief that supports the giving of the instruction. Ralph Olier,testified that he could have "stopped this thing" if Plaintiff would have said something about Mr. Traxler not having authority to negotiate the check. [T. 316.] If nothing else, Olier testified, he could have limited the damages to about $17,000. [T. 316.] Likewise, Larua Westmoreland testified that "we could have put stop-payments on the check and reversed the loan payoffs...Everything could have been reversed." [T. 419.] Thus, it is clear that the damages of the Plaintiff could have been diminished, if not eliminated, had the Plaintiff simply contacted Bank of the South. Instead, Beacon, via David Case, sat on its hands and did nothing.

An analogous situation to that of the Plaintiff is one wherein a landlord who has leased an apartment for a year has a tenant abscond two months into the lease. While the landlord is tentatively permitted to recover up to a year's worth of rent, he may only do so if he has tried to lease the premises over that time frame and not been successful. He must

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[9]Also see testimony of Ralph Olier, T. 316-317, which confirms no contact with Case following transaction.

make reasonable efforts to stop or diminish the harm the absentee tenant caused. He must mitigate.

In this case, the Plaintiff knew that the check had been taken by Traxler and claims that the Bank owes him the value of that check. Like the landlord, his damage maximum was set, but not in stone. He then had a duty to do what he reasonably could in order lessen the amount of his damages, but he chose to do nothing. There was evidence that the alleged loss could have been largely resolved, if not entirely, had Case placed the Bank upon notice. The law requires that a person must mitigate their damages. *Evans v. Clemons*, 872 So.2d 23, 30 (Miss. 2003). The reason for Plaintiff's lack of action has never been explained. However, there clearly was evidence to support the giving of the instruction

F. There was no error in denying Plaintiff's Motion for Judgment Notwithstanding the Verdict or in the Alternative, Motion for New Trial.

1. Motion for Judgment Notwithstanding the Verdict

When looking at a Motion for Judgment Notwithstanding the Verdict, the movant may only prevail if the facts are "overwhelmingly in favor" of the movant such that "that reasonable men could not have arrived at a contrary verdict." *American Fire Protection, Inc. v. Lewis*, 653 So.2d. 1387, 1390 (Miss. 1995). *See also Long v. Harris*, 744 So.2d 839 (Miss. App. 1999) and *H & E Equipment Services, LLC v. Floyd*, 959 So.2d 578 (Miss. App. 2007). If the Court finds susbtantial evidence to support the verdict, then the Court must affirm the Jury's decision. *Id.*

The sole argument of the Plaintiff is that the Court failed to instruct the jury on UCC law. However, the legal issues demanded resolution of the factual issues that revolved around ownership of the check. A perusal of the testimony and evidence shows that there was more than enough evidence to support the Jury's verdict. As stated above, that issue,

once resolved, would permit legal resolution of the issues. Given the fact that the Jury found that Traxler had a right to the surplus check, the error, if there was one, was harmless at best.

2. Motion for New Trial

"A motion for a new trial challenges the weight of the evidence and Mississippi appellate courts will only reverse a lower court's denial of a motion for a new trial if, in doing so, the lower court abused its discretion." *Townsend v. Skelton*, 911 So.2d 639, 644 (Miss. App. 2005). "No new trial will be ordered unless the appellate court is convinced that the verdict is so contrary to the overwhelming weight of the evidence that, to allow it to stand, would be to sanction an unconscionable injustice." *Id. Citing Whitten v. Cox*, 799 So.2d 1, 13 (Miss. 2000). "A trial judge in exercising his sound discretion may grant a motion for a new trial only when the jury verdict is against the overwhelming weight of the evidence or is contrary to the law." *Smith v. Parkerson Lumber, Inc.*, 888 So.2d 1197, 1204 (Miss. App. 2004), *citing Allstate Ins. Co. v. McGory*, 697 So.2d 1171, 1174 (Miss. 1997).

As discussed previously, the Court is limited to the inquiry as to whether the verdict was against the overwhelming weight of the evidence. Plaintiff focuses on the issue of who wrote "Beacon Properties, LLC" to argue its case. However, this is a red herring. The Jury had determined the Traxlers had proper rights/ownership/authority to use the surplus check. Again, in order for the Bank to be held liable, the Traxlers cannot have any right to the check. Given the fact that the Bank was not held liable, it is clear that the jury disagreed with Mr. Case, whether is proceeding in his own right or under the guise of Beacon. Accordingly, the Court properly ruled against the Plaintiff as to the Motion for New Trial.

CONCLUSION

The Plaintiff has continued in trying to make this case more complicated than it is. This was a dispute that involved Case and the Traxlers. As stated at trial when asked by Defendant's counsel "Why did you sue the bank?" [T. 237]. Case's response, "Because Billy wouldn't work it out." [T. 238]. When Case realized that he could not win against the Traxlers, he brought suit against Bank of the South. Through various motions and maneuvers, Case eventually realigned the Complaint to pin Beacon versus the Bank, and deleted the individual parties. Nevertheless, the Plaintiff cannot escape the fact that the case revolves around what happened between David and Billy, before the check was received by the Bank. Likewise, the Plaintiff cannot get around the fact that it is a jury issue as to whether Billy was given the check for working on the site, improving its value, prior payments on the Beacon note and a list of other things. All Plaintiff can say is "the check had 'Beacon Properties, LLC' written on it."

The Judge and Jury heard the entire case over four days. They weighed the evidence and credibility (and in some cases incredibility) of the testimony of the witnesses. Plaintiff claims that the Court should have applied UCC law and that the case should not have made it to a Jury. However, the application of the UCC had to be resolved only after the Jury made a determination as to who had rights to the check. The Jury, in returning their verdict, clearly found that the more credible testimony and evidence rested with the Defendant. This Honorable Court should not disturb their finding. Accordingly, Defendant respectfully requests that the Court deny Beacon's appeal and affirm the judgment of the people of Copiah County.

Respectfully submitted, this the 11th day of March, 2009.

BANK OF THE SOUTH, DEFENDANT

BY: _____
C. PAIGE HERRING, One of the Counsel of Record for the Defendant

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CERTIFICATE OF SERVICE

I, C. Paige Herring, do hereby certify that I have this day, via hand delivery to Plaintiff's Counsel and via U.S. Mail to all others, postage prepaid, a true and correct copy of the above and foregoing document to:

Michael T. Jacques, Esq.
Attorney at Law
513 North State Street
Jackson, MS 39201
Attorneys for Plaintiffs Beacon Properties, LLC

Honorable Isadore W. Patrick
Warren County Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181-0341

This the 11th day of March, 2009.

_____
C. PAIGE HERRING