IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CA-00608

BEACON PROPERTIES, LLC

Plaintiff/Appellant,

VERSUS

BANK OF THE SOUTH

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT OF COPIAH
COUNTY, MISSISSIPPI
HONORABLE ISADORE W. PATRICK, CIRCUIT JUDGE

REPLY BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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AMENDED CERTIFICATE OF INTERESTED PERSONS

I, Michael T. Jaques, the attorney for the Plaintiff/Appellant, do hereby certify that the following persons have an interest in the litigation. This certificate is provided so that the judges of this Court may determine whether they have any grounds for recusal:

1. Beacon Properties, LLC, Plaintiff/Appellant;
2. David Case, member of Beacon Properties, LLC;
3. Michael T. Jaques, Esq., Attorney for Plaintiff/Appellant, and Sessums, Dallas & Morrison, PLLC, Ridgeland, Mississippi;
4. Bank of the South, Defendant/Appellee;
5. Metropolitan Bank, formerly known as Bank of the South, Defendant/Appellee;
7. C. Paige Herring, Esq., Scott, Sullivan, Streetman & Fox, Jackson, Mississippi, Attorney for Defendant/Appellee.
8. James D. Shannon, Esq., Shannon Law Firm, Hazlehurst, Mississippi.

MICHAEL T. JAQUES

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IN THE SUPREME COURT OF MISSISSIPPI

BEACON PROPERTIES, LLC

Plaintiff/Appellant

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BANK OF THE SOUTH

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REPLY BRIEF OF APPELLANT, BEACON PROPERTIES, LLC

INTRODUCTION

The issues before this Court are not complex. The proper result is clear. It is black letter law that the Uniform Commercial Code controls the issue before this Court. One fundamental requirement of the UCC is that a check must be endorsed by the payee in order to negotiate the check to a third party, and pass title to the instrument. In this case, there is no evidence that any individual endorsed the check at issue. As a matter of law, the negotiation fails.

This Court's decision will determine whether or not Mississippi will be the only state where negotiable instruments do not require a valid endorsement to transfer title. **If checks require a valid endorsement to transfer title, Beacon prevails. If this case is affirmed, Mississippi will be the only state where unauthorized and forged endorsements can transfer title to a check.**

There is no proof that this check was endorsed by anyone with authority to do so. The Bank admitted in the Pre-Trial Order that it did not know who endorsed the check. No witness

testified that they endorsed the check. Because Mississippi adopted the Uniform Commercial Code, the Code controls the means, manner and method of transferring title and ownership to negotiable instruments. Without a valid endorsement, ownership and title of this negotiable instrument remained in the payee, Beacon Properties, LLC. The Bank has failed to establish that title or ownership ever passed to any individual or entity other than Beacon, because the Bank never proved that an endorsement occurred, much less an authorized endorsement.

This case should be reversed and rendered. There is absolutely no issue of fact for the jury to determine that has any legal relevance to the issues before this Court. As a matter of law, the jury cannot find a valid transfer of title, or proper endorsement, where the Bank stipulated that it does not know the identity of the individual who "endorsed" the check. The jury cannot find a valid endorsement or negotiation, where the only testimony is that no individual with authority to endorse the check did so. The jury cannot be allowed to invent and apply its own rules for the transfer of negotiable instruments.

The Bank's argument that the UCC does not control this case is completely without merit. The UCC controls, and compels the outcome of this litigation in favor of Beacon.

I. THIS DISPUTE IS CONTROLLED BY THE UNIFORM COMMERCIAL CODE

Application of the UCC is not optional. The UCC governs the transfer of negotiable instruments in Mississippi. The UCC requires "negotiation" to transfer a negotiable instrument. If there is no "negotiation", and the instrument is taken, the instrument has been converted. §75-3-420, *Miss. Code Ann.* The Bank did not and cannot establish an endorsement or a negotiation of this check. Because the Bank cannot establish a transfer of title to the check under

the UCC, the Bank argues that the UCC does not apply. The argument is without merit.

In its brief, the Bank states as follows: "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." *Appellee's Brief*, at 16. There could be no greater misstatement of the law with respect to this case. The courts of this state have consistently held that the transfer of title to negotiable instruments is controlled by the Uniform Commercial Code. *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985); *Hancock Bank v. Ensenant*, 819 So.2d 3 (Miss. App. 2001).

In *Ensenant*, the court considered whether or not the UCC limited available damages for conversion of a negotiable instrument, where plaintiff's complaint also asserted theories of negligence and gross negligence. The court rejected the argument that the theories of recovery plead by the plaintiff trumped the UCC's damages limitations. The court first found that the UCC was not "optional".

> The parties do not agree on the applicability of the Uniform Commercial Code. Ensenat's attorney finds the Code optional, an option Ensenat sought to avoid by seeking recovery for various common law torts that allegedly arose from the manner in which Hancock Bank conducted its business. Just being an option is not the approach of the Code. Instead, the Code controls specific transactions and issues, while other doctrines supplement at the interstices and margins.

Id. at 8.

Relying on *White v. Hancock Bank*, 477 So. 2d 265 (Miss. 1985), the *Ensenat* court rejected the argument that the UCC did not control the issue with the following emphatic language:

> Again we are told that this general negligence claim is alive and well in our law by virtue of Miss.Code Ann. §§ 75-1-103 (1972). This is true up to a point-the point where White endorsed the check and delivered it to the Bank, ***for after that moment the rights and responsibilities of the parties are determined by reference to the Mississippi Uniform Commercial Code....***
>
> ***Once White endorsed the check and delivered it to the bank, he entered the world of the Uniform Commercial Code.***
>
> *White v. Hancock Bank*, 477 So.2d 265, 271 (Miss.1985).Thus, *White* supports that the Code governs here over common law forms of action. *Once the checks were presented to the bank for deposit, the "rights and responsibilities of the parties are determined by reference to the Mississippi Uniform Commercial Code." Id.*

Id. at 9 (emphasis added).

There is no dispute in this case that the check payable to Beacon Properties was a "negotiable instrument". There is no dispute that the specific transaction - the Bank's taking of the check - is a transaction within the scope of the UCC. As in *White* and *Ensenat,* once the check entered the Bank, it entered the "...world of the Uniform Commercial Code".

The Bank's assertions to the contrary are misplaced. **Beacon's check was converted in a bank**. If the Uniform Commercial Code applies to any transaction occurring any place in Mississippi, it is in a bank when a check is being presented for payment.

Once it is determined that the Uniform Commercial Code applies, there is no dispute that Beacon prevails. The Bank does not argue to the contrary in its brief.

II. THE BANK HAS FAILED TO ESTABLISH THAT TITLE TO THE INSTRUMENT PASSED FROM BEACON TO ANY OTHER INDIVIDUAL OR ENTITY

In its brief, the Bank admits that only Beacon Properties, LLC was the payee of the check. "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." *Appellee's Brief* at 9. As such, the Bank admits that Beacon Properties, LLC was the payee on the check, and is entitled to the funds. After conceding that title to the instrument was solely vested with Beacon, the Bank then fails to demonstrate to this Court how the title to the check - or entitlement to the proceeds of the check - thereafter became vested in the Bank as opposed to Beacon. **The Bank asserts no valid legal theory as to how title to the check was transferred.**

In Beacon's initial brief, the applicable UCC sections are set forth. The UCC states that the Bank is guilty of conversion of the check unless it took the check by "negotiation." *Miss. Code Ann.* § 75-3-420. "Negotiation" requires an "endorsement" by a "holder". *Miss. Code Ann.* § 75-3-201. The "holder" is the payee - in this case, Beacon. The Bank did not show in opposition to Beacon's Motion for Summary Judgment, did not establish at trial, and does not even bother to argue to this Court that title to the instrument was passed in any manner provided for by the UCC. The Bank does not cite to the court one case supporting any theory of transfer of title to the instrument.

As the Bank claims under an endorsement, **the Bank was imposed with the burden to prove the validity of the endorsement**. *Foremost Insurance Company v. First City Savings & Loan Association of Lucedale*, 374 So.2d 840 (Miss. 1979). The Bank failed to prove any

endorsement, much less an "authorized" endorsement. **It is not possible to prove a valid or authorized endorsement without identifying the individual who allegedly endorsed the check. The Bank admits the lack of an identifiable endorsement, and therefore admits that any endorsement was unauthorized and a forgery**.

Without proof of the identity of the endorser, there is no possibility of proving that the endorsement was authorized. As such, the Bank admitted in the Pre-Trial Order - when it admitted it could not identity the endorser - that the endorsement on the check was unauthorized, and therefore a forgery. As this Court has specifically recognized, under the UCC, with respect to actions for conversion, there is no difference between an unauthorized endorsement and a forged endorsement - they are the same thing.

> Many of our sister jurisdictions have addressed the term "forgery" as it applies to § 3-419's "unauthorized endorsement" and as it applies in a strict or literal sense of the term. They have held that "forgery" under § 3-419 includes "unauthorized signature," and have interpreted the UCC in a myriad of cases as allowing the terms "unauthorized" and "forgery" to operate interchangeably for purposes of determining bank liability under § 3-419. *See Oswald Mach. & Equip., Inc. v. Yip*, 10 Cal.App.4th 1238, 13 Cal.Rptr.2d 193, 196 (1992) (holding that as with a forgery, when a bank pays on an instrument via an unauthorized endorsement, that bank has exercised dominion and control over the instrument inconsistent with the rights of the true owner, thus resulting in the conversion of the instrument); *Levy v. First Pennsylvania Bank N.A.*, 338 Pa.Super. 73, 487 A.2d 857, 860 (1985) (holding that for purposes of a conversion action under the UCC, an unauthorized signature is the same as a forgery); *Confederate Welding & Safety Supply, Inc. v. Bank of the Mid-South*, 458 So.2d 1370, 1373-74 (La.Ct.App.1984) (holding that a forged endorsement, within the meaning of UCC § 3-419, encompasses an unauthorized endorsement); *Aetna Cas. and Surety Co. v. Hepler State Bank*, 6 Kan.App.2d 543, 630 P.2d 721, 725 (1981) (holding that forged endorsement as pertains to conversion under relevant statute governing conversion of instruments does not preclude a finding of conversion where an unauthorized signature does not constitute forgery in strict sense); *Equipment Distributors, Inc. v. Charter Oak Bank & Trust Co.*, 34 Conn.Supp. 606, 379 A.2d 682, 684 (1977) (holding that both an unauthorized and a forged endorsement of an instrument are one and the same, whether one construes the

> phrase under the more liberal framework of UCC or under the strict interpretation of the forgery statute); *Salsman v. National Community Bank of Rutherford*, 102 N.J.Super. 482, 246 A.2d 162, 167-68 (1968) (holding that applicable New Jersey statute provides that an unauthorized signature or endorsement is one made without authority (actual, implied or apparent) and includes a forgery). *See generally,* Barbara Singer, *Uniform Commercial Code Section 3-419 And The Battle To Preserve A Payee's Right To Sue Directly A Depositary Or Collecting Bank That Pays On A Forged Indorsement*, 15 SETON HALL LEGIS. J. 39, 77-78 (1991). Further, comment 1 to § 3-404 provides that an unauthorized endorsement "includes both a forgery and a signature made by an agent exceeding his actual or apparent authority." Singer, *supra*, at 77-78, n. 192.Therefore, we, like many of our sister jurisdictions, agree that for purposes of a conversion suit there is little, if any, difference between "unauthorized" endorsements and forged endorsements.

Delta Chemical and Petroleum, Inc. v. Citizens Bank of Byhalia, Mississippi, 790 So.2d 862, 870-871(Miss. 2001).

The following fact was stipulated by the parties in the Pre-Trial Order, and confirmed by testimony at trial: "Neither Beacon Properties, LLC nor Bank of the South has knowledge of the individual who wrote the words 'Beacon Properties' on the check." [Pre-Trial Order, R-848]. Without an identified endorser, there can be no transfer of title to the instrument. Without an authorized endorsement, negotiation cannot legally occur under the UCC. The only two parties who assert an interest in the check are Beacon and the Bank. Neither party can identify the endorser, and no argument can be made that the unidentified person was "authorized" to endorse the check. The only conclusion that can be reached is that there is no valid endorsement, no negotiation, and no transfer of title. The endorsement was forged. The Bank does not argue to the contrary.

The Bank does makes the following statement of law in its brief: "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".[1] *Appellee's Brief*, at 9. That statement is both factually and legally incorrect. Beacon controverts the statement, as it is an improper statement of law. Mississippi law does not provide for a "multiplicity" of ways to transfer title to an instrument. The UCC controls, and state that if there is no valid endorsement, the check has been converted. The Bank does not allege any mechanism recognized by the UCC pursuant to which Beacon was divested of title to the check. Under the facts admitted by the Bank, once the UCC is determined to apply, Beacon prevails.

III. NO FACTUAL ISSUE EXISTS FOR TRIAL

The Circuit Court should have granted Beacon's Motion for Summary Judgment. Once the Bank admitted that it could not identify the endorser, could not prove a valid negotiation, and could not establish any legally cognizable claim to title of the instrument, the legal inquiry should have ended. The issues asserted by the Bank as proper factual determinations for the jury are not legally material to the case.

A. Whether or not Traxler and Case "agreed" to the ownership of the check is immaterial, and presents no issue for the jury's determination.

The Bank first argues that "(t)he Traxlers said that there was an agreement to their ownership of the surplus check." *Appellee's Brief* at 10. Beacon vigorously disputes that any agreement existed. Notwithstanding, even if the jury found there was an agreement, such a finding is not a defense to the conversion claim. The conversion statute does not contain an exception for prior "agreements" as to "ownership" of the check. The only cognizable "owner"

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[1]Having alleged a "multiplicity of ways" to transfer, the Bank does not identify even one way by which it alleges the transfer occurred.

of the instrument is the payee - Beacon. Here, the Bank cannot establish that the check was negotiated to the Traxlers, much less negotiated to the Bank. No "oral agreement" is sufficient to negotiate a check, because negotiation requires a written endorsement. The argument is without merit, and is immaterial to a determination of title to the instrument under law.

B. The members' respective ownership interest of Beacon is immaterial.

The Bank next argues that the jury needed to determine "(t)he conflict of facts and claims to ownership involving the two members of Beacon...". *Appellee's Brief* at 11. The Bank's argument is not supported by facts or law. The Bank asserts that this fact is material because it relates to "entitled to enforce". *Id.* The Bank's argument is misplaced. Case's and Traxler's respective ownership interests of Beacon have nothing to do with ownership of the funds, title to the check, or whether or not any individual member is "entitled to enforce" the instrument under the UCC. The owner of the instrument was Beacon, and Beacon was the only entity "entitled to enforce" the check.

The ownership interest of Beacon Properties, LLC has nothing to do with this case. This case involves ownership of a check made payable to the limited liability company in its own name and interest. Beacon Properties, LLC is a separate legal entity from any of its members, and owns its property - including this check - completely separate and apart from its members. The Bank provides no legal support for the novel assertion that there is ***no legal difference*** between a limited liability company and one of its members. That is not the law in Mississippi. There is a fundamental difference, especially as to property ownership.

Miss. Code Ann. §79-29-701 reads as follows:

> **A limited liability company interest is personal property. A member has no interest in specific limited liability company property.**

The "no interest" language is clear. Neither Billy nor Jason Traxler nor David Case had any "interest" in the check, which was the property of Beacon - the limited liability company. Only a party with "interest" may maintain an action to enforce an obligation. *Miss. Code Civ. Proc.* 17(a); *Owen & Galloway, LLC v. Smart Corporation*, 913 So.2d 174 (Miss. 2005). As Jason Traxler did not have title to the instrument, he could not prosecute any action to enforce the instrument. *St. Paul Fire and Marine v. W.H. Daniel Auto Company*, 121 Miss. 745, 83 So. 807 (1920). As all interest in the check was vested by statute with the limited liability company, Jason Traxler could not have "enforced the instrument".

Issues relating to the ownership of Beacon, or factual disputes relative to which member owned what portion or how much of Beacon, are completely immaterial to any issue properly considered. Had Traxler owned 99% of Beacon's membership interest, the legal analysis would not change. Regardless of the percent ownership interest held by the members, the check was the sole property of a separate legal entity - Beacon Properties, LLC. That entity's property - in this case, a check subject to the UCC's transfer rules - can only be alienated or transferred by negotiation through an authorized endorsement. As admitted by the Bank, that method of transfer is not present here.

C. <u>There is no jury issue as to "check ownership"</u>.

The Bank asserts that the jury should have been allowed to make a "determination of

check ownership"[2]. The Bank believes that the jury should have been able to determine "title of the check". *Appellee's Brief* at 11-12. Beacon disagrees. Under the applicable law, there is no factual determination for the jury to make as to "ownership" of or "title" to the check.

Whether Beacon or the Bank "owns" or has "title" to the check is an issue of law, not fact. There is no "right to the check" as invented by the Bank. *Id.* at 12. There is no dispute that the original payee on the check was Beacon. As payee, Beacon has title to the negotiable instrument, and its proceeds. The jury *could have* determined whether or not there was valid negotiation or endorsement - ***if any evidence had been presented of a valid or authorized endorsement***. Not one shred of evidence was presented to the jury upon which the jury could determine the identity of the endorser, and thereby find a valid or authorized endorsement or negotiation.[3] The Bank's actual argument is that the jury should somehow be allowed to "vest" title or ownership of the check in the Bank through the jury's own determination of rules of check transfer, irrespective of the law. The argument fails.

Under the facts and testimony presented at trial, it was impossible for the jury to determine that a valid negotiation or endorsement of the check occurred as required by the UCC. No witness ever identified the endorser, or told the jury who wrote the words "Beacon Properties" on the back of the check. Based upon that crucial failure, the trial court had a duty to resolve the title issue in Beacon's favor. The jury could not determine "title" or "ownership" in a

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[2]The Bank uses a misleading, legally irrelevant term. The UCC does not incorporate or give legal acknowledgment to the term "ownership". The UCC acknowledges that rights and title in the instrument are vested in the "payee". "Ownership" is a legally irrelevant term. The "owner" of the instrument cannot be legally determined to be different than the "payee".

[3]Again, in the Pre-Trial Order, it was stipulated between the parties that the identity of the endorser was unknown.

factual and legal vacuum. The Bank identifies no testimony from which the jury could determine that title had transferred from Beacon to the Bank. There was no such testimony. The issue of ownership of the check is not a jury issue. Title is not in dispute. Only the mechanism of transfer of title was in dispute, and no evidence of proper transfer of title was presented. The jury cannot "make up" negotiable instrument transfer rules.

D. There is no jury issue of "apparent authority", as there is no proof of any action that could be "authorized", nor of any agent.

The Bank asserts that the jury should have been allowed to consider the "apparent authority" of the Traxlers to .....??? The argument does not logically conclude, and makes no sense.

The Bank struggles in its brief - as it did at trial - to identify any legally material act that was undertaken with "apparent authority". In its brief, the Bank contends that the Traxlers had the "apparent authority" to "...utilize the check as they wished", or to "...conduct the transaction at issue." *Appellee's Brief*, at 16.

"Utilize" or "conduct" are not legally significant or material actions or terms in this case. The UCC does not incorporate those words in terms of check transfers, or in listing defenses to conversion claims. The UCC does not contain a provision that provides that the UCC applies, unless someone had "apparent authority to do whatever they wanted to" with a negotiable instrument. The argument tortures logic and the UCC.

More importantly, the Bank did not request that the court instruct the jury to find authority to "utilize" or "conduct", and the court did not do so. In the original instruction proposed, the Bank asked the court to instruct the jury relative to the existence of "apparent

authority" of the Traxlers to "***present***" the check to the Bank. However, the court properly found that "present" has no legal significance to this action, because the UCC does not allow transfer of title by "presentment". At the Bank's request, the court substituted the word "negotiate" for "present" and gave the following instruction[4]:

> In this case you have heard testimony about whether the Traxlers had authority to **negotiate** a check. If you find from a preponderance of the evidence that the Traxlers had apparent authority to **negotiate** the Beacon Properties Check on behalf of Beacon Properties to Bank of the South, then you must find in favor of the Defendant. [R-714; RE-27]

The instruction is fundamentally flawed. It is a peremptory instruction for the Bank, and instructs the jury as to the existence of facts not in evidence. The instruction erroneously instructs the jury that the Traxlers negotiated the check, when it was admitted that they did not do so.

First, the jury heard no testimony "...about whether the Traxler's had authority to negotiate a check." No witness testified that the Traxlers negotiated any check, much less had the authority to do so. The Bank stipulated it did not know who endorsed/negotiated the check. Case testified that he did not endorse it, and that he was the only authorized member of the LLC who could do so. Traxler testified he did not endorse or negotiate the check and did not know who did. No Bank employee testified as to the identity of the endorser.

Secondly, the instruction tells the jury that they do not have to find a "negotiation" to transfer title. The instruction tells the jury that if they find "apparent authority" ***to*** negotiate, then find for the Bank. The instruction completely fails to tell the jury that they have to find a "negotiation" in the first place to transfer title. As there was no evidence or testimony of

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[4] The original instruction submitted is found at R-731.

negotiation, there can be no finding of "apparent authority" to negotiate. The instruction allows the jury to find apparent authority to act, and then without finding that the "act" occurred, find for the Bank. The granting of the instruction was error.

The fundamental impropriety of the instruction is evidenced by the fact that even had Traxler been ***expressly*** authorized to negotiate checks on behalf of Beacon - which he was not - he could not have negotiated a check to himself or for his own benefit.

> Express authority to execute or endorse commercial paper in the principal's name will, in the absence of anything indicating a different intention, be construed as ***confining the authority of the cases to the execution and endorsement of such paper in the transaction of the principal's business and for the benefit of the principal***. Such authority **does not include authority** to draw or endorse negotiable paper for the benefit or accommodation of any other person; authority to sign accommodation paper or as security for a third person must be specially given. ***Nor does express authority of the nature in question allow the agent to make or endorse negotiable paper for his or her own use and behalf***.

3 Am. Jur. 2d *Agency* §147 (2008) (emphasis added).[5]

The instruction evidences the error in the trial court's view of the case, and misapplication of law to the facts. Beacon respectfully suggests the trial court erred in both its interpretation of the law, and in its recollection of factual testimony placed before the jury.

There is no issue for the jury's consideration. There is no fact that can be determined by the jury that, if found in the Bank's favor, legally transfers the check from Beacon to the Bank. This action should not be remanded for trial for a determination of entitlement to the funds, as

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[5]Moreover, the instruction clearly ignores and negates *Miss. Code Ann.* 75-3-307 "Notice of Breach of Fiduciary Duty", which prevents the Bank from ever becoming a holder in due course, as addressed in Beacon's initial brief at 30-31.

there are no disputed issues of material fact. The judgment should be reversed, and judgment rendered for Beacon as to title of the check.

IV. THE ACTION SHOULD BE REMANDED FOR A DETERMINATION OF PUNITIVE DAMAGES AND ATTORNEY'S FEES

There is no dispute that title of the check never passed to the Bank. As previously mentioned, if this verdict is affirmed, Mississippi will be the only state in the country where a check can be transferred by an unauthorized, forged endorsement made by an unidentified individual. Judgment in favor of Beacon should be entered by this Court in the face amount of the check, plus interest from the date of the demand. Additionally, this Court should remand this action for trial to determine the amount of punitive damages to be assessed.

In *Hancock Bank v. Ensenat*, 819 So.2d 3 (Miss.Ct.App. 2001), the court found that in an action for conversion against a bank brought pursuant to § 75-3-420, allowable damages include punitive damages, if warranted by the evidence. In discussing the effects of the revisions to the UCC in 1993, and the displacement of previous 75-3-419 with the currently applicable 75-3-420, the court stated as follows:

> What is left is whether an award that is not intended to compensate the victim but which instead is to serve other remedial purposes might still be authorized. The South Carolina court found that punitive damages remained a possible option despite the limitations of the Code. *Flavor-Inn,* 424 S.E.2d at 537. **We agree that the adoption of this Code did not eliminate the potential for punitive damages arising from acts that contribute to conversion of a negotiable instrument.** Ensenat's request for punitive damages was not submitted to the jury. The trial court reviewed the evidence, included a sealed explanation of relevant banking practices, and found no basis for an award of punitive damages...
>
> ...We do not address whether the facts presented would have justified a punitive damage instruction. For reasons we will explain immediately below, we find that other errors by the trial court require that we reverse and remand. **If a new trial is held, this issue can**

be reconsidered based on the evidence that is then presented.

Id. at 12.

The *Ensenat* court realized that the propriety of awarding punitive damages must be assessed on the basis of the proof at trial, under the circumstances and facts presented by the testimony. Similarly, this Court should make such a determination. Conversion is an intentional tort. Punitive damages should be available, based upon the testimony at trial, and the application of substantive Mississippi punitive damages law to the facts presented.

Moreover, there is no doubt that the conversion of over $200,000.00 of Beacon's money severely damaged the limited liability company. The Bank's actions devastated the financial security of Beacon. In such cases, punitive damages are appropriate.

In *Griffith v. Griffith*, 997 So.2d 219 (Miss.Ct.App. 2008), the court found that punitive damages were properly assessed as damages resulting from conversion of a closely held corporations assets. In *Griffith*, the court considered whether or not Tom, one of the two shareholders of the corporation, was entitled to punitive damages against Harry, the other shareholder, based on Harry's conversion of company assets. In finding the punitive damage award and the attorney fee award appropriate, the court stated:

> Harry argues that the chancellor erred by awarding Tom $50,000 in punitive damages because Tom failed to prove that his conduct was malicious and because the chancellor did not have an evidentiary hearing on the matter. *Mississippi Code Annotated* section 11-1-65(1)(a) (Supp.2008) provides that punitive damages may be awarded where the plaintiff proves by clear and convincing evidence that the defendant (1) acted with actual malice, (2) acted with gross negligence which evidences a willful, wanton, or reckless disregard for the safety of others, or (3) committed actual fraud. As the finder of fact, it is within the chancellor's sound discretion whether to grant an award of punitive damages. *See Aqua-Culture Techs., Ltd. v. Holly,* 677 So.2d 171, 184 (Miss.1996). "[T]he question of whether

> punitive damages should be awarded depends largely upon the particular circumstances of the case." *Id.*
>
> The chancellor awarded Tom punitive damages based on Harry's operation of RGC, stating that it was clearly so wanton and aggravated as to warrant an award of punitive damages. Harry admitted that he used RGC's funds for his personal expenses and for the expenses of his other two businesses. Additionally, the court-appointed CPA and the chancellor found that RGC's financial records were not properly maintained and were in poor condition. Based on the foregoing, we hold that the chancellor's finding that ***Harry operated RGC with gross negligence, evidencing a willful, wanton, or reckless disregard for the financial security of the company, which warrants an award of punitive damages***, is supported by the evidence. Therefore, we find that the chancellor did not err by awarding Tom punitive damages based on Harry's operation of RGC.
>
> In its discretion, the trial court may award attorney's fees, absent a contractual provision or statutory authority, where the trial court has found that punitive damages are appropriate. *See Aqua-Culture Techs.*, 677 So.2d at 184 (citing *Greenlee v. Mitchell*, 607 So.2d 97, 108 (Miss. 1992). "The determination of an amount constituting a reasonable attorney's fee is within the sound discretion of the trial court." *Patterson v. Holleman*, 917 So.2d 125, 135 (Miss.Ct.App. 2005) This Court will not disturb the trial court's award of attorney's fees unless there was an abuse of discretion. *Id.*

Id. at 223-224 (emphasis added).

As in *Griffith*, the Bank's actions in this case were undertaken in "reckless disregard" for the financial security of Beacon. A bank's acceptance of a $208,000.00 check payable to a company that does not have an account at that bank, and then giving the bank's customer all of the proceeds of the check - without knowing the identity of the endorser - is not "simple" negligence. That conduct is, at a minimum, grossly negligent conduct. That conduct is indisputably undertaken in "reckless disregard" for the financial security of the true owner of the check. As in *Griffith*, punitive damages and attorneys fees are properly awarded. The action should be remanded to the trial court for assessment of punitive damages and attorney's fees.

CONCLUSION

This Court should not affirm the verdict. Mississippi has adopted the Uniform Commercial Code, and the Code is applicable to transfers of negotiable instruments in the state. When the applicable Code provisions are applied, those provisions compel a finding that this check was not properly or legally transferred to the Bank.

If this Court finds that the transfer of title to this check was in conformity with the UCC, this Court will be the only court to find that a negotiable instrument can be validly negotiated by an unidentified endorser. The Bank does not cite one case to this Court adopting such a rule, because there are none. No court has ever held that a negotiation can occur through an unidentified person.

There is no factual issue for the jury's determination. The payee of the check is Beacon - not its members. The jury cannot determine "ownership" of the check without being provided guidance as to applicable rules of transfer of title, and being provided evidence that those rules were followed. There is no evidence that the rules were followed in this case.

The judgment of the trial court should be reversed, and judgment rendered for Beacon as to the value of the check - $208,526.92 plus accrued interest. The action should be remanded to the Circuit Court of Copiah County, Mississippi, for a determination of punitive damages and attorney's fees.

Respectfully submitted,
BEACON PROPERTIES, PLAINTIFF/APPELLANT

BY: MICHAEL T. JAQUES
COUNSEL FOR PLAINTIFF/APPELLANT

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CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this date mailed, postage prepaid, a true and correct copy of the foregoing instrument to:

C. Paige Herring, Esq.
Scott, Sullivan, Streetman & Fox
P.O. Box 13847
Jackson, Mississippi 39236-3847
Attorney for Bank of the South

SO CERTIFIED on this the 29th day of April, 2009.

Michael T. Jaques