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

BRIEF OF THE APPELLANT

MICHAEL T. JAQUES
[redacted]
196 CHARMANT PLACE, SUITE 1
RIDGELAND, MISSISSIPPI 39157
601/969-7500

Attorney for Plaintiff/Appellant

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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;
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

VERSUS **CAUSE NO.: 2008-TS-00608**

BANK OF THE SOUTH

Defendant/Appellee

STATEMENT OF THE ISSUES

I. Did the trial court err in rejecting Beacon's peremptory jury instruction, P-14, and instead allow the jury to determine whether or not Beacon's check had been converted by Bank of the South, when the undisputed facts established conversion pursuant to §75-3-420, as there was no negotiation of the check, and the individual who presented the check to the Bank was not an individual entitled to enforce the instrument as required by the statute?

II. Did the trial court err in denying Plaintiff's Motion for Partial Summary Judgment as to conversion by ruling that whether or not Jason Traxler was a person "entitled to enforce" the check was an issue of fact for the jury instead of an issue of law, and then compound the error by refusing to grant Jury Instructions P-8 [R-704; RE-21], P-13 [R-708; RE-23], and P-12 [R-709; RE-22][1], which instructed the jury that if Jason Traxler was not "entitled to enforce the

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[1]Throughout Appellant's brief, the following designations apply to the record: "R-xx" refers to the first six volumes of the trial court record; "T-xx" refers to the last five volumes of the record, constituting the trial transcript; "RE-xx" refers to Appellant's record excerpts, and "Trial Ex.- xx" refers to the trial exhibits contained in the notebook supplied with the record.

instrument", Beacon should prevail on the conversion claim?

III. Did the trial court err in allowing the jury to determine title to the check, where the undisputed evidence established as a matter of law that pursuant to §75-3-307, the Bank had notice of Beacon's claim to the check, the Bank was not a holder in due course, and was therefore subject at all times to Beacon's claim to title of the negotiable instrument?

IV. Did the trial court err in refusing to grant jury instruction P-16, which would have allowed the jury to determine that the Bank had notice of the claim of Beacon to the instrument, and therefore prevented holder in due course status?

V. Did the trial court err in allowing the jury to determine whether or not "apparent authority" existed and, by giving Jury Instructions C-3 [R-699; RE-20] and D-1 [R-714; RE-27], err in instructing the jury as to the applicability of "apparent authority to negotiate" as a defense to the conversion of the check under the circumstances, and instructing the jury that the check had been negotiated, where no negotiation under the Uniform Commercial Code occurred?

VI. Did the trial court err in giving jury instruction D-12 [R-716: RE-28], which was a misplaced "mitigation of damages" instruction?

VII. Did the trial court err in refusing to grant Beacon Properties, LLC's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for New Trial [R-756-787], based on the errors raise therein, including the erroneous instructions given, and the fact that the jury's verdict was contrary to the overwhelming weight of the evidence?

IN THE SUPREME COURT OF MISSISSIPPI

BEACON PROPERTIES, LLC

Plaintiff/Appellant

VERSUS **CAUSE NO.: 2008-TS-00608**

BANK OF THE SOUTH

Defendant/Appellee

STATEMENT OF THE CASE

NATURE OF THE CASE

This appeal arises from a civil suit between Beacon Properties, LLC, a Mississippi limited liability company, and Bank of the South, a Copiah County, Mississippi bank. Plaintiff below, and Appellant herein, Beacon Properties, seeks damages from the Bank due to the Bank's conversion of a negotiable instrument payable to Beacon in the amount of $208,526.92. Mississippi's Uniform Commercial Code supplies the applicable law that should be determinative of the dispute. Beacon has alleged that the Bank, without a proper endorsement or negotiation, took Beacon's check, and applied it to debts of a single member of the limited liability company. The Bank's actions amount to conversion under the relevant UCC statute, §75-3-420, Mississippi Code of 1972, Annotated, and entitle Beacon to judgment.

Beacon contends that due to the undisputed facts set forth in the Pre-Trial Order, the pleadings, and testified to at trial, Beacon is entitled to judgment as a matter of law.

COURSE OF PROCEEDINGS BELOW AND DISPOSITION

On October 17, 2005, Beacon Properties, LLC, David Case, and Case Realty, Inc., filed an Amended Complaint against the Bank of the South and Billy and Jason Traxler, seeking multiple damages, including reimbursement of the converted funds, and other amounts owed by Traxler to Beacon and Case. [R - 12]. Prior to trial, a compromise settlement was reached between Case, Case Realty, and the Traxlers.

Subsequent to the settlement, the only litigation remaining was the claim by Beacon Properties, LLC, against the Bank for the proceeds of the $208,526.92 converted check. The trial court entered its Order dismissing Plaintiffs David Case and Case Realty on August 3, 2007. [R - 405]. On October 10, 2007, Plaintiff Beacon Properties, LLC filed its Second Amended Complaint. [R - 460].

The Second Amended Complaint set forth various and distinct causes of action against the Bank, including conversion pursuant to §75-3-420, negligence and gross negligence, unjust enrichment, establishment of a constructive trust, and a request for punitive damages. [R - 465-467].

Discovery progressed, and cross-Motions for Summary Judgment were filed by the parties. By Order of December 14, 2007, the trial court denied the Motions for Summary Judgment. [R - 485; RE-17]. The court found that pursuant to Mississippi's Uniform Commercial Code "Conversion" article, §75-3-420, an issue of fact existed as to whether or not Billy Traxler was an individual "entitled to enforce" the check.

On January 10, 2008, the trial court entered its Pre-Trial Order. [R - 840 - 871]. The

action proceeded to trial, commencing January 28, 2008, in the Circuit Court of Copiah County, Mississippi. After a four day trial, and subsequent to denying all motions for directed verdict, the case was submitted to the jury. The jury returned a verdict on behalf of Defendant, Bank of the South. A Judgment on the Jury Verdict was entered by the Court on February 4, 2008. [R - 750; RE-29].

Beacon Properties filed its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial. [R-756 - 787]. After hearing oral argument, the trial court denied the Motion by Order of March 31, 2008. [R-803; RE-30]. Plaintiff, Beacon Properties, LLC, perfected this appeal by the filing of a Notice of Appeal on April 10, 2008. [R-872; RE-32]. Subsequent to trial, Defendant Bank of the South changed its name to Metropolitan Bank. Beacon filed its Motion to Amend Pleadings to Reflect Appellee's Name Change to Metropolitan Bank with this Court. The Motion was denied. This brief is submitted in support of Beacon's appeal.

FACTS

This case arises from the Bank of the South's taking of a check payable to a Mississippi limited liability company - Beacon Properties, LLC, and giving all of the funds of the check to a non-managing member. The check was taken in a manner completely contrary to permissive transfers of negotiable instruments set forth in Mississippi's statutes adopting and implementing the Uniform Commercial Code. Beacon was damaged when the check was taken by the Bank for the sole benefit of one member of the LLC, depriving the LLC of $208,526.92 - the face value of the check . The undisputed facts of the case entitle Beacon Properties, LLC, the original

identified payee on the check at issue, to judgment against Bank of the South as a matter of law. The undisputed facts establish conversion of the instrument pursuant to § 75-3-420, Mississippi Code of 1972, Annotated.

Beacon Properties, LLC ("Beacon") is a limited liability company organized and existing under the laws of the state of Mississippi. In January, 2004, when the acts that give rise to this action occurred, Beacon Properties, LLC was owned equally by David C. Case, and Billy Traxler, as custodian and for the benefit of his minor son, Jason Traxler. [R-847].

Beacon was formed primarily to buy and sell property. Prior to Beacon's sale of property which generated the funds in dispute in this case, Beacon had sold at least three parcels of property, two of which were sold while Billy Traxler and David Case were members of the LLC. [T-161-166]. At the closing of the sales, Beacon would be issued a check payable to "Beacon Properties, LLC". That check would be deposited into Beacon's account at Union Planters' Bank in Jackson, Mississippi. Subsequently, the members of the LLC would meet, and determine how and when to disburse, or retain, the proceeds received by Beacon from the real estate sales. [T-166, line 10-27]. If disagreements existed as to how the funds should be spent or disbursed, the members met, discussed and resolved the issues, and then disbursed the funds. [T-164, line 13-20; T-166, line 18-27]. After the members met in conformity with the LLC's operating agreement, and a determination made as to whether and to what extent to disburse the funds, the funds were disbursed from Beacon's Union Planters' checking account. All funds had to be disbursed pursuant to the signature of David Case. Case was the only member with signature authority on the Beacon account. [T-171, line 26 through 172, line 10].

On January 23, 2004, Beacon Properties, LLC sold a parcel of real estate that it owned

located on Beasley Road in Jackson, Mississippi. Prior to the closing, Beacon had adopted a resolution that named David Case as the sole member of Beacon with authority to execute documents to facilitate the sale of the property on Beasley Road. [R-112; Trial Ex. P-16; RE-12; T-155, line 24 through T-156, line 17]. Additionally, in the Beacon Operating Agreement, at Paragraph 2.08, the Agreement, under the provision "Authority of Members", stated as follows:

> No Member has the authority or power to act for or on behalf of the LLC, to do any act that would be binding on the LLC, or to incur any expenditures on behalf of the LLC, without the express consent of each Member of the LLC. [Trial Ex. P-2, at p. 19; RE-13-16].

As the Bank's employees testified, at all material times, the Bank of the South had a copy of the Operating Agreement containing the restriction on Member authority in the Beacon loan file. [T - 408, line 17 - 27].

At the closing, which was completed at the law offices of Watkins & Eager, Beacon Properties, LLC received possession of two checks. One check was made payable to "Bank of the South", in the amount of $76,857.84. [R-114; RE-11; Trial Ex. P-3]. That check represented the pay off balance of an outstanding loan from Bank of the South to Beacon Properties, LLC. The loan was secured by the Beasley Road property. [T-156-157].

The second check represented Beacon's income from the sale of the property. [T-169, line 16-18]. That check was drawn on Trustmark National Bank, and made payable to "Beacon Properties, LLC" in the amount of $208,526.92. [R-114; RE-10; Trial Ex. P-1; T -157].

Unlike all of the preceding transactions, the $208,526.92 was never deposited into Beacon's Union Planter's account, or any account belonging to Beacon. [T-170, line 21 - 25].

After the closing, which occurred on a Friday afternoon, David Case took the

$208,526.92 check back to the offices of Beacon Properties, LLC, where he met with Billy Traxler. While Case made copies of the closing statements for Traxler, Traxler took both checks - the $76,857.74 check payable to the Bank of the South, and the $208,526.92 Beacon income check - out of Case's folder. Case never gave Traxler the checks. [T-172, line 16 through T-173, line 25]. Believing that Traxler could not lawfully deposit the Beacon income check into any account other than Beacon's Union Planters account, Case did not attempt to physically take the check back from Traxler. [T-174, line 2-7]. Traxler and Case discussed monies owed back and forth between Traxler and Case and their related companies, including Traxler's company, Central Digging Service; Case's realty company, Case Realty; a limited liability company owned by Case, Pioneer Logistics, LLC, and; a separate limited liability company the two of them had formed together, Auto Motel, LLC. [T-180, line 13, through T-181, line 24.] Case and Traxler disagreed on amounts owed between the two of them and the various entities, and could not resolve the matters without further discussion and documentation. They agreed to obtain the necessary documents, and to meet Monday morning to continue their discussions and resolve the issues. [T-181, line 25 through T-182, line 5].

At all times, it was Case's intent to process and handle the funds from the sale of the Beasley Road property in the exact fashion all other Beacon funds had been handled - to place the funds into Beacon's checking account, agree upon a disbursement, and disburse from that account. [T-182, line 9-18]. Case was the designated tax matters partner for Beacon, and needed bank statements and deposit records to fulfill his responsibilities, and to report the income to the Internal Revenue Service. [T-177, line 17 through T-178, line 8.]. With respect to the sale of the Beasley Road property, Beacon had been furnished an IRS form 1099S, showing income to

Beacon of the entirety of the sale price - $325,000.00. That form would be sent to the IRS, and Case needed the banking records reflecting deposit of the true income figure - $208,526.92 - to document Beacon's actual income for tax purposes. [T-176, line 7 through T-178, line 8; Trial Ex. P-15].

The meeting planned for Monday never occurred. Case attempted to call Traxler and force a meeting without success. Case and Traxler never met to determine how to disburse the proceeds. Instead, unknown to Case at the time, on that same Monday, January 26, 2004, Jason Traxler, Billy Traxler's son, took the $208,526.92 check to Bank of the South in Crystal Springs, Mississippi, where Billy and Jason Traxler were long time customers, and where the Traxlers kept their personal accounts, business loans, and business accounts.

Beacon Properties, LLC never had a checking account at Bank of the South, and had no accounts at Bank of the South on January 26, 2004. Beacon did have an outstanding real estate loan on the Beasley Road property with Bank of the South, which was paid off by Jason Traxler's delivery of the $76,857.74 check from the Beasley Road property closing payable to Bank of the South.

The following material facts were stipulated to by the parties in the Pre-Trial Order, and were confirmed by the testimony at trial, and are determinative of this action:

h. On January 26, 2004, Jason Traxler, the son of Billy Traxler, took the check to Bank of the South, and presented the check to the Bank.

i. At the time Jason Traxler brought the check to the Bank of the South, the check was examined by Laura Westmoreland, a Bank of the South employee.

j. Prior to the time the check was presented to the Bank, the words "Beacon

Properties" were written on the back of the check.

k. The back of the check contains the words "Beacon Properties."

l. 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].

Laura Westmoreland, a Vice President of Bank of the South, testified at trial that she handled the Traxler transactions on January 26, 2004, when Jason brought the checks to the Bank. Westmoreland was the bank officer who had completed the Beacon loan on the Beasley Road property, and was familiar with both Case and Traxler. [T-375, lines 7-8].

Westmoreland testified that David Case had called her a few days before the Beasley Road property closing, and had asked her to telefax the payoff on the Bank of the South property loan to a paralegal at Watkins & Eager, so that the settlement statements and disbursements could be accomplished out of closing. [T-403, line 8 through T-404, line 4]. Westmoreland also testified that Case told her that Billy Traxler would be coming in to "pay off some other loans and do some other transactions." According to Westmoreland, Case told her nothing else. [T-406, line 2 - 20].

Westmoreland testified that at the time Jason Traxler presented the $208,526.92 check, the words "Beacon Properties" were already written on the check. Westmoreland did not see Jason Traxler, or anyone else, write those words on the check. [T-381, line 19 through 382, line 1; Trial Ex. P-1; RE-10].

Westmoreland testified that she did not know who wrote the words "Beacon Properties" on the back of the check, but that she was not concerned, because the Bank had no policies

requiring endorsements of checks by an identified person. [T-397, line 13 - T-398, line 1]. To the best of her knowledge, neither Jason nor Billy wrote "Beacon Properties" on the back of the check, and, as far as Westmoreland knows, anyone could have done it. [T-398, line 7-13]. As Beacon had no accounts at the Bank, the Bank could not stamp or otherwise supply the endorsement. [T-398, line 14-17]. The fact that Case did not write those words on the check is undisputed. The Bank never contended that he did.

Westmoreland testified that the Bank violated its own policies in the handling of the check. She testified that a check such as the Beacon check for $208,526.92 be endorsed. [T-398, line 18-21]. Westmoreland further testified that the Bank requires that the check be endorsed by someone with the authority to endorse the check. [T-398, line 22-24]. Westmoreland testified that she made no effort to determine who signed Beacon Properties on the check, or whether the person who had placed those words on the check had the authority to do it.

Q: Right, but you made no inquiry or investigation to determine either who had signed that check or whether they had the authority to sign it, isn't that correct?

A: That's correct. [T-399, line 2-6].

Westmoreland took the $76,857.74 check payable to Bank of the South for the loan payoff and paid off the Beasley Road property loan, writing out the payment ticket and completing the transaction. At that point, Beacon Properties, LLC owed no further monies to Bank of the South. [T-381, line 7 through T-383, line 12].

Notwithstanding a lack of knowledge of the identity of the individual who had placed the words "Beacon Properties" on the back of the check payable to Beacon for $208,526.92, or whether or not that unidentified person had the authority to do so, Westmoreland then took the

$208,526.92 check, and brought it into the office of Ralph Olier, President of the Bank. Olier was visiting with a customer when Westmoreland entered. Olier took the check from Westmoreland, looked at the check, and said to Westmoreland "yes, this is Billy's money", and said "that's fine". Olier then handed the check back to Westmoreland. Olier and Westmoreland elected not to discuss the check further because of the other customer's presence in Olier's office. [T-384, line 3 - 29].

Westmoreland then called Billy Traxler on the telephone, and Traxler told Westmoreland what to do with the check. Traxler told her he wanted some funds applied to his personal loans, and to have some bank checks issued. Westmoreland did exactly as Traxler requested. [T-385, line 4-16].

At Traxler's request, out of the proceeds of Beacon Properties, LLC's funds, Westmoreland paid off three of Traxler's loans, all held in the name of Traxler's company, Central Digging Service, Inc. Loan number 19194 was paid off, in the amount of $33,061.05. Loan number 189707, made to Traxler to purchase a Hummer vehicle, was also paid off by Westmoreland. The payoff on the Hummer loan was $56,357.32. The third loan that was paid off was secured by a 2003 Kenworth tractor. The payoff on the Kenworth loan was $56,365.73. [T-385, line 17 through T-389, line12; Trial Ex. P-7].

The balance of the $208,526.92 check was issued in official bank checks at the direction of Traxler as follows:

> Bank of the South check number 17158 payable to Robert W. Lawrence Escrow Account in the amount of $17,514.85.
>
> Bank of the South check number 17159 payable to L. Traxler (Jason) in the amount of $30,242.82.

Bank of the South check number 17160 payable to Utility Trailers in the amount of $15,000.00.

[T-391, line 10 through T-397, line 3]; Trial Ex. P-14]

The bank check payable to Jason Traxler for $30,242.82 was not processed. Jason brought that check back to the Bank in March, 2004, and exchanged it for official bank check number 17349 payable to Fleetwood Homes in the amount of $20,000.00, and two additional checks, numbers 17350 and 17351, payable to L. Traxler in the amount of $5,000.00 each. [T-396, line 25 through T-397, line 4; Trial Ex. P-14]. These derivative checks did not benefit Case or Beacon in any respect.

At all times, the Bank had actual knowledge of the relationship between Billy Traxler and Beacon Properties, LLC. The Bank knew that Traxler was a member of the LLC. [See Defendant's Itemization of Fact, at No. 14 [R - 99], stating that the Bank was "fully aware" of the relationship]. The Bank also knew, by completing the transactions, that the funds from the $208,526.92 check payable to Beacon Properties, LLC, were being applied to personal debts of Billy Traxler, and not debts or obligations of Beacon Properties, LLC. Westmoreland knew that neither Case nor Beacon was responsible for the loans paid off by the Bank for the benefit of the Bank and Traxler. [T-386, line 20-28].

As a result of the Bank's conduct, Beacon Properties, LLC was deprived of the funds. All the funds represented by the $208,526.92 check went to Billy Traxler, Jason Traxler, or third parties at their direction. At no time did Beacon Properties, LLC obtain benefit of the funds represented by the check. [See Affidavit of David Case R-116].

At no time did Beacon Properties, LLC or David Case give Billy Traxler or Jason Traxler

authority, permission, or consent to negotiate, endorse, transfer, or deliver to any person or entity the check payable to Beacon Properties, LLC from Watkins & Eager law firm in the amount of $208,526.92. At all times, Beacon Properties was the identified payee on the check, and is entitled to the check, and all funds represented by the check. [R-116].

SUMMARY OF THE ARGUMENT

The trial court erred in allowing this action to proceed to trial. There was no fact in dispute that was legally material to this action. Once it was established that the Bank could not identify the person who placed the words "Beacon Properties" on the check in an effort to endorse it, it became legally impossible for the Bank to prevail. Without being able to identify the individual who wrote those words on the check, the Bank could not establish a valid endorsement or negotiation, could not prove a valid transfer of title to the negotiable instrument, could not establish that the Bank was a holder, and could not legally defeat Beacon's valid claim of title to the instrument and its proceeds. §75-3-420, Mississippi Code of 1972, Annotated.

I. The trial court erred in allowing the jury to determine whether or not Beacon's check had been converted by Bank of the South, as the Bank's acts in taking the check amount to conversion pursuant to § 75-3-420, Mississippi Code of 1972, Annotated.

The court should have granted Beacon's peremptory instruction, P-14 [R-709: RE-24]. Under applicable law as set forth in Mississippi's statutory adoption of the Uniform Commercial Code's Article 3 and 4, the Bank converted the check payable to Beacon Properties, LLC, as the sole, identified payee, in the amount of $208,526.92. *§ 75-3-420, Mississippi Code of 1972, Annotated.* The Bank is guilty of conversion under the statute because it did not take the check from a "person entitled to enforce the instrument" and because there was no "negotiation" of the check. "Negotiation" requires delivery of the check, and a proper "indorsement" by a "holder". In

this case, the check was not obtained by the Bank from "a person entitled to enforce the instrument" and it was not indorsed at all - much less by a holder. The check was simply noted on the back "Beacon Properties". This is not a valid indorsement, as it does not constitute a signature of any identified individual. Moreover, the Bank cannot identify the individual or individuals who allegedly "indorsed" the check with this insufficient writing.

II. **The trial court erred in denying Plaintiff's Motion for Partial Summary Judgment as to conversion by ruling that whether or not Jason Traxler was a person "entitled to enforce" the check was an issue of fact for the jury instead of an issue of law, and then compounded the error by refusing to grant Jury Instructions P-8 [R-704;RE-21], P-13 [R-708; RE-23], and P-12 [R-709: RE-28], which instructed the jury that if Jason Traxler was not "entitled to enforce the instrument", Beacon should prevail on the conversion claim.**

The trial court did not instruct the jury as to the UCC conversion claim, which was plead specifically in the Second Amended Complaint. Notwithstanding the lack of endorsement or negotiation of the instrument, in denying the Motions for Summary Judgment, the trial court ruled that a jury should determine, pursuant to §75-3-420, whether or not Jason Traxler or Billy Traxler was a "person entitled to enforce the instrument". The trial court erred, in that such a determination is a matter of law. The trial court also erred in not applying clear Mississippi statutory law to determine that Traxler was not entitled to enforce the check, including § 79-3-295 and § 79-29-701, which provide that a limited liability company's property is personal to the company, and that no individual member may enforce any obligation owed to the company. These statutes, and Mississippi case law, clearly establish that no member of a limited liability company has any personal right to enforce any obligation owed to the limited liability company, including a check.

The trial court erred in denying Beacon's Motion for Summary Judgment relative to the §75-3-420 conversion claim. The issue of whether or not Jason Traxler was an individual "entitled to enforce the instrument" under the UCC was an issue of law. It is not an issue of fact, and never should have been presented to the jury. However, once the court determined that it was an issue of fact, the court should have instructed the jury as to the issue, and allowed Beacon to instruct the jury as to the elements of the §75-3-420 conversion claim, including the "entitled to enforce" element.

III. The trial court erred in allowing the jury to determine title to the check, where the undisputed evidence established as a matter of law that pursuant to §75-3-307, the Bank had notice of Beacon's claim to the check, the Bank was not a holder in due course, and was therefore subject at all times to Beacon's claim to title of the negotiable instrument.

Under applicable law, specifically, § 75-3-306, Mississippi Code of 1972, Annotated, the Bank took the check subject to the claims of the identified payee, Beacon Properties, LLC. The Bank's taking is subject to the claims of Beacon, as the Bank was not a "holder in due course" pursuant to § 75-3-302. The Bank was not a "holder in due course", because it took the draft with actual knowledge and notice of Billy Traxler's and/or Jason Traxler's breach of fiduciary duty to Beacon Properties, LLC, by applying the funds directly to Traxler's personal obligations and debts. § 75-3-307 specifically contemplates this type of wrongful conduct, and prohibits the Bank from becoming a holder in due course, and avoiding the claim of Beacon Properties, LLC, the rightful owner of the check.

IV. The trial court erred in refusing to grant jury instruction P-16 [R-711: RE-25-26], which would have allowed the jury to determine that the Bank had notice of the claim of Beacon to the instrument, and therefore prevented holder in due course status.

The Bank was obligated to prove its holder in due course status to defeat the claim of

Beacon to the instrument. Beacon submitted instruction P-16, which assimilated the "notice of claim" language of §75-3-307 of Mississippi's Uniform Commercial Code relative to holder in due course status. The court refused the instruction, and therefore did not instruct the jury as to Beacon's claim that the Bank was not a holder in due course.

V. **The trial court erred in allowing the jury to determine whether or not "apparent authority" existed and, by giving Jury Instructions C-3 [R-699; RE-20] and D-1 [R-714; RE-27], erred in instructing the jury as to the applicability of "apparent authority to negotiate" as a defense to the conversion of the check under the circumstances, as no negotiation under the Uniform Commercial Code occurred.**

"Apparent authority" was a theory and defense advanced by the Bank in this case without any basis in law or fact. At no time did the Bank point to any act of any person to which an "apparent authority" analysis could be argued applicable. The Bank's claims of apparent authority failed to such an extent that an "apparent authority" instruction that comported with the evidence at trial could not be drafted. The only evidence presented at trial was that no individual associated with Beacon Properties, LLC endorsed the instrument. The "apparent authority" jury instruction which was given had no basis in fact or law. The "apparent authority" argument cannot be made in a vacuum. The Bank never offered any proof of a legally material act to which the Bank contended "apparent authority" applied.

Additionally, the trial court erred in instructing the jury relative to "apparent authority" based on the testimony of Laura Westmoreland. Even if Westmoreland's testimony is believed in its entirety, the alleged representations are insufficient, as a matter of law, to vest Billy Traxler or Jason Traxler with the authority to do anything related to the subject check.

Most importantly, under the facts of this case, the Bank does not contend that either Jason Traxler or Billy Traxler endorsed the check, and offered no proof of the identity of the endorser

at trial. The Bank has admitted that it cannot identify the endorser of the check. Such was even admitted by stipulation in the Pre-Trial Order. For that reason, there is no act of either Billy or Jason Traxler to which an "apparent authority" analysis can be applied.

VI. The trial court erred in giving jury instruction D-12 [R-716; RE-28], which was a misplaced "mitigation of damages" instruction.

In giving a mitigation of damage instruction, the trial court erred. Under the circumstances of this case, the instruction erroneously instructed the jury that Beacon had a duty to act to prevent the processing of the check by the Bank. The granting of the instruction was error, and requires reversal.

VII. The trial court erred in refusing to grant Beacon Properties, LLC's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for New Trial, based on the erroneous instructions given, and the fact that the jury's verdict was contrary to the overwhelming weight of the evidence.

Subsequent to trial, Beacon filed its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial. The trial court erroneously denied the Motion. Notwithstanding the legal errors present in the jury instructions, based on the facts and testimony presented at trial, the verdict of the jury was contrary to the overwhelming weight of the evidence.

The jury verdict in this action should be reversed, and judgment rendered in favor of Beacon Properties, LLC for the full value of the converted instrument. In the alternative, the judgment should be reversed, and the action remanded to the Circuit Court of Copiah County, Mississippi, for a new trial.

ARGUMENT I.

I. The trial court erred in allowing the jury to determine whether or not Beacon's check had been converted by Bank of the South, as the Bank's acts in taking the check amount to conversion pursuant to § 75-3-420, Mississippi Code of 1972, Annotated.

The Bank's actions amount to conversion of the instrument. There was no valid "negotiation" of the instrument, and it was not taken from a "...person entitled to enforce the instrument...". § 75-3-420, Mississippi Code of 1972, Annotated, is Mississippi's "conversion" statute related to negotiable instruments. It reads as follows

> **75-3-420. Conversion of Instrument**
>
> (a) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, **other than a negotiation**, from a person **not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment**. An action for conversion of an instrument may not be brought by (I) the issuer or acceptor of the instrument or (ii) a payee or indorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.
>
> (b) In an action under subsection (a), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
>
> (c) A representative, **other than a depositary bank**, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.
>
> **[Emphasis supplied]**

§75-3-420 establishes a viable cause of action for conversion where the instrument, in this case, a check, is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument. In this case, the statute requires a determination of:

a. whether there was a valid "negotiation", and

b. whether or not Jason Traxler, from whom the check was taken by the Bank, was a "...person not entitled to enforce the instrument..."

A. **There was no valid "negotiation" of the check, because it was not "indorsed".**

Pursuant to § 75-3-201, "negotiation" must include a valid "indorsement". § 75-3-201 reads as follows:

> 75-3-201 - Negotiation
>
> a) "Negotiation" means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.
>
> (b) Except for negotiation by a remitter, **if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder.** If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.
>
> **[Emphasis supplied]**.

As such, a valid "negotiation" requires a transfer of possession, and "...its indorsement by the holder".

It is undisputed that the check for $208,526.92 was not a "bearer" instrument. It was made payable to a specific payee, Beacon Properties, LLC. [RE-10; Trial Ex. P-1]. As the check was made payable to an identified payee, an indorsement was absolutely necessary to accomplish "negotiation". The indorsement had to be made by a "holder" of the instrument.

> § 75-3-204 (a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (I) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement....

Crucially, a "signature" is required to constitute an "indorsement". Here, there is no "signature". There is no individual identified as the indorser, by signature or otherwise. **As stipulated in the Pre-Trial Order, the Bank cannot identify the individual who placed the words "Beacon Properties" on the check**. [R - 848]. Because there is no "signature", and the person who wrote on the back of the check is unidentified, there can be no "indorsement".

Moreover, for a "negotiation" to occur, the "indorsement" must be made ***by a holder*** of the instrument. Again, because the Bank cannot identify the individual who placed the words on the check, even if those words are considered an indorsement, there is no individual identified as the "holder" who could have indorsed the check.

Notwithstanding the fact that the Bank cannot identify Jason Traxler as the individual who wrote those words on the check, in response to Beacon's Motion for Summary Judgment, the Bank argued that Jason Traxler was a "holder". The argument is misplaced. § 75-1-201(20) defines "holder" as follows:

> (20) "Holder" means:
>
> (a) The person in possession of a negotiable instrument that is payable either to bearer or ***to an identified person that is the person in possession***;
>
> (b) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or
>
> (c) The person in control of a negotiable electronic document of title.

Jason Traxler, in possession of the check, cannot be a "holder". He is not the "identified person" to whom the instrument is payable. Even if Jason Traxler put those words on the check, and even if such words constituted an "indorsement", the Bank's argument still fails. "Negotiation" requires "indorsement" ***by the "holder"***. Since Jason was not "Beacon Properties,

LLC" - the sole payee on the check - he is not a "holder", and cannot negotiate the check.

As there is no "indorsement" by a "holder" there is no "negotiation". As there is no "negotiation", the action for conversion is well founded, unless Jason Traxler, the person from whom the Bank took the check, was a person "...entitled to enforce the instrument." Because Jason Traxler was not a person entitled to enforce the instrument, Beacon prevails on the conversion claim.

B. Jason Traxler was a person "...not entitled to enforce the instrument".

Neither Jason Traxler, nor Billy Traxler, as a 50% owner of Beacon Properties, LLC, was entitled to enforce the instrument. The check was the personal property of Beacon Properties, LLC - a limited liability company. Pursuant to Mississippi law, the property of a limited liability company is personal to that limited liability company. Jason Traxler had no interest in specific limited liability company property.

The only named payee on the instrument was "Beacon Properties, LLC". As set forth in the Affidavit of David Case, and at trial, no assignment of Beacon's interest had occurred with respect to the instrument. Moreover, Beacon Properties, LLC had never authorized Jason Traxler or Billy Traxler to enforce, negotiate, or otherwise transfer the check. [R-116].

§79-29-701, Mississippi Code of 1972, Annotated, reads as follows:

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

Neither Billy nor Jason Traxler had any "interest" in the check, which was the property of Beacon - the LLC. Only a party with "interest" may maintain an action to enforce an obligation. Miss. Code Civ. Proc. Rule 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 LLC, Jason Traxler could not have "enforced the instrument".

In addition, as a member of the Beacon Properties, LLC, neither Jason Traxler nor his beneficial owner, Billy Traxler, was a proper party to enforce any obligation owed to the limited liability company. § 79-3-295, Mississippi Code of 1972, Annotated, specifically prohibits enforcement of an obligation owed to a limited liability company by an individual member. The statute reads, in material part, as follows:

> § 79-29-305 - Liability to third parties
>
> (1) A person who is a member of a limited liability company is not liable, by reason of being a member, under a judgment, decree or order of a court, or in any other manner, for a debt, obligation or liability of the limited liability company, whether arising in contract, tort or otherwise or for the acts or omissions of any other member, manager, agent or employee of the limited liability company.
>
> (2) **A member of a limited liability company is not a proper party to a proceeding by or against a limited liability company, by reason of being a member of the limited liability company**, except:
>
> (a) Where the object of the proceeding is to enforce a member's right against or liability to the limited liability company; or
>
> (b) In a derivative action brought pursuant to Article 11 of this chapter.

Jason Traxler was not an individual "entitled to enforce the instrument". The instrument, which named "Beacon Properties, LLC" as the sole payee, was the personal property of Beacon Properties, LLC. Neither Jason Traxler nor Billy Traxler had any interest in the property. Moreover, each of them, as a member, is specifically barred by statute from seeking enforcement

of a obligation owed to the limited liability company. Any action to enforce the check against the maker, Watkins & Eager, by statute and common law, could only have been commenced by the owner of the instrument, Beacon Properties, LLC, in its proper legal form.

The UCC also defines a "person entitled to enforce the instrument" to exclude Jason Traxler. § 75-3-301, Mississippi Code of 1972, reads in part, as follows:

> 75-3-301 Person Entitled to Enforce Instrument
>
> Person entitled to enforce" an instrument means (I) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 75-3-309 or 75-3- 418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

As set forth above, Jason was not a "holder" - he was not the identified payee in possession of the check. Jason was also not a "non-holder in possession of the instrument who has the rights of a holder". He may have been a "non-holder in possession" - but he did not have "the rights of a holder". Again, there was no assignment, authorization, or other transfer of the rights or ownership interest of Beacon Properties, LLC in the check to Jason Traxler. Jason had no right, by assignment or otherwise, to the proceeds of the check, which was the personal property of the LLC. The Bank's argument that since Jason and/or Billy owned a portion of the LLC, that the Court should equate their identity with that of the LLC, is misplaced. Whether Jason or Billy owned 1% or 99% of the LLC, they are not the LLC for purposes of being the "person" to whom the check was payable. It was payable to Beacon Properties, LLC - not to Jason Traxler or Billy Traxler.

As there was no "negotiation" of the instrument, and as Jason Traxler was an individual

"...not entitled to enforce the instrument...", the Bank's acts of taking the check amount to conversion pursuant to §75-3-420. .

The trial court, upon consideration of Beacon's Motion for Summary Judgment, denied the Motion, and found that whether or not Billy Traxler/Jason Traxler was "entitled to enforce" the instrument was a jury issue. The court erred. That issue is an issue of law, that should be determined in Beacon's favor.

Beacon submitted jury instruction P-14, a peremptory instruction for Beacon, which read as follows:

> The Court instructs the jury to find for Plaintiff, Beacon Properties, LLC, and against Bank of the South, in the amount of $208,526.92. The form of your verdict shall be:
>
> "We, the jury, find for the plaintiff in the amount of $208,526.92." [R - 709; RE-24].

The instruction was refused. The court erred in refusing the instruction. The jury should have been instructed to find for Beacon Properties, LLC, in the amount of the check.

As the Bank took the check from Jason Traxler - a person not entitled to enforce the instrument - and since the instrument had not been negotiated, conversion was established. The court erred in ruling otherwise, and allowing the jury to rule on the issue. Plaintiff Beacon Properties, LLC, is entitled to the funds.

C. <u>The Bank's claims to the instrument fail as a matter of law due to the lack of proof of the identity of the endorser</u>.

As the Bank claimed under an endorsement, **the Bank had the burden of proof to prove the validity of the endorsement**. *Foremost Insurance Company v. First City Savings & Loan Association of Lucedale*, 374 So.2d 840 (Miss. 1979). David Case testified and presented

uncontroverted proof that the purported endorsement on the check was unauthorized, and not undertaken by him. Case testified emphatically that he did not write the words "Beacon Properties" on the check. [T-189, line 12-13], and Case's testimony was undisputed by the Bank. The only other member of the LLC, Billy Traxler, testified that to the best of his knowledge, neither he nor his son, Jason Traxler, endorsed the check. [T-497, lines 25-27]. There is no proof in the record of the identity of any individual - much less an "authorized" individual, who endorsed the check. The endorsement is therefore, by law, an "unauthorized" endorsement. Pursuant to the Uniform Commercial Code and Mississippi law, an "unauthorized endorsement" is equivalent to a "forged endorsement". *Delta Chemical & Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So.2d 862 (Miss. 2001). Neither transfers title to the instrument. No negotiation of the instrument ever occurred. Without negotiation, the Bank of the South never became a "holder". Without becoming a "holder", the Bank of the South never took title to the instrument, never became a "holder in due course", and was at all times, subject to the claims to the instrument of the only payee/holder of the check, "Beacon Properties, LLC". Accordingly, based upon the undisputed facts, Beacon is entitled to judgment in its favor.

ARGUMENT II.

II. The trial court erred in denying Plaintiff's Motion for Partial Summary Judgment as to conversion by ruling that whether or not Jason Traxler was a person "entitled to enforce" the check was an issue of fact for the jury instead of an issue of law, and then compounded the error by refusing to grant Jury Instructions P-8 [R-704; RE-21], P-13 [R-708; RE-23], and P-12 [R-709; RE-22], which instructed the jury that if Jason Traxler was not "entitled to enforce the instrument", Beacon should prevail on the conversion claim.

The trial court's Order denying Beacon's Motion for Partial Summary Judgment as to the conversion claim pursuant to §75-3-420 reads, in part, as follows:

The Court finds that there does exist questions of fact as to whether or not Billy Traxler on the day in question was a person entitled to enforce the instrument presented to the Defendant, the Bank of the South, and whether, Defendant, Bank of the South, had sufficient evidence before it to accept said Billy Traxler as a person entitled to present or have the check cashed.

[R - 487; RE-19].

As such, the court determined that the issue of fact to be tried to the jury was whether or not Billy Traxler was a person "entitled to enforce" the instrument.[2] As set forth above, Beacon disagrees with the ruling, and vigorously contends that such a determination should have been an issue of law, not an issue of fact. Beacon incorporates such arguments previously made in support of this assignment of error, and contends that the trial court erred in denying Beacon's Motion for Partial Summary Judgment, and erred in ruling that the jury should determine whether Jason or Billy Traxler had a right of action to enforce the instrument.

The trial court additionally erred by refusing Beacon's jury instructions related to the "entitled to enforce" issue. The following instructions were submitted and proposed by Beacon, and refused by the trial court:

Jury Instruction P-8

The Court instructs the jury that at the time the check in dispute was given to the Bank of the South by Jason Traxler, that the only entity entitled to enforce the instrument was Beacon Properties, LLC. [R - 704; RE-21].

Jury Instruction P-13

The Court instructs the jury that at the time the check in dispute was given to Bank of the South by Jason Traxler, that Jason Traxler was an individual not entitled to enforce the instrument. [R - 708; RE-23].

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[2]In subsequent appearances before the trial court, the court directed that the Order should have read "Jason Traxler" instead of "Billy Traxler", as there was no dispute between the parties that it was Jason Traxler who brought the check into the bank.

Jury Instruction P- 12

The Court instructs the jury that the Uniform Commercial Code provides applicable rules and laws with respect to this case. Pursuant to the Uniform Commercial Code, Beacon Properties, LLC has alleged that Bank of the South has, through conversion of Beacon Properties, LLC's check payable to Beacon Properties, LLC in the amount of $208,526.92, deprived Beacon Properties, LLC of the use and possession of those funds, and is therefore liable to Beacon Properties, LLC for the amount of the check.

The relevant section of the Uniform Commercial Code provides that a check is converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.

The Court instructs the jury that, as a matter of law, the Beacon Properties, LLC check was taken by Bank of the South by transfer from Jason Traxler, and that no negotiation of the check occurred. The Court further instructs the jury that Bank of the South made or obtained payment with respect to the check. **Accordingly, if you find by a preponderance of the evidence that Jason Traxler was a person "not entitled to enforce the instrument", your verdict shall be for Plaintiff.** [R - 707; RE-22] **[Emphasis supplied]**.

The court erred in denying these instructions. As to P-8 and P-13, the instructions were peremptory in favor of Beacon, but should have been granted, as the proof at trial showed that Jason Traxler, as an individual minor owner of a membership interest in the LLC, was not "entitled to enforce" the instrument, and Beacon Properties, LLC, the payee on the check, was the only entity entitled to enforce it. However, Jury Instruction P-12 was also refused. By refusing instruction P-12, the trial court denied Beacon an opportunity to instruct the jury as to the Uniform Commercial Code conversion claim under §75-3-420. The proposed instruction would have given the jury an opportunity to determine the only fact the trial court found in dispute and material to the resolution of the action - i.e., was Traxler "entitled to enforce" the instrument. **As such, the trial court not only erred in failing to instruct the jury relative to Beacon's theory of the case, but also failed to instruct the jury as to the trial court's theory**

of the presence of a material issue of fact. No other jury instruction was given which addressed the issue.

The denial of the instructions was error. Beacon contends that the issue of "entitled to enforce" is an issue of law. However, if the trial court was correct in determining that it was an issue of fact, then the court should have allowed the jury an opportunity to resolve it. By denying the jury an opportunity to resolve the material of issue of fact, the court deprived Beacon of an opportunity to prevail on the action. Such is error, and requires reversal of the verdict.

ARGUMENT III.

III. The trial court erred in allowing the jury to determine title to the check, where the undisputed evidence established as a matter of law that pursuant to §75-3-307, the Bank had notice of Beacon's claim to the check, the Bank was not a holder in due course, and was therefore subject at all times to Beacon's claim to title of the negotiable instrument.

Notwithstanding all other arguments, the Bank's claim to the instrument must fail as a matter of law, because the Bank was not a holder in due course, and remained subject to the claims of Beacon to the instrument.

A. The Bank was never a "holder" of the check.

As set forth previously herein, Beacon contends the Bank was never a "holder" of the instrument, as the Bank was never the named payee. § 75-1-201(20) defines "holder" in part as follows:

> (20) "Holder" means:
>
> (a) The person in possession of a negotiable instrument that is payable either to bearer or ***to an identified person that is the person in possession***;

The Bank, in possession of the check, cannot be a "holder". The Bank is not the "identified person" to whom the instrument is payable. The Bank is not the named payee, and the

instrument is not bearer paper. Regardless, even if somehow the Bank could qualify as a "holder", it cannot qualify as a holder in due course.

B. **The Bank was not a holder in due course of the check**.

Under Mississippi's commercial paper law, a transferee that takes a negotiable instrument is subject to the claims of rightful owners of the instrument unless the transferee is a "holder in due course". § 75-3-306 Mississippi Code of 1972, states the rule as follows:

> A person taking an instrument, ***other than a person having rights of a holder in due course***, **is subject to a claim of a property or possessory right in the instrument or its proceeds, including a claim to rescind a negotiation and to recover the instrument or its proceeds.** A person having rights of a holder in due course takes free of the claim to the instrument.
>
> § 75-3-306 [**Emphasis supplied**].

As such, if it is determined that the Bank was not a "holder in due course" with respect to the $208,526.92 check payable to Beacon Properties, LLC, the Bank is subject to the claims of Beacon Properties, LLC, the actual owner of the check.

§ 75-3-302 sets forth the requirements necessary to become a "holder in due course", and take the instrument free from such claims. The statute reads, in part, as follows:

> **75-3-302. Holder in Due Course**
>
> (a) Subject to subsection (c) and Section 75-3-106(d), "holder in due course" means the holder of an instrument if:
>
> (1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
> (2) The holder took the instrument (I) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, **(v) without notice of any claim to the instrument described in Section 75-3-306**, and (vi)

without notice that any party has a defense or claim in recoupment described in Section 75-3-305(a).

Pursuant to §75-3-302 - assuming the Bank is a holder - if the Bank took the check "without notice of any claim to the instrument", it can be a "holder in due course". In this case, applying §75-3-307, because of the Bank's actual notice and knowledge of the fiduciary status of Billy and/or Jason Traxler to Beacon Properties, LLC, the Bank had knowledge and notice of the claim of Beacon Properties, LLC to the check, and cannot be a "holder in due course". The Bank is therefore subject to Beacon Properties, LLC's possessory interest in the check and the proceeds.

§ 75-3-307 reads, in part, as follows:

75-3-307 Notice of Breach of Fiduciary Duty

a) In this section:

(1) "Fiduciary" means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.

(2) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in paragraph (1) is owed.

(b) If (I) an instrument is taken from a fiduciary for payment or collection or for value, (ii) the taker has knowledge of the fiduciary status of the fiduciary, and (iii) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:

(1) **Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.**

(2) **In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (I) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.**

[Emphasis supplied].

The official comment to 75-3-307 reads, in part, as follows:

1. **This section states rules for determining when a person who has taken an instrument from a fiduciary has notice of a breach of fiduciary duty that occurs as a result of the transaction with the fiduciary**... Section 3-307 is intended to clarify the law by stating rules that comprehensively cover the issue of **when the taker of an instrument has notice of breach of a fiduciary duty and thus notice of a claim to the instrument or its proceeds.**

2. Subsection (a) defines the terms "fiduciary" and "represented person" and the introductory paragraph of subsection (b) describes the transaction to which the section applies. **The basic scenario is one in which the fiduciary in effect embezzles money of the represented person by applying the proceeds of an instrument that belongs to the represented person to the personal use of the fiduciary. The person dealing with the fiduciary may be a depositary bank that takes the instrument for collection or a bank or other person that pays value for the instrument...** Subsections (b)(2), (3), and (4) state rules for determining when the person dealing with the fiduciary has notice of breach of fiduciary duty. Subsection (b)(1) states that notice of breach of fiduciary duty is notice of the represented person's claim to the instrument or its proceeds.
Under Section 3-306, a person taking an instrument is subject to a claim to the instrument or its proceeds, unless the taker has rights of a holder in due course. Under Section 3-302(a)(2)(v), the taker cannot be a holder in due course if the instrument was taken with notice of a claim under Section 3-306. Section 3-307 applies to cases in which a represented person is asserting a claim because a breach of fiduciary duty resulted in a misapplication of the proceeds of an instrument. The claim of the represented person is a claim described in Section 3-306. Section 3-307 states rules for determining when a person taking an instrument has notice of the claim which will prevent assertion of rights as a holder in due course.

§75-3-307, Official Comment [**Emphasis Supplied**].

For purposes of applying §75-3-307, the statutory scheme must be applied to the identity of the parties to this action. Beacon Properties, LLC is the "represented person" as contemplated by section (a)(2). Billy Traxler and/or Jason Traxler are the "fiduciary" as contemplated by section (a)(1). Under the section, if a fiduciary duty is owed by the fiduciary (Traxler) to the

represented party (Beacon), the Bank is on notice of Beacon's claim if the funds were "**(I) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person**. Under the facts present here, the Bank has "notice of the claim".

First, there is no dispute that as members of the Beacon Properties, LLC, Billy Traxler and/or Jason Traxler owed fiduciary duties to the LLC and to the members of the LLC.

> Champluvier had, as all members of a LLC have to each other, **a fiduciary duty to the LLC and the respective individual members thereof**. Members have a right to repose trust upon another member acting in a fiduciary capacity, *i.e.*, a trustee.
> *Champluvier v. State*, 942 So.2d 145 (Miss. 2006)

As the Traxlers owed a fiduciary duty to both Beacon Properties, LLC and its other member, David Case, the statute applies. The elements of the statute are satisfied. With respect to section (b)(I), the Beacon check was "taken from a fiduciary (Traxler) for payment or collection or for value". Under subsection (b)(ii), the taker (the Bank) had knowledge of the fiduciary status of the fiduciary. The Bank has admitted in its Itemization of Facts that it was "fully aware" of the relationship between the Traxlers and Beacon Properties, LLC. [See Defendant's Itemization of Fact, at No. 14 [R - 99], stating that the Bank was "fully aware" of the relationship]. With respect to subsection (b)(iii) the represented person (Beacon Properties, LLC) has made a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary (Traxler) is a breach of fiduciary duty. [See Amended Complaint, where claims of breach of fiduciary duty are set forth against both the Traxlers, and the Bank; R-26]. As such, pursuant to § 75-3-307, "the

following rules apply...".

In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (I) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.

The $208,526.92 check was an instrument "payable to the represented person: - it was payable to Beacon. The Bank took the check, and applied it to three personal loans of Billy Traxler at the Bank, with the remainder issued in personal checks to "L. Traxler" and "Robert Lawrence -Escrow Account" - all at the direction of Billy Traxler. [T-385, line 17 through T-389, line12; Trial Ex. P-7].

There is no dispute but that the Bank knew that the loan debt it paid with the funds was a "...debt known by the taker (the Bank) to be the personal debt of the fiduciary." Westmoreland's testimony confirmed this, as did the names on the loans. Westmoreland knew that neither Case nor Beacon was responsible for the loans paid off by Traxler. [T-386, line 20-28]. As such, under the statute, the Bank had "notice of the breach of fiduciary duty". Pursuant to section (b)(1) of the statute, **"(n)otice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person"**

As the Bank had notice of the breach of fiduciary duty by Traxler, the Bank had notice of the claim of Beacon Properties, LLC, to the check and/or proceeds of the check. Pursuant to §75-3-307, as specified in the official comments, and pursuant to §75-3-306, the Bank cannot be a "holder in due course" with respect to the funds. The Bank is therefore subject to the claim of Beacon Properties, LLC, the rightful owner of the check, for the proceeds.

Beacon filed its Motion for Partial Summary Judgment on this issue and others. [R-104-111]. Beacon again filed a separate Motion for Partial Summary Judgment on this issue alone. [R- 582-588]. The trial court erred in denying the Motions, and allowing the action to proceed to trial. The undisputed facts entitle Beacon to a judgment for the amount of the check.

ARGUMENT IV.

IV. The trial court erred in refusing to grant jury instruction P-16 [R-711; RE-25], which would have allowed the jury to determine that the Bank had notice of the claim of Beacon to the instrument, and therefore prevented holder in due course status.

As set forth in the previous assignment of error, Beacon contends the trial court wrongfully denied Beacon's Motion for Partial Summary Judgment based upon the lack of holder in due course status of the Bank, pursuant to §75-3-307.

Additionally, the trial court erred in refusing to instruct the jury on the issue. Beacon submitted jury instruction P-16, which read as follows:

> The Court instructs the jury that pursuant to the Uniform Commercial Code, if the Bank of the South had notice of the claim of Beacon Properties, LLC at the time that the check was taken by the Bank from Jason Traxler, that the Bank of the South is not a holder in due course, and is subject to the claims of Beacon Properties, LLC to the check.
>
> The Court further instructs the jury that pursuant to §75-3-307, Mississippi Code, at all times, Bank of the South was aware that Billy Traxler, on behalf of Jason Traxler, and David Case were members of Beacon Properties, LLC. The Court further instructs the jury that as a member of Beacon Properties, LLC, Billy Traxler, on behalf of Jason Traxler, was a fiduciary with respect to Beacon Properties, LLC.
>
> The Court instructs the jury that a taker of an instrument not payable to the fiduciary in his capacity as such has notice of the breach of fiduciary duty if the instrument is (I) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (ii) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (iii) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.
>
> Accordingly, if you find that:

(A) the check payable to Beacon Properties, LLC was taken in payment for a debt known by the Bank of the South to be the personal debt of Billy Traxler, **or**

(B) you find that the check payable to Beacon Properties, LLC check was taken in a transaction known by the Bank of the South to be for the personal benefit of Billy Traxler, **or**

(C) you find that the Beacon Properties, LLC check was deposited to an account other than an account of Beacon Properties, LLC;

then you shall find that Bank of the South had notice of the claim of Beacon Properties, LLC to the instrument, was not a holder in due course, and your verdict shall be for Beacon Properties, LLC.

[R-711-712; RE-25-26].

This instruction sets forth correct law. Had the jury been instructed as urged by Beacon, the jury would have found that the Bank took Beacon's funds for the known benefit of Traxler. Pursuant to §75-3-307, the jury would have had no choice on the undisputed facts before them to return a verdict in favor of Beacon. The trial court denied the instruction, and refused to instruct the jury on holder in due course status. Such was error, and prevented the jury's just determination of this cause. The denial of the instruction wrongfully and erroneously prevented any consideration by the jury of Beacon's claims of lack of holder in due course status.

ARGUMENT V

V. The trial court erred in allowing the jury to determine whether or not "apparent authority" existed and, by giving Jury Instructions C-3 [R-699; RE-20] and D-1 [R-714; RE-27], erred in instructing the jury as to the applicability of "apparent authority to negotiate" as a defense to the conversion of the check under the circumstances, as no negotiation under the Uniform Commercial Code occurred.

Throughout the course of litigating this action, the Bank sought to raise a purported defense of "apparent authority" to the conversion claim. That "defense" had no application under the facts of the case, or under Mississippi's Uniform Commercial Code. Consistently, the Bank

claimed that based on a conversation that Laura Westmoreland had with David Case several days before the Beasley Road property closing, that the Bank had "apparent authority" to take the check. Beacon disputed the claim of "apparent authority", and argued that under the facts as testified to by Westmoreland in both her deposition and at trial, the claim could not be factually supported based on the specific representations allegedly made by Case to Westmoreland. Beacon also asserted that as a matter of law, an "apparent authority" analysis could not be made under the facts of the case, as there was no legally material act that the Bank alleged was "apparently authorized". The trial court disagreed, and gave the following instructions to the jury, over Beacon's objection:

Jury Instruction C-3

The Court instructs the jury that in order to establish apparent authority, the Defendant must prove, by a preponderance of the evidence: 1) acts or conduct by the principal indicating the agent's authority, 2) reasonable reliance by a third party upon those acts or conduct; and 3) detrimental change in position by the third party as a result of such reliance. [R - 699; RE-20].

Jury Instruction D-1

Apparent authority of an agent or employee is that authority which a reasonably prudent person, familiar with the usage of the particular business, would think such an agent or employee would have. (If a principal or employer by words or conduct permits such appearance of authority in an agent or employee, he is responsible for any resulting injury to another, provided the injured person acted reasonably in relying on such appearance of authority and did not know, or have reason to know, the true facts of the agent's authority.

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 word **negotiate** was added by the trial court, after the court rejected the original instruction, which read "present" in place of the court's added "negotiate". [The original instruction submitted is found at R-731].

At no time did the Bank point to any act of any person to which an "apparent authority" analysis could be argued to be applicable. The Bank's claims of apparent authority failed to such an extent that an "apparent authority" instruction that comported with the testimony at trial could not be drafted.

Such is evidenced by the trial court's redrafting of proposed Instruction D-1. That instruction was initially submitted by Defendant with the word "present" included.[R-731]. The Bank wanted the jury to consider whether or not the Traxlers had "apparent authority" to "present" the check. However, after the trial court correctly determined that the act of "presentment" was legally immaterial, and could not serve as the basis for a valid instruction, the Bank suggested that the word "endorse" be substituted for "present". As the trial court noted, there was no evidence at trial that either one of the Traxlers "endorsed" the instrument. The only evidence presented was that no individual associated with Beacon Properties, LLC endorsed the instrument.[1] The trial court therefore denied the use of the word "endorse" in the instruction.

Over Beacon's objection, the trial court placed the word "negotiate" in the instruction. Such was error. Negotiation is a legal term, and it is defined in the UCC. There can be no negotiation without an endorsement. When a check is payable to an identified payee - such as this check payable to Beacon Properties, LLC - "**negotiation**" "... requires **transfer of possession of the instrument and its indorsement by the holder".** §75-3-201(b). The court therefore instructed the jury that it could find a "negotiation" took place, when the uncontroverted evidence presented at trial established that no negotiation ever occurred. Again,

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[1]That should have ended the case in Beacon's favor. With no "endorser" identified, as a matter of law, the endorsement is either forged or un-authorized. Such a finding precludes a valid transfer of title to the instrument, and therefore Beacon should have prevailed.

this is because (a) neither Traxler was a "holder", and (b) no proof as to who endorsed the check was presented at trial. The giving of the instruction was erroneous.

The Bank's "apparent authority" argument cannot be made in a vacuum. The Bank never offered any proof of a legally material act to which any "apparent authority" applied. The Bank never identified what either of the Traxlers - the alleged agents - were supposed to have done that bound the alleged principal - Beacon Properties, LLC. The only proof at trial of the Traxler's "doing" anything related to the check was the **presentment** of the check to the Bank. Again, presentment is legally immaterial in this case.

A. **The testimony of Westmoreland does not support an "apparent authority" instruction.**

The trial court erred in instructing the jury relative to "apparent authority" based on the testimony of Laura Westmoreland. Westmoreland testified that Case told her that Billy Traxler would be coming in to "pay off some other loans and do some other transactions." According to Westmoreland, Case told her nothing else. [T-406, line 2-20]. Such a representation is insufficient, as a matter of law, to vest Billy Traxler with the authority to do anything related to the subject check - notwithstanding that it was Jason Traxler who presented the check. The comment Westmoreland attributes to Case does not mention the $208,526.92 check. At the time the comment was made, neither Westmoreland nor Case had any idea Traxler would take the $208,526.92 check to the Bank of the South. At the time the conversation occurred, Case was attempting to get the payoff for the loan. Case was the acting real estate agent with respect to the sale of the property, and no communication occurred relative to the $208,526.92 check, or Beacon's income from the sale. Additionally, at the time of any conversation between Case and

Westmoreland, the Bank had in its possession Beacon's LLC Operating Agreement, which expressly restricted the authority of any Member to bind the LLC without the express consent of all other Members. The Bank's argument that Case somehow vested Traxler with authority to unilaterally alienate hundreds of thousands of dollars of Beacon's property, by telling Westmoreland that Traxler was coming to the Bank to "do some other transactions" is misplaced and not legally credible.

B. **No "apparent authority" analysis is material when applying the post-1993 version of §75-3-420**

As a matter of law, an "apparent authority" defense is not material or legally relevant to the facts of this case. Such a defense may have been material if the endorser of the instrument was identified, and the trial court and/or jury could apply the "apparent authority" analysis to the act of endorsement. The Bank relied upon *Delta Chemical & Petroleum, Inc. v. Citizens Bank of Byhalia*, 790 So.2d 862 (Miss. 2001) in support of its "apparent authority" argument. The case is not relevant. The statute has been revised, and the endorser/negotiator in that case was identified. To satisfy the elements of the *Delta Chemical* conversion statute, the original payee had to establish that the check was taken by the depository bank over a ***forged indorsement***. [See *Delta Chemical*, at p. 869]. Because of the necessity of establishing a "forged endorsement" to satisfy the pre-1993 conversion statute, the *Delta Chemical* court undertook an analysis of the indorser's "***actual or apparent authority***" to indorse the instrument. [See *Delta Chemical*, at p. 870 -871, analyzing what constitutes a "forged signature", and equating it to an "unauthorized signature".] Because of the necessity of determining whether or not the signature on the checks was an "unauthorized signature", the *Delta Chemical* court examined the actual and apparent

authority of the indorser **to indorse those checks** on behalf of the original payee.

Based upon this analysis, the Bank argued at trial that the "apparent authority" of Jason and/or Billy is material and relevant to the issues before the trial court.[2]

Such "apparent authority" issues are no longer implicated by Mississippi's conversion statute, §75-3-420. No longer must a "forged indorsement" be established to recover in conversion. In its current form, the statute has incorporated - through its requirement of "negotiation" by a "person entitled to enforce the instrument" - the other provisions of the UCC. The analysis of "unauthorized signature" has been rejected, in favor of a simplified approach. The determination now is whether or not the instrument was properly negotiated by a person who could enforce the instrument. As set forth above, in this case, it was not. Beacon is entitled to prevail against the Bank in conversion. *Hancock Bank v. Ensenat*, 819 So.2d 3 (Miss.Ct.App. 2001).

The trial court erred in allowing the "apparent authority" instruction to be given to the jury. Beacon should prevail in this action as a matter of law.

ARGUMENT VI

VI. The trial court erred in giving jury instruction D-12 [R-716; RE-28], which was a misplaced "mitigation of damages" instruction.

The Bank argued to the trial court, and excessively argued to the jury, that Beacon should be barred from seeking damages from the Bank, or that such damages should be reduced, due to an alleged delay by Beacon in notifying the Bank of the conversion. Notwithstanding that Beacon

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[2]Again, this argument is made although the Bank did not offer proof of the identity of the purported "indorser", or provide the identity of the individual for whom an apparent authority analysis is argued to be appropriate.

had no legal duty to notify the Bank within any time certain, other than applicable statutes of limitations - there was no evidence at trial that any delay was material. The only evidence presented was that Jason Traxler brought the $30,000 check issued to him from the proceeds of Beacon's check back to the bank some weeks later. Ostensibly, the Bank asserts that had it been notified of the conversion prior to the exchange of that $30,000.00 check for other checks, it could have recovered some of the money.

Such is immaterial to Beacon's claims against the Bank. The Bank was on notice of the conversion the moment it took the check. Crucially, Beacon's actual damages - which Beacon does have a duty to mitigate - did not increase one cent after the instant the conversion occurred. Beacon has no duty to minimize or mitigate the Bank's expenditures of the converted funds. The trial court instructed the jury as follows:

Jury Instruction D-12

> You are instructed that the plaintiff was under a duty after suffering harm, if any, to exercise due care and take reasonable steps to avoid or diminish the damages resulting from that harm. You are further instructed that the plaintiff is not entitled to damages for the harm that he could have avoided by the use of due care, nor for the harm which proximately resulted from his own conduct, if any, which contributed to his damages.

Not only does the instruction erroneously state the law, it does not comport with the argument the Bank wished to make, and which the Bank used to justify the instruction. First, Beacon could not have "diminished the damages". Beacon's damages were set, at the amount of the check, by operation of §75-3-420, at the moment of conversion. The damages did not increase or decrease. No additional harm resulted to Beacon, and no additional harm could have been "avoided". The instruction is a complete perversion and misstatement of the law. The instruction is a mitigation instruction, given in a context where the actual damages did not

increase one cent after the moment of conversion. There was no evidence in the record to support instructing the jury as to a failure to mitigate. The giving of the instruction was material, erroneous, and entitles Beacon to a new trial. *Lake v. Gautreaux*, 893 So.2d 252 (Miss. App. 2004).

ARGUMENT VII

VII. The trial court erred in refusing to grant Beacon Properties, LLC's Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Motion for New Trial, based on the erroneous instructions given, and the fact that the jury's verdict was contrary to the overwhelming weight of the evidence.

Beacon filed its Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, for New Trial [R-756-787]. The Motion raised many errors and sought entry of judgment on behalf of Beacon, or a new trial. The trial court denied the Motion. Such denial was error.

After having determined in denying the Motions for Summary Judgment that an issue of fact existed material to the application of §75-3-420 (UCC conversion), the trial court, through denial of all UCC statutory based jury instructions, failed to instruct the jury on any claim or law related to the Uniform Commercial Code. As such, the jury was not instructed as to Beacon's theory of the case under the UCC, or any applicable UCC law. Such was error.

Additionally, the jury's verdict was contrary to the overwhelming weight of the evidence. The jury had no evidence before it by which it could determine that any legally recognized transfer of title to the check occurred. There was no testimony as to the identity of the individual who wrote the words "Beacon Property, LLC" on the check. The jury had no evidence before it to support its verdict. The only conclusion that could have been reached based upon the evidence at trial was that the check was issued to Beacon, it was Beacon's property, and it was converted by the Bank. The verdict for the Bank was not supported by the law or the evidence.

CONCLUSION

The trial court erred in allowing the jury to determine any issues in this case. This case should have been disposed of on summary judgment. No material facts were in dispute. Once the Bank could not identify the individual who wrote the words "Beacon Properties" on the back of the check, the Bank's legal claims to the check ended. Applying any relevant article of the UCC, or applicable case law results in only one supportable conclusions - the Bank converted the check.

Beacon is entitled to judgment against the Bank for the full value of the check - $208,526.92 - plus interest. Further, Beacon is entitled to a remand to the Circuit Court for a determination of the merits of Beacon's claim for attorney's fees and punitive damages.

Beacon respectfully requests that this Court set aside the verdict of the jury and the judgment thereon as entered by the trial court, render judgment in favor of Beacon properties on the undisputed facts herein in the amount of $208,526.92 plus accrued interest, and remand the action to the Circuit Court of Copiah County for further proceedings.

Respectfully submitted,
BEACON PROPERTIES, PLAINTIFF/APPELLANT

BY: MICHAEL T. JAQUES
COUNSEL FOR PLAINTIFF/APPELLANT

MICHAEL T. JAQUES
[redacted]
196 CHARMANT PLACE, SUITE 1
RIDGELAND, MISSISSIPPI 39157
601/969-7500
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that I have this date hand delivered, 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 7th day of January, 2009.

Michael T. Jaques