IN THE SUPREME COURT OF MISSOURI

CHRISTIAN COUNTY, MISSOURI, Respondent, v. EDWARD D. JONES & CO. L.P., d/b/a EDWARD JONES, Appellant.	))))))))))	No. SC87392

Appeal from the Circuit Court of Greene County
Thirty-First Judicial Circuit
Division 2
Honorable J. Miles Sweeney

On Transfer from the Missouri Court of Appeals of the Southern District

SUBSTITUTE OPENING BRIEF OF DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

This case involves whether the Circuit Court of Greene County erred in granting summary judgment in favor of Plaintiff/Appellant Christian County, Missouri, and against Defendant/Respondent Edward D. Jones & Co., L.P., d/b/a Edward Jones. The trial court's decision was a final judgment in accordance with Missouri Supreme Court Rule 74.01. After briefing and oral argument, on November 30, 2005, the Missouri Court of Appeals for the Southern District affirmed the trial court's granting of summary judgment. See Christian County v. Edward D. Jones & Co., L.P., No. SD 26026, 2005 WL 3196419 (Mo. Ct. App. Nov. 30, 2005). On January 31, 2006, this Court sustained Edward Jones' Application for Transfer and assumed jurisdiction. See Mo. Const. art. V, § 10; Mo. Sup. Ct. R. 83.05

STATEMENT OF FACTS

Christian County (the "County") is a duly organized county of the State of Missouri that is subject to, among other provisions, Chapter 110 of the Missouri Revised Statutes. (Legal File ("LF") at 10, 133).

Edward D. Jones & Co., L.P., d/b/a Edward Jones ("Edward Jones") is a Missouri limited partnership that is headquartered in St. Louis, Missouri. (LF at 10, 62-63). Edward Jones is licensed by state and federal agencies as a securities broker-dealer. (LF at 69). Edward Jones is not a bank, as defined by Mo. Rev. Stat. § 362.010(3). (LF at 69, 83).

On June 19, 1996, Gary Melton ("Melton"), the then treasurer for Christian County, met with Steve Askren ("Askren"), an investment representative at the Springfield, Missouri branch office of Edward Jones, to discuss the possibility of opening an account for the County. (LF at 17, 35, 80-81, 128). Melton, as treasurer of the County, possessed various powers that authorized him to deposit the County's funds as specified in Mo. Rev. Stat. §§ 110.130, et seq. Melton told Askin that he had recently attended a meeting with other county treasurers and that an idea was presented to them about the possibility of earning higher rates of return on monies they were allowed by statute to invest in other options. (LF at 81). The account Melton opened with Edward Jones was in the name of "Christian County Building Fund" with an account number of 866-01642-1-4. (LF at 17, 128).

On or about June 21, 1996, Melton delivered a check in the amount of $650,000 to Askern's office for deposit. (LF at 11, 128). The check was drawn on the County's account at Ozark Bank in Ozark, Missouri, which had previously been selected by the County as its depositary of County funds.[1] (LF at 18, 78, 128). The check was payable to Edward Jones and was deposited in the account set up by Melton. (LF at 38, 69, 133). The check itself was drawn on the "Christian County Treasurer County Fund" and was signed by Melton as treasurer. (LF at 18, 38).

When the check was presented to Ozark Bank for payment, bank officials did not immediately honor the check. (LF at 69). Instead, bank officials held the check while contacting County officials to secure direction for the processing of the check. (LF at 69, 77). Bank officials specifically called Christian County Presiding Commissioner Joe Nelson ("Nelson") to ask about the check. (LF at 69, 77, 83). Nelson did not have any knowledge of the check. (LF at 77). Nelson went to Ozark Bank and was shown a photocopy of the $650,000 check to Edward Jones. (LF at 78). Bank officials then asked Nelson why these funds were being transferred to Edward Jones. (LF at 78). According to Nelson, bank officials were

1 Although atypical, the word "depositary" is the spelling used in Chapter 110. The statutory spelling will be used throughout this Brief.

upset at the prospect of another entity holding County funds when bank officials believed they were to have control over all of the County's money. (LF at 78).

Nelson proceeded to try to contact, by telephone, two other County commissioners. (LF at 77). He was only able to reach Commissioner William Barnett ("Barnett") and asked him if he would meet him at the Christian County Prosecuting Attorney's Office. (LF at 69, 78). Pursuant to Mo. Rev. Stat. § 56.060, the county prosecuting attorney serves as legal counsel to the County. Nelson met with Prosecuting Attorney Mark Orr ("Orr") and Barnett. (LF at 78). At this meeting, Orr advised Nelson and Barnett that, for legal purposes and "possible ramifications of whatever agreement that Mr. Melton could have made with Edward Jones," they should permit the check to be honored. (LF at 78, 83; see also Suggestions in Opp'n to Application for Transfer at 2). "No [C]ounty official, other than Melton, ever communicated directly with Edward Jones until after Melton's theft was discovered." (Suggestions in Opp'n to Application for Transfer at 3; LF at 81). Nelson then contacted the Ozark bank officials and directed them to honor the check. (LF at 78, 84). Ozark Bank honored the check, and the proceeds were placed into a money market account at Edward Jones. (LF at 144). At that point, the cash from the check was intermingled with the money market funds of other customers of Edward Jones. (LF at 43).

For nearly two weeks, the funds sat in the account, and the County never contacted Edward Jones or any of its representatives concerning the account. (LF at 126). Then, on or about July 2, 1996, Melton instructed Edward Jones to wire transfer funds from the Edward Jones money market account to an account at Metropolitan National Bank in Springfield, Missouri. (LF at 126, 145). These included transfers of $350,000 on July 2, 1996, and $275,000 on July 3, 1996, for a total amount of $625,000. (LF at 24-25, 145). Edward Jones complied with Melton's instructions, and Melton subsequently converted these funds for his own personal use. (LF at 94).

The County later determined that Melton had misappropriated the $650,000 and diverted it for his own personal use.

The County attempted to recover the stolen funds from Melton, Edward Jones, Metropolitan Bank, Commerce Bank, Union Planters Bank, and others. (LF at 66). On January 24, 2000, the County made its first and only demand upon Edward Jones, before filing suit, for a return any of the funds taken by Melton. (LF at 39). At that time, Edward Jones had returned all funds that remained in Edward Jones' possession as of that date to the County. (LF at 24, 138). The funds in Edward Jones' possession that were paid to the County totaled $24,955.00 plus an additional $536.26 in interest. (LF at 66).

The County commenced this action on March 8, 2000. (LF at 10). The two-page, one-count, eight-paragraph Petition alleges that Edward Jones was holding funds for the County "as trustee ex-maleficio and has converted the same to its own use" because the Edward Jones account was not opened in accordance with "Missouri statutes, particularly § 110.130, RSMo., et seq." (LF at 10, 11).

On August 21, 2002, the County filed its Motion for Summary Judgment. (LF at 17). The legal basis for the Motion for Summary Judgment was that Edward Jones "did not comply with the requirements of Section 110.130 RSMo., et seq., by submitting a bid or proposal to be a depositary for county funds." (LF at 18). In its description of the "Nature of the Case and Summary of the Argument," the County stated that Edward Jones "was not the lawful County depositary for funds for Christian County because it did not comply with § 110.130 RSMo. et seq." (LF at 40). Similarly, the County stated that "as a direct result of [Edward Jones' alleged noncompliance with Chapter 110], plaintiff Christian County has been damaged in the sum of Three Hundred Sixty Nine Thousand Nine Hundred Sixteen and 28/100 Dollars ($369,916.28)." (LF at 19). In addition, the County argued that Edward Jones' defenses, such as estoppel, were not applicable in cases to enforce the depositary statutes because "[a]ll persons dealing with public officers and funds are charged with knowledge of statutory provisions relating to county depositaries." (LF at 43).

After the filing of the Motion for Summary Judgment by the County, the parties engaged in further discovery. (LF at 46-50). The County then supplemented its Motion for Summary Judgment, and on March 24, 2003, Edward Jones filed its own Motion for Summary Judgment. (LF at 64, 68).

On September 23, 2003, the trial court entered "Judgment" by denying Edward Jones' Motion for Summary Judgment and by granting the County's Motion for Summary Judgment. (LF at 125-129). The Judgment, with findings of fact and conclusions of law, was drafted by counsel for the County. (LF at 131). The trial court concluded that Edward Jones had "violated § 110.240 RSMo. by paying out county money without requiring a check signed by the County Treasurer." (LF at 129). The trial court awarded the net amount it found that Edward Jones purportedly held as trustee ex malifecio, $368,837.28, and prejudgment interest at 9% for an additional nearly quarter of a million dollars. (LF at 130). The total Judgment, therefore, against Edward Jones was for $601,204.80 and costs. (LF at 130).

On September 29, 2003, Edward Jones moved for the September 23, 2003 Judgment to be vacated for lack of notice and for a variety of other objections with the findings, including the award of prejudgment interest. (LF at 131). The trial court granted Edward Jones' request in an Order decreed September 29, 2003. (LF at 135). Thereafter, Edward Jones filed detailed objections to the County's

proposed form of judgment, including that prejudgment interest was not allowed for a violation of Chapter 110 and that the County's use of conversion remedies was inappropriate because no conversion claim had been pleaded or moved upon to reach the proposed Judgment. The trial court, however, re-entered the same order it had in September. (LF at 133-143). The Judgment was dated December 8, 2003. (LF at 144).

Edward Jones timely filed a Notice of Appeal. (LF at 147). After briefing and oral argument, on November 30, 2005, the Missouri Court of Appeals for the Southern District affirmed the trial court's summary judgment against Edward Jones. See Christian County v. Edward D. Jones & Co., L.P., No. SD 26026, 2005 WL 3196419 (Mo. Ct. App. Nov. 30, 2005). On December 15, 2005, Edward Jones filed a Motion for Rehearing or, in the Alternative, Transfer to the Missouri Supreme Court. These requests were denied by the Southern District.

On January 6, 2006, Edward Jones filed an Application for Transfer with this Court. On January 20, 2006, the County submitted Suggestions in Opposition to Application for Transfer. On January 31, 2006, this Court sustained Edward Jones' Application for Transfer and assumed jurisdiction over Edward Jones' appeal herein.

POINTS RELIED ON

I. The Trial Court Erred In Granting Summary Judgment In Favor Of The County And Against Edward Jones For Failure To Comply With The Statutory Requirements of Mo. Rev. Stat. §§ 110.130, Et Seq., Because These Statutes, By Their Plain And Unambiguous Terms, Apply Only To Banks And Not To Edward Jones, Which Is a Limited Partnership And Securities Broker-Dealer; And Edward Jones Could Not Be Liable As A Trustee Ex Maleficio For Allegedly Violating These Statutes.

Cases

1. **State ex rel. BP Prods. North Am. Inc. v. Ross, 163 S.W.3d 922 (Mo. banc 2005).**
2. **Vance Bros. Inc. v. Obermiller Constr. Servs., 181 S.W.3d 562 (Mo. banc 2006).**
3. **Giloti v. Hamm-Singer Corp., 396 S.W.2d 711 (Mo. banc 1965).**
4. **Rundquist v. Dir. of Rev., State of Mo., 62 S.W.3d 643 (Mo. Ct. App. 2001).**

II. The Trial Court Erred In Granting Summary Judgment Based On A Common Law Conversion Claim Because The County Failed to Establish The Elements Of Conversion In That Edward Jones Acted Properly, Did Not Violate Chapter 110 Or Any Other Statute Or Common Law, Edward Jones Did Not Exercise Unauthorized Control Over The County's Funds And Did Not Deprive The County Of Its Right Of Possession Of These Funds; The County Is Responsible For The Theft Of The Funds By Its Agent Melton Under An Agency Theory; There Is No Cause Of Action For Conversion Of Money; The County Never Pleaded Conversion; And The Award Of Damages Was In Error Because Edward Jones Did Not Possess Any County Funds At The Date Of Demand.

Cases

1. **First Nat. Bank of Steeleville v. ERB Equip. Co., Inc., 972 S.W.2d 298 (Mo. Ct. App. 1998).**
2. **Scott v. Scott, 157 S.W.3d 332 (Mo. Ct. App. 2005).**
3. **In re Estate of Boatright, 88 S.W.3d 500 (Mo. Ct. App. 2002).**
4. **Rehbein v. St. Louis Southwestern R. Co., 740 S.W.2d 181 (Mo. Ct. App. 1987).**

III. The Trial Court Erred In Applying Prejudgment Interest To The Judgment In Favor Of The County And Against Edward Jones Because Edward Jones Did Not Act Improperly Under Chapter 110 And Did Not Convert Any Of The County's Funds And Was Not A Trustee Ex Maleficio; Mo. Rev. Stat. §§ 110.130, Et Seq., Do Not Provide For Pre-Judgment Interest; No Other Missouri Statute Allows Prejudgment Interest Under The Facts Of This Case; And No Prejudgment Interest Is Allowed Under Conversion In That Edward Jones Did Not Engage In Tortious Conduct That Conferred A Benefit Upon Itself And The County Did Not Show That The Requirements Of Mo. Rev. Stat. § 408.040.2 Had Been Satisfied.

Cases

1. **Auto Alarm Supply Corp. v. Lou Fusz Motor Co., 918 S.W.2d 390 (Mo. Ct. App. 1996).**
2. **Pediatric Associates, Inc. v. Charles L. Crane Agency Co., 21 S.W.3d 884 (Mo. Ct. App. 2000).**
3. **River Landscaping, Inc. v. Meeks, 950 S.W.2d 495 (Mo. Ct. App. 1997).**
4. **Brown v. Donham, 900 S.W.2d 630 (Mo. banc 1995).**

IV. The Trial Court Erred In Declaring Edward Jones' Claimed Defenses Of Waiver And Estoppel Inapplicable Because Edward Jones' Responses And Legal Memorandum In Opposition Established The Following Material Factual Issues: That The County And Its Officials Were Aware That Melton, The Then County Treasurer, Had Opened An Account With Edward Jones In Another County, And Was Attempting To Deposit A $650,000 Check Into That Account; And That The County Was Given The Opportunity To, But Did Not, Stop Payment On The Check Issued To Edward Jones.

Cases

1. **Doe v. O'Connell, 146 S.W. 3d 1 (Mo. Ct. App. 2004).**
2. **Blackburn v. Mackey, 131 S.W.3d 392 (Mo. Ct. App. 2001).**
3. **Cole County v. Central Missouri Trust Co., 257 S.W.2d 774 (Mo. 1924).**
4. **In re N. Mo. Trust of Mexico, Mo., 39 S.W.2d 415 (Mo. Ct. App. 1931).**

STANDARD OF REVIEW

"The propriety of summary judgment is purely an issue of law, which an appellate court reviews de novo." Nusbaum v. City of Kansas City, 100 S.W.3d 101, 105 (Mo. banc 2001). Because the trial court's judgment is based on the record submitted and the law, an appellate court should not defer to the trial court's order granting summary judgment. Id.; ITT Commercial Fin. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal only if: (1) the pleadings, affidavits, admissions, and exhibits demonstrate there is no genuine issue of material fact; and (2) the moving party is entitled to judgment as a matter of law. Mo. Sup. Ct. R. 74.04; Nusbaum, 100 S.W.3d at 105. An appellate court accords the non-moving party the benefit of all reasonable inferences from the record. ITT Commercial, 854 S.W.2d at 376.

INTRODUCTION

The County filed this action in an attempt to recover funds which were deposited in an Edward Jones investment account and then stolen by the County's duly elected treasurer, Gary Melton – even though the deposit was brought to the attention of, and affirmatively authorized by, the County. In an attempt to avoid the consequences of its own official's actions, the County has advanced the novel theory that Edward Jones should be held liable for the funds eventually misappropriated by the County's treasurer because Edward Jones did not ensure that the County followed the statutory protocol for establishing a county depositary before accepting the County's funds. The deficiency in the County's theory, and the trial court's Judgment, is that the statutory provisions on which it relies, Chapter 110, apply only to banks. Edward Jones is not a bank. Edward Jones is a limited partnership conducting business as a securities broker-dealer. The statute on which the County relies simply does not apply to Edward Jones and, for this reason alone, the trial court erred when it entered summary judgment in favor of the County and against Edward Jones.

Further, even were this Court to find that the requirements of Chapter 110 apply to Edward Jones, the County's cause of action is barred by the equitable doctrines of waiver and estoppel as a result of the County's voluntary authorization of the transaction that the County seeks to rescind.

Melton was the duly elected treasurer of the County and was given complete authority to write checks and transfer county funds. Ozark Bank notified the County's presiding commissioner of the check, and the commissioner and the County's legal counsel instructed Ozark Bank to honor the check. Then, for nearly two weeks, these funds sat in the Edward Jones account. The County never contacted Edward Jones or any of its representatives in any manner whatsoever. On July 2, 1996, Melton ordered Edward Jones to transfer the funds to Metropolitan National Bank, and subsequently, Melton used these funds for his own personal use. There were ample factual grounds for Edward Jones' affirmative defenses of estoppel and waiver.

The trial court also erred when it treated – for remedial and prejudgment interest purposes – the County's claim as a common law claim for conversion, rather than a statutory claim, as pleaded. Such an award is improper because the County failed to plead and prove this claim in its Motion for Summary Judgment. No prejudgment interest was authorized either under a statutory claim or a conversion claim.

Edward Jones, therefore, respectfully requests that this Court reverse the Judgment entered by the trial court and remand with instructions to enter Judgment in favor of Edward Jones in this case.

ARGUMENT

I. The Trial Court Erred In Granting Summary Judgment In Favor Of The County And Against Edward Jones For Failure To Comply With The Statutory Requirements of Mo. Rev. Stat. §§ 110.130, Et Seq., Because These Statutes, By Their Plain And Unambiguous Terms, Apply Only To Banks And Not To Edward Jones, Which Is a Limited Partnership And Securities Broker-Dealer; And Edward Jones Could Not Be Liable As A Trustee Ex Maleficio For Allegedly Violating These Statutes.

The trial court erred by concluding that the provisions of Chapter 110 of the Missouri Revised States applied to Edward Jones. Chapter 110, by its express terms, creates duties only for banking or trust companies. See, e.g., Mo. Rev. Stat. §§ 110.130, et seq. Because it is undisputed that Edward Jones is not a bank or a banking institution, the trial court erred as a matter of law in entering judgment against Edward Jones for violation of statutes that, by definition, do not apply to Edward Jones.

Sections 110.010-.060 relate to depositaries of public funds generally. Sections 110.130-.270 relate to depositaries of county funds. These statutory provisions generally refer to "banks," "banking institutions," "depositary banking institutions," "banks and trust companies," "banks or trust companies," "banking

corporations or associations," and "all banks and trust companies and other banking institutions now or hereafter engaged in business in this state." In other words, this Chapter does not, by its express terms, create duties for any person who receives and holds public funds or money from a county, but only duties for banks and banking institutions that receive and hold public funds or county money.

The trial court found that Edward Jones violated statutory provisions of Chapter 110, namely Mo. Rev. Stat. §§ 110.130, 110.140, and 110.240 (2000). (LF at 145). Section 110.130 provides:

> 1. Subject to the provisions of section 110.030 the county commission of each county in this state, at the April term, in April 1997 and every fourth year thereafter, with an option to rebid in each odd-numbered year, shall receive proposals from ***banking corporations or associations*** at the county seat of the county which desire to be selected as the depositaries of the funds of the county. For the purpose of letting the funds the county commission shall, by order of record, divide the funds into not less than two nor more than twelve equal parts, except that in counties of the first classification not having a charter form of government, funds shall be divided in not less than two nor more than twenty equal parts, and the bids provided

for in sections 110.140 and 110.150 may be for one or more of the parts.

2. Notice that such bids will be received shall be published by the clerk of the commission twenty days before the commencement of the term in some newspaper published in the county, and if no newspaper is published therein, then the notice shall be published at the door of the courthouse of the county. In counties operating under the township organization law of this state, township boards shall exercise the same powers and privileges with reference to township funds as are conferred in sections 110.130 to 110.260 upon county commissions with reference to county funds at the same time and manner, except that township funds shall not be divided but let as an entirety; and except, also, that in all cases of the letting of township funds, three notices, posted in three public places by the township clerk, will be a sufficient notice of such letting.

Mo. Rev. Stat. § 110.130 (emphasis added).

Section 110.140 provides:

1. Any ***banking corporation or association*** in the county desiring to bid shall deliver to the clerk of the commission, on or before the first day of the term at which the selection of depositaries is

to be made, a sealed proposal, stating the rate of interest that the ***banking corporation, or association*** offers to pay on the funds of the county for the term of two or four years next ensuing the date of the bid, or, if the selection is made for a less term than two or four years, as provided in sections 110.180 and 110.190, then for the time between the date of the bid and the next regular time for the selection of depositaries as fixed by section 110.130, and stating also the number of parts of the funds for which the ***banking corporation or association*** desires to bid.

2. Each bid shall be accompanied by a certified check for not less than the proportion of one and one-half percent of the county revenue of the preceding year as the sum of the part or parts of funds bid for bears to the whole number of the parts, as a guaranty of good faith on the part of the bidder, that if his bid should be the highest he will provide the security required by section 110.010. Upon his failure to give the security required by law, the amount of the certified check shall go to the county as liquidated damages, and the commission may order the county clerk to readvertise for bids.

3. It shall be a misdemeanor, and punishable as such, for the clerk of the commission, or any deputy of the clerk, to directly or indirectly disclose the amount of any bid before the selection of depositaries.

Mo. Rev. Stat. § 110.140 (emphasis added).

Section 110.240 provides:

It is the duty of the county treasurer to draw a check as county treasurer upon a county depositary in favor of the legal holder thereof, and to charge the same to the fund upon which it is drawn. No county treasurer shall draw any check upon the funds in any depositary unless there is sufficient money belonging to the fund upon which the check is drawn to pay the same, and no money belonging to the county shall be paid by any depositary except upon checks of the county treasurer.

Mo. Rev. Stat. § 110.240.

Although Edward Jones is not a bank, the trial court erroneously found that:

The opening of Account #866-01642-1-4 in the name of "Christian County Building Fund" and accepting funds into an account was not authorized as provided for in §§ 110.130-140 R.S.Mo. by the submitting of a bid or a proposal to be a "depositary" for county funds ***by a bank*** and was unlawful.

(LF at 145) (emphasis added); see Christian County, 2005 WL 3196419, at *6 ("the trial court found that Edward Jones was not a bank.") Further, although Mo. Rev. Stat. § 110.240 provides duties only to county treasurers[2] when drawing checks, the trial court nonetheless found that Edward Jones "violated § 110.240 R.S.Mo. by paying out county money without requiring a check signed by the County Treasurer." (LF at 145).

The trial plainly misconstrued these statutes by expanding them to impose liability to Edward Jones, which is a securities broker-dealer, not a bank. Thus, Edward Joes is not even subject to the requirements of Chapter 110.

A. The Requirements Of Chapter 110, By Their Plain And Unambiguous Terms, Apply Only To Banks And Not Edward Jones, With Is A Limited Partnership And Securities Broker-Dealer, Not A Bank.

This Court has held that the "primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their plain and ordinary meaning." State ex rel. BP Prods. North Am. Inc. v. Ross, 163 S.W.3d 922, 927 (Mo. banc 2005) (quoting State ex rel. Nixon v. Quicktrip Corp., 133 S.W.3d 33,

[2] County treasurers have general duties with respect to county funds. See, e.g., Mo. Rev. Stat. § 54.140.

37 (Mo. banc 2004)). "If possible, each word or phrase in a statute must be given meaning." BP Prods. North Am., 163 S.W.3d at 927. If the intent of the legislature is clear and unambiguous, giving the language of the statute its plain and ordinary meaning, then courts are bound by that intent and cannot resort to any statutory construction in interpreting that statute. See Vance Bros. Inc. v. Obermiller Constr. Servs., 181 S.W.3d 562, 564 (Mo. banc 2006); Smith v. Shaw, 159 S.W.3d 830, 834 (Mo. banc 2005)). Related statutes are relevant to clarify the meaning of a statute. BP Prods., 163 S.W.3d at 927.

The word "bank" is defined by the Missouri Legislature in Chapter 362 of the Missouri Revised Statutes, titled "Banks and Trust Companies." Under Mo. Rev. Stat. § 362.010, a bank is:

> ***any corporation*** soliciting, receiving or accepting money, or its equivalent, on deposit as a business, whether the deposit is made subject to check, or is evidenced by a certificate of deposit, a passbook, a note, a receipt, or other writing, ***and specifically a commercial bank chartered under this chapter or a national bank located in this state***.

Mo. Rev. Stat. § 362.010(3) (emphasis added); see also Mo. Rev. Stat. § 400.1-201(4) (defining "bank" as "any person engaged in the business of banking"). The terms "bank," "banking institution," and "banking corporation" also have special

legislative significance. The Missouri Legislature has enacted numerous statutes regulating the banking business. When the Legislature enacts a statute referring to terms that have had other judicial or legislative meaning attached to them, the Legislature is presumed to have acted with knowledge of that judicial or legislative meaning. See Hudson v. School Dist. of Kansas City, 578 S.W.2d 301 (Mo. Ct. App. 1979).

Further, the well-known cannon of statutory construction expressio unius est exclusio alterius provides that when the legislature expressly states that a statute applies to one group, it implies the exclusion of other groups. See Giloti v. Hamm-Singer Corp., 396 S.W.2d 711, 713 (Mo. banc 1965)); see also Wicklund v. Handoyo, 181 S.W.3d 143, 152 (Mo. Ct. App. 2005). "When a statute enumerates the person affected, it is to be construed as excluding from its effect all those not expressly mentioned." Rundquist v. Dir. of Rev., State of Mo., 62 S.W.3d 643, 647 (Mo. Ct. App. 2001); but see Six Flags Theme Parks, Inc. v. Dir. of Rev., 179 S.W.3d 266, 269-70 (Mo. banc 2005). Thus, the Legislature's repeated use in Chapter 110 of the terms "bank," "banking institution," and "banking corporation" – words which have clear legislative meaning – means that the statutes at issue apply only to these institutions.

Edward Jones is not a "bank" as that term is defined by the Missouri Legislature. It is undisputed that Edward Jones is a limited partnership registered

to do business as a securities broker-dealer. (LF at 69). The trial court did not find that Edward Jones was a banking institution. "In fact, the trial court found that Edward Jones was not a bank." Christian County, 2005 WL 3196419, at *6.

There are general differences between banks and securities broker-dealers. For example, broker-dealers engage in different types of businesses and are regulated by different governmental entities. Banks are regulated by the Federal Reserve and the Comptroller of the Currency, whereas Missouri broker-dealers are regulated by the Securities and Exchange Commission and the Missouri Secretary of State. Broker-dealers are not eligible to apply for FDIC insurance and cannot become members of the Federal Reserve Bank. Mo. Rev. Stat. §§ 362.105(3)-(4). The Legislature also has recognize the distinction between a "bank" and a "broker-dealer." A broker-dealer, as defined in 2000 in the Missouri Revised Statutes, "means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. 'Broker-dealer' does not include (1) an agent, (2) an issurer, (3) ***a bank, savings institution, or trust compan***y . . . ." Mo. Rev. Stat. § 409.401(c) (2000) (emphasis added). A similar definition recently has been codified at Mo. Rev. Stat. § 409.1-102(4). The term "bank" is defined separately in § 409.1-102(3).

Although recent legislation and practices may have blurred the line between the banking and securities industries, the Missouri Legislature has never amended

Chapter 110 to include securities broker-dealers or anyone else besides banks. The original county depositary act, the predecessor to Chapter 110, was enacted in 1889 to protect county funds and was amended several times thereafter. See Marion County v. First Sav. Bank of Palmyra, 80 S.W.2d 861, 863 (Mo. 1935); see id. ("Giving consideration to these provisions, the General Assembly must have intended to, and we think did, provide for the protection of county funds," especially in a time when many banks were closing and in liquidation); In re Cameron Trust Co. School Dist. of Cameron v. Cameron Trust Co., 51 S.W.2d 1025 (Mo. 1932) ("The Legislature in its wisdom has placed safeguards about these funds so as to protect them"). None of these amendments extended the statutory requirements of county depositaries to broker-dealers. In this case, the County impermissibly and ostensibly invites this Court to rewrite or amend Chapter 110 under the guise of its own concept of public policy. The Court should reject such an invitation. See Jepson v. Stubbs, 555 S.W.2d 307, 313 (Mo. banc 1977) (noting courts should not "rewrite" statutes. "If that is to be done, it must be by legislative action.").

Even though Chapter 110 imposes duties and liabilities only on banking institutions when acting as depositaries, the trial court erred, as a matter of law, by effectively holding that any person who receives and holds county money is a depositary. The implications of the trial court's ruling means that insurance

agents, real estate agents, escrow companies, brokers, contractors and the myriad of other non-bank businesses who receive and hold funds from the county are in violation of Chapter 110. The Legislature surely chose to limit the application of Chapter 110 to banks because banks are highly regulated institutions that would have processes and procedures in place to assume the duties, and hence liability, of Chapter 110.

B. Edward Jones Could Not Be Liable As A Trustee Ex Maleficio For Allegedly Violating Chapter 110.

Edward Jones is not aware of any authority applying the liabilities of a county depositary to anyone other than a bank, such as a securities broker-dealer like Edward Jones in this case.

The County references case law for its theory of trustee ex malifecio. Each one of the cases, however, applies this theory to a defendant bank.[3] See, e.g., Howard County v. Fayette Bank, 149 S.W.2d 841 (Mo. 1941); Marion County v. First State Bank of Palmyra, 80 S.W.2d 863 (Mo. 1935). A trustee ex malifecio is described as a "trustee from wrongdoing; the trustee of a trust of a trust arising by operation of law from a wrongful acquisition." Lucas v. Central Mo. Trust Co.,

[3] As reflected by Southern District: "It is true that the authorities cited above involved banks that had not qualified as depositaries of public funds." Christian County, 2005 WL 3196419, at *6.

166 S.W.2d 1053, 1056 (1942). Black's Law Dictionary defines trustee ex maleficio as a "person who, being guilty of wrongful or fraudulent conduct, is held in equity to the duty and liability of a trustee, in relation to the subject matter, to prevent him from profiting by his own wrongdoing." Black's Law Dictionary 1514 (6th ed. 1990). The alleged wrongdoing in this case is that Edward Jones failed to comply with the statutory provisions of Chapter 110. But as explained above, these statutes apply only to banks and banking institutions and Edward Jones did not profit from any wrongdoing. Because Edward Jones is not a bank, there was no wrongdoing. A fortiori, Edward Jones was not a trustee ex maleficio. For these reasons, the trial court's Judgment should be reversed.

II. The Trial Court Erred In Granting Summary Judgment Based On A Common Law Conversion Claim Because The County Failed to Establish The Elements Of Conversion In That Edward Jones Acted Properly, Did Not Violate Chapter 110 Or Any Other Statute Or Common Law, Edward Jones Did Not Exercise Unauthorized Control Over The County's Funds And Did Not Deprive The County Of Its Right Of Possession Of These Funds; The County Is Responsible For The Theft Of The Funds By Its Agent Melton Under An Agency Theory; There Is No Cause Of Action For Conversion Of Money; The County Never Pleaded Conversion; And The Award Of Damages Was In Error Because Edward Jones Did Not Possess Any County Funds At The Date Of Demand.

The County's Petition and Motion for Summary Judgment were based solely on a statutory theory of liability – that Edward Jones violated certain provisions of Chapter 110. It was error for the trial court to grant the County judgment based on a theory of conversion when such a theory was never viable under the County's own version of the undisputed facts. The County never proved that it was entitled to judgment on this conversion theory.

A. The County Failed to Establish The Elements Of Conversion In That Edward Jones Did Not Exercise Unauthorized Control Over The County's Funds And Did Not Deprive The County Of Its Right Of Possession Of These Funds.

Even if the County properly pleaded its conversion theory, judgment for the County was erroneous for several reasons.

First, there was no conversion because there was no tortious misconduct or violation of Chapter 110, as discussed above.

To establish a conversion claim, the following elements must be proven: "(1) that the plaintiff is entitled to possession of the property; (2) that the defendant exercised unauthorized control over the property; and (3) that the defendant deprived the plaintiff of its right of possession." First Nat. Bank of Steeleville v. ERB Equip. Co., Inc., 972 S.W.2d 298, 300 (Mo. Ct. App. 1998). Here, Edward Jones did not exercise unauthorized control over the County's funds. The funds were deposited by Melton, an acknowledged thief, with the full knowledge of County Officials. (LF at 77-78). At the time the County demanded possession of the money from Edward Jones on January 24, 2000, Edward Jones had returned all of the money in its possession. As conversion is purely a possessory claim and is triggered by a refusal to surrender possession following a demand, the question

becomes: what County money did Edward Jones possess on January 24, 2000? There is no evidence in the record that, on the date of demand, Edward Jones possessed any of the County's money. If anyone deprived the County of its right of possession, it was "the thief Melton," (Suggestions in Opp'n to Application for Transfer at 6), who unlawfully appropriated the funds.

B. The County Is Responsible For The Theft Of The Funds By Its Agent Melton.

Even if one assumes that Edward Jones acted improperly under Chapter 110, Edward Jones is not liable under common law conversion. Rather, it is the County that is liable for Melton's actions under an agency theory. It is undisputed that the County knew that Melton was attempting to deposit the check in the Edward Jones account and instructed Ozark Bank to honor the check. The County, therefore, ratified and confirmed Melton's conduct by allowing this deposit and never questioning Edward Jones about it. See Clear v. Missouri Coordinating Bd. of Higher Educ., 23 S.W.3d 896, 901 (Mo. Ct. App. 2000)

C. There Is No Viable Cause Of Action Against Edward Jones For Conversion Of Money.

There is no cause of action for conversion of money. This is especially true where the funds at issue have been commingled with other funds and are no longer a specific and identifiable chattel. Missouri court have recognized that

"[c]onversion is the unauthorized assumption of the right of ownership over another person's personal property to the exclusion of the owner's rights." Scott v. Scott, 157 S.W.3d 332, 336 (Mo. Ct. App. 2005). "Money represented by a general or ordinary debt is not subject to a claim for conversion." In re Estate of Boatright, 88 S.W.3d 500, 506 (Mo. Ct. App. 2002). "As a general rule a claim for money may not be in conversion because conversion lies only for a specific chattel which has been wrongfully converted." Id. (quoting Dayton Const., Inc. v. Meinhartdt, 882 S.W.2d 206, 208 (Mo. Ct. App. 1994)). Nevertheless, it is possible for money to be an appropriate subject of conversion, but only "when it can be described or identified as a specific chattel." In re Estate of Boatright, 88 S.W.3d at 506. Thus, where allegedly converted funds are commingled with other funds, no claim for conversion can exist as a matter of law. See Reason v. Payne, 793 S.W.2d 471, 475 (Mo. Ct. App. 1990).

The trial court could not enter judgment on a conversion claim when it was, as the County asserted in its Memorandum in Support, an undisputed fact that "[Edward Jones] took county funds, [and] co-mingled those funds with the funds of its other depositars." (LF at 43). Consequently, because it was undisputed that the money in question was commingled, it was error for the trial court to enter judgment for the converted monies.

Another narrow exception to the rule that money may not sound in conversion provides: "In order to fall within this exception, a plaintiff must have delivered funds to a defendant for a specific purpose, and the defendant must have diverted them to a different purpose of his own." Rehbein v. St. Louis Southwestern R. Co., 740 S.W.2d 181, 183 (Mo. Ct. App. 1987) (citing Dillard v. Payne, 615 S.W.2d 53, 55 (Mo. 1981)). In this case, Edward Jones did not divert the County's funds for its own purpose. Rather, Edward Jones simply complied with Melton's requests to electronically transfer a portion of the funds. Therefore, the trial court erred in finding that the County was entitled to judgment on this alleged conversion claim.

D. The County Failed To Plead Conversion In Its Petition Or In Its Motion For Summary Judgment

The County's two-page, one-count, eight-paragraph Petition alleges a claim for violation of Chapter 110. Although the word "converted" appears in one paragraph of that Petition, the elements for conversion claim were not pleaded. "It is axiomatic that a trial court cannot enter a judgment on a cause of action not pleaded." Brock v. Blackwood, 143 S.W.3d 47, 60 (Mo. Ct. App. 2004); see also The Medve Group v. Sombright, 163 S.W.3d 453, 456 (Mo. Ct. App. 2005) (noting that a judgment which is based upon issues not made by the pleadings is void). Further, the trial court can only grant or deny "motions for summary

judgment on the basis of what is contained in the motions for summary judgment and the responses thereto." Mothershead v. Greenbriar Country Club, Inc., 994 S.W.2d 80, 85 (Mo. Ct. App. 1999) (citing Mo. R. Civ. P. 74.04(c)(3)). Because the County never pleaded a claim for conversion in its Petition or in its Motion for Summary Judgment, it was error for the trial court to find Edward Jones liable under a conversion theory.

For all of these reasons, Edward Jones respectfully requests that this Court reverse the trial court's Judgment, as Plaintiff cannot state a claim for conversion as a matter of law.

E. The Award Of Damages Was In Error Because Edward Jones Did Not Possess Any County Funds At The Date Of Demand.

Even if one assumes that this Court finds that the County has a claim for common law conversion and that Judgment for the County based on conversion remedies is appropriate, then the amount award by the trial court was erroneous. Missouri law provides that the date of conversion is the date of demand to return possession of property and a refusal to do so. Thus, damages are award upon, and interest accrues from, the date of demand. "To sufficiently state a cause of action for conversion, the plaintiff must state that the defendant refused upon demand to return the property at issue and that the plaintiff had a right to possess the property

at the time of the alleged conversion." Capitol Indemn. Corp. v. Citizens Nat'l Bank of Fort Scott, 8 S.W.3d 893, 899 (Mo. Ct. App. 2000). Simply stated, conversion is proved by evidence of refusal to give up possession of personal property to the owner on demand.

Edward Jones received the County's demand on January 24, 2000. Damages, therefore, are measured by the amount of County funds in Edward Jones' possession on January 24, 2000. There is no evidence in the record Edward Jones was in possession of any County monies on January 24, 2000. The trial court's award of damages, therefore, was in error.

III. The Trial Court Erred In Applying Prejudgment Interest To The Judgment In Favor Of The County And Against Edward Jones Because Edward Jones Did Not Act Improperly Under Chapter 110 And Did Not Convert Any Of The County's Funds And Was Not A Trustee Ex Maleficio; Mo. Rev. Stat. §§ 110.130, Et Seq., Do Not Provide For Pre-Judgment Interest; No Other Missouri Statute Allows Prejudgment Interest Under The Facts Of This Case; And No Prejudgment Interest Is Allowed Under Common Law Conversion In That Edward Jones Did Not Engage In Tortious Conduct That Conferred A Benefit Upon Itself And The County Did Not Show That The Requirements Of Mo. Rev. Stat. § 408.040.2 Had Been Satisfied.

Because Edward Jones is not liable under Chapter 110 and did not serve as a trustee ex maleficio, the trial court's awarding of prejudgment interest should be vacated. Even if one assumes that the provisions of Chapter 110 apply to Edward Jones and that Edward Jones converted the County's funds, this Court should reverse the trial court's award of prejudgment interest.

A. Mo. Rev. Stat. §§ 110.130, Et Seq., Do Not Provide For Pre-Judgment Interest.

The trial court's award of prejudgment interest in the amount of $232,367.52 is erroneous because Chapter 110 does not authorize the recovery of prejudgment interest. Prejudgment interest is available in statutory claims only where the statute expressly provides for recovery of such interest. Here, the County's Petition and Motion for Summary Judgment were based solely on the theory that Edward Jones violated provisions of Chapter 110. The County even concedes that Chapter 110 contains no civil remedy for violation of its terms. Because Chapter 110 does not provide for prejudgment interest, none may be recovered by the County.

B. No Other Missouri Statute Allows Prejudgment Interest Under The Facts Of This Case.

The County also is not entitled to prejudgment interest under any other Missouri statute. The general Missouri interest statute, Mo. Rev. Stat. § 408.020, provides that interest is applicable to claims based on contract and is not applicable where liability is based on a statute or in tort. Section 408.020 provides, in relevant part:

> Creditors shall be allowed to receive interest at a rate of nine percent annum, when no other rate is agreed upon for all moneys after they

become due and payable, ***on written contracts***, and on accounts after they become due and demand of payment made.

Mo. Rev. Stat. § 408.020 (emphasis added). Plaintiff's claim is not premised on a contract, and therefore § 408.020 is inapplicable.

Another statute, Mo. Rev. Stat. § 537.520, states that the "***jury on the trial*** of any issue, or on any inquisition of damages, ***may, if they shall think fit***, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure." Id. (emphasis added). This discretionary statute allows for the awarding of prejudgment interest only if there is a jury or bench trial on the conversion issue. Because the trial court's Judgment was pursuant to the County's Motion for Summary Judgment and not a trial, Mo. Rev. § 537.520 is inapplicable to facts of this case.

C. No Prejudgment Interest Is Allowed Under Common Law Conversion In That Edward Jones Did Not Engage In Tortious Conduct That Conferred A Benefit Upon Itself And The County Did Not Show That The Requirements Of Mo. Rev. Stat. § 408.040.2 Had Been Satisfied.

The County's argument, as adopted by the Southern District, is that "[i]nasmuch as this was not a claim based solely on a violation of the provisions of

Chapter 110, but was for conversion, it was not error to include a judgment for interest." Christian County, 2005 WL 3196419, at *7.

Conversion, as defined by Missouri case law, "is a tort against the right of possession." Auto Alarm Supply Corp. v. Lou Fusz Motor Co., 918 S.W.2d 390, 392 (Mo. Ct. App. 1996).

In Missouri, the "general rule is that prejudgment interest is not allowed in tort cases." Pediatric Associates, Inc. v. Charles L. Crane Agency Co., 21 S.W.3d 884, 886 (Mo. Ct. App. 2000) (quoting River Landscaping, Inc. v. Meeks, 950 S.W.2d 495, 496 (Mo. Ct. App. 1997)). There are limited exceptions to this general rule. "One of the exceptions is where the defendant's tortious conduct confers a benefit upon the defendant, prejudgment interest may be recovered by the plaintiff on his claim." Meeks, 950 S.W.2d at 496. In this case, the County did not present any evidence in its Motion for Summary Judgment to show that Edward Jones derived a benefit from either accepting the funds on June 21, 1996 or transferring a portion of those funds on July 2 and 3, 2006. Rather, it was Melton who personally benefited from misappropriating the County's money. The County, therefore, cannot satisfy this exception.

The other exception to the general rule is codified at Mo. Rev. Stat. § 408.040.2 (2000), which provides, in relevant part:

> In tort actions, if a claimant has made a demand for payment of a claim or an offer of settlement of a claim, to the party, parties or their representatives, and ***the amount of the judgment or order exceeds the demand for payment or offer of settlement, prejudgment interest***, at the rate specified in subsection 1 of this section, ***shall be calculated from a date sixty days after the demand or offer was made, or from the date the demand or offer was rejected without counteroffer, whichever is earlier***. Any such demand or offer shall be made in writing ***and sent by certified mail*** and shall be left open for sixty days unless rejected earlier.

Mo. Rev. Stat. § 408.040.2 (emphasis added). Under this statute, a claimant is entitled to prejudgment interest only if the amount of the judgment or order exceeds the demand. This provision "promotes settlement and deters unfair benefit from delay of litigation." Brown v. Donham, 900 S.W.2d 630, 633 (Mo. banc 1995). Here, Edward Jones admits that it received a demand letter on January 24, 2000 (LF at 39, 53), although this letter was not attached to County's Motion and was not submitted to the trial court for consideration. Thus, there was no evidence before the trial court to show whether this letter was sent certified mail, and more importantly, whether the amount of the judgment exceeded the demand. The County only included a February 2, 2000 letter from Edward Jones denying

liability. (LF at 39). Under summary judgment standards, however, it was the County's burden to show "that the necessary requirements of the statute are satisfied." Smith, 159 S.W.3d at 835

In addition, the trial court awarded the County "the sum of $368,837.28 with simple interest at the lawful rate of 9% ***from the date of conversion***, for a total sum of $601,204.80 and costs." (LF at 146) (emphasis added). The County alleges that the conversion occurred on June 25 but no later than July 2 and 3, 1996. Mo. Rev. Stat. § 408.040.2 states that prejudgment interest is calculated from a date sixty days after the demand was made, or from the date the demand was rejected, whichever is earlier. In this case, the earliest date would be February 2, 2000, when Edward Jones rejected the County's demand. Thus, if one assumes that the County's demand letter complied with the statutory requirements of § 408.040.2, the trial court erred as a matter of law in awarding prejudgment interest from the date of the conversion and not from the date of the rejection letter.

IV. The Trial Court Erred In Declaring Edward Jones' Claimed Defenses Of Waiver And Estoppel Inapplicable Because Edward Jones' Responses And Legal Memorandum In Opposition Established The Following Material Factual Issues: That The County And Its Officials Were Aware That Melton, The Then County Treasurer, Had Opened An Account With Edward Jones In Another County, And Was Attempting To Deposit A $650,000 Check Into That Account; And That The County Was Given The Opportunity To, But Did Not, Stop Payment On The Check Issued To Edward Jones.

Edward Jones asserted affirmative defenses to the County's claim, including waiver and equitable estoppel. These defenses centered on the undisputed facts that County officials, including the County's lawyer, knew about Melton's check to an Edward Jones branch in another county, authorized Ozark Bank to honor the check after being given a chance to stop payment, and then took no action for the two weeks in which the funds sat untouched in the account. Indeed, the County waited for years before ever notifying Edward Jones in January 2000 that there was an issue with the account opened by Melton. The County admits: "No [C]ounty official, other than Melton, ever communicated directly with Edward Jones until

after Melton's theft was discovered." (Suggestions in Opp'n to Application for Transfer at 3).

The trial court granted summary judgment to the County on these affirmative defenses, finding that waiver and estopped are not legally viable defenses to a Chapter 110 claim. Presumably, the trial court, relying on the proposed Judgment drafted by the County, shifted back from its common law conversion theory back to the Chapter 110 statutory theory as the only way to avoid these affirmative defenses. Edward Jones' affirmative defenses are viable against a Chapter 110 claim and a conversion claim, thereby rendering the trial court's summary judgment in error. At a minimum, Edward Jones is entitled to a jury trial on its waiver and estoppel defenses.

A. The Defense Of Waiver Precludes The Granting Of Summary Judgment In Light Of the Facts In This Case.

The defense of waiver is applicable in statutory claims brought by governmental entities.[4] Waiver is defined as "the intentional relinquishment of a known right." Shahan v. Shahan, 988 S.W.2d 529, 534 (Mo. banc 1999). In this case, it is undisputed that the County, through its duly elected officials, was aware

[4] Because the parties briefed the affirmative defense of waiver (see, e.g., LF at 112-13) and the trial court specifically ruled on the defense of waiver (LF at 146), this defense was not waived below.

of the fact that Melton had opened an account with Edward Jones in another county and was attempting to deposit a $650,000 check into that account. (LF at 69, 77-78; see also Suggestions in Opp'n to Application for Transfer at 2). It is further undisputed that Nelson was contacted by Ozark Bank regarding payment on this check. (LF at 77-78). The reason that Ozark Bank called Nelson before paying the check was to question whether the transfer was appropriate under law, given the fact that Ozark Bank was the County's selected depositary. (LF at 78).

To the extent that the County had a right to question the propriety of this transaction under the county depositary law, this right was "known" by the County when it discussed this matter with Ozark Bank. County officials should have known that opening an Edward Jones account ***in another county*** would run afoul of Chapter 110. Likewise, the County's right to rescind the transaction with Edward Jones was "intentionally relinquished" when the County officials met, weighed their options, and later instructed Ozark Bank to honor the check. By virtue of its own acts, the County has waived any claim against Edward Jones based on a transaction that the County officials expressly authorized. For this reason, summary judgment in favor of the County was inappropriate and constitutes reversible error.

B. The Defense Of Equitable Estoppel Precludes The Granting Of Summary Judgment In Light Of the Facts In This Case.

Even if this Court were to find that the County has not waived the right to pursue its claim against Edward Jones, the undisputed facts described above prove that the County should be estopped from pursuing this claim against Edward Jones in this action.

Under the doctrine of equitable estoppel, a defendant need only show: (1) an admission, statement or act inconsistent with a claim afterwards asserted or sued upon; (2) action by the other party on the faith of such admission, statement or act; and (3) injury to such other party resulting from allowing the first party to contradict or repudiate such an admission, statement or act. Doe v. O'Connell, 146 S.W.3d 1, 4 (Mo. Ct. App. 2004).

As the record reflects, on June 19, 2000, Melton, acting as treasurer, an official agent of the County, met with Askren of Edward Jones in Springfield, Missouri. Melton told Askin that he had recently attended a meeting with other county treasurers and that an idea was presented to them about the possibility of earning higher rates of return on monies they were allowed by statute to invest in other options. (LF at 81). In Missouri, there is a "presumption that everything done by an officer in connection with the performance of an official act in the line of his duty is legally and rightfully done." Blackburn v. Mackey, 131 S.W.3d 392,

397 (Mo. Ct. App. 2001). Relying on Melton's representations, Askren opened an account for him. (LF at 17, 128).

The County knew of Melton's plan to deposit county funds into an Edward Jones account in another county. The County, in fact, ***authorized*** this transfer by telling bank officials to honor the check. (LF at 78, 84). The funds were then held in the Edward Jones account for approximately two weeks. (LF at 126, 145). Despite having knowledge of this deposit, no County official ever contacted Edward Jones during this two-week time period to warn Edward Jones that Melton may be attempting to misappropriate county funds or that the transfer was somehow invalid based on Missouri statutes. (Suggestions in Opp'n to Application for Transfer at 3). It is undisputed that Melton did not convert the funds to his own use while they were held at Edward Jones. Melton transferred the funds to an account at Metropolitan National Bank and subsequently made withdrawals for his personal use.

Had a County official stopped payment on the check, the loss alleged in the Petition would have been avoided. Had a County official contacted anyone at Edward Jones to raise concerns about Melton or the deposit, the loss alleged in the Petition would have been avoided. Nonetheless, the County chose to authorize the transaction it now hopes to rescind. Despite having two weeks to do so, the County chose not to contact Edward Jones to address this situation before Melton

could transfer the funds and eventually convert them to his own use. Applying these undisputed facts to the equitable doctrine of estoppel, the County should now be estopped from brining this claim against Edward Jones.

Though cases involving a civil claim under Chapter 110 are limited, at least two courts have held that a County can be estopped from bringing such a claim as a result of the actions of its County Commission. See Cole County v. Central Missouri Trust Co., 257 S.W.2d 774 (Mo. 1924); In re N. Mo. Trust of Mexico, Mo., 39 S.W.2d 415 (Mo. Ct. App. 1931). Based on its own actions, the County should be estopped from bringing this claim against Edward Jones.

For these reasons, the trial court's judgment is in error and should be reversed. Alternatively, this case should be remanded back to the trial court for trial on these affirmative defenses.

CONCLUSION

For these reasons, this Court should vacate and reverse the trial court's Judgment against Edward Jones and remand the case to the trial court with directions to dismiss the County's claims with prejudice. Even if the Court finds that the County can state a claim, Judgment should be reversed and case remanded for trial on Edward Jones' waiver and estoppel defenses. Alternatively, the Court should vacate and reverse the trial court's award of prejudgment interest.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Missouri Supreme Court Rule 84.06(b) and (c), the undersigned certifies that the foregoing Substitute Opening Brief of Defendant-Appellant complies with the type-volume limitations, using fourteen point double-spaced typeface and based on the number of words of text in the brief as determined by the word count of Microsoft Word, which is the word-processing system used to prepare the Brief. Based on that word count, the number of words in this brief is 9,619.

In accordance with Rule 84.06(g), Defendant-Appellants also file herewith a 3 ½ inch floppy disk containing in Microsoft Word format the full Substitute Opening Brief of Defendant-Appellants, saved in a format that allows for text copying and searching, which has been scanned for viruses and is virus-free.

/s/ David P. Niemeier

CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of The Substitute Opening Brief of Defendant-Appellant and a copy of a 3 ½ inch floppy disk containing the Brief were served by regular U.S. mail, postage prepaid, to John C. Holstein, Esq. and Tom O'Neal, Esq., Shugart, Thompson & Kilroy, P.C., 901 St. Louis Street, Suite 1200, Springfield, MO 65806, counsel for Respondent, this 13th day of March, 2006.

/s/ David P. Niemeier
David P. Niemeier

IN THE SUPREME COURT OF MISSOURI

CHRISTIAN COUNTY, MISSOURI, Respondent, v. EDWARD D. JONES & CO. L.P., d/b/a EDWARD JONES, Appellant.	))))))))))	No. SC87392

Appeal from the Circuit Court of Greene County
Thirty-First Judicial Circuit
Division 2
Honorable J. Miles Sweeney

On Transfer from the Missouri Court of Appeals of the Southern District

APPENDIX TO SUBSTITUTE OPENING BRIEF OF DEFENDANT-APPELLANT

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APPENDIX

TABLE OF CONTENTS

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I hereby certify that two true and accurate copies of The Cover Page and Table of Contents to the Appendix to The Substitute Opening Brief of Defendant-Appellant and a copy of a 3 ½ inch floppy disk containing the Brief were served by regular U.S. mail, postage prepaid, to John C. Holstein, Esq. and Tom O'Neal, Esq., Shugart, Thompson & Kilroy, P.C., 901 St. Louis Street, Suite 1200, Springfield, MO 65806, counsel for Respondent, this 13th day of March, 2006.

/s/ David P. Niemeier
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