IN THE SUPREME COURT

STATE OF MISSOURI

Case No. SC83410

CHOUTEAU AUTO MART, INC. and
NORTHLAND ACCEPTANCE CORP.,

Plaintiffs-Appellants,

v.

FIRST BANK OF MISSOURI,

Defendant-Respondent.

On Appeal from the Circuit Court of Clay County, Missouri
Case No. CV197-8926CC
Division Three
The Honorable William E. Turnage
On Transfer from the Missouri Court of Appeals, Western District
Case No. WD58204

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JURISDICTIONAL STATEMENT

The action involves the question whether, under the Uniform Fiduciaries Law, §§ 456.240-456.350, RSMo 1994,[1] a bank is liable to two corporations for losses arising from breaches of fiduciary duty committed by the corporations' officer. The case does not fall within this Court's exclusive appellate jurisdiction under Article V, Section 3, of the Constitution, and therefore was subject to the general appellate jurisdiction of the Missouri Court of Appeals, Western District. This Court obtained jurisdiction pursuant to Article V, Section 10, of the Constitution when the Court of Appeals, after opinion, sustained the plaintiffs-appellants' motion to transfer.

STATEMENT OF FACTS

Milton ("Red") McGuire is the president and sole stockholder of plaintiffs-appellants Chouteau Auto Mart, Inc. ("Chouteau") and Northland Acceptance Corp. ("Northland") (collectively "the plaintiffs"). L.F. 104 ¶ 6, 145 ¶ 2, 180-81. Janice Thompson ("Thompson") was an employee and officer of Chouteau and of Northland; the parties agree that she was a "fiduciary" of both plaintiffs. L.F. 173 ¶ 10.[2] Chouteau maintained two corporate business accounts at defendant-respondent First Bank of Missouri, formerly First Bank of Gladstone ("the Bank"). L.F. 172 ¶ 3, 173 ¶ 5. Thompson was authorized to write and sign

[1] All statutory references are to RSMo 1994 unless otherwise noted.

[2] The parties' stipulation is for summary judgment purposes only. L.F. 172 n.1.

checks on both of those accounts. L.F. 47 § 4, 68 ¶ 1, 172 ¶ 9, 181. Northland had an account at a different bank, Norbank, on which Thompson was authorized to write and sign checks. L.F. 173 ¶¶ 8-9, 181. Thompson in fact wrote large numbers of checks on those accounts to pay corporate obligations. L.F. 181.

Although initially hired as a bookkeeper, Thompson's duties evolved over the course of years. L.F. 181. By 1993, her responsibilities included virtually all financial record-keeping activities, including management of the books, payroll, and preparation of information for tax returns. L.F. 181. Thompson was solely responsible for bookkeeping and for maintaining the ledgers, checkbooks and accounts receivable of each plaintiff. L.F. 48 ¶¶ 6-8, 68 ¶ 1. The Bank provided the plaintiffs with monthly statements for each of their accounts. L.F. 48 ¶ 9, 68 ¶ 1. Thompson was solely responsible for receiving, reviewing and reconciling the bank statements and cancelled checks of each plaintiff. L.F. 48 ¶¶ 6-8 & 10, 68 ¶ 1.

In 1990 Red McGuire signed and submitted to the Bank a Depositor's Agreement and Signature Card for each of Chouteau's two corporate business accounts. L.F. 103 ¶ 2, 104 ¶ 4, 145 ¶ 2, 172 ¶ 4, 173 ¶ 6; Supp. L.F. 211-14.[3] These documents authorized the Bank to recognize the signature of Thompson in payment of funds or in the transaction of any business for these accounts. L.F. 103 ¶ 3, 104 ¶ 5, 145 ¶ 2. Chouteau later presented the Bank with

[3] A more legible copy is contained in Appendix A1-A2 at the back of this brief.

a Corporate Authorization Resolution adopted by Chouteau's board on August 20, 1995. L.F. 104 ¶ 8, 145 ¶ 2, 173 ¶ 7; Supp. L.F. 215. Among other things, the resolution authorized Thompson, acting alone, to withdraw funds that Chouteau had on deposit with the Bank. Supp. L.F. 215. The resolution also ratified, approved and confirmed all transactions with respect to any deposits, withdrawals, rediscounts and borrowings by or on behalf of Chouteau with the Bank prior to the adoption of the resolution. Supp. L.F. 215.

On numerous occasions, Thompson wrote checks on one of the plaintiffs' accounts and made the checks payable to the Bank. She presented those checks to Bank tellers and directed them what to do with the checks. When presenting numerous checks payable to the Bank, Thompson directed Bank tellers to apply the proceeds for legitimate purposes. L.F. 175 ¶ 13A, 181 n.1. In those instances, she directed the Bank teller to deposit those checks into one of the Chouteau accounts at the Bank, to apply those checks in payment of a loan or line of credit that Chouteau had with the Bank, or to issue cashier's checks. L.F. 175 ¶ 13A, 181 n.1. In these instances, Thompson acted in an authorized manner in making the checks payable to the Bank and directing the Bank what to do with those checks. L.F. 175 ¶ 13A.

The genesis of this lawsuit is that, in other instances, Thompson wrote checks payable to the Bank but breached her fiduciary duty to the plaintiffs when directing the Bank what to do with those checks. The plaintiffs seek to hold the Bank liable for the dollar amounts of 87 checks that Thompson wrote on the

plaintiffs' checking accounts between July 26, 1993 and January 22, 1996. L.F. 173 ¶ 11; Supp. L.F. 216-20. Eighty-three of the checks were drawn on Chouteau's checking accounts at the Bank; the other four were drawn on Northland's Norbank checking account. L.F. 173 ¶ 11; Supp. L.F. 216-20. The summary appearing at L.F. 216-20 accurately reflects the date on which each check was written, the account on which the check was drawn, the account in which the check was deposited, and the amount of the check. L.F. 173 ¶ 11. The 83 Chouteau checks totaled $843,624.98; the four Northland checks totaled $59,002.93. Supp. L.F. 219-20.

Thompson was authorized to, and did, draw and sign each of the 87 checks. L.F. 173 ¶ 11, 94 ¶¶ 13-14. She made each of the checks payable to the Bank as payee. L.F. 173 ¶ 11. Thompson presented each of the checks to a Bank teller along with a deposit slip for one of two accounts at the Bank that she controlled (collectively "the Thompson Accounts"), a business account held in the name of Janey Bear Menagerie and a personal account held in the names of Janice Thompson and her daughter. L.F. 172 ¶¶ 1-2, 174 ¶ 11A. Over the two and one-half year period, 33 different Bank tellers took one or more of the 87 checks for deposit in the Thompson Accounts. L.F. 174 ¶ 11A.

The parties agree that Thompson was not authorized by Chouteau or Northland to deposit the 87 checks in the Thompson Accounts *and* that the Bank had no actual knowledge of this limitation on her authority. L.F. 174 ¶ 12, 175 ¶ 14. The parties agree that Thompson breached her fiduciary duty to the

plaintiffs by depositing the checks in the Thompson Accounts *and* that the Bank had no actual knowledge that Thompson was breaching or intending to breach her fiduciary duty to the plaintiffs in those transactions. L.F. 174 ¶ 12, 175 ¶ 15. None of the checks was delivered by Thompson to the Bank in payment of or as security for a personal debt of Thompson with the Bank. L.F. 175 ¶ 13B.

The plaintiffs state that Thompson "absconded with the proceeds" of the checks that were deposited in the Thompson Accounts. L.F. 208. They further state that Thompson also stole money by writing checks directly to herself, for which they make no claim against the Bank. L.F. 149 n.2. The summary judgment record, however, does not reveal what Thompson did with any of this money. Thompson invoked the Fifth Amendment and remained silent. L.F. 93 n.1. For purposes of summary judgment, the parties agreed that thus far there was no evidence that the plaintiffs or their owner benefited from the deposits of the 87 checks in the Thompson Accounts. L.F. 176 ¶ 17. Nor did the parties on summary judgment explore whether the plaintiffs should have discovered Thompson's misconduct earlier. The plaintiffs contend that, although Thompson stole nearly a million dollars from them over the course of about three years, they never noticed the absence of funds. L.F. 49 ¶ 11, 68 ¶ 1. At times during her tenure with the plaintiffs, Thompson had been sexually involved with Red McGuire. L.F. 47 ¶ 2, 68 ¶ 2.

On December 19, 1997, the plaintiffs sued. Their First Amended Petition included separate counts against the Bank for breach of the Uniform

Fiduciaries Law, conversion, and money had and received, dropping an earlier negligence count. L.F. 1-32. The Bank moved for summary judgment on all the claims in the amended petition. L.F. 47-67. The trial court sustained that motion as to the claims sounding in conversion and money had and received, but overruled it in all other respects. L.F. 88. That order has not been appealed. Substitute Brief of Appellant ("App. Br.") at 5. After the trial court denied the Bank's second, and the plaintiffs' first, motions for summary judgment on the remaining claim under the Uniform Fiduciaries Law, L.F. 168, the parties entered into a Stipulation of Facts, L.F. 172-76, and thereafter filed cross-motions for summary judgment. By order dated January 13, 2000, the trial court granted the Bank's motion and denied the plaintiffs' motion. L.F. 206. The plaintiffs noticed their appeal of that order. L.F. 207-09.

The Court of Appeals affirmed in a split decision. Chouteau Auto Mart, Inc. v. First Bank of Missouri, No. WD 58204, slip op. (Mo. Ct. App. Dec. 12, 2000). The plaintiffs moved for rehearing en banc or, in the alternative, for transfer to this Court. On February 27, 2001, the Court of Appeals denied the motion for rehearing but sustained the motion for transfer.

POINTS RELIED ON

I. The trial court did not err in granting the Bank's motion for summary judgment because:

A. Section 456.310 controls because Thompson breached her fiduciary duty by depositing the checks in the Thompson Accounts, and the Bank is not liable thereunder because in receiving the deposits it undisputedly lacked actual knowledge that Thompson was breaching her fiduciary duty in making such deposits and knowledge of such facts that its actions in receiving the deposits amounted to bad faith.

Sugarhouse Fin. Co. v. Zions First Nat'l Bank, 440 P.2d 869 (Utah 1968);

Johnson v. Citizens Nat'l Bank of Decatur, 334 N.E.2d 295 (Ill. Ct. App. 1975);

In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 751 P.2d 77 (Haw. 1988);

§ 456.310;

§ 456.340.

B. Section 456.270 does not apply because Thompson did not breach her fiduciary duty by making the checks payable to the Bank, and because the Bank's receipt of the checks for deposit in the Thompson Accounts does not establish that the checks were "drawn or delivered in any transaction known by the payee to be for the personal benefit of the fiduciary."

Bolger v. Merrill Lynch Ready Assets Trust, 423 N.W.2d 173 (Wis. Ct. App. 1988);

Johnson v. Citizens Nat'l Bank of Decatur, 334 N.E.2d 295 (Ill. Ct. App. 1975);

In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 751 P.2d 77 (Haw. 1988);

Southern Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100 (Mo. 1970);

Mo. Ann. Stat. § 400.3-307, UCC Comment (Vernon 1994);

Uniform Fiduciaries Act, 7A (Pt. I) U.L.A. 495, Comments (1999);

Benfield & Alces, "Bank Liability For Fiduciary Fraud," 42 Ala. L. Rev. 475 (1991);

§ 456.270.

II. The trial court's denial of the plaintiffs' summary judgment motion is not appealable, and the issues presented on appeal from the Bank's summary judgment (even if decided in the plaintiffs' favor) would not permit a final disposition for the plaintiffs pursuant to Rule 84.14.

Mo. R. Civ. P. 84.14.

ARGUMENT

Standard of Review

The plaintiffs appeal the trial court's ruling granting the Bank's motion for summary judgment. Appellate review of that decision is *de novo*. ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). The Bank's summary judgment will be upheld on appeal if: (1) there are no genuine issues of material fact; and (2) the Bank is entitled to judgment as a matter of law. Id. at 377. The plaintiffs concede the former but challenge the latter. Because the Court's review is *de novo,* it may affirm the trial court's order "on an entirely different basis than that posited at trial." Id. at 387-88 (citing Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 243 (Mo. banc 1984) ("An order of summary judgment will not be set aside on review if supportable on any theory.")).

The plaintiffs also contend that "the trial court erred in . . . denying plaintiff's motion for summary judgment." App. Br. at 8 (Point Relied On). "The matter of the propriety of the court's action in *overruling* a motion for summary judgment is not an appealable order." Parker v. Wallace, 431 S.W.2d 136, 137 (Mo. 1968) (emphasis in original). "This is true even if the denial occurs at the same time summary judgment is granted to the other party." Jones v. Landmark Leasing, Ltd., 957 S.W.2d 369, 373 (Mo. Ct. App. 1997); see Prairie Properties, L.L.C. v. McNeill, 996 S.W.2d 635, 641 (Mo. Ct. App. 1999); Kaufman v. Bormaster, 599 S.W.2d 35, 38 (Mo. Ct. App. 1980).

The plaintiffs claim that Mo. R. Civ. P. 84.14 empowers the Court to enter judgment for them. App. Br. at 13-14. Rule 84.14 provides, in pertinent part, that the "appellate court shall . . . give such judgment as the court ought to give" and "[u]nless justice otherwise requires, the court shall dispose finally of the case." The plaintiffs cite several cases in which the appellant was entitled to summary judgment for precisely the same reason that the respondent's summary judgment motion was reversed, and the Court of Appeals disposed of the case by directing that summary judgment be entered for the appellant. Moore Equip. Co. v. H.H. Halferty, 980 S.W.2d 578, 588 (Mo. Ct. App. 1998); General Am. Life Ins. Co. v. Barrett, 847 S.W.2d 125, 132, 134 (Mo. Ct. App. 1993). This is not that kind of case. As a defending party, the Bank could prevail on summary judgment by negating any one of the elements of the plaintiffs' claim or establishing any single defense. ITT Commercial Fin. Corp., 854 S.W.2d at 381. As claimants, the plaintiffs could prevail only by establishing all of the elements of their claim and the non-viability of all of the Bank's defenses. Id. at 381-82. For reasons explained on pages 49-53 infra, the plaintiffs' entitlement to the judgment for which they pray would not be established even if the Court were to rule in the plaintiffs' favor on the issues presented on appeal from the Bank's judgment. Accordingly, this could not be an appropriate case for a final disposition for the plaintiffs pursuant to Rule 84.14.

Introduction

Although the Uniform Fiduciaries Law is codified in a chapter of the Missouri Revised Statutes entitled "Trusts and Trustees," it also applies to corporations and officers. Like a trust, a corporation acts through its fiduciaries. Fiduciaries control the assets of their principals. A fiduciary "is placed in a situation where there may be a great temptation to pursue his own interest and lose sight of the interest of those for whom he acts." Scott, "Participation in a Breach of Trust," 34 Harv. L. Rev. 454, 481 (1921). By maintaining internal control procedures, a principal can minimize the risk of fiduciary misconduct. If a fiduciary nevertheless misappropriates her principal's assets, she is liable to her principal for breach of fiduciary duty.

The liability of third persons dealing with fiduciaries has been problematic. An apt example is a fiduciary who steals money from accounts that his principal maintains at a bank. When the principal cannot recover its loss from the fiduciary, it tries to shift that loss to the bank that dealt with the fiduciary. The case-by-case approach of the common law to this kind of situation proved unsatisfactory. As one court reported: "Prior to the adoption of the [Uniform Fiduciaries Act], common law imposed upon persons dealing with fiduciaries the duty to assure that fiduciary funds were properly applied to the account of the principal. In some cases, the courts went so far as to charge depository banks with constructive notice of fiduciary misconduct. As a result, third parties were reluctant to deal with fiduciaries." Bolger v. Merrill Lynch Ready Assets Trust,

423 N.W.2d 173, 176 (Wis. Ct. App. 1988) (citations omitted). The potential liability of a third party for failure to supervise the conduct of the fiduciary "ma[de] it dangerous to deal with a fiduciary and seriously interfere[d] with the proper performance by the fiduciary of his duties." Scott, 34 Harv. L. Rev. at 481.

The problems with the common law prompted the National Conference of Commissioners on Uniform State Laws and the American Bar Association to promulgate the Uniform Fiduciaries Act ("UFA") in 1922. "The general purpose of the Act is to establish uniform and definite rules in place of the diverse and indefinite rules now prevailing as to 'constructive notice' of breaches of fiduciary obligations," thereby "facilitat[ing] the performance by fiduciaries of their obligations." 7A (Pt. I) U.L.A. 496, Prefatory Note (1999). "The prime reason for enactment of the Uniform Fiduciaries Act is to facilitate banking transactions by relieving depository banks of their common law duty to inquire into the propriety of fiduciary transactions." General Ins. Co. v. Commerce Bank of St. Charles, 505 S.W.2d 454, 457 (Mo. Ct. App. 1974). Missouri is among the 25 states and the District of Columbia that have adopted the UFA. 7A (Pt. I) U.L.A. at 495, Table. Missouri enacted the UFA in 1959, codified it as §§ 456.240-456.350, and called it the Uniform Fiduciaries Law ("UFL").

The parties agree that the UFL applies to the facts of this case, but they point to different sections of it as setting forth the controlling standards. The Bank should prevail no matter which section applies. The Bank begins its argument with § 456.310, the section of the UFL that it contends (and the Court of

Appeals agreed) applies to the facts of this case. The Bank then turns to § 456.270, the section upon which the plaintiffs rely. The applicability of § 456.310 and the inapplicability of § 456.270 are supported not just by the statutory language of those two sections, but also by official commentary and case law. These authorities establish that a depository bank is not liable under the UFA unless it had actual knowledge that the fiduciary was breaching her fiduciary duty, had knowledge of such facts that its action amounted to bad faith, or was the payee on a check on the principal's account delivered by the fiduciary in payment of or as security for her personal debt to the bank.

I. The trial court did not err in granting the Bank's motion for summary judgment because:

A. Section 456.310 controls because Thompson breached her fiduciary duty by depositing the checks in the Thompson Accounts, and the Bank is not liable thereunder because in receiving the deposits it undisputedly lacked actual knowledge that Thompson was breaching her fiduciary duty in making such deposits and knowledge of such facts that its actions in receiving the deposits amounted to bad faith.

1. By its terms, § 456.310 provides the Bank a defense on the facts of this case.

Section 456.310, Missouri's codification of § 9 of the UFA, provides in pertinent part as follows:

> **Deposit in fiduciary's personal account.** If a fiduciary makes a deposit in a bank to his personal credit . . . of checks drawn by him

> upon an account in the name of his principal if he is empowered to draw checks thereon . . . or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary . . . unless the bank receives the deposit . . . with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit . . . or with knowledge of such facts that its action in receiving the deposit . . . amounts to bad faith.

Section 456.310 perfectly fits the facts of this case. The breach of fiduciary duty for which the plaintiffs seek to hold the Bank liable was Thompson depositing the checks in the Thompson Accounts, precisely the situation summarized in the title and described in the text of this section. The checks were drawn by Thompson upon the plaintiffs' accounts as she was empowered to do, and otherwise represented funds held by her as fiduciary. She made deposits of the checks to her "personal credit" when she deposited them in the Thompson Accounts. In this situation, the Bank was not bound to inquire whether Thompson was breaching her fiduciary duty to the plaintiffs in making such deposits, unless the Bank received the deposits with actual knowledge that Thompson was thereby breaching her fiduciary duty (hereinafter "actual knowledge") or with knowledge of such facts that its actions in receiving the deposits amounted to bad faith (hereinafter "bad faith").

It is no accident that § 456.310 protects a depository bank from liability to the principal unless the bank has actual knowledge of the fiduciary breach or acts in bad faith. As stated before, the "prime reason" the UFA was enacted was "to facilitate banking transactions by relieving depository banks of their common law duty to inquire into the propriety of fiduciary transactions." General Ins. Co., 505 S.W.2d at 457; see Trenton Trust Co. v. Western Sur. Co., 599 S.W.2d 481, 490 (Mo. banc 1980); In re Broadview Lumber Co., 118 F.3d 1246, 1251 (8th Cir. 1997); Sugarhouse Fin. Co. v. Zions First Nat'l Bank, 440 P.2d 869, 870 (Utah 1968). "The bank dealing with a fiduciary is entitled to rely on the presumption that the fiduciary will fulfill its obligations to its principal." Trenton Trust Co., 599 S.W.2d at 490; see General Ins. Co., 505 S.W.2d at 457; In re Broadview Lumber Co., 118 F.3d at 1251. "As the depository has no duty to inquire whether the fiduciary properly applies funds held in trust, mere negligence on the part of the depository bank is not sufficient to hold it liable to the principal if the fiduciary in fact misappropriated the fund." Trenton Trust Co., 599 S.W.2d at 490. The UFA "places a duty upon principals to use only honest fiduciaries, and gives relief to those who deal with fiduciaries" except where they have actual knowledge that the fiduciary is breaching her fiduciary duty or they act in bad faith. Sugarhouse Fin. Co., 440 P.2d at 870. Actual knowledge or bad faith "is the liability test prescribed by the statutes in question which govern exclusively." Southern Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100, 105 (Mo.

1970); see General Ins. Co., 505 S.W.2d at 456-57; In re Broadview Lumber Co., 118 F.3d at 1251; In re Lauer, 98 F.3d 378, 383 (8th Cir. 1996).

2. The plaintiffs' arguments against the applicability of § 456.310 lack merit.

The plaintiffs state that "§ 456.310 is not, by its terms, applicable to the transactions at issue, and that it therefore cannot provide a defense" to the Bank. App. Br. at 24. In their Point Relied On, they make two arguments against the applicability of § 456.310. Neither is persuasive.

First, the plaintiffs argue that § 456.310 "does not address the specific situation where the bank is the payee of a check drawn and delivered in a transaction known by the bank, as payee, to be for the personal benefit of the fiduciary." App. Br. at 8; see id. at 25. This simply rehashes the language from § 456.270 that the plaintiffs contend is controlling and that the Bank addresses later in this brief. As explained on pages 21-22 supra, the *text* of § 456.310 (UFA § 9) easily encompasses the situation when the bank is the payee of a check deposited in the fiduciary's personal account. The *case law* confirms this point. In Sugarhouse Fin. Co. v. Zions First Nat'l Bank, 440 P.2d 869 (Utah 1968), the fiduciary drew three checks on his principal's account made payable to the defendant bank and deposited those checks in his personal account there. The court held that the bank was protected by § 9 of the UFA because it acted without actual knowledge of the fiduciary breach and without bad faith. Id. at 871. In Johnson v. Citizens Nat'l Bank of Decatur, 334 N.E.2d 295 (Ill. Ct. App. 1975),

the fiduciary over a two-year period wrote 23 drafts payable to the defendant bank and deposited all proceeds of these drafts in his personal account there. Rejecting the principal's argument "that when an instrument is drawn to the order of a bank, as is true here, the applicable section is section 5," the court held that "[s]ection 9 of the Act, by its terms, applies to the situation at bar and exculpates the Bank from liability to the principal." Id. at 298. In In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 751 P.2d 77 (Haw. 1988), the fiduciary wrote checks on his principal's account made payable to the defendant bank for deposit in an account established for the fiduciary to purchase a home. Despite the assumption that the bank knew that the funds were for the fiduciary's personal use, id. at 78, the court held that, under §§ 5 and 9 of the UFA, the bank was not liable "[w]here evidence is lacking that a bank received checks drawn by a fiduciary as his personal creditor, or that it transferred funds received with actual knowledge of the fiduciary's breach of his obligation as a fiduciary, or that the transfers were made in bad faith." Id. at 81. Although these cases are from other states that have enacted the UFA, they are important because the UFL "shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." § 456.340. In analyzing the UFA, the Missouri courts have cited Sugarhouse and Johnson. See Trenton Trust Co., 599 S.W.2d at 490; General Ins. Co., 505 S.W.2d at 457.

Second, the plaintiffs argue that "the checks at issue are not payable to, endorsed to, or otherwise proper for deposit into the fiduciary's account, as

required by section 456.310." App. Br. at 8. There seem to be two strands to this argument, one questioning whether the deposits at issue fall within the "otherwise makes a deposit" clause of § 456.310, and the other questioning whether the Bank "paid the checks as written."

The plaintiffs argue that the clause of § 456.310 referring to a fiduciary who "otherwise makes a deposit of funds held by him as fiduciary" should not be construed to cover the situation in which the fiduciary deposits in her personal account a check that she had made payable to the bank. App. Br. at 25-26. The plaintiffs argue that if "otherwise makes a deposit" is open-ended, then § 456.310 would protect a bank that received a deposit in the fiduciary's personal account of (i) a check made payable to the principal and endorsed by the fiduciary even if the fiduciary lacked endorsement authority, or (ii) the principal's check made payable to Union Electric. App. Br. at 26.

There are several answers to this strand of the plaintiffs' argument. First, a court can readily decide that the "otherwise makes a deposit" clause covers the deposit of a check made payable to the bank, without coming close to the plaintiffs' slippery slope. (In any event, the plaintiffs' examples likely would be excluded from the catch-all clause because (i) the more specific clause requiring endorsement authority would take precedence, and (ii) the presenter of the check would not be a fiduciary of Union Electric.). Second, law review commentary disagrees with the plaintiffs' point. See Benfield & Alces, "Bank Liability For Fiduciary Fraud," 42 Ala. L. Rev. 475, 525 n.312 (1991) ("Section 9 contains a

catch-all provision that covers deposit of checks payable to the bank, viz: 'or otherwise makes a deposit of funds held by him as fiduciary.'"). Third, besides the "otherwise makes a deposit" clause, this situation is also covered by the clause referring to a fiduciary who "makes a deposit . . . of checks drawn by him upon an account in the name of the principal if he is empowered to draw checks thereon." Fourth, nothing in § 456.310 even suggests that it does not apply to the situation in which the fiduciary writes the check payable to the bank and then directs the bank to deposit the check in the fiduciary's personal account. That is exactly what happened in the Sugarhouse and Johnson cases discussed above.

The other strand of the plaintiffs' argument is their oft-repeated point that, in receiving the checks payable to the Bank for deposit in the Thompson Accounts, the Bank did not "pay the checks as they were written" or did not "follow[] the written instructions on the checks." App. Br. at 20. They even argue that, in following Thompson's direction to deposit the checks in the Thompson Accounts, the Bank acted "in contravention of the express written instructions of the maker." Id. at 23. The plaintiffs invoke this argument in several contexts. Pertinent to § 456.310, they argue that the protections afforded a depository bank under that section should not extend to the situation in which the bank did not pay the checks as written. Id. at 27. Pertinent to § 456.270, they say that "[t]he only reason the bank's role may have in fact been limited to a depository bank was because of its malfeasance in failing to honor and pay the checks as they were

written." Id. at 20. The plaintiffs' argument is inconsistent with UFA cases such as Sugarhouse and Johnson.

Moreover, it makes no sense in this context to say that the Bank should have paid the checks as written or followed the written instructions on the checks. The Bank does not have an account in its own name in which it deposits checks made payable to the Bank. If the Bank took each Chouteau check and credited it against the account upon which it was drawn, the check transaction (crediting and debiting the same account) would be commercially meaningless. See St. Stephen's Evangelical Lutheran Church v. Seaway Nat'l Bank, 350 N.E.2d 128, 130 (Ill. Ct. App. 1976). The Bank needed to receive directions as to what to do with the checks made payable to itself. The Bank always received its directions from Thompson. Thompson "was the proper person for the bank to look to for instructions." Id. She had written the checks in the first place, as she was authorized to do. The plaintiffs had designated Thompson as a person authorized to transact business with the Bank on their accounts. No limitations on that authority had been communicated to the Bank. L.F. 175 ¶ 14. On numerous occasions, she had given proper instructions. She had at least apparent authority to direct the Bank what to do with such checks, based both on formal documentation and course of dealing. The Bank was entitled to treat her directions as the directions of her principals, absent actual knowledge or bad faith. See Southern Agency Co., 452 S.W.2d at 105; In re Broadview Lumber Co., 118 F.3d at 1251 n.6.

The plaintiffs' case citations do not support their argument that the Bank breached a contractual obligation to pay the checks as written. The plaintiffs cite American Sash & Door Co. v. Commerce Trust Co., 25 S.W.2d 545, 548 (Mo. Ct. App. 1930), on transfer, 56 S.W.2d 1034 (Mo. banc 1932), and Cassel v. Mercantile Trust Co., 393 S.W.2d 433, 438 (Mo. 1965), for the proposition that the bank must pay out a depositor's money only to persons to whom the depositor orders payment to be made. App. Br. at 20-21. In the case of each plaintiff, the depositor is a corporation. The corporation formally designated Thompson as a person who could act for it in transactions involving its accounts. When the Bank followed Thompson's directions, it was following the orders of the depositor. If those directions constituted a breach of her fiduciary duty, the UFL protects the bank absent actual knowledge or bad faith.

The plaintiffs place special emphasis on Wright v. Mechanics Bank of St. Joseph, 466 S.W.2d 174 (Mo. Ct. App. 1971), see App. Br. at 21, but in that case the bank took its direction from a stranger, not a fiduciary, of the maker of the check. Mrs. Peery wrote a check payable to the defendant bank, with whom she had no relationship. Mr. Stewart presented the check to the bank and deposited it in an account he opened there. In holding the bank liable to Mrs. Peery's estate, the court cited "the rule that the banks will receive, hold and disburse the moneys of their depositors as such depositors direct." 466 S.W.2d at 177. The bank's failure was that it accepted the directions of a person (Mr. Stewart) who had not been authorized by the maker of the check (Mrs. Peery) to act on her behalf. Both

Wright and this case involved checks made payable to the bank, but the difference is that Thompson was authorized by the plaintiffs to give directions to the Bank on their behalf (i.e., Thompson was a fiduciary) while Mr. Stewart was not authorized by Mrs. Peery to give directions on her behalf (i.e., Mr. Stewart was not a fiduciary). When the presenter of a check made payable to the bank is a fiduciary, the UFL applies. The UFL permitted the Bank "to indulge in the presumption" that, in directing what to do with these checks, Thompson was "acting lawfully and in accordance with [her] duties." General Ins. Co., 505 S.W.2d at 457.

3. The Bank received the deposits without actual knowledge or bad faith.

The plaintiffs cannot (and have not even tried to) establish either actual knowledge or bad faith. The parties have stipulated that the Bank had no actual knowledge that Thompson was breaching or intending to breach her fiduciary duty to the plaintiffs when she deposited the 87 checks in the Thompson Accounts. L.F. 175 ¶ 15. Although in the stipulation the plaintiffs reserved the right to argue bad faith, L.F. 175 ¶ 15, they did not make that argument in the trial court. By their own admission, the plaintiffs chose to proceed under § 456.270 in order to avoid the "more onerous burden" of proving actual knowledge or bad faith under § 456.310. L.F. 80, 82. They have not preserved for appeal any issue about bad faith. The Court of Appeals observed that "[t]he appellants concede that given the stipulation of the parties, they could not recover on their UFL claims applying the standard of liability imposed by § 456.310." Slip op. at 7. The plaintiffs have

not disputed that observation. In their brief before this Court, the plaintiffs do not in their Point Relied On or elsewhere dispute whether the Bank acted in bad faith. See App. Br. at 23-29; see also Thummel v. King, 570 S.W.2d 679, 686 (Mo. banc 1978) (Point Relied On must inform the Court and opposing party of the precise matters presented for resolution).

In any event, there is no evidence that the Bank was guilty of bad faith. The UFL does not define "bad faith," but it does define "good faith." Trenton Trust Co., 599 S.W.2d at 492. "A thing is done 'in good faith' within the meaning of [the UFL] when it is in fact done honestly, whether it be done negligently or not." § 456.240.2. Bad faith requires willfulness. 599 S.W.2d at 492. An example of bad faith is where the taker "suspects that the fiduciary is acting improperly and deliberately refrains from investigating in order that he may avoid knowledge that the fiduciary is acting improperly." 7A (Pt. I) U.L.A. 518, Comment. For a principal to establish bad faith, it need not show that the bank had actual knowledge that the fiduciary was committing a breach of her fiduciary duty, but it must show a "deliberate desire to evade knowledge" or an "intentional closing of the eyes or stopping of the ears." 599 S.W.2d at 492-93 (citations omitted). "Where a bank engages in transactions with a fiduciary and has 'both reason to suspect a misappropriation by a fiduciary and a monetary interest in the continuance of such activity,' the bank acts in bad faith." Id. at 493 (citations omitted).

Applying these legal standards to the undisputed facts, the Bank did not act in bad faith as a matter of law. The Bank did not have actual knowledge that Thompson was breaching her fiduciary duty in depositing the 87 checks in the Thompson Accounts. L. F. 175 ¶ 15. Nor did it know that Thompson did not have actual authority from the plaintiffs to make those deposits. L. F. 175 ¶ 14. The plaintiffs authorized the Bank to recognize the signature of Thompson in payment of funds or in the transaction of any business for their accounts, and authorized Thompson, acting alone, to withdraw funds that Chouteau had on deposit with the Bank. L.F. 103 ¶¶ 2-3, 104 ¶¶ 4-5&8, 145 ¶ 2, 172 ¶ 4, 173 ¶¶ 6-7; Supp. L.F. 211-15. In numerous instances, Thompson had written checks payable to the Bank and directed the Bank to apply the proceeds for legitimate purposes. L.F. 175 ¶ 13A, 181 n.1. Thompson dealt with 33 different Bank tellers in depositing the 87 checks over the course of two and one-half years. L.F. 174 ¶ 11A. The Bank did not financially benefit from these transactions; none of the checks was delivered in payment of or as security for a personal debt of Thompson with the Bank. L.F. 175 ¶ 13B.

# # #

The plaintiffs acknowledge, as they must, that § 456.310 protects a depository bank from liability (absent actual knowledge or bad faith) in "numerous situations . . . involving a known personal benefit to the fiduciary." App. Br. at 25. They also acknowledge that § 456.310 confers the same protection in a number of different "situations that provide the fiduciary, because of the authority granted

him by the principal, with excellent opportunities to abuse that authority and misappropriate the principal's money." Id. at 27. They argue that this case is different simply because the checks were made payable to the Bank, which they say triggers § 456.270 and liability "rising virtually to the level of insurer." Id. at 16. Neither the text of § 456.310 nor the case law applying it supports a "bank as payee" exception to the protections afforded depository banks when they act honestly with fiduciaries. As explained below, there is no support for such an exception in § 456.270 either.

B. Section 456.270 does not apply because Thompson did not breach her fiduciary duty by making the checks payable to the Bank, and because the Bank's receipt of the checks for deposit in the Thompson Accounts does not establish that the checks were "drawn or delivered in any transaction known by the payee to be for the personal benefit of the fiduciary."

1. By its terms, § 456.270 does not apply to the facts of this case.

Section 456.270, Missouri's codification of § 5 of the UFA, provides in pertinent part as follows:

> **Check drawn by fiduciary payable to third person.** If a check . . . is drawn by a fiduciary . . . in the name of his principal by a fiduciary empowered to draw such instrument in the name of his principal, the payee is not bound to inquire whether the fiduciary is committing a breach of his obligation as fiduciary in drawing or

> delivering the instrument, and is not chargeable with notice that the fiduciary is committing a breach of his obligation as fiduciary unless he takes the instrument with actual knowledge of such breach or with knowledge of such facts that this action in taking the instrument amounts to bad faith. If, however, such instrument is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor, or is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary, the creditor or other payee is liable to the principal if the fiduciary in fact commits a breach of his obligation as fiduciary in drawing or delivering the instrument.

The plaintiffs base their claim on this section. App. Br. at 14. As its title indicates, this section deals with checks drawn by the fiduciary payable to a third person. The first sentence provides that, as long as the fiduciary is authorized to draw the check on the principal's account, the third person will not be liable to the principal if the fiduciary in drawing the check has breached her fiduciary duty, unless the third person takes the check with actual knowledge or bad faith. The plaintiffs totally mischaracterize the first sentence of § 456.270, see App. Br. at 16 (first paragraph), but they do not base their claim on that sentence in any event. Instead, they base their claim solely on that part of the second sentence referring to an instrument "drawn and delivered in any transaction known

by the payee to be for the personal benefit of the fiduciary." Id. at 16. According to the plaintiffs' argument, (a) the Bank was the payee because the checks were made payable to the Bank, (b) the checks were drawn and delivered in a transaction that the Bank knew to be for Thompson's personal benefit because the checks were deposited in the Thompson Accounts, and (c) the Bank therefore is liable to the plaintiffs for Thompson's breach of fiduciary duty without any showing of culpability on the Bank's part. Id.

There are many reasons why § 456.270 does not apply to the facts of this case. The most obvious is that the deposit of the checks in the Thompson Accounts is not, as a matter of law, a "transaction known by the payee to be for the personal benefit of the fiduciary."[4] The plaintiffs erroneously state that, "[a]lthough not expressly stipulated, there is no dispute" on this point. App. Br. at 17. Whether the checks were drawn and delivered in any transaction known by the Bank to be for the personal benefit of Thompson has been disputed throughout these proceedings. See, e.g., L.F. 62-63 ("Bank did not know that it was taking the checks from Janice Thompson for her personal benefit . . .. Plaintiffs may contend that, since the tellers conducting the transactions deposited the checks into Janice Thompson's personal account, actual knowledge may be inferred. . . . [T]he Missouri legislature has specifically rejected the inference of knowledge from the mere fact of a fiduciary depositing funds into his personal account."); L.F. 161

[4] This was the plaintiffs' only evidence on this point. L.F. 165.

("As a matter of law, the 'deposit' of a check made payable to a drawee or depository bank into an account of a fiduciary authorized to write the check is not a transaction known to be for the personal benefit of the fiduciary."); L.F. 99 (plaintiffs argue the point); L.F. 107-12 (Bank argues the point); L.F. 138-42 (Bank argues the point); L.F. 147 (plaintiffs argue the point); L.F. 168 (trial court comments on the point); L.F. 183-84 (plaintiffs argue the point).

The fact that Thompson deposited checks made payable to the Bank in the Thompson Accounts does not establish that the Bank knew that Thompson would use the proceeds of the checks for her personal benefit instead of the plaintiffs' benefit. The parties have stipulated that, thus far, there is no evidence that Thompson used those proceeds to benefit the plaintiffs, but the Bank did not know that when Thompson deposited the checks in the Thompson Accounts. As far as the Bank knew at that time, Thompson could have intended to use those proceeds for the plaintiffs' benefit as she had on numerous other occasions in which she wrote checks payable to the Bank. L.F. 175 ¶ 13A, 181 n.1. As stated before, the UFL permits a depository bank to indulge in the presumption that the fiduciary will act lawfully and fulfill her obligations to her principal. Trenton Trust Co., 599 S.W.2d at 490; General Ins. Co., 505 S.W.2d at 457.

Just because the principal's funds are deposited in the fiduciary's personal account does not mean that those funds will be converted to the fiduciary's personal use. See Sugarhouse Fin. Co., 440 P.2d at 870 ("There may be a lot of reasons why a principal and his fiduciary may engage in odd and

unusual check writing, such, for example, as making a political contribution or putting funds into a secret agent's possession to purchase property and hold it in a name other than that of the principal. The [UFA] was intended to cover just such situations."); Western Sur. Co. v. Farmers & Merchants State Bank, 63 N.W.2d 377, 379 (Minn. 1954) ("'We cannot agree to the contention that when one deposits funds in his personal bank account that it must be regarded as equivalent to a declaration of intent to devote them to his personal ends.'") (quoting Rodgers v. Bankers' Nat. Bank, 229 N.W. 90, 92 (Minn. 1930)); Benfield & Alces, 42 Ala. L. Rev. at 520 ("The U.F.A. rule is based upon the assumption that a fiduciary will properly apply fiduciary funds and that knowledge by a depositary bank that a fiduciary has deposited fiduciary funds in her personal account is not knowledge or notice of a present or intended future misappropriation."); id. at 548 ("The mere fact of deposit into the fiduciary's personal account does not establish that the transaction is for the personal benefit of the fiduciary."). As the court stated in Rheinberger v. First Nat'l Bank of Saint Paul, 150 N.W.2d 37, 41 (Minn. 1967): "The mere fact that a fiduciary deposits in his personal account funds known by the bank to be fiduciary funds does not put the bank on notice that the fiduciary intends to misappropriate such funds." Both logic and legal authorities demonstrate that the fact that Thompson deposited the 87 checks in the Thompson Accounts did not even put the Bank "on notice" that she would use those funds for her personal benefit, much less create the "knowledge" on the Bank's part that the second sentence of § 456.270 requires.

The plaintiffs acknowledge that Thompson could have written the checks payable to the Bank and asked for cash, and "the Bank might have legitimately claimed that it did not know whether said cash was for the personal benefit of Thompson." App. Br. at 18. The plaintiffs argue that the Bank can make no such claim when those checks are deposited in the fiduciary's personal account because in that situation the fiduciary is the "owner" as opposed to a "possessor" of the funds. Id. The plaintiffs cite no support for this distinction. The cases actually go the other way. In Western Sur. Co. the court refused to treat the deposit of the principal's check in the fiduciary's personal account any differently than the cashing of a check over the counter. 63 N.W.2d at 379. Likewise, the court in St. Stephen's Evangelical Lutheran Church stated that "[t]here is no difference in substance between a payee bank crediting a check to the fiduciary's personal account and then permitting the fiduciary to draw on that account . . . and paying the proceeds of the check in cash to the fiduciary." 350 N.E.2d at 131. The fiduciary is no more likely to spend funds for her personal benefit in one situation than in the other. In both situations, the Bank lacks the requisite knowledge that the fiduciary will act dishonestly and use the principal's funds for her personal benefit.

The plaintiffs cite Trenton Trust Co., 599 S.W.2d at 489 n.2, with the following parenthetical: "(deposit of guardianship funds to personal account is 'transaction known by the transferee to be for the personal benefit of the fiduciary' under § 456.260)." App. Br. at 18. The parenthetical is highly misleading; it is

drawn from dicta in a footnote that was tied to the particular facts of that case. In Trenton Trust, a mother was appointed guardian of the estates of each of her two children. The mother received two checks (one per child) from an insurance company made payable to her as guardian of the estate of the child. She went to the bank to invest the funds in guardianship accounts. A bank officer instructed her to endorse both checks exactly as they were made payable, but he then drew up certificates of deposit ("CD's") in the names of the mother and her child, failing to reflect the fiduciary character of the funds. Nine and ten months later, the mother and her husband obtained personal bank loans through the same officer and, at his suggestion, the mother pledged the CD's as collateral. There later developed a dispute between the bank and a successor guardian about whether the bank was entitled to retain the CD's as collateral for the loans. This Court ruled that the successor guardian was entitled to the CD's based on the trial court's factual findings that the bank, in making the personal loans, had acted with actual knowledge that the mother was breaching her fiduciary duty and in bad faith. 599 S.W.2d at 483, 486, 493-94. In a footnote, the Court offered some observations about whether the bank had any liability arising from the creation of the CD's in the first place – an issue the Court did not decide. Id. at 489 & n.2. Given the significant factual differences in the two cases, this footnote dicta should carry no weight here. Although the bank officer in Trenton Trust knew that the CD's were being purchased with guardianship assets, *he* decided that the CD's should be held in the personal names of the mother and her children. The mother breached her

fiduciary duty by following the bank's direction. In contrast, the Bank's involvement in this case was limited to accepting for deposit in the Thompson Accounts checks that Thompson had made payable to the Bank. The Bank tellers simply followed Thompson's directions in conducting these routine transactions, as the plaintiffs had authorized the Bank to do.

As discussed above, the courts dealing with this situation protect the bank under § 9 of the UFA, the section dealing with depositories of fiduciary funds and, specifically, deposits in a fiduciary's personal account. Perhaps because the defendant was not a bank, the court in Bolger v. Merrill Lynch Ready Assets Trust, 423 N.W.2d 173 (Wis. Ct. App. 1988), decided the case under § 5 of the UFA, the section under which the plaintiffs make their claim in this case. In Bolger, a fiduciary wrote checks on trust accounts made payable either to Merrill Lynch or to the bank in which Merrill Lynch had a custodial account. The fiduciary presented the checks to the bank with the directive to deposit the funds in the fiduciary's personal brokerage account at the bank. The fiduciary subsequently withdrew the funds and used them for his own benefit. The trusts then sought to recover the funds from Merrill Lynch. The case presented the question whether the checks were "drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary" under § 5 of the UFA. Although the checks drawn on trust accounts were deposited in the fiduciary's personal account, the court ruled that, as a matter of law, the evidence did not establish that either

the bank or Merrill Lynch had actual knowledge that the transactions were for the fiduciary's personal benefit. Id. at 177.

2. UCC § 3-307 confirms that this case does not involve a "transaction known by the payee to be for the personal benefit of the fiduciary."

Although the parties agree that the issue is how the *Uniform Fiduciaries Law* applies to the facts of this case, § 3-307 of the *Uniform Commercial Code* and its commentary support the Bank's position on two points: First, the deposit of a check made payable to the bank in the fiduciary's personal account is not a "transaction known by the payee to be for the personal benefit of the fiduciary," as that phrase is used in § 456.270. Second, that phrase is not intended to cover depository transactions like those involved here, but instead addresses the situation when a vendor sells goods and services to the fiduciary knowing that they are for her personal benefit and that it is being paid with the principal's funds.

Section 3-307 of the UCC establishes rules about when the "taker" of an "instrument" from a "fiduciary" has "notice" that the transaction is a breach of a fiduciary duty that the fiduciary owes to the "represented person." As revised in 1990, § 3-307(b)(4) provides that, if the fiduciary writes a check in her capacity as fiduciary "to the taker as payee," the taker has notice of the breach of fiduciary duty if the check is "(i) taken in payment of or as security for a debt known by the taker to be for 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." § 400.3-307, RSMo 1992 Supp.

The language in clauses (i) and (ii) of § 3-307(b)(4) parallels the language of the second sentence of § 456.270, upon which the plaintiffs bring their claim. The language of clause (iii), which captures the deposit of the check in the fiduciary's personal account, has no counterpart in the second sentence of § 456.270. The plaintiffs argue that the deposit of the check in the fiduciary's account establishes, as a matter of law, that the bank knew that the transaction was for the personal benefit of the fiduciary. If that were the case, there would have been no reason for UCC § 3-307 to have treated those two situations in separate clauses.

The conflict between UCC § 3-307 and the UFL as to whether a bank as payee has notice of the breach of fiduciary duty when it accepts the check for deposit in the fiduciary's personal account has not gone unnoticed. Comment 3 accompanying UCC § 3-307 notes the "split of authority": "Subsection (b)(2)(iii) states that the bank is given notice of breach of fiduciary duty because of the deposit. The Uniform Fiduciaries Act § 9 states that the bank is not on notice unless it has knowledge of facts that makes its receipt of the deposit an act of bad faith." Mo. Ann. Stat. § 400.3-307, UCC Comment 3 (Vernon 1994). A law review article on the subject reports that UCC § 3-307 generally follows the Uniform Fiduciaries Act with "one important exception": "That exception is that

under 3-307 a depositary bank is on notice of a breach of fiduciary duty if it allows a fiduciary to deposit to her personal account an item . . . drawn by . . . the fiduciary as such and payable to the bank. Under the U.F.A., the bank could have allowed deposit of such instruments to the account of the fiduciary without incurring liability unless the bank actually knew of a breach of trust or acted in bad faith." Benfield & Alces, 42 Ala. L. Rev. at 529; see id. at 535, 546.

In Missouri, the legislature resolved the "split of authority" noted in the UCC Comment and eliminated the "one important exception" noted by the law review article. In 1992, the legislature had adopted the revised § 3-307 in its entirety. See § 400.3-307, RSMo 1992 Supp. In 1994, however, the legislature repealed clause (iii). See § 400.3-307, RSMo 1994. Although there is no legislative history from which to divine legislative intent, a fair inference is that the legislature did not intend bank payees to be liable simply because they accepted a check for deposit in the fiduciary's personal account.

The UCC Comment accompanying § 3-307 provides other useful guidance. It notes that the "taker" of a check will often be a bank. Mo. Ann. Stat. § 400.3-307, UCC Comment 2 (Vernon 1994). It addresses the circumstances in which a bank will be deemed to have notice of a breach of fiduciary duty: first, when it takes the check in payment of a personal loan of the bank to the fiduciary; and second, when it takes the check for deposit in the fiduciary's personal account. Id., Comments 2 & 5. (In this case, the first is not present, and the second was never part of the UFL and is no longer a part of the UCC in Missouri.) When the

Comment addresses UCC § 3-307(b)(4)(ii) – "taken in a transaction known by the taker to be for the personal benefit of the fiduciary" – the only example it provides is when the fiduciary uses the check "to buy goods or services" and the person acting for the vendor knows that the goods or services are for the personal benefit of the fiduciary. Id., Comments 2 & 5. A bank accepting a check for deposit (transferring funds from the principal's account to the fiduciary's account) is not comparable to the vendor who accepts the principal's funds in payment of goods or services that it knows are for the personal benefit of the fiduciary.

Finally, the Comment reiterates that the standard is "knowledge," not "notice," and that the "knowledge of the organization is determined by the knowledge of the 'individual conducting that transaction,' i.e. the clerk who receives and processes the instrument." Id., Comment 2. Thus, it concludes, "[t]he requirement that the taker have knowledge rather than notice is meant to limit Section 3-307 to relatively uncommon cases in which the person who deals with the fiduciary knows all the relevant facts." Id. The 33 different Bank tellers who dealt with Thompson on the 87 checks did not "know[] all the relevant facts" and, in particular, did not know whether, in these routine deposit transactions, Thompson was converting the plaintiffs' funds to her personal benefit.

3. The Bank did not financially benefit from the transactions, unlike the creditor and payee addressed by the second sentence of § 456.270.

The plaintiffs argue that the legal obligation imposed upon a payee by the second sentence of § 456.270 is "much more stringent" than the legal obligation imposed by the first sentence, "rising virtually to the level of insurer." App. Br. at 16. The plaintiffs are wrong to totally divorce the second sentence from the culpability standard of actual knowledge or bad faith articulated in the first sentence. As one court put it: "The history of this provision indicates that it was intended to illustrate the general rule of liability rather than create an exception to it." Maryland Casualty Co. v. Bank of Charlotte, 340 F.2d 550, 553 (4th Cir. 1965).

A common characteristic of the two situations outlined in the second sentence of § 456.270 is that the payee is financially benefiting from the transaction and has actual knowledge that the principal's assets are being used for the personal benefit of the fiduciary. In the first situation – when the check "is payable to a personal creditor of the fiduciary and delivered to the creditor in payment of or as security for a personal debt of the fiduciary to the actual knowledge of the creditor" – the creditor accepts a check drawn on the principal's account to pay the fiduciary's personal debt. The example cited in the UCC Comment for the second situation – when the check "is drawn and delivered in any transaction known by the payee to be for the personal benefit of the fiduciary" – the vendor accepts a check drawn on the principal's account to pay for goods or services that the vendor knows are for the personal benefit of the fiduciary. The financial benefit to the third person from these transactions gives it "a monetary

interest in the continuation of such activity" and an incentive to "close the eyes" and "stop the ears," i.e., the indicia of bad faith. Trenton Trust Co., 599 S.W.2d at 493. The Bank received no financial benefit when it received the 87 checks for deposit in the Thompson Accounts. Its 33 tellers had no reason to "close the eyes" or "stop the ears."

In Southern Agency Co. v. Hampton Bank of St. Louis, 452 S.W.2d 100 (Mo. 1970), Phillips was the president and one-third owner of Southern Agency and the president and sole owner of Colonial Insurance Agency. Phillips endorsed two checks made payable to Southern and deposited them in the Colonial account at the defendant bank. Southern sued the bank for conversion, and the parties agreed that the UFL was controlling. One of the sections quoted in this Court's opinion is § 456.260, which (like § 456.270) establishes an actual knowledge or bad faith standard in the first sentence and addresses the "personal debt" and "personal benefit" situations in the second sentence. Even though the fiduciary had deposited checks made payable to his principal in the account of his wholly owned business, this Court held that actual knowledge and bad faith constituted "the liability test prescribed by the statutes" and found that neither had been proved. Id. at 105. The Court stated:

> Plaintiff has not cited a case, and we do not find any, which holds under facts such as we have here that a bank is liable to a principal, in a conversion action occasioned by misappropriation by the fiduciary, for failure to inquire as to whether or not the intended

> deposit to the fiduciary's account or the subsequent withdrawal of funds from the account was for the benefit of the fiduciary in derogation of the rights of the principal, *unless* the bank is benefiting from the transaction . . ..

Id. (emphasis in original); see General Ins. Co., 505 S.W.2d at 457, 459. What the Court wrote in 1970 remains true today. Under the UFL, a bank acting merely as a depository bank is not liable to the principal for a fiduciary breach unless the bank had actual knowledge that the fiduciary was breaching her fiduciary duty or acted in bad faith.

4. UFA Comments confirm the limited situations in which a depository bank may be held liable.

The Bank's position in this case is also supported by the Comments accompanying the Uniform Fiduciaries Act, 7A (Pt. I) U.L.A. 495 (1999). Those Comments confirm that a depository bank (even when it is a payee) is not liable to the principal for the fiduciary breach unless the bank had actual knowledge that the fiduciary was breaching her fiduciary duty, the bank acted in bad faith, or the bank received the check in payment of or as security for a bank loan to the fiduciary.

The sections of the UFA establish rules for different "classes of persons." 7A (Pt. I) U.L.A. at 496, Prefatory Note. Sections 4, 5 and 6 deal with persons receiving negotiable instruments; § 5 deals specifically with checks drawn by a fiduciary payable to a third person. Id. Sections 7, 8 and 9 deal with

depositories of fiduciary funds; § 9 deals specifically with deposits in a fiduciary's personal account. Id. Consistent with the organization of the UFA, there is one Comment for §§ 4, 5 and 6, and one Comment for §§ 7, 8 and 9. Id. at 517-18, 525, Comment.

The Comment addressing §§ 7, 8 and 9 provides that "a depository of fiduciary funds is not bound to inquire into the authority of the fiduciary to make the deposit even where the deposit is made in the personal account of the fiduciary . . . [b]ut when the check is payable to the depository bank and delivered in payment of or as security for a personal debt of the fiduciary, the bank is put upon inquiry." Id. at 525, Comment. The Comment summarizes as follows:

> The purpose of Sections 7, 8 and 9 is to lay down a definite rule, making the bank, where it acts solely as a depository, liable only if it has actual knowledge of the fiduciary's breach of duty or if it acts in bad faith; and where the bank acts as creditor, making it liable to the same extent as other creditors are made liable.

Id. The Comment addressing §§ 4, 5 and 6 describes three instances in which the "the instrument is given in a transaction known to be for the personal benefit of the fiduciary." Each instance involves a payment by the fiduciary of his personal debt, a fact not present in this case.

5. The Court of Appeals correctly held that, when read in harmony with § 456.310, § 456.270 does not apply to the facts of this case.

The Court of Appeals correctly held that § 456.270 does not encompass a depository bank that was made a "payee" for the sole purpose of effectuating a deposit from the principal's account to the fiduciary's personal account. Slip op. at 12. The court reached that holding by finding a conflict between § 456.270, which "would appear, on its face, to be applicable where a bank is the payee," and § 456.310, which provides a defense to a bank "when its role in the transaction in question was, as a practical matter, limited to a depository bank." Id. Had the court focused on the entire phrase "transaction known by the payee to be for the personal benefit of the fiduciary," rather than just the word "payee," the court would have reached the same correct holding without finding a conflict between §§ 456.270 and 456.310. As the Illinois court recognized in Johnson, §§ 5 and 9 of the UFA "are not at odds," and a bank acting as a depository rather than a creditor is not liable under either section absent actual knowledge or bad faith. 334 N.E.2d at 299; accord In re Bishop, Baldwin, Rewald, Dillingham & Wong, Inc., 751 P.2d at 81.

As the Court of Appeals recognized, the liability of a payee bank acting as a depository is limited to instances in which it acted with actual knowledge or bad faith, and the liability of a bank payee acting as a creditor is the same as any other creditor. Slip op. at 13. Those rules derive from the statutory text and are confirmed by the purpose of the UFA, the official comments accompanying both the UFA and the UCC, and cases in Missouri and other jurisdictions. In this case, it is undisputed that the Bank received the checks

without actual knowledge that Thompson was breaching her fiduciary duty, without bad faith, and in its capacity as a depository rather than a creditor. Accordingly, the Bank is not liable under the UFL as a matter of law.

II. The trial court's denial of the plaintiffs' summary judgment motion is not appealable, and the issues presented on appeal from the Bank's summary judgment (even if decided in the plaintiffs' favor) would not permit a final disposition for the plaintiffs pursuant to Rule 84.14.

The plaintiffs argue that the Court should not just reverse the entry of summary judgment for the Bank, but should direct that judgment be entered for the plaintiffs instead in the amount of $1,300,699.95 plus $222.57 per day in prejudgment interest since December 13, 1999. As explained on page 16 supra, the trial court's denial of the plaintiffs' motion for summary judgment is not appealable. Nor will Mo. R. Civ. P. 84.14 justify the relief that the plaintiffs seek. Even if the plaintiffs were to prevail on the legal issues discussed above, a number of additional issues now separate them from their requested judgment. None of these issues has been decided by the trial court. Some have not been briefed. This could not, therefore, be an appropriate case for a final disposition for the plaintiffs pursuant to Rule 84.14.

The plaintiffs assume that their claim is not limited by the applicable statute of limitations. In its first summary judgment motion, the Bank argued that the applicable limitations period is three years or less. L.F. 55-59. In response, the plaintiffs argued that a five-year statute of limitations, § 516.120(2), applies to

their claim under the UFL. L.F. 70 (citing In re Lauer, 98 F.3d 378, 385-86 (8th Cir. 1996) (finding no case from the Missouri courts directly on point, the court applied § 516.120)). In ruling on this first summary judgment motion, the trial court did not resolve the statute of limitations issue. L.F. 88. The plaintiffs ignore the issue in their brief on appeal. This outstanding issue alone precludes entry of the judgment for which the plaintiffs pray.

Nor have the plaintiffs established that they have been damaged in the full amount of the 87 checks that were deposited in the Thompson Accounts. Their position below was that it did not matter how Thompson may have used the proceeds after the checks were deposited. See L.F. 148. Unless Thompson withdrew the proceeds of those checks from the Thompson Accounts and converted them to her personal use, however, she holds them for her principals and the plaintiffs have suffered no loss. Sugarhouse Fin. Co., 440 P.2d at 870. Absent evidence of what Thompson did with those proceeds, this Court cannot enter a judgment for the plaintiffs for a specific amount of damages.

The plaintiffs request a judgment that includes specific dollar amounts of prejudgment interest. App. Br. at 30. The plaintiffs claim to be entitled to prejudgment interest of 9% per annum on the amount of each check from the date the check was written. (At the trial court level, the Bank stipulated to the mathematical calculation of interest, but disputed the plaintiffs' entitlement to prejudgment interest. L.F. 173 ¶ 11, 204 n.5.). Section 408.020 allows "creditors" to recover interest: first, "for all moneys after they become due and

payable, on written contracts," and second, "on accounts after they become due and demand of payment is made." The plaintiffs have not sued for breach of a written contract, and therefore neither the first part of this section nor the case they cite, J.R. Waymire Co. v. Antares Corp., 975 S.W.2d 243, 248-49 (Mo. Ct. App. 1998), is applicable. The plaintiffs once had a claim for "money had and received," but the trial court dismissed that claim in an order that has not been appealed. Moreover, the plaintiffs did not make a "demand of payment" before the lawsuit was filed. For those reasons, neither the second part of § 408.020 nor the case they cite, 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858, 871-72 (Mo. Ct. App. 1995), supports the plaintiffs' prayer for prejudgment interest from the date of each check. If there is a cause of action for breach of the UFL, it likely would sound in tort. See, e.g., Schwartz v. Pierucci, 60 B.R. 397, 400 (E.D. Pa. 1986). The general rule is that prejudgment interest is not allowed in tort cases. Emery v. Wal-Mart Stores, Inc., 976 S.W.2d 439, 449 (Mo. banc 1998). In any event, as it did in Dalton & Marberry, P.C. v. NationsBank, N.A., 982 S.W.2d 231, 237-38 (Mo. banc 1998), this Court should leave to the trial court the determination whether the plaintiffs (if they prevail) are entitled to prejudgment interest.

Statute of limitations, damages and prejudgment interest are just three of the issues that would need to be resolved in the plaintiffs' favor before they could obtain a judgment on their claim for breach of the UFL. As an initial matter, it is not clear that the UFL creates a cause of action for violation of its

provisions or instead merely provides standards of conduct for (or defenses against) common law causes of action. See Appley v. West, 832 F.2d 1021, 1031 (7th Cir. 1987) (the UFA does not create a cause of action but provides the bank a defense unless it has actual knowledge or bad faith). Even if there is a cause of action under the UFL, no Missouri court has articulated the scope of such a claim. In a common law negligence case in which the UFL is not applicable, the plaintiff cannot prevail if its agent had apparent authority to conduct the challenged transaction with the bank. See Dalton & Marberry, P.C., 982 S.W.2d at 235. In such a case, the finder of fact must determine which losses were proximately caused by the principal's fault (in failing to discover the agent's breach earlier) and which were caused by the bank's negligence. Id. at 237. If such rules are appropriate in a common law case in which the plaintiff must establish some level of culpability on the bank's part (i.e., negligence), they ought to apply in a case like this if, as the plaintiffs argue, the Bank can be liable under the second sentence of § 456.270 without any showing of culpability. It would be ironic if the UFL, enacted to "reliev[e] depository banks of their common law duty to inquire into the propriety of fiduciary transactions," General Ins. Co., 505 S.W.2d at 457, were construed to impose stricter standards than the common law it replaced.

None of these additional issues was considered by the trial court because the Bank prevailed on other grounds. This Court should decide the legal issues presented by the plaintiffs' appeal from the entry of summary judgment for

the Bank. The Court should affirm, but if it cannot, it should reverse and remand for further proceedings consistent with its opinion. The additional issues could then be developed in and decided by the trial court, and that final decision could be reviewed on appeal in the normal course.

CONCLUSION

First Bank of Missouri respectfully requests the Court to affirm the judgment of the Circuit Court of Clay County.

Respectfully submitted,

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Dated: April 16, 2001

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the limitations contained in Special Rule No. 1(b). This brief has been prepared using Microsoft Word 97. The brief contains 13,361 words, as determined by the word-count feature of that word processing system. The floppy disks required by Special Rule No. 1(f) have been scanned for viruses and are virus-free.

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Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of April, 2001, one copy of the foregoing Substitute Brief of Respondent and one floppy disk containing the brief were mailed, postage prepaid, to Michael S. Shipley and Vincent F. Igoe, Jr., Withers, Brant, Igoe & Mullennix, P.C., Two South Main Street, Liberty, Missouri 64068, attorneys for appellants, and the original and ten copies of the foregoing Substitute Brief of Respondent and one floppy disk containing the brief were sent by Federal Express to the Clerk of the Supreme Court.

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Attorney for Respondent