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

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INTRODUCTION

Christian County (the "County") filed this action to recover funds from Edward D. Jones & Co., L.P. ("Edward Jones"), which were deposited in an Edward Jones investment account and then stolen by the County's duly elected treasurer, Gary Melton ("Melton"). Melton's deposit was authorized by the County's Presiding Commissioner Joe Nelson ("Nelson"), Commissioner William Barnett ("Barnett"), and its Prosecuting Attorney Mark Orr ("Orr). The County seeks to avoid responsibility for its own officials' actions and argues that Edward Jones should be held liable for the funds embezzled by the County's treasurer.

The County erroneously argues that Edward Jones, a securities broker-dealer, violated Chapter 110, which expressly applies to banks and requires them to become a county depositary before accepting a county's funds. Even if one assumes that Edward Jones did not comply with a technical legal obligation in the administration of its investment business, these alleged violations are irrelevant to the fact that the County is responsible for the conduct of its treasurer who stole the funds. Indeed, the County officials ratified Melton's decision to invest County fund with Edward Jones. Edward Jones is a victim that should not be required to pay for Melton's embezzlement of the County's funds.

Mo. Rev. Stat. § 110.130, et. seq., are the statutory provisions on which the County relies for its arguments that Edward Jones should have followed special

statutory rules in the administration of its investment funds. Chapter 110, however, expressly only applies to banks, and Edward Jones is not a bank. It is, therefore, not surprising that the County has admitted that Edward Jones is not a bank, and "the trial court found that Edward Jones was not a bank." Christian County v. Edward D. Jones & Co., L.P., No. SD 26026, 2005 WL 3196419, at *6 (Mo. Ct. App. Nov. 30, 2005). Because Chapter 110 does not apply to Edward Jones, and the County's treasurer stole the County's funds, the trial court erred when it entered summary judgment in favor of the County.

Edward Jones also cannot be held liable as a trustee ex maleficio. The County and the Amicus Curiae cite no authority for the legal theory that a securities broker-dealer such as Edward Jones can be subject to liability as a trustee ex maleficio for another person's theft of county funds under Chapter 110. Likewise, Edward Jones cannot be liable for the alleged conversion of the County's funds when Edward Jones acted properly in following the instructions of the County's treasurer.

In addition, no legal basis for an award of prejudgment interest exists under Chapter 110 or Mo. Rev. Stat. § 537.520, as the County argues. As Edward Jones is not liable for Melton's embezzlement of the County's funds, it cannot be liable for any prejudgment interest on a non-existent liability.

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.

ARGUMENT

I.

The County relies on the technicalities of Chapter 110 to support its unprecedented theory of recovery, but the plain language of Chapter 110 applies to banks and not to securities broker-dealers such as Edward Jones. Mo. Rev. Stat. § 110.130, et seq., by their unambiguous terms, create duties and liabilities only for banks. In the Judgment, the trial court plainly misconstrued these statutes by expanding them to impose absolute liability onto Edward Jones.

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

It is undisputed that Edward Jones is a limited partnership registered to do business as a securities broker-dealer. (LF at 69). Edward Jones is not a "bank" as that term is defined by the Missouri Legislature. The County improperly invites this Court to determine whether Edward Jones in fact qualifies as a "banking association" under Chapter 110, reasoning that Edward Jones is an association that provides "bank-like services." This argument, however, is contrary to the County's recognition of the "fact that Edward D. Jones is not a bank" and the trial court's factual finding. (LF at 110).

"As a general rule, a party is bound by allegations or admissions of fact in his own pleadings. In other words, he may be estopped or precluded by his pleadings." Dick v. Children's Mercy Hosp., 140 S.W.3d 131, 141 n.5 (Mo. Ct. App. 2004); see also New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (noting that judicial estoppel is often invoked to "prohibit[ ] parties from deliberately changing positions according to the exigencies of the moment" and that "[t]he circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle") (internal quotations omitted). The County, therefore, is estopped from arguing that Edward Jones is a bank. At a minimum, the County raises a material factual dispute, rendering summary judgment inappropriate.

By their plain and unambiguous terms, the requirements of Chapter 110 outline the duties and responsibilities of counties (and county treasurers) and banks only if those banks choose to become depositaries for the county. Chapter 110 does not, by its express terms, create duties for any person who receives and holds money for a county, but creates duties only for banks and banking institutions that receive and hold money for a county. This is reflected in the first section of Chapter 110, which describes how deposits of public funds are secured. Section 110.010.1 states, in relevant part, that the "public funds of every county, . . . ***which are deposited in any banking institution acting as a legal depositary*** . . . shall be

secured." Id. (emphasis added). The statute does not provide that public funds are to be secured whenever deposited or held by any person or financial institution; the statute is plainly limited to banks.

Chapter 110 was enacted at a time when bank failures were rampant throughout the country, and in fact, all the cases cited by the County address factual circumstances where banks failed during the Great Depression and governmental entities sought priority over other creditors to the bank assets. See, e.g., Cantely v. Beard, 98 S.W.2d 730, 731 (Mo. 1936); Marion County v. First Sav. Bank of Palmyra, 80 S.W.2d 861 (Mo. 1935); Ralls County v. Commissioner of Finance, 66 S.W.2d 115, 115 (Mo. 1933); In re Cameron Trust Co. School Dist. of Cameron v. Cameron Trust Co., 51 S.W.2d 1025, 1026 (Mo. 1932); Harrison Township, Vernon County v. People's State Bank of Bronaugh, 46 S.W.2d 165 (Mo. banc 1932); State ex rel. Gentry v. Page Bank of St. Louis Co., 14 S.W.2d 597 (Mo. 1929). These cases are totally inapplicable to the fraud, malfeasance, and embezzlement committed by the County's treasurer, Melton, the thief.

Although Chapter 110 and its predecessor provisions have been the law for more than a century, the Legislature has never decided to extend the statutory requirements of county depositaries to securities broker-dealers. Presumably, the protections given to counties under this antiquated law were no longer necessary

when the economy became more sophisticated and banks, securities brokers, and other financial entities became independently regulated.

Because the requirements of Chapter 110 extend only to banks, Edward Jones cannot be held liable under these statutes.[1]

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

A trustee ex maleficio is described as a "trustee from wrongdoing; the trustee of a trust arising by operation of law from a wrongful acquisition." Lucas v. Central Mo. Trust Co., 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

[1] As a matter of pure statutory construction, Chapter 110 does not even authorize an action by the County against Edward Jones. A "cause of action for civil damages does not necessary arise from the violation of a statute." J.M.F. v. Emerson, 768 S.W.2d 579, 582 (Mo. Ct. App. 1989). "The creation of a private right of action is not favored, and the trend is away from judicial inferences that a statute's violation is personally actionable." State Dep't of Social Serv., Div. of Med. Serv. v. Brundage, 85 S.W.3d 43, 49 (Mo. Ct. App. 2002) (quoting Shqeir v. Equifax, 636 S.W.2d 944, 947 (Mo. banc 1982)).

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 and unlawfully converted the County's funds. But as explained above, these statutes apply only to banks (and county treasurers). Edward Jones did not profit from any wrongdoing or wrongfully acquire the County's funds. Edward Jones did nothing wrong that justifies "absolute liability" for Melton's theft in this case, especially when the County officials knew about the check and instructed Ozark Bank to honor the check. As the County concedes, Melton was the custodian of these funds. He was the one who committed the wrongdoing. He was the trustee ex maleficio. The County is seeking to recover the money from Edward Jones when instead it should pursuing these funds from Melton as full restitution.

Neither the County nor the Amicus Curiae cites any authority applying the liabilities of a trustee ex maleficio to anyone other than a bank.

The cases cited by the County for its theory of trustee ex maleficio are all distinguishable because they apply the requirements of Chapter 110 to bank defendants. See, e.g., Marion County, 80 S.W.2d 861, 863 (Mo. 1935); In re Cameron Trust, 51 S.W.2d 1025, 1026 (Mo. 1932); Harrison Township, 46 S.W.2d 165, 165 (Mo. 1932); Fidelity and Deposit Co. of Maryland v. People's Bank, 44

F.2d 19, 20 (8th Cir. 1930). In these cases, when the defunct bank was adjudicated to be a trustee ex maleficio, the remedy was that the county received a preferred claim against the bank's assets.

Faced with no authority in support of their position, the County and the Amicus Curiae instead argue that it would be "sound public policy" to extend such liability to ***anyone*** holding public funds. (Amicus Curiae Brief at 2, 14). The County contends that "one receiving county funds for deposit who is not the legal county depositary becomes a trustee ex maleficio." (Substitute Brief of Plaintiff-Respondent at 29). Under this theory, any private or public entity that receives and holds county funds, for any purpose for any period of time, without first qualifying as a county depositary under § 110.130, et seq., assumes the duties of a trustee ex maleficio. The implications of this theory are that insurance agents, real estate agents, escrow companies, securities brokers, ERISA plan administrators, contractors, and the myriad of other non-bank entities that receive and hold county funds are in violation of § 110.130 and have absolute liability for the funds. The plain and unambiguous terms of Chapter 110 do not support such a broad extension of liability. The County and Amicus Curiae's overly-expansive reading of the county depositary statutes should be rejected.

Even assuming, arguendo, that Edward Jones, a non-bank, was a trustee ex maleficio, an administrative remedy would exist for allegedly not following the

requirements to serve as a qualified county depositary. No principled basis exists to conclude that the remedy is absolute liability for Melton's theft of the funds.

The County and the Amicus Curiae attempt to shift the burden to Edward Jones to identify some alternative statutory authority for a securities dealer to become a county depositary. This argument confuses the issue in this case. The question here is not whether Edward Jones can hold county funds without first qualifying as a county depositary (which Edward Jones can never become because it is not a bank; nor is it required to become a county depositary under Mo. Rev. Stat. § 110.270 to accept county funds not needed for current operations). Rather, the question is whether Edward Jones, which was a victim of theft by the treasurer of Christian County, can be found vicariously liable as a trustee ex maleficio for Melton's theft of the County's funds because Edward Jones did not qualify as a selected county depositary under Mo. Rev. Stat. § 110.130. The language of Chapter 110 cannot justify such a result.

The Amicus Curiae argues that the Missouri Constitution does not authorize the investment of county funds in mutual fund accounts. The County also contends that Edward Jones' receipt of the County's funds was prohibited by other Missouri constitutional and statutory provisions. These arguments are irrelevant for purposes of this case because the County did not plead (whether expressly or

impliedly) that these alleged constitutional and statutory violations in its Petition; nor did the trial court's Judgment find that Edward Jones violated these provisions.

"Appellate review of a grant of summary judgment is limited to those issues put before the trial court." Barner v. The Missouri Gaming Co., 48 S.W.3d 46, 50 (Mo. Ct. App. 2001). An appellate court may affirm a trial court's granting of summary judgment only "if it could have been ***based on any ground raised in the motion and supported by the summary judgment record***." Missouri Employers Mut. Ins. Co. v. Nichols, 149 S.W.3d 617, 623 (Mo. Ct. App. 2004) (emphasis added). Because the County did not advance these arguments in the trial court below, it is improper for the County and the Amicus Curiae to raise these arguments now before this Court.

Even if these provisions were pleaded against Edward Jones, the proper remedy would not be to hold Edward Jones liable for the return of all of the stolen funds by Melton. Such a result would be inequitable because of the lack of Edward Jones' culpability, wrongdoing, and knowledge of Melton's wrongdoing. Melton was the one who served as trustee and custodian of the County's funds. He was the one who embezzled these funds for his own personal use. Melton, not Edward Jones, was the cause of the County's loss of its funds.

Moreover, the County's highest officials ratified Melton's conduct in depositing the County's funds with Edward Jones. These officials thereby

assumed a duty to supervise Melton's actions vis-à-vis the funds. Public officers may be responsible for acts of subordinate officials if they "directed or encouraged or ratified such acts, or [have] personally co-operated therein." State ex rel. Green v. Neill, 127 S.W.3d 677, 679 (Mo. banc 2004) (quoting Davis-Bey v. Missouri Dep't of Corrections, 944 S.W.2d 294, 298-99 (Mo. Ct. App. 1997)). Liability should fall squarely on Melton and the County.

II.

The County erroneously contends that Edward Jones' Point II is an entirely new and different point than was asserted before the Court of Appeals. The basis of Edward Jones' argument in the Court of Appeals and before this Court, however, are the same. See Nusbaum v. City of Kansas City, 100 S.W.3d 101, 105 (Mo. banc 2001) (noting that review of summary judgment is de novo). Upon transfer, this Court may determine the case as on original appeal. Philmon v. Baum, 865 S.W.2d 771, 774 (Mo. Ct. App. 1993); Rule 83.09. "The decision of the court of appeals in a case subsequently transferred is of no precedential effect." Philmon, 865 S.W.2d at 774. Here, Edward Jones has consistently maintained on appeal that the County failed to plead and prove conversion.

The purpose of Rule 84.04(d), as noted by Missouri case law, is "to give notice to the opposing party of the precise matters which must be contended with and to the inform the court of the issues presented for review." Daniel v. Indiana Mills & Mfg., Inc., 103 S.W.3d 302, 312 (Mo. Ct. App. 2003). Edward Jones' points relied on, together with its arguments, afforded sufficient notice of the legal bases for the claimed errors in the trial court's Judgment. Indeed, if Edward Jones' points relied on had more detail, it would be at risk of violating Rule 84.04(d) that points relied on should be concise.

A. The County Failed To Plead Conversion In The Petition And In The Motion For Summary Judgment.

A simple review of the Petition belies the County's statement that "[c]onversion was the legal basis of the claim pleaded in the petition." (Substitute Brief of Plaintiff-Respondent at 22-23).

Although the word "converted" appears in one paragraph of that Petition, the elements for conversion claim were not pleaded. Instead, the County's two-page, one-count, eight-paragraph Petition alleges a claim for violation of Chapter 110. The County moved for summary judgment only on these alleged statutory violations. (LF at 17-20). The words "converted" or "conversion" do not even appear in Plaintiff's Motion For Summary Judgment. (LF at 17-20). The County's alleged conversion theory was first raised in the County's proposed Judgment submitted to the trial court. (LF at 136). The trial court erred in granting 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.

B. 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.

The County never established that it was entitled to Judgment on this conversion theory. 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). When 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. There is no evidence that, on the date of demand, Edward Jones possessed any of the County's money.

The County argues that the mere acts of receiving the check from Melton, depositing the check with the full knowledge of County officials, and transferring the funds without issuing a check amounted to conversion. The County concludes

that based on these acts alone, the County was deprived of the right of possession. But the County does not acknowledge that Edward Jones was the not the one who deprived the County of its right of possession; it was Melton, who unlawfully appropriated the funds. The County admits that Melton was the custodian of the funds and held these funds as trustee. Melton was the County's duly elected treasurer and agent. The County should be liable for ratifying Melton's actions in depositing the funds with Edward Jones and then failing to supervise his actions.

The County argues that "[o]ne aiding a trustee, like Melton, in making the conversion of trust property, ***with knowledge thereof*** is also liable for conversion." (Substitute Brief of Plaintiff-Respondent at 24). The County also asserts that Edward Jones should have known that Melton was acting beyond the scope of his statutory authority. No evidence in the record, however, suggests that Edward Jones knew that Melton was unlawfully stealing these funds for his own personal use. Based on the County's logic, the County and its officials, including Nelson, Barnett, and Orr, should also be liable for conversion because they had knowledge of Melton's deposit with Edward Jones and should have realized that the deposit was allegedly unlawful. They also should have ensured that the funds were not misappropriated by Melton. At a minimum, this raises a material factual dispute, rendering summary judgment inappropriate.

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

Furthermore, 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 courts 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). Here, the County's conversion claim fails because it is undisputed that the money was commingled with other funds.

III.

Because Edward Jones is not liable under Chapter 110, did not become a trustee ex maleficio, and not convert any of the County's funds, the trial court award of prejudgment interest of $232,367.52 should be vacated. If Edward Jones is not liable on the underling claim, Edward Jones surely cannot be liable for prejudgment interest.

Furthermore, 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. Because Chapter 110 does not provide for prejudgment interest, none may be recovered by the County.

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. The County, however, neither pleaded conversion in its Petition nor established the elements of conversion in its Motion For Summary Judgment. See supra at 24-26. In fact, it was the acknowledged thief Melton, the County's agent and designated "custodian of the funds" (Substitute Brief of Plaintiff-Respondent at 15), who stole the money

and deprived the County of its right of possession. The trial court, therefore, erred in granting summary judgment to the County for prejudgment interest in addition to liability.

The County does not refute Edward Jones' submission that Mo. Rev. Stat. §§ 408.020 and 408.040.2 do not authorize prejudgment interest in this case. (See Substitute Opening Brief of Defendant-Appellant at 46, 48-50). Rather, the County relies exclusively on Mo. Rev. Stat. § 537.520 to justify the trial court's awarding of prejudgment interest from the date of the alleged conversion. See Independence Flying Serv., Inc. v. Ailshire, 409 S.W.2d 628, 632 (Mo. 1966). Section 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 the interest, over and above the value of the goods ***at the time of the conversion*** or seizure." Id. (emphasis added).

The awarding of prejudgment interest under this statute was erroneous for several reasons.

First, § 537.520, by its plain and unambiguous terms, allows for the awarding of prejudgment interest from the time of conversion only if there is a jury (or non-jury) trial on the conversion issue. Here, the trial court's Judgment was pursuant to the County's Motion For Summary Judgment and not a trial. Section 537.520 thus is inapplicable.

Second, the trial court made no factual findings, nor provided any explanation, why in its discretion it "thought fit" to grant prejudgment interest under § 537.520 from the time of the alleged conversion. There are several mitigating factors against such an award that were presented to the trial court below. For example, the County was dilatory in demanding the funds from Edward Jones. As explained by in Joplin CMI, Inc. v. Spike's Tool & Die, Inc., 719 S.W.2d 930 (Mo. Ct. App. 1986):

> In order to attain the ends of justice in this case plaintiff is entitled to some compensation . . . ***but in view of plaintiff's delay in asserting its right we deem it inequitable to award interest*** from February 1975 [the date of conversion], and rule that interest not begin until there was a formal demand for payment of interest which was not made prior to the filing of this action on September 23, 1983.

Id. at 938 (internal citations omitted) (emphasis added). Here, because the County's demand on January 24, 2000, was almost four years after Melton opened the account at Edward Jones, the trial court's awarding of prejudgment interest from June 21, 1996 is inequitable. Furthermore, Edward Jones acted in good faith and never had any knowledge of Melton's criminal scheme to embezzle the County's funds. As explained by this Court, "in view of the fact that defendant acted in good faith, we rule that the interest would not begin until there was a

formal demand for payment." Independence Flyer Serv., 409 S.W.2d at 632. The County contends that Edward Jones "has not demonstrated the kind of 'good faith' that might justify any such relief." (Substitute Brief of Plaintiff-Respondent at 30). The County's argument raises a genuine issue of material fact, rendering summary judgment inappropriate on this point.

Third, § 537.520 authorizes prejudgment interest from the date of conversion. The County maintains that the conversion date is the date Edward Jones placed the funds in the account (June 21, 1996), or at the latest, the date the funds were unlawfully transferred to Melton's individual accounts (July 2 and 3, 1996). The trial court's Judgment calculated prejudgment interest from June 21, 1996. The County, however, did not demand the return of these funds from Edward Jones until January 24, 2000.

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). As conversion is purely a possessory claim and is triggered by a refusal to surrender possession following a demand, the actual date of the alleged conversion is January 24, 2000, the date the County made its first and only demand on Edward Jones. Indeed, but for Edward Jones' alleged refusal to return the money at that time, there would be no alleged conversion. In Defendant's Memorandum Of Law In Response To Proposed Judgment, Edward

Jones specifically raised this objection, stating that "the Court did not address the primary issue of what is the date of conversion." (LF at 140). Edward Jones maintains that the earliest that prejudgment interest would be from January 24, 2000. (LF at 141). At a minimum, the date of conversion is a material factual dispute, rending summary judgment inappropriate. This Court should hold that, as a matter of law, the County is not entitled to prejudgment interest. Alternatively, the Court should remand this case for a jury trial on this issue.

IV.

In the Judgment entered in this case, the trial court denied Edward Jones' affirmative defenses. (LF at 146). The Judgment referred to the law under Chapter 110, which applies only to banks, as discussed above. In the County's Brief, however, the County effectively abandons its statutory claim by conceding that its legal theory is not a claim or remedy authorized by any statute, but a conversion action based on money of the County that fell into Edward Jones' possession as a result of an illegal and void deposit agreement. Nevertheless, when arguing that Edward Jones' affirmative defenses are inapplicable, the County argues that its pleaded claim is statutory, but when seeking hundreds of thousands of dollars in damages and prejudgment interest, the County's claim becomes conversion. (Compare Substitute Brief of Plaintiff-Appellant at 22-23, 28-31 with 35-36, 40-42).

Based on the trial court's analysis, if this is indeed a conversion claim, the reason for barring Edward Jones' affirmative defenses, and the cases cited by the County regarding county depositaries, no longer act to bar these defenses to a conversion claim. Thus, the County has no valid argument that remains to prevent these defenses.

Because Edward Jones' defenses of waiver and estoppel are viable, the undisputed conduct of the County officials and its treasurer Melton provide substantial evidence to support these affirmative defenses.

A. Edward Jones Has Not Abandoned The Affirmative Defense of Waiver.

Based on the long-standing rule of pleadings, a defendant has not waived a defense if: (1) the plaintiff either impliedly or expressly consented to trying the case on that defense; or (2) the trial court permitted the pleading to be amended to include the defense. Mo. Sup. Ct. R. 55.33(b). Assuming that the County did not impliedly or expressly consent, the trial court was still authorized, in its discretion, to allow this amendment. Rule 55.33(b) directs the trial court to ***freely*** allow such amendments "when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits." Id.

The record in this case demonstrates that Edward Jones was asserting the defense of waiver and that the trial court intended by its Judgment to amend Edward Jones' First Amended Answer to include waiver. (LF at 139). It is noteworthy that the form of Judgment, with findings of fact and conclusions of law, was drafted by the County's counsel. (LF at 131). The trial court found that

"[t]he ***claimed defenses of waiver*** or estoppel due to alleged conduct of county officials is applicable" and that "[n]o other affirmative defenses are shown to apply to this case." (LF at 146). Because the Judgment specifically ruled on waiver, this defense was not abandoned by Edward Jones.

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

The defense of waiver has been defined as:

> The intentional relinquishment of a known right, on the question of which intention of the party charged with waiver is controlling, and if not shown by express declarations but implied by conduct, there must be a clear, unequivocal, and decisive act of the party showing, such purpose, and so consistent with intent to waive that no other reasonable explanation is possible.

Morgan v. City of Rolla, 947 S.W.2d 837, 840 (Mo. Ct. App. 1997).

Melton was the duly elected treasurer of Christian County and was given complete authority to write checks and transfer county funds. In the County's own words: He was the custodian of the funds. There were no co-signing requirements or other oversight by the County Commission. On June 21, 1996, county depository Ozark Bank notified Nelson, the presiding commissioner, of the $650,000.00 check. (LF at 69, 77, 83). Nelson then notified Barnett and Orr of this

transaction. (LF at 69, 78). Before the day ended, Nelson instructed Ozark Bank to honor the check. (LF 70). Then, for nearly two weeks, these funds remained untouched in the Edward Jones account. (LF at 126). The County officials never contacted Edward Jones or any of its representatives in any manner whatsoever to inquire about this check. On July 2, 1996, Melton ordered Edward Jones to transfer the funds to Metropolitan National Bank. Subsequently, Melton converted these funds for his own use. (LF at 94, 126, 145).

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 Nelson discussed this matter with Ozark Bank. The County officials should have known that opening an Edward Jones account in another county would allegedly violate 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. The trial court's Judgment in favor of the County was inappropriate and should be reversed.

C. The Defense of Equitable Estoppel Precludes The Granting Of Summary Judgment In Light Of The Facts In This Case.

The doctrine of equitable estoppel may be applied against a government entity "in exceptional cases where required by right and justice . . . or to prevent

manifest injustice." Murell v. Wolff, 408 S.W.2d 842, 851 (Mo. 1966); State ex rel. Letz v. Riley, 559 S.W.2d 631, 634 (Mo. Ct. App. 1977). The County's "assertion that estoppel is generally not applicable to the acts of a government body is at best misleading and at worst a misstatement of the law." Kenneth D. Dean, Equitable Estoppel Against The Government - The Missouri Experience: Time To Rethink The Concept, 37 St. Louis U. L.J. 63, 89 (1992). According to one legal scholar:

> [If this assertion] gains acceptance through repetition without careful analysis to determine if the conditions for imposition of estoppel are different for some functions of government (e.g., proprietary), as opposed to other functions (e.g., governmental), then not only has a claimant been robbed of a potential remedy but the law has been changed by inattention rather than deliberation.

Id. at 91-92.

Under the doctrine of equitable estoppel, a claimant need only establish the following three elements: (1) an admission, statement or act inconsistent to a claim asserted later; (2) an action by the other party on the faith of or in reliance upon such admission, statement or act; and (3) an injury to that other party as a result of allowing the first party to contradict the admission, statement or act. Missouri Highway & Trans. Comm'n v. Myers, 785 S.W.2d 70, 73 (Mo. banc 1990).

This is an exceptional case in which the County officials' acts require that the doctrine of equitable estoppel be applied to prevent manifest injustice, and contrary to the County's assertion, this Court need not overrule any precedent to make this finding. All of the elements of estoppel are present.

The County argues that its officials should be excused from any actions they took authorizing the transaction at issue because a county allegedly has no authority to open an account with Edward Jones. This assertion is not contained in the County's Petition and should be rejected for that reason alone. (LF at 10-11). Even if this assertion had been pleaded, the County should not be permitted to object to Edward Jones' estoppel defenses. In support of its new argument, the County admitted that Edward Jones is not a bank as that term is defined by the Missouri Revised Statutes. (LF 83). Despite this admission, the County continues to argue that Edward Jones is liable for the funds that were embezzled by Melton. The County maintains that Chapter 110 only allows banks to be county depositaries and that county officials did not have the authority to open an account with Edward Jones. The County's argument assumes that Chapter 110 applies only to. By admitting that Edward Jones is not a bank, the County tacitly concedes that Edward Jones may assert its estoppel defense because the County also argues that Edward Jones is a banking association under Chapter 110.

Furthermore, the County shall not be permitted to argue two contradictory theories in the same case.

The County's position also defeats its argument that Edward Jones' defenses of estoppel and waiver are not valid defenses. The County argues that the defenses of estoppel and waiver are not available to Edward Jones because application of such defenses would justify a void and illegal contract. Referencing the alleged illegal deposit with Edward Jones, the County asserts that estoppel may not be applied under a contract that is void. Nevertheless, the County's allegations demonstrate that it has authority to open an Edward Jones account. Indeed, the County argues that its officials were justified in authorizing the check because Melton could have placed a valid transaction with Edward Jones. In its Brief, the County also recognizes that "the county treasurer could have been lawfully purchasing government securities from [Edward] Jones." (Substitute Brief of Plaintiff-Respondent at 35).

Indeed, the County concedes that Article IV, § 15 of the Missouri Constitution provides counties with the authority to purchase government securities that are offered for sale by Edward Jones. This argument, however, demonstrates that Melton and the County did in fact have authority to open an account with Edward Jones. In addition, despite the County's assertion that banking corporations and associations are the only entities identified as being

permitted to submit proposals to become a County depositary, and to whom a depositary contract may be awarded, the County has failed to identify any language in Chapter 110 that states that the only entity that can hold money for the County are banks. There, in fact, is no provision excluding other institutions.

The County acted with the authority to open an account with Edward Jones. Thus, the County's assessment against the application of Edward Jones' waiver and estoppel defenses, which are premised on the allegation that no such authority exists, are contradictory and cannot support Judgment in the County's favor.

The County further states that although "the commissioners knew a check had been delivered to [Edward] Jones by Melton they had no reason to believe it was for an illegal purpose." (Substitute Brief of Plaintiff-Respondent at 41). It is disingenuous at best to suggest that County officials had no reason to know that Melton's delivery of a check to an Edward Jones branch in another county was illegal, while at the same time contending that Edward Jones should have known that Melton's actions were unlawful.

In support of its argument that Edward Jones' defense of estoppel is not viable, the County again relies on an alleged illegal transaction based on a violation of Chapter 110. To restate, not only has the County conceded its action is not a statutory action, but Edward Jones, by definition of Missouri law and as acknowledged by the County itself, is not a bank and thus not subject to the

requirements of the County depositary law. Each estoppel case cited by the County continues to address the duties assigned a bank under Chapter 110 or predecessor depository law that allegedly prevents, a defendant from asserting an equitable defense. In this respect, the County's premise – that the parties entered "a contract which is void" – is flawed. Because the County has conceded that it is not pursuing a claim under Chapter 110 and there is not a private right of action under the statute pleaded by the County, Edward Jones cannot possibly be in violation of this law, subjecting the contracts it enters into as void.

Even if Chapter 110 were deemed to apply to Edward Jones and the transaction entered into with the county treasurer was done so illegally, estoppel remains an equitable defense available to Edward Jones. See Cole County v. Central Missouri Trust Co., 257 S.W. 774 (Mo. 1924) ("A county may be estopped to deny a contract which it [the county] entered illegally.") Further, "[w]here the act or contract of a municipal or quasi-municipal corporation is not one which it is without corporate power to make, but is unenforceable merely because of an irregular exercise of power, in the making or execution of it, it may be estopped to deny the validity of the contract where it has accepted the benefits thereof." Id.

Cole County v. Central Missouri Trust Co., 257 S.W. 774 (Mo. 1924), is the dispositive case regarding estoppel in the context of county depository law, not In re Cameron Trust Co. School Dist. of Cameron v. Cameron Trust Co., 51 S.W.2d

1025, 1026 (Mo. 1932). The County's argument that In re Cameron Trust overruled In re North Missouri Trust, 39 S.W.2d 415 (Mo. Ct. App. 1931) and Cole County. is incorrect. Edward Jones relied on In re North Missouri Trust and Cole County as they apply to a civil claim under Chapter 110 in which the Court held that a County can be estopped from bringing its claim as a result of the action of its County Commission. These holdings have not been overruled by In re Cameron Trust, which is distinguishable.

The precise issue presented to the Court in In re Cameron Trust was "in what way or manner may a ***banking institution*** receive the funds of a school district so as to obtain title thereto." In re Cameron Trust, 51 S.W.2d at 1026 (emphasis added). The holding of In re Cameron Trust is that "the advertising for bids is a prerequisite to the authority of the school board to designate any ***bank or trust company*** a depository of the funds of the district." Id. (emphasis added). Edward Jones is not a bank and the case, therefore, is inapposite. In addition, In re Cameron Trust does not discuss the law of estoppel, and thus it cannot overrule the rule of law established in Cole County.

The fact remains that Melton participated in a fraudulent scheme to steal the County's funds. For the County to now assert that the means to accomplish the plan were suggested, facilitated and accomplished by Edward Jones is false, inequitable, unjust, and contrary to the applicable rule of law in Missouri. If

Edward Jones, which was victimized by the County's treasurer, were compelled to pay the County for its officer's egregious conduct and its commissioners' negligent supervision, this would be a mockery of justice. Edward Jones did not cause or profit from Melton's illegal conduct. Edward Jones should not be required to pay the County nearly $700,000 that was stolen by the County's treasurer.

CONCLUSION

For these reasons, this Court should vacate and reverse the trial court's Judgment of $368,837.28 in actual damages and $232,367.52 in prejudgment interest for a total of $601,204.80 against Edward Jones. This Court should 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, the Judgment should be reversed and the case remanded for a jury trial on Edward Jones' waiver and estoppel defenses. Alternatively, the Court should vacate and reverse the trial court's award of prejudgment interest. If the Court concludes that the issue of prejudgment interest includes a fact question, that issue should be remanded to the trial court for a jury trial.

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 Reply Brief of Defendant-Appellant complies with the type-volume limitations, using fourteen point double-spaced typeface and based on the number of words 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 7,674.

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 Reply 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.

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 overnight mail this 18th day of April, 2006, 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, and to Thomas M. Blumenthal, Paule Camazine & Blumenthal P.C., 165 North Meramec Ave., Sixth Floor, St. Louis, MO 63105, counsel for Amicus Curiae.

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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 REPLY BRIEF OF DEFENDANT-APPELLANT

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APPENDIX

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