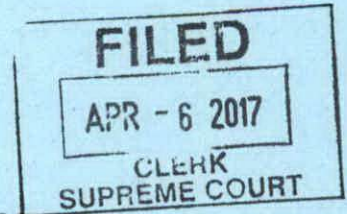


COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2016-SC-000136-D
ON REVIEW FROM THE KENTUCKY COURT OF APPEALS
CASE NO. 2014-CA-00791-MR



ATI VENTURES, LLC; ANGELA FORD;
ANGELA FORD, P.S.C.; AND VILLA
PARIDISIO, LLC

APPELLANTS

v.

ON APPEAL FROM THE FAYETTE CIRCUIT COURT
CIRCUIT COURT ACTION NO. 12-CI-03758

FAISAL SHAH

APPELLEE

BRIEF FOR APPELLEE

This is to certify that on April 6, 2017, ten (10) copies of this Brief were served via hand delivery on Susan Stokley Clary, Clerk of the Kentucky Supreme Court, Room 235, Capitol Building, 700 Capitol Avenue, Frankfort, Kentucky 40601-3415; one (1) copy was served via U.S. Mail upon Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601; one (1) copy was served upon John N. Billings, Christopher L. Thacker, John F. Billings, and Stephen F. Wilson, Billings Law Firm, PLLC, 111 Church Street, Suite 200, Lexington, KY 40507; one (1) copy was served via U.S. Mail upon Mindy G. Barfield, Dinsmore & Shohl LLP, 250 West Main Street, Suite 1400, Lexington, Kentucky 40507; one (1) copy was served via U.S. Mail upon Angela M. Ford, Chevy Chase Plaza, 836 Euclid Avenue, Suite 311, Lexington, Kentucky 40502; one (1) copy was served via U.S. Mail upon Hon. Judge Thomas L. Clark, Fayette Circuit Court, 120 North Limestone Street, Lexington, Kentucky 40507; and one (1) copy was served via U.S. Mail upon the Fayette Circuit Court Clerk, 120 North Limestone Street, Lexington, Kentucky 40507. The undersigned also certifies that the record on appeal has been returned to the Fayette Circuit Court Clerk on or before this date.

Respectfully submitted,

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STEPHEN M. O'BRIEN, III

STATEMENT CONCERNING ORAL ARGUMENT

Appellee, Faisal Shah, does not believe oral argument will be helpful in resolving the issues presented in this case, since the law is clear and the briefs should sufficiently resolve the issues for this Court.

COUNTERSTATEMENT OF POINTS AND AUTHORITIES

COUNTERSTATEMENT OF THE CASE.....1-4

ARGUMENT.....4-17

I. APPELLANTS FAILED TO SATISFY THE NECESSARY ELEMENTS COMPRISING A VIABLE CONVERSION CLAIM.....4-17

Kentucky Ass’n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626 (Ky. 2005)4-5

A. Appellants Did Not Have Rights to the Check or the Funds5-14

i. Appellants Voluntarily Relinquished Title and Possession of the Check and Funds Through an Authorized Agent6-10

KRS §355.3-2036-7

KRS §355.3-3096-10

KRS §355.3-3126-10

ii. Mr. Johnston had Authority to Transfer Title and Possession.....10-11

Clark v. Burden, 917 S.W.2d 574 (Ky. 1996)10

Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co., 434 S.W.3d 489 (Ky. 2014)10-11

iii. Application to Conversion12-14

Kentucky Ass’n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626 (Ky. 2005)12

Urban v. Lansing’s Adm’r, 39 S.W.2d 219, 221 (Ky. 1931).....12-14

B. Appellee Did Not Exercise Dominion Over the Funds in a Manner which Denied Appellants’ Rights to Use and Enjoy the Funds14

C. Appellee Did Not Intend to Interfere with Appellants’ Possession of the Check15

D. Appellee’s Act Was Not the Legal Cause of Appellants’ Loss of the Check15-17

Jasper v. Blair, 492 S.W.3d 579 (Ky. App. 2016)15
CONCLUSION17

COUNTERSTATEMENT OF THE CASE

Appellee does not accept Appellants' Statement of the Case because it fails to identify many critical facts. This case involves a series of transactions originating from funds in an account at Republic Bank held by ATI Ventures, LLC, a company which is owned, operated, or managed to some degree by Appellants. Appellants' cloaked their agent – Seth Johnston (“Mr. Johnson”) – with unlimited authority over the account, and failed to manage or supervise Mr. Johnston’s actions in any way thereafter. As will be shown below, the most likely reason Mr. Johnston was given such limitless opportunity and authority was because Appellant Ford appeared to be actively attempting to distance herself from any evidence that she owned or controlled the funds in question. Following the formation of the three companies, Mr. Johnston initiated a number of transactions with the funds in question, all of which Appellees now claim were unauthorized and contrary to their interests.

Beginning in 2007, Appellant Angela Ford obtained a very large sum of sum of attorney’s fees stemming from the Abbot et al. v. Gallion et al. litigation, commonly referred to as the “Fen-Phen” litigation. R. at 1473. Appellant Ford retained then-attorney Seth Johnston (“Mr. Johnston”) to engage in “asset protection” measures for the fees she received from this case, though she repeatedly refused to describe from whom these assets were being protected. R. at 1674. Mr. Johnston formed three Delaware limited liability companies, presumably to accomplish the goal of “asset protection”: Villa Paradisio, LLC, Solutions Ventures, LLC, and ATI Ventures, LLC. R. at 1495-96; 1513. ATI Ventures, LLC was formed on July 13, 2011. Id. The organizational documents for ATI Ventures, LLC contained no mention of Appellant Ford’s name or

any other information disclosing Appellant Ford's interest in the company. R. at 1551-53. Furthermore, the ATI Ventures, LLC account at Republic Bank had only one signatory: Mr. Johnston. Id. Importantly, there are no documents in the record which evidence that Appellants and Mr. Johnston shared authority over the ATI Ventures, LLC account, or that Appellants made efforts to limit Mr. Johnston's authority to engage in transactions involving this account in any way.

On June 29, 2011, a United States District Judge issued an order compelling Appellant Ford to account for all of the Abbot funds, including Appellant Ford's attorney's fees. R. at 1498. This Order was issued barely over two weeks prior to the three companies' formation by Mr. Johnston. Id.; R. at 1496-96; 1513. Appellant Ford filed a motion to alter, amend, or vacate Judge Reeves' Order, which was ultimately denied on September 9, 2011. R. at 1515.

On May 24, 2012, Mr. Johnston purchased a cashier's check for \$150,000 from Republic Bank on behalf of ATI Ventures, LLC. R. at 1082. Mr. Johnston then voluntarily took the check and gave it to someone named Zafir Nassar ("Mr. Nassar") for unclear reasons. Id. Mr. Nassar then took the check and gave it Appellee for the purpose of repaying Appellee for a \$12,000 loan. R. at 1085-86. Appellee deposited the cashier's check into his personal account at Chase Bank, and wrote Mr. Nassar a personal check for the difference between the amount of the check and the amount owed to him. Id. That is the extent of Appellee's involvement in this case.

Later that year, Appellant Ford traced the funds back to Appellee's account at Chase Bank and obtained a temporary restraining order freezing Appellee's bank account. R. at 9; 11. Ford then sued Appellee for the full \$150,000, even though he only

retained \$12,000 of that original amount. Following a period of discovery, both Appellee and Appellants filed motions for summary judgment. R. at 999. On July 19, 2013, the Fayette Circuit Court denied Appellee's motion for summary judgment and granted summary judgment in favor of Appellant ATI Ventures, LLC against Appellee in the amount of \$150,000.¹ R. at 2434. The judgment was payable "jointly and severally with Seth Johnston." Id. Appellee filed a motion to alter, amend, or vacate that Order, which was ultimately denied in April, 2014. R. at 2752. Appellee appealed to the Court of Appeals.

The Court of Appeals reversed the Trial Court and found that a claim for conversion could not lie against Appellee. Opinion, at 5-8. The Court of Appeals reasoning was as follows:

Ford lost any possessory interest in the check once Johnston negotiated it to Nassar. Ford cloaked Johnston with apparent authority to engage in the transactions with Republic Bank by directing him to open the account and by failing to either remove his signature from the account's signature card or add hers. Republic Bank thus reasonably issued an enforceable \$150,000 cashier's check to Johnston, and when Johnston subsequently transferred the check to Nassar, Ford's rights in the check also transferred.

Opinion, at 8. Appellants moved for discretionary review, and now the case is before this Court.

It should be noted that Appellee has never been charged, indicted, or convicted for any fraudulent activity. Despite Justice Combs's dissenting opinion and Appellants' baseless allegations and characterizations of Appellee as complicit with Mr. Johnston,

¹ The Fayette Circuit Court granted summary judgment in favor of ATI Ventures, LLC, not in favor of Appellants Angela Ford or Angela Ford, P.S.C. R. at 2434.

there is *absolutely no evidence* suggesting that Appellee was involved in any criminal or fraudulent activity in this case. All of the accusations against Appellee are simply statements of speculation that have no reasonable or articulable foundation. This Court should refuse to acknowledge any of these accusations or allegations because they are not supported by anything in the record, and consideration of them is improper.

ARGUMENT

I. APPELLANTS FAILED TO SATISFY THE NECESSARY ELEMENTS COMPRISING A VIABLE CONVERSION CLAIM

The Court of Appeals correctly held that Appellants failed to satisfy the necessary elements of a conversion claim. In Kentucky, a plaintiff bringing a conversion action must be able to show all of the following:

- (1) the plaintiff had legal title to the converted property;
- (2) the plaintiff had possession of the property or the right to possess it at the time of conversion;
- (3) the defendant exercised dominion over the property in a manner which denied the plaintiff's rights to use and enjoy the property and which was to the defendant's own use and beneficial enjoyment;
- (4) the defendant intended to interfere with the plaintiff's possession;
- (5) the plaintiff made some demand for the property's return which the defendant refused;
- (6) the defendant's act was the legal cause of the plaintiff's loss of the property; and
- (7) the plaintiff suffered damage by the loss of the property.

Ky. Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 632 n. 12 (Ky. 2005) (quoting 90 Corpus Juris Secundum (C.J.S.) Trover and Conversion §4 (2004)). Appellants do not appear to dispute that these are the elements necessary to prevail on a claim for conversion in Kentucky.

Appellants failed to show four of these elements. Specifically, Appellants failed to show the following: that Appellants had possession of the property or the right to possess it at the time of conversion; that Appellee exercised dominion over the property in a manner which denied the Appellants' rights to use and enjoy the property and which was to the Appellee's own use and beneficial enjoyment; that Appellee intended to interfere with Appellants' possession; and that Appellee's act was the legal cause of the Appellants' loss of the property. See id. The Court of Appeals opined that Appellants failed to show they "had possession of the property or the right to possess it at the time of conversion" and reversed the Trial Court's grant of summary judgment in Appellants' favor. Opinion, at 6-8. Since the failure to show merely one of the seven elements nullifies a conversion claim, the Court of Appeals did not err by reversing the Trial Court's grant of summary judgment in Appellants' favor.

A. Appellants Did Not Have Rights to the Check or the Funds

The Court of Appeals correctly held that Appellants transferred their rights in the check and the funds at the moment Mr. Johnston gave the cashier's check to Mr. Nassar. Opinion, at 6-8. Appellants lost their rights because Mr. Johnston had apparent authority to purchase the check from Republic Bank and to transfer the check to Mr. Nassar, as Mr. Johnston was the sole signatory on the Republic Bank account and Appellants placed no restrictions or limitations on his authority. R. at 1551-53. Thus, Mr. Johnston's purchase

and transfer of the check was lawful. To that end, every case upon which Appellants now rely to argue that “even an innocent recipient of stolen property is subject to liability for conversion” is incongruent with the facts of this case, and inapplicable in law. Brief for Appellants, at 13.

i. Appellants Voluntarily Relinquished Title and Possession of the Check and Funds Through their Authorized Agent

The Court of Appeals wrote in its Opinion that because Appellants did not sue under KRS §355.3-420 and, consequently, Appellee did not preserve any arguments under KRS Chapter 355 *et seq.*, Appellants’ claim for conversion does not fall within the ambit of Kentucky’s Commercial Code delineating the law of negotiable instruments. Opinion, at p. 5-6. However, the Court of Appeals held that Appellants “lost any possessory interest in the check once Johnston negotiated it to Nassar.” Opinion, at 8. This holding is correct, and requires a brief analysis of how and when title and possession of a cashier’s check is transferred under Kentucky’s Commercial Code.

Kentucky’s Commercial Code supports the proposition that when an authorized signatory to an account lawfully purchases a cashier’s check made payable to an identified third person on behalf of a principal accountholder, and then voluntarily gives that check to a third party, both the agent-signatory and principal-acountholder lose title and possession of the check and the funds. See, KRS §355.3-203; KRS §355.3-309; KRS §355.3-312. An examination of Kentucky’s Commercial Code is necessary to ascertain how Appellants’ loss of title and possession occurred.

First, KRS §355.3-203 explains the relative rights of parties to a transfer of a negotiable instrument, such as a cashier’s check. That Section states as follows, in pertinent part:

Transfer of instrument; rights acquired by transfer

- (1) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument;
- (2) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any rights of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affected the instrument;

KRS §355.3-203. Thus, when a remitter (or a remitter's agent) voluntarily transfers a cashier's check to a third party for the purpose of giving the third party the right to enforce the check (including the right to deposit the check), the rights of the remitter are granted to the third party along with the check. Id. In this respect, transfer of a cashier's check is fundamentally the same as the transfer of cash.

Second, KRS §355.3-309 supports the inference that a remitter (or the remitter's agent) who voluntarily transfers a cashier's check to another person transfers title to the instrument, and therefore loses legal rights in the instrument. KRS §355.3-309 states:

Enforcement of lost, destroyed, or stolen instrument

- (1) A person not in possession of an instrument is entitled to enforce the instrument if:
 - (a) The person seeking to enforce the instrument:
 1. Was entitled to enforce the instrument when loss of possession occurred;

2. Has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
- (b) *The loss of possession was not the result of a transfer by the person* or a lawful seize; and
 - (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

KRS §355.3-309 (emphasis added). Thus, if an instrument is actually “stolen,” (as Appellants claim), the remitter can only claim title to the instrument if the remitter (or their agent) did not previously and voluntarily relinquish possession of the instrument to a third person. See id. As with cash, voluntary relinquishment of possession grants title to the instrument to the transferee.

Third, and finally, KRS §355.3-312 also supports the proposition that remitters of cashier’s checks who voluntarily transfer the check to someone else lose title, and therefore lose all possessory interest and enforcement rights in the instrument. KRS §355.3-312 provides a remedy to both remitters and payees of cashier’s check in the case of lost, stolen, or destroyed cashier’s checks, and requires the obligated bank to issue payment to the remitter or payee under certain conditions. KRS §355.3-312. However, in order for an obligated bank to actually issue payment to the remitter, the remitter is required to submit a “declaration of loss” under penalty of perjury. Id. The remitter must state the following in a “declaration of loss”:

Lost, destroyed, or stolen cashier's check, teller's check, or certified check

- (c) "Declaration of loss" means a statement, made in a record under penalty of perjury, to the effect that:
1. The declarer lost possession of a check;
 2. The declarer is the drawer or payee of the check, in the case of a certified check, or the remitter or payee of the check, in the case of a cashier's check or teller's check;
 3. *The loss of possession was not the result of a transfer by the declarer* or a lawful seizure; and
 4. The declarer cannot reasonably obtain possession of the check because the check was destroyed, its whereabouts cannot be determined, or it is in wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

KRS §355.3-312 (emphasis added). Once again, a remitter is permitted to claim title to a lost or stolen cashier's check only if the remitter can state, under penalty of perjury, that the loss of possession of the instrument was *not* the result of a voluntarily transfer to another person. Id.

In this case, the issue correctly identified by the Court of Appeals is whether Appellants lost possession of the check during the chain of transactions, beginning with the check's purchase by Mr. Johnston and ending with the check's deposit by Appellee. At the time Mr. Johnston purchased the cashier's check, he had possession of the check under the Code and he held the right to enforce the instrument. However, at the moment Mr. Johnston gave the cashier's check to Mr. Nassar, both Mr. Johnston and Appellants

lost title and possession of the check, and Mr. Nassar gained title and possession. Neither Mr. Johnston nor Appellants had any dominion and control over the funds at the time the check was transferred to Mr. Nassar, and Appellants, as remitters, no longer were entitled to enforce the instrument, since the instrument had been voluntarily transferred to another person. KRS §355.3-309; KRS §355.3-312.

Furthermore, Appellants had no remedies available to them under Kentucky's Commercial Code to recoup the check, since the Code specifically mandates that any attempt at enforcement of the instrument if lost, stolen, or destroyed requires a declaration by Appellants that the check was not voluntarily transferred to another person. KRS §355.3-309; KRS §355.3-312. No such declaration of loss was ever filed by Appellants. Thus, because Mr. Johnston, acting as a duly authorized agent of ATI Ventures, LLC, voluntarily transferred the check to Mr. Nassar, Appellants title also transferred to Mr. Nassar under the Code. KRS §355.3-203.

ii. Mr. Johnston's had Authority to Transfer Title to the Check and the Funds

It is a well-established and longstanding legal rule in Kentucky that a "principal is bound by the act of his appointed or recognized agent when it is within that sphere of the agent's apparent authority." Clark v. Burden, 917 S.W.2d 574, 579 (Ky. 1996). As between accountholders at banks (principals), signatories (agents), and payees (third parties), it is also well-established "[t]hat a principal did not approve an individual transaction [with a bank] does not change the fact that an agent can have apparent authority to...engage in the transaction, at least when viewed from the perspective of the bank." Mark D. Dean, P.S.C. v. Commonwealth Bank & Trust Co., 434 S.W.3d 489, 500 (Ky. 2014). Apparent authority is created when the principal manifests to third parties

that the agent has authority, the third party reasonably believes the agent has authority based on the manifestation, and there is a direct link between the principal's manifestation and the third party's belief. Id.

Appellants do not seem to dispute that Republic Bank reasonably believed Mr. Johnston had apparent authority to purchase the cashier's check. See, Brief for Appellant, p. 17-22. Instead, Appellants argue that only Republic Bank can avoid liability, since they are the only party who actually relied on Mr. Johnston's authority. Id. According to Appellants, because Appellee never relied firsthand on Johnston's apparent authority, Appellee is not shielded from liability for allegedly converting the funds. Id.

Appellants' position confuses the issue. Undoubtedly, Appellee never relied on any manifestation from Mr. Johnson in this transaction.² What Appellee asserts, and what the Court of Appeals correctly determined, was that the doctrine of apparent authority authorized Mr. Johnston to both (1) purchase the check from Republic Bank, and (2) *lawfully divest Appellants of title* to the check when he gave it to Mr. Nassar. As the Court of Appeals recognized, Mr. Johnston was the only name on the signature card at Republic Bank and, by anyone's estimation, the manager and operator of ATI Ventures, LLC. Opinion, at 8. Because of this, the divestment of Appellants' title to the check and funds was the legal act to which Appellees were bound by their agent, Mr. Johnston, since they cloaked him with apparent authority to do so and failed to limit his authority in any way. Indeed, as the Court of Appeals wrote: "Republic Bank thus reasonably issued an enforceable \$150,000 cashier's check to Johnston, and when

² In fact, Appellee testified in his deposition that he had never had any business dealings with Mr. Johnston, and did not even know who he was. R. at 1087.

Johnston subsequently transferred the check to Nassar, Ford's rights in the check also transferred." Opinion, at 8.

iii. Application to Conversion

The above analysis shows the Court of Appeals correctly held that Appellants failed to show they had possession of the check or the right to possess the check at the time of the alleged conversion. Ky. Ass'n of Counties All Lines Fund Trust v. McClendon, 157 S.W.3d 626, 632 n. 12 (Ky. 2005) (quoting 90 Corpus Juris Secundum (C.J.S.) Trover and Conversion §4 (2004)). Under Kentucky's Commercial Code and the common law doctrine of apparent authority, at the time Appellee received the check from Mr. Nassar, neither Appellants nor Mr. Johnston held title to the check, much less any possessory interest. Therefore, the claim for conversion fails because none of the Appellants possessed or had the right to possess the check or the funds, since they lost title to the check when Mr. Johnston transferred it to Mr. Nassar. This is the crux of the Court of Appeals' holding, and that holding was correct.

Despite Appellants' failure to satisfy the second element of conversion, they rely on Urban v. Lansing's Adm'r, 39 S.W.2d 219, 221 (Ky. 1931) to support the proposition that "even an innocent recipient of stolen property is subject to liability for conversion." Brief for Appellants, at p. 13. Appellants cite Urban to support the principle that "[i]t simply does not matter if stolen funds pass through innocent hands. The original property owner has the right to recover her property." Brief for Appellants, at p. 13. Appellants then proceed to discuss how Urban also explains the element of intent as applied to conversion, arguing that the only act a party must intend in a conversion claim

is the intent to exercise dominion and control over the property, not the intent to convert the property itself. Brief for Appellants, p. 15.

Appellants' reliance on Urban is misplaced. While it may be true under Urban that innocent recipients of stolen property can be liable in conversion to the rightful owner, Urban contains a critical difference from the instant case. The difference between Urban and the instant case is that the property at issue here was not unlawfully taken from its owner. In Urban, an automobile was first stolen from its owner by a thief and then purchased from the thief by an innocent party. Urban, 39 S.W.2d at 220-21. The word "stolen" means that the automobile was taken from its original owner without the owner's consent, i.e. unlawfully, and without prior authorization from the owner. Although the thief in Urban unlawfully wrested the automobile's owner from actual possession of the vehicle, *title* to the automobile never passed.

In this case, title to the cashier's check *did* pass, as the property was transferred by Mr. Johnston to Mr. Nassar, and Appellants granted Mr. Johnston authority to do so. Appellants bestowed upon Mr. Johnston apparent authority to operate the checking account at Republic Bank. Inherent to that authority, as described above, was the power to purchase cashier's checks on behalf of the company and, because Mr. Johnston's authority was never limited in any way, nothing prevented Mr. Johnston from transferring title to those funds to third parties. Mr. Johnston had lawful authority to both (1) purchase the cashier's check, and (2) transfer title to the check to a third party. He did both.

Urban does not compare to this case because the original automobile owner did not control an agent with lawful apparent authority who voluntarily relinquished title to

the automobile to someone else. Instead, the owner of the automobile in Urban was unlawfully divested of possession of his property, and therefore title to the property never passed. Id. As a result, the Urban Court's holding that "the purchaser of *stolen* chattels acquires no title, however innocent he may be" comports both with law and equity, as title cannot lawfully pass to a thief. Id. at 221 (emphasis added). But there is no "thief" in this case, in the sense that the word "thief" was used in Urban. Rather, Appellants voluntarily bestowed upon Mr. Johnston lawful authority to engage in these transactions. Despite the fact that Appellants may not approve of these transactions after their occurrence, the fact remains that Mr. Johnston had apparent authority to divest Appellants of title to their property at the time.³ As a result, there is no "stolen" property or a "thief," rendering Urban inapplicable to this case. Title in the check lawfully passed from Mr. Johnston to Mr. Nassar, and then from Mr. Nassar to Appellee.

B. Appellee Did Not Exercise Dominion Over the Property in a Manner which Denied Appellants' Rights to Use and Enjoy the Property

Appellants failed to show that Appellee exercised dominion over the funds in a manner which denied Appellants' rights to use and enjoy the funds. The reason is because, as the Courts of Appeals held and as described above, at the time Appellee received the check, Appellants no longer had any rights to the funds in question. Opinion, at 8. Appellants had no title or equitable claim to the funds. Therefore, Appellee's dominion over the funds did not, and could not, have denied any of Appellants' rights to use and enjoy the funds.

³ To the extent Appellants claim these transactions were unlawful or unauthorized, Appellants had a number of alternative remedies available to them to recoup these funds from Mr. Johnston, most of which sound in claims for breach of the fiduciary duty of care and/or loyalty.

C. Appellee Did Not Intend to Interfere with Appellees' Possession of the Check

Appellants failed to show that Appellee intended to interfere with Appellees' possession of the check. The reason Appellants failed to show this element of conversion is because, for the reasons outlined above, Appellants lost all possessory interest and legal rights in the check at the time Mr. Johnston lawfully transferred the check to Mr. Nassar. As a result, it is impossible that Appellee intended to interfere with Appellants' possession of the check, since Appellants had no possessory interest with which Appellee could interfere in the first place.

D. Appellee's Act Was Not the Legal Cause of Appellants' Loss of the Check and Funds

Appellants failed to show that Appellee was the legal cause of Appellants' loss. Although the Court of Appeals did not opine on this element of conversion, the direct and proximate cause of Appellants loss of title to the check was unquestionably the actions of Mr. Johnston, not any acts committed by Appellee. As a result, the legal cause of Appellants' loss of the funds was the actions of Mr. Johnston, not the actions of Appellee.

The Court of Appeals recently discussed the burden imposed on the plaintiff to show the defendant was the legal cause of the loss of property in Jasper v. Blair, 492 S.W.3d 579 (Ky. App. 2016). In Jasper, which was an action involving the conversion of a ring, the Court of Appeals held that the standard for legal causation in conversion claims mirrors the standard for legal causation in other Kentucky torts:

In Kentucky, legal causation has been defined by the substantial factor test as set forth in the Restatement (Second) of Torts...[which] essentially provides that an "actor's negligent conduct is a legal cause of harm to another if his conduct is a substantial factor in bringing about the harm." "Substantial factor" has been used to indicate that a defendant's conduct had "such an

effect in producing the harm as to lead reasonable men to regard it as a cause..."

Id. at 583 (internal citations omitted). Thus, only if the plaintiff can prove that the defendant's conduct was a substantial factor in causing the loss of their property can a conversion action succeed. Id.

In this case, Appellee did two things: (1) he received a cashier's check from Mr. Nassar, and (2) he deposited that check into his bank account. When given these facts, no reasonable person could attribute the cause of Appellants' loss to the passive actions of Appellee. The direct and proximate cause of the loss of Appellants' property is without question the combined actions of Mr. Johnston, not the actions of Appellee. Appellants seem to repeatedly acknowledge this in their Brief, writing first and foremost in their Introduction that this case involves whether Appellants "can recover almost \$1 million that was stolen by a Kentucky lawyer." Brief for Appellant, at i. Notwithstanding the above arguments that Mr. Johnston had lawful authority to engage in these transactions, if Appellants themselves argue that they are the "victim of a theft" and that Mr. Johnston was the actor who initiated these allegedly unlawful transactions, the most reasonable conclusion to be drawn can only be that Mr. Johnston was the direct and proximate cause of Appellants' loss. Any reasonable person, when confronted with these facts, will point the finger at Mr. Johnston as being the direct and proximate cause of Appellants' loss of property, not Appellee, who simply received the property afterwards.

Consider the absurdity of the alternative. If Appellee's actions are found to be a substantial factor in causing Appellants' loss, then it must also be true that anyone who receives the funds from Appellee is also a substantial factor in causing Appellants' loss, and so on. Thus, if Appellee were to purchase merchandise from a department store with

the funds, the department store, too, could be considered a substantial factor in causing Appellants' loss. There is no legal distinction between Appellee's actions and the actions of the department store. Both Appellee and the department store simply took money and deposited it into their respective accounts. The same is true for anyone who receives the money from the department store, and so on. This is obviously an untenable conclusion.

Appellee is not the legal cause of Appellants' loss. Mr. Johnston is the legal cause of Appellants' loss. He is the actor whom Appellants continuously allege stole the property in question, not Appellee. Appellee merely received the allegedly converted property and deposited it into his account. This surely cannot be considered a substantial factor in causing Appellants to lose the property in question. Appellee's actions were passive, indirect, and unessential. Mr. Johnston's acts, by contrast, were active, direct, and essential to Appellants' loss. As a result, Appellants failed to satisfy this element of conversion.

CONCLUSION

For the foregoing reasons, Appellee respectfully requests that this Court AFFIRM the Court of Appeals' holding in this case.

Respectfully submitted,

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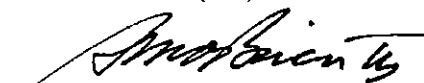
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