S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

NEW PROPERTIES, INC., ROBERT W. KITCHEN, and HARRIET KITCHEN,

Plaintiffs-Appellees/Cross-Appellants,

UNPUBLISHED
September 14, 2006

v

No. 259932
Grand Traverse Circuit Court
LC No. 97-15769-CH

GEORGE D. NEWPOWER, JR., INC., RITA JACOBS, JANN NORTON, CHASTITY SCHAUB, JOHN NEWPOWER, CAROL FRANKLIN, SHAWN GRACE, RYAN DOBRY, JASON NORTON, MANCELONA PROPERTIES, INC., VIRGINIA L. NEWPOWER, a/k/a VIRGINIA L MOEKE, REGINA M NEWPOWER, GEORGE J. NEWPOWER, HOI POLLOI PRODUCTIONS, INC., PAMELA CANNON, DIANNE BIHLMAN, Individually and as Personal Representative of the Estate of DAVID BIHLMAN, and JAMES HUNT,

Defendants,

and

MURIEL HART and HUNTINGTON NATIONAL BANK, f/k/a FMB NORTHWESTERN BANK,

Defendants-Appellants/Cross-Appellees,

and

LAKES OF THE NORTH REALTY, INC,

Defendant-Appellee.

Before: Davis, P.J. and Sawyer and Schuette, JJ.

PER CURIAM.

In this appeal from a bench trial involving embezzlement defendants George D. Newpower, Jr., Inc, d/b/a Hansen Realty, Lakes Of The North Real Estate, Inc., Muriel Hart, FMB Northwestern Bank n/k/a The Huntington National Bank (the Bank) and James Hunt appeal as of right the judgment of the circuit court awarding plaintiffs damages in the amount of $1.8 million. We affirm in part and reverse in part, as discussed within this opinion.

I. FACTS

Introduction

George Newpower, Jr. (Newpower) was a prominent businessperson in the northern Michigan village of Mancelona. In 1996, Newpower embezzled $755,000.00 from plaintiffs Robert and Harriet Kitchen (the Kitchens), his business partners. In 1997, plaintiffs sued Newpower and the various recipients of the embezzled funds. Plaintiffs also sued the Bank and its Mancelona branch Manager Muriel Hart (Hart) for conversion under the Uniform Commercial Code (UCC) alleging that the Bank and Hart knowingly allowed and, in fact, facilitated the embezzlement. Newpower eventually pleaded guilty to embezzlement of over $100 and was sentenced to 6-10 years in prison.

Newpower and the Mancelona Community

Newpower moved to Mancelona in 1976 and purchased Hansen Realty, a local real estate agency. For the next twenty years, Newpower's agency was actively engaged in the real estate business. Newpower formed another real estate company in 1994, Lakes of the North Realty, which managed vacation rental properties in the area. Newpower was the Principal Broker with Lakes of the North, served as its President, Vice President, Director, Chief Executive Officer and Chief Operating Officer and was the sole signatory of its trust accounts at the bank. Newpower kept the bank accounts for his business ventures at the Antrim County State Bank, where Muriel Hart was "his banker." Newpower helped recruit, FMB Northwestern State Bank[1] ("the Bank") to Mancelona and he recommended Hart to the Bank as an experienced and well-respected banker in the community who could bring them immediate business. Hart then opened the new branch in Mancelona as its manager. Newpower then moved his personal and business accounts to the Bank.

The Mancelona Area Health Clinic Scandal

Newpower was also president and a member of the board of directors of the Mancelona Area Health Clinic (MHC). Hart, too, was involved in the operation of the MHC, acting as the

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[1] FMB Northwestern State Bank is now known as The Huntington National Bank.

treasurer. In September 1993, Newpower suggested that $30,000 of MHC's money deposited into an account at the Bank could earn more interest in an investment account of his choosing. Upon taking the money from the MHC account, however, Newpower did not invest it but rather deposited it into his personal account at the Bank for his own uses. The money was eventually discovered to have been used by Newpower to make a $1400.74 mortgage loan payment to the Bank, a $165.30 personal loan payment to Hart, and a $91.67 personal loan payment to Hart and her mother.

In January or February 1995, Hart became suspicious of Newpower's investment of the money as she had not received any statements about its performance. As early as March 1995, she pulled copies of Newpower's accounts and determined that he had deposited the money into his personal account rather than investing it. Hart testified that she sought the advice of the Bank's Senior Lender, Daniel Spagnuolo, who told her to investigate the matter and seek the advice of Jack McKaig, an attorney on the MHC board. Spagnulo initially testified that he "may" have been told by Hart that Newpower had deposited the money in his personal account, but later testified that she did not mention this fact.

David Brooks, a MHC Board member, also was concerned with the whereabouts of the money. He was told by Newpower that the investment was made with "Munson & Madison Financial Service Corp.," a Chicago investment firm, because they had a "means of pooling moneys" to get better interest rates. The Munson & Madison investment firm was fictitiously created by Newpower to attempt to hide his embezzlement. Thus, when Brooks inquired with Munson Hospital, he was unsuccessful in discovering the location of the funds. The first mention of the "investment" in MHC's records was not until February 16, 1995, when Hart recorded that Newpower had invested the money at Munson & Madison Financial Service Corp. and that Newpower reported the account was paying 8.65% and he had given instructions for the investment firm to send Hart statements and tax information. The only statement ever received was fraudulently created by Newpower, and Hart never received any tax information regarding the investment.

The money mysteriously reappeared after this series of inquiries. A check was issued from Munson & Madison to refund the investment; however, the check was not written on a Chicago investment firm account but rather a NBD Bank in Traverse City. Newpower created the NBD account solely to deposit embezzled money and to subsequently issue the fraudulent Munson & Madison check. The account at NBD was only open for five days. When MHC was made whole, all other inquiries into the use of the money were dropped.

Newpower and the Kim Biehl scandal

Kim Biehl was Newpower's secretary at Lakes of the North. Her husband, James Biehl, worked for Newpower at Hansen Realty. In August 1994, Mrs. Biehl discovered that checks she had written were bouncing because a check that Newpower had given to her husband for a commission had been dishonored. Mrs. Biehl went to the small Mancelona branch of the Bank and complained loudly, asserting that the only way Newpower's check could have bounced from the trust account it was written on was if he was "cooking the books." This information was apparently communicated to Hart, although she was not in the Bank at the time. Hart later stated that she regarded the accusation as "hearsay."

Newpower and the Bank
Newpower and Muriel Hart's banking relationship

Muriel Hart had 26 years of banking experience. Hart was Newpower's banker for both his business endeavors as well as his personal finances. When Newpower recruited the Bank to come to Mancelona, he personally recommended Hart as a qualified manager to run the new business. Hart continually practiced lenient banking procedures with regards to Newpower's various accounts. Hart often held checks to prevent overdrafts from occurring in Newpower's accounts until he could deposit funds to cover the check. More than once, Hart sat down and went extensively through Newpower's accounts to determine why his balance showed different amounts than the Bank's balance of his accounts. When Hart inquired as to why certain deposits were made to certain accounts, Newpower often replied that the secretary must have deposited into the wrong account, yet Hart never fixed such errors.

In addition to this banking relationship, Newpower and Hart had been friends for many years. Hart had personally loaned $12,000.00 to Newpower and had also arranged for her mother to loan him $10,000.00. Additionally, Hart lent approximately $28,800.00 to the corporation Newpower ran with Jerry Biehl, Mancelona Properties, Inc. Personally, financially and professionally, Hart and Newpower were closely connected.

Newpower and his other accounts at the Bank

Newpower had eight other accounts at the Bank for his own personal finances, as well as for his real estate business ventures with Lakes of the North, Hansen Real Estate, and MPI. Each of these accounts experienced significant overdrafts from 1993 to 1996. In particular, the trust accounts for the Mancelona trailer park that Newpower managed through Hansen Realty, as well as the trust accounts for Lakes of the North, experienced overdrafts despite the fact that they should not have been used to withdraw monies. In total, there were approximately 288 overdrafts in these accounts in this short three year period.

Newpower also had a $42,000.00 line of credit with the Bank. When Dan Spagnuolo took his position as Senior Lender at the Bank, one of his jobs was to reduce the outstanding debts of its customers. In 1994, Spagnuolo met with Newpower and reviewed his overdraft history with him. Spagnuolo advised Newpower that unless he paid in full his great debts to the Bank, his line of credit would not be renewed because of Newpower's breach of both trust and contractual agreements. Without explanation, Newpower paid off this large debt to the Bank within a month of this correspondence with Spagnuolo.

Muriel Hart and the Bank
Overdraft review responsibilities

As manager of the Bank, Hart's job included ensuring that the bank's financial security controls were implemented to protect the bank from fraudulent and criminal activity. Specifically, Hart was responsible for reviewing the daily overdraft report and deciding which overdrafts to pay and which ones to refuse. Despite Newpower's extensive overdraft history, Hart continually paid out his checks when his funds were insufficient. In particular, in March

1996, three of Newpower's checks were returned for insufficient funds. After Newpower transferred the majority of a wire transfer from plaintiffs from the NPI account into his personal account, the bank cleared the three returned checks and paid them on the same day. No explanation could be given as to how this could occur on the same day in a small bank without direct intervention by a bank employee. Ironically, Newpower also wrote a check to Hart for his loan payment to her on the same day.

Other bank responsibilities

The Bank's procedures for managing its accounts requires a series of progressive disciplinary steps that begin with warning letters and end with the closing of an account. While the bank manager does have some discretion, in the end it is the manager's job to ensure that such fraudulent activities do not occur. To implement this, the Bank had clear policies and procedures to follow for monitoring suspicious activities of its customers. Suspicious activities include excessive overdrafts and large numbers of fund transfers between accounts and the unexplained and sudden pay-off of problem loans. While Hart often discussed her concerns about Newpower's management of his accounts with him, she never closed any of his accounts at the Bank nor flagged his activities as suspicious to the bank's other employees.

Newpower and the Kitchens
The formation of NPI

In 1995, the Kitchens decided to sell their interest in their potato farm to Robert Kitchen's brother, William.[2] Around the same time, Newpower and the Kitchens formed a property development business called New Properties, Inc. (NPI). The Kitchens and Newpower had a former business relationship through the Kitchens' potato farm. After forming NPI, the Kitchens moved to Alaska, leaving Newpower in charge. Newpower and the Kitchens were to each own 50% of the shares in the new company, and for each deposit the Kitchens made, Newpower was to deposit an equal amount into an NPI bank account. When Newpower opened the NPI account, Muriel Hart, the bank's manager, was involved. Newpower told Hart that he was going into business with the Kitchens and also told her that NPI was to have the same business model as MPI, Newpower's other real estate business venture. Newpower thus had broad authority to endorse, sign and draw checks on NPI's account. Newpower was the only signatory authority on the NPI account.

The embezzlement from NPI

In January 1996, Harriet Kitchen delivered Newpower two checks, one for $200,000.00 and another for $2,000.00. The former check was made out to Newpower personally and was intended as the payment for the Kitchens' half of a 320 acre parcel of land in Kalkaska (as indicated in the memo section of the check) while the latter check was made out to NPI and was

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[2] Newpower also embezzled $220,000 from the Robert and William Kitchen's farming business that was discovered after the discovery of the embezzlement from NPI.

intended as the payment for the Kitchens' shares of stock in NPI. Newpower took the Kitchens' checks to the bank and deposited the $200,000.00 check into his personal account. The $2,000.00 check was eventually used to open an account for NPI at the Bank in February 1996.

After Newpower deposited the Kitchens' $200,000.00 check into his personal account in January, he later made two deposits from his personal account into two Lakes of the North accounts at the bank. No other deposits were made into Newpower's personal account between the deposit of the plaintiffs' $200,000.00 check and Newpower writing the checks subsequently deposited into Lakes of the North's accounts. Thus, the source of the two deposits into the Lakes of the North accounts by Newpower was the plaintiffs' $200,000.00 check.

Additionally, about a month later, Newpower made a third deposit into a Lakes of the North account by directly transferring the funds from the NPI corporate account into the Lakes of the North account. All deposits into the NPI account were from the Kitchens. Thus, the third deposit into the Lakes of the North account was entirely plaintiffs' funds.

From February through October of 1996, the Kitchens made six wire transfers from their new home in Alaska to the NPI account, totaling $638,250. Newpower never matched any of these funds as he agreed to do when he formed NPI with Robert Kitchen. Robert Kitchen testified that with the first two or three wire transfers he called and personally talked to Hart to verify that they were going into the NPI account. Hart also testified that she was aware of the wire transfers coming from the Kitchens and that she had personally handled at least one for $220,000.00.

The discovery of the embezzlement

The Kitchens corresponded with Newpower on a regular basis. Robert Kitchen spoke with him on the phone twice a week. The Kitchens would wire their half of the money needed to buy the property Newpower claimed to be purchasing. While they did not receive the property deeds they requested, this was consistent with their previous dealings with Newpower, which had not resulted in any negative transactions. The Kitchens did admit that they did not ask or receive regular statements for the NPI bank account.

In December 1996, the Kitchens discovered that Newpower was embezzling their funds. They reported the behavior to the Michigan State Police, who then issued an order to freeze Newpower's accounts. Only the NPI corporate account was frozen, leaving Newpower's personal account open, and resulting in the loss of an additional $10,000.00. By pursuing all the beneficiaries of Newpower's largess, plaintiffs have recovered approximately $248,000.00 of their stolen funds.

Procedural history

During the proceedings, defendants filed three motions for summary disposition that were denied. Plaintiffs also filed a motion for partial summary disposition as to claims against defendant Lakes of the North Realty that was denied.

In its order and final judgment, the trial court found that the Bank, through Hart, had actual knowledge of Newpower's fraud and failed to exercise due diligence with notice of that

fraud. The Bank was held liable for conversion of plaintiffs' funds. However, under MCL 440.4704, plaintiffs' failed to exercise ordinary care with respect to unauthorized orders of Newpower, and thus were not awarded interest on their recovery. Plaintiffs were, however, awarded treble damages under MCL 600.2919a. The trial court found that in the absence of a clearly expressed legislative intent to repeal MCL 600.2919a, the statutory treble damage remedy must remain effective and that it was not inconsistent with the actual damage remedy provided by the UCC. The court declined to engage in a negligence analysis, and stated that since it was not awarding damages based upon negligence, it also declined to consider issues of contributory or comparative negligence. The court entered judgment against the Bank and Hart jointly and severally in the amount of $1,840,393.66.

II. DEFENDANTS' GOOD FAITH, ACTUAL KNOWLEDGE AND NOTICE

A. Standard of Review

We review for clear error the trial court's findings of fact in a bench trial. *Alan Custom Homes, Inc v Krol,* 256 Mich App 505, 512, 667 NW2d 379 (2003); MCR 2.613(C). A finding of fact is clearly erroneous when, although there is evidence to support it, we are left with a definite and firm conviction that a mistake has been made. *Alan Custom Homes, supra* at 512. We give deference to the trial court's superior ability to judge the credibility of the witnesses who appeared before it. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n,* 264 Mich App 523, 531, 695 NW2d 508 (2004).

B. Analysis

The trial court did not clearly err in finding that defendants had actual knowledge of Newpower's illegal activities. Defendants argue that the trial court clearly erred in concluding that defendants had actual knowledge of illegal activity and did not act in good faith. They also argue that Hart's knowledge of Newpower's embezzlement from the Health Clinic and her knowledge of Kim Biehl's accusation of Newpower "cooking the books" is not relevant to the transactions related to the NPI account because they occurred long before the NPI account was opened. We disagree.

"Good faith" is defined for purposes of Article 3 of the UCC as "honesty in fact and the observance of reasonable commercial standards in fair dealing." MCL 440.3103(1)(d). Black's Law Dictionary (7th ed) defines "good faith" as:

> A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or seek unconscionable advantage.

Here, Hart's actions reflect that she was not acting in good faith. Hart knew the purpose of the funds in the NPI account because Newpower told her when he opened the account that he was going into business with the Kitchens. Hart also knew that Newpower was depositing money from the NPI account into his own account and then using it to pay other bills, including debts owed to Hart and her mother personally. This was in direct contravention of the bank's written policies. Furthermore, Hart had knowledge that Newpower had embezzled from the Health

Clinic in the past and had knowledge that his former employee, Kim Biehl, had accused him of "cooking the books." Hart was certainly not observing commercial standards and fair dealing, nor does her behavior reflect "honesty in fact."

The trial court also did not clearly err in concluding that defendants had actual notice and knowledge of Newpower's illegal activities. The trial court relied on the notice provision of the UCC, which states:

> Notice, knowledge, or a notice or notification received by an organization is effective for a particular transaction from the time when it is brought to the attention of the individual conducting that transaction, and in any event from the time when it would have been brought to the individual's attention if the organization had exercised due diligence. An organization exercises due diligence if it maintains reasonable routines for communicating significant information to the person conducting the transaction and there is reasonable compliance with the routines. Due diligence does not require an individual acting for the organization to communicate information unless such communication is part of his or her regular duties or unless he or she has reason to know of the transaction and that the transaction would be materially affected by the information. [MCL 440.1201(27).]

Defendants interpret this provision extremely narrowly and urge this Court to read this statute as requiring actual proof on the face of each instrument disbursed from the NPI account indicating that there was a problem. We do not think such a narrow reading is warranted. The Bank, through Hart, had actual knowledge that Newpower embezzled money from the Health Clinic. Hart also had actual knowledge that Newpower had opened the NPI account for the purpose of acquiring land for the business. Hart knew that the money coming into the account by wire transfers was being removed from that account and used to pay other debts, including personal debts owed Hart by Newpower. In a case where a bank employee is that intimately involved with fraudulent activity, requiring written notice on the face of each instrument in question affords too much protection to the bank.

Defendants cite to *Columbia Land Co v Empson*, 305 Mich 220, 226; 9 NW2d 452 (1943), for the proposition that Newpower's disbursements from NPI's account to himself is not enough to charge defendant's with notice that Newpower intended to misappropriate funds. The *Columbia Land* Court stated:

> There is no allegation in the declaration that there was any actual bad faith on the part of the bank or any of its officers, no claim that the bank benefited in any way, either directly or indirectly, because of the shortage and failure to account, no claim that the bank officers knew of any misappropriation or that they were put upon inquiry, no claim that the plaintiff had any account in the bank or in any other bank, no claim that there was any concerted action of the bank or its officers and the deceased, no claim that the bank had any warning that deceased was not accounting for the funds belonging to the plaintiff. There is no claim or any contractual relation between the plaintiff and the bank. The declaration makes no express claim of fraud, bad faith, connivance, personal benefit or gain, on the part of the bank or any of its officers, directors or employees. It is not claimed that

> Empson owed the bank, or that the bank applied the deposit to his debt. No claim is asserted that anyone on behalf of the bank ever had any notice or knowledge, or reason to suspect, that G. R. Empson was misappropriating corporate funds to his own use. [*Id*. at 224-225.]

Here, however, there is direct evidence that Hart personally benefited from Newpower's actions. Furthermore, as detailed above, there is also evidence that removes this case from the realm of negligence and places it squarely within the bounds of actual bad faith.

Defendants also argue that "[w]here an instrument is regular on its face and there are no suspicious circumstances that show a deliberate desire to evade knowledge, the law does not impose a duty on the holder to inquire about possible defenses to the instrument." *Unbank Co v Dophin Emporary Help Sevrs, Inc*, 485 NW2d 332, 334 (Minn App, 1992). Defendants assert that plaintiffs offered no proof concerning a single check and how an examination of the face of the instrument would have provided notice. However, defendants fail to consider that this is a case replete with suspicious circumstances. Despite appearing regular, the instruments in question were being manipulated by Newpower, a man the bank actually knew had a history of manipulations and illegal financial transactions.

Therefore, the trial court did not clearly err in finding that defendants acted in bad faith with notice.

III. DEFENDANTS' DUTY TO PLAINTIFFS

A. Standard of Review

The question whether the trial court correctly determined that defendants owed plaintiffs a duty is a matter of law. The trial court's conclusions about defendants' bad faith, fraud, notice and knowledge are issues of fact. We review the trial court's factual findings for clear error, while questions of law are reviewed de novo. *Merkur Steel Supply, Inc v Detroit,* 261 Mich App 116, 124; 680 NW2d 485 (2004).

B. Analysis

Defendants argue that they did not owe any duties to plaintiffs. Yet, as plaintiffs note, the trial court found that defendants were liable to plaintiffs under statutory causes of action under the UCC, none of which require that the element of duty be proven. Defendants argue that in spite of the provisions not requiring a duty to be shown, the case law unequivocally supports their contention that banks do not owe any duty to non-customers. Defendants quote from *Portage Aluminum Co v Kentwood Nat'l Bank*, 106 Mich App 290; 307 NW2d 761 (1981) to support their argument. The *Portage* Court stated:

> In the instant case, there was no relationship whatsoever between the plaintiffs and defendant bank. Defendant bank did not even know the identity of the plaintiffs nor that they were customers of CPAS. While it is true that the defendant bank could have learned the identity of the customers of CPAS, such an investigation would neither have been proper nor required. It is generally no business of a bank to pry into the affairs of depository customers to determine

> who the customers of the depositor are or to act on behalf of such persons. In the instant case, we find no privity between plaintiffs and defendant bank on which to base a fiduciary relationship.

The *Portage* Court went on to discuss the application of *Columbia Land*, *supra*, stating:

> The Court noted that the bank had no duty toward third parties absent a showing of special attenuating circumstances, viz: fraud, bad faith, connivance, personal benefit, collusion. The Court noted that the bare fact that the depositor itself was a fiduciary did not create any special obligations on the part of the bank for the protection of third parties. The Court cited approvingly the following applicable rule of law:
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> "'The mere fact, however, that a bank knows that moneys deposited with it have by a depositor been acquired in a fiduciary capacity does not impose on it the duty, or give it the right, to institute an inquiry into the conduct of its customer in order to protect those for whom he may hold the fund, but between whom and the bank there is no privity.'" [*Portage*, *supra* at 296 (Citations omitted).]

This case can be distinguished from *Portage* because, here, defendants did have knowledge of the type of relationship shared by Newpower and the Kitchens. Further, this is a case rife with the type of special attenuating circumstances mentioned by the *Portage* Court; specifically: fraud, bad faith and personal benefit.

The other cases cited by defendants in support of their argument are from other jurisdictions and are not binding upon this Court. The essence of these cases is that banks do not ordinarily owe duties to non-customers. Here, however, there is clear and unequivocal evidence that Hart was acting in bad faith. The trial court recognized that the idea that Hart was unaware of Newpower's activities was a "hypothetical fiction." In this case we have a small bank located in a small town and a bank manager who had a close personal relationship with the embezzler. This is not a case of mere negligence on the part of the bank, but of actual bad faith. Thus, holding the Bank responsible in this case does not impose blanket duties on all banks to monitor their customers' accounts, disclose information to non-customers, restrict the use of funds or any of the other duties suggested by defendants. Rather, upholding the trial court's decision in this case merely holds these particular defendants responsible for their bad faith under this precise set of circumstances. Thus, the trial court did not err in finding that defendants owed a duty to plaintiffs in this case.

IV. LIABILITY UNDER THE UCC

A. Standard of Review

The proper interpretation and application of Article 4A of the UCC, codified at MCL 440.4703, is a question of law. This Court reviews questions of law de novo. *Title Office, Inc v Van Buren Co Treasurer,* 469 Mich 516, 519; 676 NW2d 207 (2004). The issue of the scope of Newpower's agency is an issue of fact reviewed for clear error by this Court. *Michigan Nat'l Bank of Detroit v Kellam*, 107 Mich App 669, 678-679; 309 NW2d 700 (1981).

B. Analysis

We agree with the trial court that pursuant to MCL 440.4703 the transfers from the NPI account were not "authorized." The statute provides, in relevant part:

> (1) If a receiving bank accepts a payment order issued in the name of its customer as sender which is (*i*) not authorized and not effective as the order of the customer under section 4A202, or (*ii*) not enforceable, in whole or in part, against the customer under section 4A203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized by the customer and to notify the bank of the relevant facts within a reasonable time not exceeding 90 days after the date the customer received notification from the bank that the order was accepted or that the customer's account was debited with respect to the order. The bank is not entitled to any recovery from the customer on account of a failure by the customer to give notification as stated in this section. [MCL 440.4703(1).]

Defendants argue that Newpower had the authority to make the funds transfers in question based upon the corporate resolution executed by Newpower when the account was opened. This resolution was not executed by Robert Kitchen, who, as secretary of the corporation was required to execute the document in order for it to be valid. Furthermore, "[w]hen a purported agent is shown to have been acting outside the scope of the law, it is presumed that he was not acting within the scope of his duties for the purported principal." *Rohe Scientific Corp v National Bank of Detroit*, 133 Mich App 462, 469-470, 350 NW2d 280 (1984) mod on other grounds on reh 135 Mich App 777 (1984).

Again, the actual knowledge of defendants plays a key role in this analysis. If defendants had not known that Newpower was appropriating funds for his own benefit, then the outcome might perhaps be different. Indeed, defendants cite the case *Dick Loehr's Inc v Secretary of State*, 180 Mich App 165, 168; 446 NW2d 624 (1989), for the general rule that the principal is bound by the acts of the agent under the doctrine of apparent authority where the agent is held out to the other party as having competent authority. However, the apparent authority of an agent to act on behalf of the principal is to be determined by viewing all of the facts and circumstances, and ordinarily is a question of fact. *Central Wholesale Co v Sefa,* 351 Mich 17, 26; 87 NW2d 94 (1957) (Citations omitted). Here, defendants had knowledge beyond the corporate resolution that put them on notice that the funds being transferred by Newpower were being transferred outside the authority purportedly given to him by that document. A review of all the facts and circumstances results in a conclusion that the trial court correctly determined that Newpower was acting without the authority of NPI; thus, plaintiffs were entitled to relief under MCL 440.4703.

We also agree with the trial court that the Bank is liable under Article III of the UCC. MCL 440.3307 provides:

> (1) As used in this section:
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> (a) "Fiduciary" means an agent, trustee, partner, corporate officer or director, or other representative owing a fiduciary duty with respect to an instrument.
>
> (b) "Represented person" means the principal, beneficiary, partnership, corporation, or other person to whom the duty stated in subdivision (a) is owned.
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> (2) If (*i*) an instrument is taken from a fiduciary for payment or collection or for value, (*ii*) the taker has knowledge of the fiduciary status of the fiduciary, and (*iii*) the represented person makes a claim to the instrument or its proceeds on the basis that the transaction of the fiduciary is a breach of fiduciary duty, the following rules apply:
>
> (a) Notice of breach of fiduciary duty by the fiduciary is notice of the claim of the represented person.
>
> (b) In the case of an instrument payable to the represented person or the fiduciary as such, the taker has notice of the breach of fiduciary duty if the instrument is (*i*) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (*ii*) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (*iii*) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person.
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> (c) If an instrument is issued by the represented person or the fiduciary as such, and made payable to the fiduciary personally, the taker does not have notice of the breach of fiduciary duty unless the taker knows of the breach of fiduciary duty.
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> (d) If an instrument is issued by the represented person or the fiduciary as such, to the taker as payee, the taker has notice of the breach of fiduciary duty if the instrument is (*i*) taken in payment of or as security for a debt known by the taker to be the personal debt of the fiduciary, (*ii*) taken in a transaction known by the taker to be for the personal benefit of the fiduciary, or (*iii*) deposited to an account other than an account of the fiduciary, as such, or an account of the represented person. [MCL 440.3307.]

Here, Newpower fits within the definition of a fiduciary as outlined in this provision. Hart knew that Newpower was acting in this role because he told her that he and the Kitchens were partners in NPI when he opened the NPI account. As discussed *supra*, defendants had actual knowledge and notice that Newpower was breaching his fiduciary duty to the Kitchens. Thus, the Bank, as taker, knew of the breach of fiduciary duty and was properly held liable by the trial court.

V. SATISFACTION OF ONE-YEAR NOTICE REQUIREMENT

A. Standard of Review

Statutory interpretation constitutes a question of law that this Court reviews de novo. *MacKenzie v Wales Twp,* 247 Mich App 124, 127; 635 NW2d 335 (2001).

B. Analysis

The trial court did not err in finding that the search warrant served on the Bank by the police satisfied the one-year notice requirements of MCL 440.4406(6). The statute provides, in pertinent part:

> (1) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide the information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.
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> * * *
>
> (6) Without regard to care or lack of care of either the customer or the bank, a customer who does not *within 1 year* after the statement or items are made available to the customer (subsection (1)) *discover and report his or her unauthorized signature on or any alteration on the item* is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under section 4208 with respect to the unauthorized signature or alteration to which the preclusion applies. (Emphasis added.) [MCL 440.4406(1), (6).]

Subsection (6) is a statutory prerequisite of notice that absolutely bars a customer's right to make a claim against the bank after one year without regard to the care or lack of care of either the customer or the bank. *Siecinski v First State Bank*, 209 Mich App 459, 464; 531 NW2d 768 (1995). Our Courts do not appear to have addressed what level of particularity is required of customers when notifying the bank of the unauthorized signatures or alterations on the items. Defendants argue that the duty to discover and report requires the customer to provide the bank with specific information concerning the checks, the payees, the dates of the checks and the amounts involved, and that plaintiffs did not satisfy the notification requirement until they filed their fourth amended complaint on April 24, 1997, in which they set forth their claims against defendants. This is over a year after the statements were made available to the customer pursuant to subsection (1), and thus should be barred. In support of this argument, defendants cite to case law from another jurisdiction *Watseka First Nat'l Bank v Horney*, 686 NE2d 1175 (Ill Ct App 1997). The *Watseka* court first noted that the UCC and its state's case law did not decide what degree of specificity was required, but went on to state that:

> [C]ommon sense indicates that the report should be sufficient to at least identify the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted. [*Id.* at 1179]

We are not bound by this Illinois case. But, even if we were to follow the "common sense" of the *Watseka* court, the search warrant issued by the Michigan State Police to the Bank would meet the level of specificity required. The warrant contains a sworn affidavit of the investigating

officer that gives the dates that the Kitchens wired money into the NPI corporate account, the account number, the amount of each deposit and the property it was to acquire. It also stated with particularity that Newpower was supposed to be in business with the Kitchens to acquire, develop and sell property through NPI but that none of such property actually was acquired. The information given to the bank gave plenty of specific information upon which it could have acted.

Furthermore, the facts of our case are distinguishable from those of *Watseka*, where the notice was found to be insufficient. There, the plaintiff bank customer did not provide any specific information to the bank. *Id*. at 1174, 79. The plaintiff requested copies of checks because of "possible forgery" but did nothing further after this correspondence. *Id*. In fact, the plaintiff went on to patronize the bank for another four years. *Id*. at 1174. Conversely here, the Kitchens took vigorous action upon discovering Newpower's fraud. The NPI corporate account was opened on February 2, 1996, and the search warrant ordering the account frozen was served upon the Bank on December 19, 1996. When their money was not returned by the Bank, the Kitchens then proceeded not to patronize the bank for four more years, but rather promptly instituted this lawsuit.

The same is true of the other cases from foreign jurisdictions upon which defendants rely. Notice was found insufficient where the plaintiffs made general statements of concerns but took no further action, and often continued to patronize the bank for extended periods of time after the alleged unauthorized activities. See *First Place Computers v Security Nat'l Bank*, 558 NW2d 57, 61 (Neb 1997); *Villa Contracting Co v Summit Bancorporation*, 695 A2d 762, 766 (NJ Super Ct 1996). Here, however, the case is much different. The Kitchens did not continue to do business with the Bank for years after the discovery of the unauthorized signatures. Rather, they immediately provided the Bank with written notice expressly identifying their concerns with all of the transactions associated with the NPI account.

Under the reasoning of these authorities, we find that the Bank was given sufficient notice by the search warrant. It stated specific information that the Bank could have acted on, including the date of and amounts of the wire transfers, the account they were deposited in, and the lack of legitimacy of any transactions from the NPI account by Newpower. The trial court did not err in finding that the search warrant met the notice requirements of MCL 440.4406(6).

VI. PLAINTIFFS' CLAIMS UNDER MCL 440.4406

A. Standard of Review

This Court reviews questions of law such as statutory interpretation de novo, and reviews findings of fact for clear error. *Meredith Corp v City of Flint*, 256 Mich App 703, 711-712; 671 NW2d 101 (2003).

B. Analysis

The trial court did not err in finding that plaintiffs' claims are not barred by MCL 440.4406. The statute provides, in pertinent part:

> (1) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to

> the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount, and date of payment.
>
> * * *
>
> (3) If a bank sends or makes available a statement of account or items pursuant to subsection (1), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.
>
> (4) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by subsection (3), the customer is precluded from asserting against the bank the following:
>
> (a) The customer's unauthorized signature or any alteration on the item, if the bank also proves that it suffered a loss by reason of the failure.
>
> (b) The customer's unauthorized signature or alteration by the same wrongdoer on any other item *paid in good faith* by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding 30 days, in which to examine the item or statement of account and notify the bank.
>
> (5) *If subsection (4) applies* and the customer proves that the bank failed to exercise ordinary care in paying the item and that the failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with subsection (3) and the failure of the bank to exercise ordinary care contributed to the loss. *If the customer proves that the bank did not pay the item in good faith, the preclusion under subsection (4) does not apply*. (Emphasis added.) [MCL 440.4406(1), (3), (4), (5).]

The Bank made available a statement of items pursuant to subsection (1). The Kitchens, however, did not exercise reasonable promptness in examining the statement and would seemingly be precluded from asserting against the Bank the unauthorized signature. However, as subsection (4) stipulates, the items must have been paid in good faith. As discussed in Section II, *supra*, the trial court did not err in its finding of fact that the Bank failed to pay the items in good faith. Thus, subsection (4) does not apply and no error by the trial court occurred in allowing plaintiffs' claims to proceed under MCL 440.4406.

We also find that the trial court did not err in not requiring plaintiffs to provide proof that the Bank failed to act with ordinary care and to observe reasonable commercial standards. MCL

440.4406(5) provides that such proof is necessary only if subsection (4) applies. Again, since we agree with the trial court that the Bank failed to pay the items in good faith, we also agree that subsection (5) does not apply and thus the trial court did not err in not requiring plaintiffs to provide such proof. Accordingly, we do not need address whether the evidence submitted by plaintiffs on the Bank's own policies and procedures was sufficient to show that the Bank failed to act with ordinary care.

VII. TESTIMONY OF PROFESSOR WHITE

A. Standard of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *Craig v Oakwood Hosp,* 471 Mich 67, 76; 684 NW2d 296 (2004). Specifically, this Court reviews decisions "regarding the qualification of an expert witness for an abuse of discretion." *Clerc v Chippewa War Mem Hosp,* 267 Mich App 597, 601; 705 NW2d 703 (2005). An abuse of discretion exists when "an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling." *Franzel v Kerr Mfg Co,* 234 Mich App 600, 620; 600 NW2d 66 (1999) (Citations omitted). An error in the admission of evidence will not warrant appellate relief unless refusal to take this action appears inconsistent with substantial justice or affects a substantial right of the opposing party. *Craig*, *supra* at 76 (Citation omitted). The proponent of the evidence bears the burden of establishing its admissibility. *Gilbert*, *supra* at 781.

B. Analysis

While the trial court erred in admitting Professor White's testimony, the error is harmless. Improperly admitted testimony is clearly erroneous under Michigan law. Allowing an expert to testify to legal interpretation has been held to be erroneous, *People v Lyons*, 93 Mich App 35, 45-47; 285 NW2d 788 (1979), as it invades the exclusive province of the judge. *People v Drossart*, 99 Mich App 66, 75-76; 297 NW2d 863 (1980). This Court has previously stated that expert witnesses "may not testify as to the meaning of the law or a legal term." *In re Portus*, 142 Mich App 799, 802; 371 NW2d 871 (1985). Yet, Professor White's testimony was admitted precisely for this purpose as evidenced by his introduction as a witness to "testify on the application of the Uniform Commercial Code and related law to the facts of this case." The trial court was also made aware of the law prohibiting the testimony's admission, as it occurred over defense counsel's objection. However, the trial court allowed the expert testimony of Professor White. The final opinion of the trial court reflects the esteem and regard held by the trial court with respect to Professor White's credentials.

This would seemingly require reversal, however, several mitigating factors are present that render the error harmless. First, the proceeding below was a bench trial, and much of the applicable case law indicates that a primary purpose for the rule against expert testimony on legal issues is to avoid jury confusion. *Drossart*, *supra* at 76. Second, reversal is only necessary if this Court finds that the defendants' "substantial rights" were affected. *Stitt v Holland Abundant Life Fellowship*, 243 Mich App 461, 470; 624 NW2d 427 (2000); MRE 103. Furthermore, "the testimony of experts for the party opposing introduction of expert testimony may dilute the improper introduction of that testimony." *Stitt*, *supra* at 469. See also *Bourdon v Read*, 30 Mich App 681, 685-686, 186 NW2d 737 (1971). Here, defendants had their own

expert witness, Michael Kus who has a long history of bank employment and representation, and is currently the spokesperson for the Michigan Association of Community Bankers. Kus testified on the same subjects and issues as Professor White. As a result, we do not find that defendants' substantial rights were affected, and we find that any error in the admission of Professor White's testimony was harmless.

VIII. APPLICATION OF THE UCC

A. Standard of Review

Where a court following a bench trial has determined the issue of damages, we review the award for clear error. We will not "set aside a nonjury award merely on the basis of a difference of opinion." Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made. *Marshall Lasser, PC v George,* 252 Mich App 104, 110; 651 NW2d 158 (2002) (citations omitted).

B. Analysis

The trial court did not err in finding that plaintiffs were entitled to judgment under the UCC. Defendants argue that the plaintiffs cannot maintain claims for conversion under the common law, UCC 3-420 and MCL 600.2919a. We disagree.

First, plaintiffs did not pursue a claim of common law conversion. They sought relief under the statutory provisions of the UCC and MCL 600.2919a. Second, the trial court correctly concluded that the UCC does provide plaintiffs with a remedy. Section 3-420 of the UCC provides:

> (1) The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment. An action for conversion of an instrument may not be brought by (*i*) the issuer or acceptor of the instrument or (*ii*) a payee or endorsee who did not receive delivery of the instrument either directly or through delivery to an agent or a co-payee.
>
> (2) In an action under subsection (1), the measure of liability is presumed to be the amount payable on the instrument, but recovery may not exceed the amount of the plaintiff's interest in the instrument.
>
> (3) A representative, other than a depository bank, who has in good faith dealt with an instrument or its proceeds on behalf of one who was not the person entitled to enforce the instrument is not liable in conversion to that person beyond the amount of any proceeds that it has not paid out.

Here, an instrument was transferred by Newpower, a person not entitled to enforce the instrument; the Bank paid these instruments with actual knowledge that Newpower was acting outside of his authority. The conversion action was properly brought by the Kitchens as they are

not issuers, acceptors, payees, or endorsees of the instruments. Thus, the statutory conversion action was proper and plaintiffs were entitled to a remedy under this UCC provision.

Finally, plaintiffs were also entitled to a remedy under MCL 600.2919a. Defendants argue that finding statutory liability for treble damages under this statute was improper. They maintain that such liability cannot be premised on constructive knowledge and that Hart had no duty of inquiry and had no actual knowledge of any wrongdoing. However, as discussed in Section II, *supra*, we find that defendants Hart and the Bank had actual knowledge and notice of Newpower's illegal activities.

IX. DAMAGES

A. Standard of Review

We review a trial court's decision to award attorney fees for an abuse of discretion. *Hovanesian v Nam,* 213 Mich App 231, 237; 539 NW2d 557 (1995). Statutory interpretation is a question of law that this Court reviews de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999); *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

B. Analysis

Defendants also challenge the method and amount of damages calculated by the trial court. They assert that the UCC provides a carefully structured guide to the relief available. Defendants maintain that by its language neither Article 3 nor 4 provide for treble damages in the event of conversion, even if there is bad faith, that MCL 440.4704 specifically limits NPI's recovery to a refund of the transfer, and that plaintiffs cannot recover treble damages under any theory for account transfers. Defendants also argue that attorney fees were improperly rewarded as the applicable UCC provisions do not allow for such an award. We disagree with defendants' arguments.

First, the trial court properly determined that treble damages were available to plaintiffs. Treble damages are recoverable under MCL 600.2919a, which provides in pertinent part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.
>
> (b) Another person's buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property when the person buying, receiving, possessing, concealing, or aiding in the concealment of stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted.

> (2) The remedy provided by this section is in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a.]

While it is true, as defendants argue, that the UCC does not expressly provide for treble damages, defendants incorrectly assert that Michigan's adoption of the UCC provisions supersede MCL 600.2919a, disallowing an award of treble damages.

First, as the trial court found, there is no affirmative provision of the UCC or other legislation that shows a legislative intent to repeal MCL 600.2919a. Second, our Supreme Court has rejected the notion of repeal by implication in *Valentine v McDonald*, 371 Mich 138, 123 NW2d 227 (1963), stating:

> Repeal by implication is not permitted if it can be avoided by any reasonable construction of the statutes. If by any reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand. The duty of the courts is to reconcile statutes if possible and to enforce them. The courts will regard all statutes on the same general subject as part of one system and later statutes should be construed as supplementary to those preceding them. (Citations omitted).

Third, § 1103 of Article 4 of the UCC expressly provides that

> Unless displaced by the particular provisions of this act, *the principles of law and equity*, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause *shall supplement its provisions*. (Emphasis added.) [MCL 440.1103.]

Finally, MCL 600.2919a(2), *supra*, notes that it is cumulative to other rights or remedies the person may have at law.

Defendants' assertion that MCL 440.4704 only allows recovery of a refund is also without merit. While the statute does provide that "the bank shall refund any payment of the payment order," nothing in its language or any other part of the UCC provide that a refund is the exclusive remedy available. Accordingly, in the absence of a clearly expressed legislative intent to repeal MCL 600.2919a, the statutory treble damage remedy remains effective. Thus, under the plain language of this statute, plaintiffs were entitled to treble damages as a result of defendants' UCC violations; the trial court did not err in this finding.

We also find that the trial court's award of attorney fees was not an error. MCL 440.4103(5) allows "any other damages the party suffered as a proximate consequence" of bad faith action, which certainly includes conversion. Plaintiffs' attorney fees were an obvious and proximate result of the defendants' actions. However, while the trial court appears to have correctly calculated the reasonable fees and costs it awarded to plaintiff, it incorrectly trebled the attorney fees that resulted in the pursuit of other defendants. Although these are also a proximately result of the defendants' conduct, there was no statutory or common law basis for the trebling of said fees. We find this to be an abuse of discretion. We also note that we disagree with defendants' assertion that the trial court exceeded its jurisdiction by awarding the

fees at all, and that the bankruptcy court which presided over the recovery actions against the other defendants was the proper venue for such an award. The bankruptcy court could not award attorney fees to plaintiffs against defendants in the present action because they were not party to those proceedings. As a result, we remand for recalculation of the award.

X. LAKES OF THE NORTH REALTY'S LIABILITY

A. Standard of Review

This Court reviews a trial court's decision on a motion for summary disposition de novo as a question of law. *Ardt v Titan Ins Co*, 233 Mich App 685, 688; 593 NW2d 215 (1999). "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. This Court reviews de novo a trial court's decision regarding a motion for summary disposition under MCR 2.116(C)(8) to determine whether the claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

B. Analysis

The trial court erred in finding that Lakes of the North Realty was not liable to plaintiffs for Newpower's actions[3]. Contrary to the trial court's conclusion, the doctrine of imputed knowledge is applicable to this case. In *Upjohn Co v New Hampshire Ins Co*, 438 Mich 197; 476 NW2d 392 (1991), our Supreme Court agreed with this Court's decision in *Gordon Sel-Way, Inc v Spence Bros, Inc*, 177 Mich App 116; 440 NW2d 907 (1989), to adopt the standard for imputed knowledge set forth in *Copeman Laboratories Co v General Motors Corp*, 36 F Supp 755, 762 (ED Mich 1941). That standard says:

> When a person representing a corporation is doing a thing which is in connection with and pertinent to that part of the corporation business which he is employed, or authorized or selected to do, then that which is learned or done by that person pursuant thereto is in the knowledge of the corporation. The knowledge possessed by a corporation about a particular thing is the sum total of all the knowledge which its officers and agents, who are authorized and charged with the doing of the particular thing acquire, while acting under and within the scope of their authority. [*Id.*]

Additionally, this Court has said that "a corporation is liable for the fraudulent conduct of its president where the conduct was within the scope of his authority." *People v American Medical Centers of Michigan, Ltd*, 118 Mich App 135, 155; 324 NW2d 782 (1982) (quoting *James v National Cash Register Co*, 182 Mich 99, 111-12; 148 NW 420 (1914)).

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[3] Defendants Hart and the Bank do not address this issue in their reply to the cross-appeal as they are not the subject of this cross-appeal. Lakes of the North does not appear to have submitted a brief in reply to plaintiffs' cross-appeal.

Newpower was the Principal Broker with Lakes of the North, served as its President, Vice President, Director, Chief Executive Officer and Chief Operating Officer and was the sole signatory of the North trust accounts at the Bank. He was representing the Lakes of the North when he made the deposits of the funds he embezzled from plaintiffs into the Lakes of the North's various bank accounts. His positions at the Lakes of the North authorized him to make such deposits. He was acting within the scope of his authority in regards to his job at Lakes of North in that he was authorized to deposit into the accounts and they were his responsibility. He had previously acted outside of the scope of his authority in regards to his employment at Lakes of the North by embezzling the $93,000.00 from Lakes of the North, and also had acted outside of the scope of his authority with regards to NPI by embezzling plaintiffs' money and converting it for his own use. However, the actual deposits of the money into the accounts were within the scope of his employment. Additionally, he was in no way privileged not to disclose or act upon the knowledge he had that the funds were embezzled from plaintiffs. Thus, the knowledge of Newpower is considered the knowledge of the Lakes of the North.

That Newpower was the only employee of the Lakes of the North with such knowledge about the embezzled status of the funds does not change the analysis. The "sum total" of the knowledge of Lakes of the North's officers and agents who are "authorized and charged with the doing of the particular thing" is the knowledge possessed by the corporation; here, the "sum total" is all of the knowledge possessed by Newpower as the corporation's officer positions were predominately held by him.

Defendant argued to the trial court that only bad faith on the part of a third person receiving stolen money, or the failure on his or her part to give a valuable consideration for it, will defeat his or her title to the money as against the true owner. Defendant claims that only when Newpower replaced the $93,000.00 he had previously embezzled from the Lakes of the North with the plaintiffs' embezzled funds did anyone at Lakes of the North know of the original theft, and not until even later did anyone know that the funds he deposited were embezzled from plaintiffs. Thus, defendant claimed a lack of "bad faith." Here, the Lakes of the North held plaintiffs' money subject to plaintiffs' interest. By refusing to return the money to plaintiffs, Lakes of the North has accepted Newpower's act as their own and must therefore be held liable for the conversion of plaintiffs' property.

Lakes of the North benefited from Newpower's embezzlement of plaintiffs' funds. Without the embezzled funds, Lakes of the North would be out the $93,000.00 Newpower embezzled from it. However, Lakes of the North still has plaintiffs' money and thus in taking the gains of Newpower's fraud, it must also take the consequences of it. Lakes of the North should be liable for the fraudulent conduct of Newpower.

Plaintiffs additionally have argued that since they are entitled to a judgment for the return of the converted funds, they are also entitled to treble damages, interest, attorney fees and costs pursuant to MCL 600.2919a because Lakes of the North, by and through Newpower, knowingly received property that had been converted from plaintiffs, and/or knowingly aided in the concealment of property converted from plaintiffs. As discussed *supra*, treble damages, attorney fees and costs pursuant to MCL 600.2919a are allowable. In sum, Lakes of the North is liable for the fraudulent conduct of Newpower.

XI. POST-FILING, PRE-JUDGMENT INTEREST

A. Standard of Review

Statutory interpretation is a question of law that this Court reviews de novo. *Attard v Citizens Ins Co of America*, 237 Mich App 311, 319; 602 NW2d 633 (1999); *Everett v Nickola*, 234 Mich App 632, 638; 599 NW2d 732 (1999).

B. Analysis

The trial court erred by not awarding post-filing, pre-judgment interest to plaintiffs. Interest under the UCC provisions is addressed by MCL 440.4704(1) which provides, in pertinent part:

> Sec. 4A204. If a receiving bank accepts a[n unauthorized] payment order . . . the bank shall refund any payment of the payment order . . . and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund. However, the customer is not entitled to interest from the bank on the amount to be refunded if the customer fails to exercise ordinary care to determine that the order was not authorized.

The Official Comment to this provision of the UCC states that:

> Section 4A-204 is designed to encourage a customer to promptly notify the receiving bank that it has accepted an unauthorized payment order . . . [P]rompt notification may make it easier for the bank to recover some part of its loss . . . The customer has a duty to exercise ordinary care to determine that the order was unauthorized . . . The only consequence of a failure of the customer to perform this duty is a loss of interest on the refund payable by the bank. A customer that acts promptly is entitled to interest from the time the customer's account was debited or the customer otherwise made payment. The rate of interest is stated in Section 4A-506. If the customer fails to perform the duty, no interest is recoverable for any part of the period before the bank learns that it accepted an unauthorized order. . . . Loss of interest is in the nature of a penalty on the customer designed to provide an incentive for the customer to police its account.

As stated *supra,* the funds transfers and payment orders here were unauthorized. Defendants go through a lengthy analysis to show the transactions here involve funds transfers and payment orders. Thus, Article 4A no doubt governs the transactions in question. Plaintiffs admit that under MCL 440.4704, no interest is available to them from the period of time before the Bank learned that it accepted an unauthorized order because they failed to perform their duty to police their account. However, plaintiffs' request for statutory judgment interest does not rest upon this period of time. Rather, plaintiffs are requesting interest for the period of time after the Bank learned it had accepted an unauthorized order but refused to refund plaintiffs' monies, forcing them to institute this drawn-out lawsuit. Thus, as they were not entitled to interest under Article 4A, plaintiffs seek judgment interest pursuant to MCL 600.6013, which provides in pertinent part:

> (1) Interest is allowed on a money judgment recovered in a civil action as provided in this section. . . .
>
> * * *
>
> (6) For a complaint filed on or after January 1, 1987, but before July 1, 2002 . . . .
>
> * * *
>
> (8) [I]nterest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint.

Defendants argue that MCL 440.4704 preempts the award of any interest under MCL 600.6013. Defendants put forth the statutory construction canon that a specific provision should govern over a more general provision. *Gebhart v O'Rourke*, 444 Mich 535, 542-43, 510 NW2d 900 (1994). However, more important is the canon that "if by any reasonable construction two statutes can be reconciled and a purpose found to be served by each, both must stand." *Valentine v McDonald*, *supra* at 144. Thus, an analysis of the purposes of each statute is required.

The official comment to MCL 440.4704, *supra*, explains that the section is designed to provide an incentive for customers to notify financial institutions when unauthorized payment orders have been submitted because it may make it easier for the bank to recover some of its losses. If a customer gave prompt notice, they are entitled to interest. If the customer failed to act promptly, the customer pays the penalty of losing the interest for the period between when the unauthorized order was paid and when the customer notified the bank of the unauthorized nature.

On the other hand, MCL 600.6013 is designed to "compensate prevailing parties for expenses incurred in bringing suits for money damages and for any delay in receiving such damages." *Hadfield v Oakland Co Draim Comm'r*, 218 Mich App 351, 356; 554 NW2d 43 (1996). It is "remedial in nature and is to be construed liberally in favor of plaintiff." *Everett*, *supra* at 638-39.

These two statutes may be interpreted without conflict. The interest provision in MCL 440.4704 seeks to protect the bank from a customer delaying giving notification to a bank in an attempt to gain more interest under that provision, while the interest provision in MCL 600.6013 supplements it to protect the customer from banks prolonging the refund of the unauthorized payments. Thus, while not entitled to interest under MCL 440.4704, the plaintiffs here are entitled to interest under MCL 600.6013. The Bank had a duty to refund plaintiffs the unauthorized payments once notified of their unauthorized nature. Since the Bank ignored this duty, the Bank should then be subject to the imposition of interest from the time it learned it accepted an unauthorized order; this occurred at least by the time the plaintiffs filed their complaint in February, 1997.

This interpretation of MCL 600.6013 as supplementing the UCC provisions as adopted by our State is consistent with the Act. As stated in MCL 440.1103, unless specifically displaced by a provision of the Act, the principles of law and equity supplement it. The comments

highlighted by defendants in MCL 440.4602 do not speak to the contrary. They provide, in pertinent part:

> The rules that emerged [from the drafting process of this Article] . . . are intended to be the exclusive means of determining the rights, duties and liabilities of the affected parties in any situation covered by particular provisions of the Article. Consequently, resort to principles of law or equity outside of Article 4A is not appropriate to create rights, duties and liabilities *inconsistent* with those stated in this Article. (Emphasis added.) [MCL 440.4602.]

However, as explained above, the interpretation of MCL 600.6013 is not inconsistent with the rights, duties and liabilities created by Article 4A. Furthermore, as defendants might be indirectly arguing, MCL 440.4602 and its comments are not an implied repeal of MCL 600.6013. Implied repeals are strongly disfavored. *Valentine*, *supra* at 144. We presume that if Legislature intended to repeal a statute or one of its provisions, it would have expressly done so. *Knauff v Oscoda Cty Drain Comm'n*, 240 Mich App 485, 491; 681 NW2d 1 (2000). Since a reasonable construction of the two statutes is possible and there is no express repeal of MCL 600.6013, both statutes must stand. Therefore, plaintiffs are entitled to prejudgment interest under MCL 600.6013.

Since the issue can be decided on statutory interpretation, we need not address whether the facts of this case distinguish it from our other case law that finds the imposition of statutory interest pursuant to MCL 600.6013 mandatory.

XII. CONCLUSION

We find that the trial court properly determined that defendants acted in bad faith with actual knowledge and notice of Newpower's illegal activities. Under the facts and circumstances of this case, the trial court did not err in finding defendants liable under the applicable UCC provisions. The trial court properly determined that Newpower was acting without the authority of NPI and that thus, plaintiffs were entitled to relief under MCL 440.4703. Notice by the search warrant served on the Bank was sufficient to meet the notice requirements of MCL 440.4406. Plaintiffs' claims were not barred under MCL 440.4406 because defendants acted in bad faith; the trial court did not err in this determination or in not requiring plaintiffs to provide proof that the Bank failed to act with ordinary care and to observe reasonable commercial standards. While Professor White's testimony was improperly admitted, defendants' expert witness testimony on the same issues and subjects renders this error harmless. The trial court did not err in determining that treble damages are available to plaintiffs; however, it was error to treble the attorney fees awarded to plaintiffs. The trial court also erred in finding that Lakes of the North was not liable for the fraudulent conduct of Newpower. Plaintiffs are entitled to prejudgment interest under MCL 600.6013 from at least the time they filed their complaint in February 1997.

We affirm in part and reverse in part and remand for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette