NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 0823

STATE OF LOUISIANA, DIVISION OF ADMINISTRATION,
OFFICE OF RISK MANAGEMENT

VERSUS

CHENNEL LITE CLARK a/k/a CHENNEL LITE, ALFRED CLARK, JP MORGAN CHASE BANK, N.A. AND HANCOCK BANK OF LOUISIANA

Judgment Rendered: December 23, 2008

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge, Louisiana
Trial Court Number 546,704

Honorable R. Michael Caldwell, Judge

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

WELCH, J.

In this appeal, the State of Louisiana, Division of Administration, Office of Risk Management ("ORM") appeals a summary judgment granted in favor of JP Morgan Chase Bank, N.A., the successor in interest to Bank One, N.A. ("Chase"), that dismissed ORM's claims against Chase with prejudice. Because we find that a genuine issue of material fact exists which precludes summary judgment, we reverse the judgment of the trial court.

I. FACTUAL AND PROCEDURAL HISTORY

ORM is part of the Division of Administration, which is within the office of the Governor. La. R.S. 39:1528; La. R.S. 36:4(B)(1)(a). Among other things, ORM is statutorily charged with the duty to administer the State's risk management program and to negotiate, compromise, and settle claims against the State of Louisiana or its agencies that are covered by the Self-Insurance Fund and all tort claims against the State or its agencies, whether or not covered by the Self-Insurance Fund. La. R.S. 39:1535(B)(1) and (6).

Around April 1, 2002, the defendant, Chennel Lite Clark, was hired by ORM as an Insurance Claims Examiner. Mrs. Clark was eventually promoted to Risk Adjustor III. During Mrs. Clark's employment with ORM, she was responsible for adjusting general liability, road hazard, and workers' compensation claims. Her job duties included reviewing loss notices, verifying claims data, processing claims, and authorizing claim payments to claimants up to a certain dollar limit set by ORM. This latter duty included filling out a payment claim sheet with the payee's name, address, and amount of the claim payment. As a claims adjustor, Mrs. Clark handled numerous claims at any given time and had the authority to direct the issuance of settlement checks to given payees at particular addresses. At all times during Mrs. Clark's employment with ORM, ORM maintained a checking account at Chase.

During the time period between November 2002 and August 2005, Mrs. Clark submitted payment claims and requested that fifty-four checks be issued and made payable to claimants purportedly in settlement of the claims brought by each payee against ORM. The payees on those fifty-four checks were real persons with potential claims against the State; however, the claims were near the one-year prescriptive period for the claim, the payees/claimants were not pursuing their claims, and they did not know about the purported settlements submitted by Mrs. Clark. These fifty-four fraudulent checks total $125,228.30.

In requesting the settlement checks, Mrs. Clark directed that the checks be made payable to the potential claimants, but that they be mailed to a physical address or post office box belonging to either herself or her husband, Alfred Clark, or to a relative, or mailed to some other address to which she had access. When the checks arrived at the various addresses, Mrs. Clark would then retrieve the checks from the mailbox or post office box. On forty of the checks, Mrs. Clark forged the payee's signature, forged an endorsement of the check to herself, signed the check, and deposited the funds into her personal checking account at Hancock Bank of Louisiana ("Hancock"). On the remaining fourteen checks, Mrs. Clark forged the payee's signature on the back of the check, endorsed the check to Mr. Clark, and forged Mr. Clark's signature. The checks were then deposited into Mr. Clark's personal checking account at Chase. The circumstances surrounding the deposit of these fourteen checks into Mr. Clark's checking account at Chase forms the basis of the dispute between ORM and Chase in this appeal.

Upon discovery of Mrs. Clark's fraudulent check scheme in September 2005, ORM contacted the proper authorities, as well as Chase and Hancock. On August 25, 2006, ORM filed a petition for damages naming as defendants, Mrs. Clark, Mr. Clark, Chase, and Hancock, and alleging therein that the defendants

were liable to ORM for the total sum of the forged checks plus interest.[1] Chase responded by filing an answer and asserting affirmative defenses set forth in the Uniform Commercial Code that would bar ORM's claims, specifically La. R.S. 10:3-404 (the fictitious payee or imposter provision) and La. R.S. 10:3-405 (the entrusted employee provision), La. R.S. 10:3-406 (contributory negligence), and La. R.S. 10:4-406 (failure to discover and report upon receipt of a statement of account); a peremptory exception raising the objection of prescription pursuant to La. R.S. 10:4-406(f) and La. R.S. 10:3-420; and cross-claims against Mrs. Clark, Mr. Clark, and Hancock.

Thereafter, Chase filed a motion for summary judgment seeking the dismissal of ORM's claims against it based on prescription and on the asserted affirmative defenses. By judgment signed on October 18, 2007, the trial court granted summary judgment in favor of Chase pursuant to La. R.S. 10:3-404, La. R.S. 10:3-405, and La. R.S. 10:3-420.[2] ORM timely filed a motion for new trial, which the trial court denied by judgment signed on December 17, 2007.[3] From the October 18, 2007 and December 17, 2007 judgments, ORM appeals, asserting nine assignments of error, which present three main issues for this court's review, *i.e.*, whether the trial court erred in granting Chase's motion for summary judgment

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[1] On April 16, 2007, Mrs. Clark pleaded guilty to theft over $500, and as part of her plea bargain, she agreed to make restitution to ORM in the amount of $50,000.

[2] Chase also sought summary judgment dismissing ORM's claims against it pursuant to La. R.S. 10:4-406. However, the trial court's judgment is silent with respect to that defense. When a judgment is silent as to a claim or demand placed before the court, it is presumed that the trier of fact denied the relief sought. See **Caro v. Caro**, 95-9173, p. 7 (La. App. 1st Cir. 10/6/95), 671 So.2d 516, 520. Accordingly, we conclude that the trial court denied summary judgment pursuant to La. R.S. 10:4-406.

[3] The trial court also granted a motion for summary judgment in favor of Hancock based on La. R.S. 10:3-420. At the hearing on the motion for new trial, the trial court determined that while La. R.S. 10:3-420 was not applicable to this case, Chase was still entitled to summary judgment under La. R.S. 10:3-404 and La. R.S. 10:3-405. However, since the summary judgment in favor of Hancock was based solely on La. R.S. 10:3-420, the trial court granted ORM a new trial with respect to Hancock. ORM and Hancock have since settled their claims against each other.

pursuant to La. R.S. 10:3-404, La. R.S. 10:3-405, and La. R.S. 10:3-420.[4]

II. LAW AND DISCUSSION

A. Summary Judgment Law

An appellate court's review of a summary judgment is a *de novo* review based on the evidence presented to the trial court, using the same criteria used by the trial court in deciding whether a summary judgment should be granted. **Buck's Run Enterprises, Inc. v. MAPP Construction, Inc.**, 99-3054, p. 4 (La. App. 1st Cir. 2/16/01), 808 So.2d 428, 431. A motion for summary judgment should be granted only if all the pleadings, depositions, answers to interrogatories, admissions, and affidavits submitted to the trial court show that there is no genuine issue of material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B); **Buck's Run Enterprises, Inc.**, 99-3054 at p. 4, 808 So.2d at 431.

On a motion for summary judgment, if the issue before the court is one on which the party bringing the motion will bear the burden of proof at trial, the burden of showing that there is no genuine issue of material fact is on the party bringing the motion. La. C.C.P. art. 966(C)(2); **Buck's Run Enterprises, Inc.**, 99-3054 at p. 4, 808 So.2d at 431. Once the mover has made a prima facie showing that the motion for summary judgment should be granted, the burden shifts to the non-moving party to present evidence demonstrating that a genuine issue of material fact remains. **Jones v. Estate of Santiago**, 2003-1424, p. 5 (La. 4/14/04), 870 So.2d 1002, 1006. The failure of the non-moving party to produce evidence of a genuine issue of material fact mandates the granting of the motion. **Hutchinson**

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[4] Although the trial court stated in its reasons for denying ORM's motion for new trial with respect to Chase that La. R.S. 10:3-420 was inapplicable, the judgment from the hearing on the motion for new trial does not reflect that determination. Where there is a discrepancy between the judgment and the reasons for judgment, the judgment prevails. **Perkins v. Willie**, 2001-0821, p. 5 (La. App. 1st Cir. 2/27/02), 818 So.2d 167, 170-171. Therefore, since the judgments appealed from provide that Chase was entitled to summary judgment dismissing ORM's claims against it based on La. R.S. 10:3-420, ORM has listed and briefed that issue as an assignment of error.

v. Knights of Columbus, Council No. 5747, 2003-1533, p. 7 (La. 2/20/04), 866 So.2d 228, 233. Any doubt as to a dispute regarding a genuine issue of material fact must be resolved against granting the motion and in favor of a trial on the merits. **Fernandez v. Hebert**, 2006-1558, p. 8 (La. App. 1st Cir. 5/4/07), 961 So.2d 404, 408, writ denied, 2007-1123 (La. 9/21/07), 964 So.2d 333.

In determining whether an issue is genuine, a court should not consider the merits, make credibility determinations, evaluate testimony, or weigh evidence. *Id.* A fact is material if it potentially ensures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. **Anglin v. Anglin**, 2005-1233, p. 5 (La. App. 1st Cir. 6/9/06), 938 So.2d 766, 769. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is "material" for summary judgment purposes can only be seen in light of the substantive law applicable to the case. **Dickerson v. Piccadilly Restaurants, Inc.**, 99-2633, pp. 3-4 (La. App. 1st Cir. 12/22/00), 785 So.2d 842, 844.

In this case, Chase sought and was granted summary judgment dismissing ORM's claim against it pursuant to specific affirmative and other defenses Chase pled in its answer.[5] See La. C.C.P. art. 1005. A party pleading an affirmative defense has the burden of proving it by a preponderance of the evidence. **Abadie v. Markey**, 97-0684, p. 11 (La. App. 5th Cir. 3/11/98), 710 So.2d 327, 332. Thus, Chase had the initial burden of presenting a prima facie case that no genuine issue of material fact existed with regard to its affirmative defenses. The affirmative defenses asserted by Chase, and upon which the trial court granted summary judgment, were based on La. R.S. 10:3-404 and La. R.S. 10:3-405. Chase also had the burden of proof with respect to its defense of prescription based on La. R.S.

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[5] An affirmative defense raises a new matter which, assuming the allegations in the petition to be true, constitutes a defense to the action and will have the effect of defeating the plaintiff's demand on its merits. **Buck's Run Enterprises, Inc.**, 99-3054 at p. 4, 808 So.2d at 431.

10:3-420.

B. Louisiana Revised Statutes 10:3-404 and 10:3-405

The general rule established by long-standing jurisprudence is that when a bank pays on a forged check (or forged endorsement), it is liable for the amount of the check, plus legal interest from the date of judicial demand. **Marx v. Whitney National Bank**, 97-3213, p. 4 (La. 7/8/98), 713 So.2d 1142, 1145; **Cable Cast Magazine v. Premier Bank, Nat. Ass'n**, 98-0676, p. 3 (La. App. 1st Cir. 4/1/99), 729 So.2d 1165, 1166, writ denied, 99-1257 (La. 6/18/99), 745 So.2d 31; see also La. R.S. 10:3-401, comment 1. Statutory exceptions to this general rule are provided in La. R.S. 10:3-404 and La. R.S. 10:3-405. Louisiana Revised Statutes 10:3-404 provides:

> (a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an [e]ndorsement of the instrument by any person in the name of the payee is effective as the [e]ndorsement of the payee in favor of a person who, in *good faith*, pays the instrument or takes it for value or for collection.
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> (b) If (i) a person whose intent determines to whom an instrument is payable ([La.] R.S. 10:3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special [e]ndorsement:
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> (1) Any person in possession of the instrument is its holder.
>
> (2) An [e]ndorsement by any person in the name of the payee stated in the instrument is effective as the [e]ndorsement of the payee in favor of a person who, in *good faith*, pays the instrument or takes it for value or for collection.
>
> (c) Under Subsection (a) or (b), an [e]ndorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not [e]ndorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee.
>
> (d) With respect to an instrument to which Subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for

collection *fails to exercise ordinary care* in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(Emphasis added.)

Additionally, Louisiana Revised Statutes 10:3-405 provides:

(a) In this Section:

(1) "Employee" includes an independent contractor and employee of an independent contractor retained by the employer.

(2) "Fraudulent [e]ndorsement" means (i) in the case of an instrument payable to the employer, a forged [e]ndorsement purporting to be that of the employer, or (ii) in the case of an instrument with respect to which the employer is the issuer, a forged [e]ndorsement purporting to be that of the person identified as payee.

(3) "Responsibility" with respect to instruments means authority (i) to sign or [e]ndorse instruments on behalf of the employer, (ii) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (iii) to prepare or process instruments for issue in the name of the employer, (iv) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (v) to control the disposition of instruments to be issued in the name of the employer, or (vi) to act otherwise with respect to instruments in a responsible capacity. "Responsibility" does not include authority that merely allows an employee to have access to instruments or blank or incomplete instrument forms that are being stored or transported or are part of incoming or outgoing mail, or similar access.

(b) For the purpose of determining the rights and liabilities of a person who, in *good faith*, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent [e]ndorsement of the instrument, the [e]ndorsement is effective as the [e]ndorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or taking it for value or for collection *fails to exercise ordinary care* in paying or taking the instrument and that failure substantially contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss.

(c) Under Subsection (b), an [e]ndorsement is made in the name of the person to whom an instrument is payable if (i) it is made in a name substantially similar to the name of that person or (ii) the

> instrument, whether or not [e]ndorsed, is deposited in a depositary bank to an account in a name substantially similar to the name of that person.

(Emphasis added).

Thus, under both La. R.S. 10:3-404 and La. R.S. 10:3-405, Chase would be required to prove, among other things, that in paying the instruments at issue, (1) it was in good faith and (2) it exercised ordinary care.[6]

"Good faith" means "honesty in fact in the conduct or transaction concerned." La. R.S. 10:1-201(19).[7] Good faith is determined on a reasonableness standard, in that the facts must be such as would necessarily put a reasonable person on inquiry to ascertain the true facts. **Thompson v. H & S Packing Co., Inc.**, 540 So.2d 371, 375 (La. App. 1st Cir. 1989). Summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, *good faith*, knowledge, or malice, and should only be granted on such subjective issues when no genuine issue of material fact exists concerning that issue. **Rager v. Bourgeois**, 2006-0322, p. 6 (La. App. 1st Cir. 12/28/06), 951 So.2d 330, 333, writ denied, 2007-0189 (La. 3/23/07), 951 So.2d 1105; see also **Jones v. Estate of Santiago**, 2003-1424 at p. 6, 870 So.2d at 1006.

"Ordinary care" means in the case of a person engaged in business, "observance of reasonable commercial standards, prevailing in the area ... with respect to the business in which the person is engaged." La. R.S. 10:3-103(a)(7).[8] However, in the case of a bank that takes an instrument for processing for

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[6] There appears to be no dispute that the other elements of the affirmative defenses under La. R.S. 10:3-404 and La. R.S. 10:3-405 are present under the facts of this case.

[7] The definition of good faith provided in La. R.S. 10:1-201(19) was re-designated as La. R.S. 10:1-201(20) and amended by 2006 La. Acts No. 533, § 1. Louisiana Revised Statutes 10:1-201(20) presently defines "good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing," except as otherwise provided in La. R.S. 10:1-304 and in Chapter 5 of the Uniform Commercial Code. However, since all of the relevant transactions in this case occurred prior to 2006, the definition of good faith provided in former La. R.S. 10:1-201(19) is applicable to this case.

[8] Although La. R.S. 10:3-103 was amended by Acts, No. 533, § 1, the definition of "ordinary care" remained the same.

collection or payment by automated means, "reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage." La. R.S. 10:3-103(a)(7).

Concerning the issues of whether Chase was in good faith and exercised ordinary care in paying the checks at issue, Chase offered, in support of its motion for summary judgment, the affidavit of Priscilla Kay, the Regional Operations Manager for Chase. According to Ms. Kay's affidavit, her responsibilities included the oversight of operations in retail branches of Chase in Louisiana. She further stated that in accepting checks for deposit, such as the checks at issue in this litigation, the generally accepted banking practice both in Louisiana and nationwide is for the depositary bank to review the endorsements to make certain that the last endorsement is by the person making the deposit and that the initial endorsement matches the payee name. Ms. Kay further stated that it *appeared* that Chase made such verifications on the subject checks in this case, because in each check, the typed payee name matched the payee endorsement, and the last endorsing party, Mr. Clark, deposited the checks into his individual account at Chase.

Based on the affidavit of Ms. Kay, we find that Chase established that it acted in good faith and exercised ordinary care in accepting the checks, and therefore, Chase established a *prima facie* case to support summary judgment on its affirmative defenses under La. R.S. 10:3-404 and La. R.S. 10:3-405. Accordingly, the burden shifted to ORM to present evidence demonstrating that genuine issues of material fact remained. In this regard, ORM offered the deposition testimony of Mrs. Clark and Chase's answers to requests for admissions.

In requests for admissions, Chase admitted that its internal policies and

procedures for check handling provide as follows: (1) with respect to a check payable to an individual or individuals, a check with a subsequent endorsement may only be accepted from an account holder; (2) with respect to a check payable to an individual or individuals, the last endorser does not have to be the same person as the payee, but only the last endorser may cash or deposit the check; (3) endorsements on checks with subsequent endorsers, government checks, and insurance claim checks or drafts are considered high risk and require special attention. Chase also admitted in its answers to requests for admissions that it considers all checks drawn on ORM's account at Chase to be government checks.

In Mrs. Clark's deposition testimony, she testified, with regard to the fourteen checks deposited into Mr. Clark's account at Chase, that she signed Mr. Clark's name to the checks, that she physically went to a Chase branch office and personally deposited the checks into Mr. Clark's account, that she did not have authority from Mr. Clark to sign each check, that she was never asked any questions from any teller or employee at Chase about depositing the checks into Mr. Clark's account, and that no teller or employee at Chase ever asked her for identification when she deposited the checks into Mr. Clark's account.

After considering all of the evidence in the record, we find that although Chase demonstrated that it may have valid affirmative defenses under La. R.S. 10:3-404 and La. R.S. 10:3-405 to ORM's suit, ORM produced sufficient countervailing evidence that created a genuine issue of material fact with respect to whether Chase exercised ordinary care in accepting the checks. While the affidavit of Ms. Kay establishes that Chase exercised ordinary care, because it appeared that Chase, in accordance with generally accepted banking practices, verified that the typed payee name matched the payee endorsement and verified that the last endorsing party, Mr. Clark, deposited the checks into his individual account at Chase, the evidence offered by ORM suggests otherwise. Mrs. Clark's deposition

testimony, along with Chase's answers to requests for admissions, establishes that Chase failed to follow generally accepted banking practices in Louisiana and failed to follow its own internal policies and procedures in accepting the checks at issue. Specifically, on at least fourteen different occasions Chase allowed Mrs. Clark, a non-account holder, to deposit a check that contained a subsequent endorsement into Mr. Clark's account and allowed Mrs. Clark, a person who was not the purported subsequent endorser, to deposit the check.

Furthermore, according to Chase's internal policies and procedures, the checks at issue were considered high risk checks requiring special attention. The affidavit of Ms. Kay indicates that Chase did not give special attention to the checks at issue because all Chase appeared to do was make certain that the last endorsement was by the person making the deposit and that the initial endorsement matched the payee name. And, according to Mrs. Clark's testimony, when she deposited the fourteen checks at issue, the checks were not given any special attention, because she was neither questioned about depositing the checks into Mr. Clark's account nor asked for identification when she deposited the checks into Mr. Clark's account. Since the factual basis upon which Chase sought to prove that it had exercised ordinary care with respect to paying the checks at issue was contradicted by the sworn testimony of Mrs. Clark and contradicted by Chase's own internal policies and procedures, we find that genuine issues of material fact exist.

Chase contends that the evidence offered by ORM failed to establish a genuine issue of material fact as to whether it exercised ordinary care because, although Chase's policies and procedures may provide that a subsequently endorsed check may only be accepted from an account holder, its policies did not limit the ability of another person to make the deposit to the account holder's account on behalf of the account holder. Chase further explained that when a

check is deposited to an account holder's account, it is accepted from that account holder regardless of whether the account holder or some other person, such as the account holder's spouse, physically delivered the check to Chase. Therefore, notwithstanding the evidence produced by ORM, Chase contends that regardless of who physically made the deposit, the checks at issue in this case were accepted by and deposited by the subsequent endorser, Mr. Clark, in accordance with both its policies and procedures and generally accepted banking practices in Louisiana.

Additionally, Chase argued that Mrs. Clark's deposition testimony with regard to the fact that she personally went to a Chase branch office and made the deposits was "generally incredible" because Mrs. Clark was unable to identify the Chase branches where she made the deposits or the cities in which she made the deposits. Furthermore, Chase points out that the deposits on their face make reference to Mr. Clark's birth date, social security number, and/or drivers' license number and indicate that Mr. Clark made the deposit, and Mr. Clark refused to testify regarding the matter of the deposits and invoked the Fifth Amendment. However, the credibility of a witness is a question of fact. **Hutchinson v. Knights of Columbus, Council No. 5747**, 2003-1533 at p. 8, 866 So.2d at 234. In deciding a motion for summary judgment, a trial court cannot make credibility determinations and must assume that all of the affiants and deponents are truthful. **In Re Succession of Fisher**, 2006-2493, p. 9 (La. App. 1st Cir. 9/19/07), 970 So.2d 1048, 1054. Accordingly, for purposes of deciding this motion for summary judgment, we must assume that Mrs. Clark was truthful in her deposition testimony and find no merit to Chase's argument that her incredible testimony could not establish a genuine issue of material fact.

We likewise find no merit to Chase's attempt to justify, on summary judgment, its failure to comply with its internal policies and procedures by offering that its policies and procedures do not have to be strictly adhered to and may be

deviated from, for instance by allowing a non-account holder to deposit a check on behalf of an account holder. The failure of a bank to follow reasonable banking standards and/or its own internal policies with regard to the handling of checks may constitute a failure to exercise ordinary care. See **Dean Classic Cars, L.L.C. v. Fidelity Bank and Trust Co.**, 2007-0935, p. 17 (La. App. 1st Cir. 12/21/07), 978 So.2d 393, 402. The circumstances under which a teller or other employee of Chase may permissibly deviate from Chase's internal policies and procedures with regard to check handling, and whether such deviation was appropriate or permissible when the high risk checks at issue in this case were accepted for deposit or payment are issues of fact and would require an evaluation of testimony and a weighing of evidence that is inappropriate on summary judgment.

Therefore, since a genuine issue of material fact exists with regard to whether Chase exercised ordinary care in accepting and paying the fourteen checks at issue in this case, we conclude that summary judgment was improperly granted in favor of Chase on its affirmative defenses under La. R.S. 10:3-404 and La. R.S. 10:3-405. Accordingly, we hereby reverse the October 18, 2007 judgment of the trial court in that regard.

C. Louisiana Revised Statutes 10:3-420

Louisiana Revised Statutes 10:3-420 provides:

> (a) An instrument is converted when
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> (i) a drawee to whom it is delivered for acceptance refuses to return it on demand; or
>
> (ii) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or
>
> (iii) 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.
>
> (b) 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 [e]ndorsee who did not receive delivery of the instrument either directly or through delivery to an agent or co-payee or (iii) by the drawer.
>
> (c) In an action under Subsection (a), 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.
>
> (d) A representative other than a depositary 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.
>
> (e) Nothing in this Section prevents the owner of an instrument that has been wrongfully taken from him and not negotiated from requiring the drawer or maker to issue a substitute for it.
>
> (f) Any action for conversion or an action for replacement under Subsection (e) prescribes in one year.

Chase asserts that all of ORM's claims against Chase were for conversion under La. R.S. 10:3-420(a)(iii) since ORM alleged in its petition that Chase made or obtained payment of the checks at issue for Mr. Clark and Mrs. Clark, both of whom were persons not entitled to enforce the subject checks or to receive payment on those checks. Accordingly, Chase contends that ORM's claims against it are subject to the one-year prescriptive period set forth in La. R.S. 10:3-420(f). In support of the motion for summary judgment on this defense, Chase relied on evidence establishing that the last date on which Mrs. Clark issued an improper check was August 13, 2005, that the last check was deposited into Mrs. Clark's account at Hancock on August 18, 2005, and that the last check was paid by Chase on August 19, 2005. Accordingly Chase submits that it established a prima facie case that there were no genuine issues of material fact with regard to the fact that ORM's petition filed on August 25, 2006, more than one year from the date of the last converted check, was prescribed.

However, after reviewing La. R.S. 10:3-420, we find that its provisions are not applicable to ORM's claims against Chase. Although Chase argues that

ORM's claims against it were for conversion, we note that La. R.S. 10:3-420(b)(iii) provides that an action for conversion of an instrument may *not* be brought by the drawer of the instrument. Louisiana Revised Statutes 10:3-103(a)(3) defines the "drawer" as a "person who signs or is identified in a draft as a person ordering payment." In this case, there is no dispute that ORM was the drawer of the checks because ORM is identified in the checks as ordering the payment. As the drawer of the checks, ORM has no right of action against Chase for conversion of an instrument under La. R.S. 10:3-420. See La. R.S. 10:3-420(b)(iii). If ORM has no right of action for conversion under La. R.S. 10:3-420, then Chase could not seek the dismissal of ORM's claims against it pursuant to the prescriptive period contained therein, *i.e.*, La. R.S. 10:3-420(f).[9] Accordingly, the trial court erroneously determined that Chase was entitled to judgment as a matter of law on the basis of prescription, and we hereby reverse the October 18, 2007 judgment of the trial court in that regard.[10]

III. CONCLUSION

For all of the above and foregoing reasons, the October 18, 2007 judgment of the trial court is hereby reversed, and the matter is remanded to the trial court for proceedings consistent with this opinion.

All costs of this appeal are hereby assessed to the defendant/appellee, JP Morgan Chase Bank, N.A.

REVERSED AND REMANDED.

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[9] A peremptory exception raising the objection of no right of action would have been the appropriate pleading.

[10] Although the trial court subsequently concluded in oral reasons at the hearing on the motion for new trial that La. R.S. 10:3-420 was not applicable, the October 18, 2007 judgment on appeal reflects that summary judgment was also granted under La. R.S. 10:3-420. The December 17, 2007 judgment on the motion for new trial does not modify the October 18, 2007 judgment in that respect. Accordingly, the October 18, 2007 judgment in that regard must be reversed.