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IN THE COURT OF APPEALS OF GEORGIA

APPEAL CASE NO. A08A0688 SD8A1662

FILED BY CERTIFIED MAIL
DEC 18 2007

RICHARD C. HAUGABOOK,

Appellant

JUN 18 2008 CLERK COURT OF APPEALS OF GA

v.

GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER,

Appellees

On Appeal from the Superior Court of Athens-Clarke County

BRIEF OF APPELLANT RICHARD C. HAUGABOOK

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FILED IN OFFICE
JUN 23 2008
SUPREME COURT OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

RICHARD C. HAUGABOOK,	:	
	:	
Appellant,	:	
	:	
vs.	:	APPEAL CASE NO. A08A0688
	:	
GEOFFREY CRISLER,	:	
CHRISTOPHER CRISLER and	:	
TIMOTHY SCOTT CRISLER	:	
	:	
Appellees	:	

BRIEF OF APPELLANT

PART ONE

A. The Proceedings in the Trial Court.

Appellant Richard C. Haugabook ("Haugabook") brought suit by verified complaint (R-5-16) against Appellees Geoffrey Crisler and Christopher Crisler and eventually their brother Appellee Scott Crisler[1] to attempt to recover $1,000,000 they obtained from the law firm of Barnes, Farr & NeSmith, P.C. (the

[1] Scott Crisler, a resident of South Carolina, submitted himself to the jurisdiction of the court and became a party defendant by order of the court. (R-442).

"Law Firm") purportedly as the result of one of its attorneys, Paul Farr ("Farr"), settling the Crislers' wrongful death claim. (R-599; R-308). In fact, as all parties admit, the Trial Court found and as we will establish, no wrongful death action had even been filed by Farr much less settled, (b) the $1,000,000 received by the Crisler brothers had been obtained by Farr through a series of fraudulently kited $1,000,000 check overdrafts on the Law Firm's checking accounts at three banks and (c) Farr covered the last check in the check-kiting scheme by fraudulently obtaining a $1,000,000 loan from Haugabook, Farr's father-in-law.

The parties filed cross-motions for summary judgment, and on September 21, 2007 the Court entered its order granting the Crislers' motion for summary judgment on all claims of Haugabook and denying Haugabook's motion for summary judgment. (R-3303-3351). Haugabook timely filed his notice of appeal on September 28, 2007. (R-1-3).

B. Statement of Facts.

1. Paul Farr's Other Manufactured Settlements.

The story does not begin with what we will later see were bizarre pretensions by Farr to Scott Crisler that he was vigorously prosecuting and then had settled the Crislers' wrongful death action. As it develops, Farr, beginning in

2004, had "manufactured settlements" (R-480-481) totaling $128,000 six times previous to the faked Crisler settlement and one time thereafter (R-628-629; R-632). However, in those settlements Farr used either his own money or money he had legitimately borrowed rather than money he had obtained by criminal fraud. (R-629-632). Farr explained that the money he had provided " . . . would either be paying my client, or in certain circumstances it was paying the opposing party if my client owed the money." (R-633). (Emphasis added).

2. The Events Leading up to Thanksgiving Week 2006.

On January 12, 2005 Scott Crisler employed the Law Firm to represent the Crisler brothers in pursuing a claim for the wrongful death of their mother on December 14, 2004. (R-505; R-507; R-348). Thereafter, Farr, over a period of twenty-three months, represented to Scott Crisler, among other things, that (a) he had filed the wrongful death suit on behalf of the Crislers (R-586), (b) the lawsuit had been answered (R-586), (c) written discovery had been filed in the case (R-587), (d) depositions taken (R-593), (e) the Court had granted partial summary judgment (R-594) and (f) a settlement had been reached (R-599; R-308). In fact, Farr had not filed suit (R-586), and nothing that he had represented had in fact occurred (R-586-587; R-593; R-594; R-596; R-599-600).

As Farr's wild pretensions that he had settled the Crislers' case reached the point of logically requiring a consummation, Farr engaged in increasingly irrational conduct. On September 29, 2006 Farr told Scott Crisler, after purportedly conferring with fictitious opposing counsel that they promised they would wire the settlement funds to the Law Firm October 4th. (R-599-600). A fake release and lien agreement Farr created were sent to Scott Crisler on October 13, 2006. (R-601). Farr testified that at this point he had no plan for funding the fabricated settlement and "was still of the mind that I could get this settled, however unreasonable that was." (R-602-603). (Emphasis added).

On October 19, 2006 Scott Crisler signed the fake release of the wrongful death claim as "executor" for the stated consideration of the payment of policy limits of a Maryland Casualty policy. (1/3/07 Transcript, Exhibit I).

Farr on November 15, 2006 went to Central Bank where his Law Firm maintained a trust account to request a "wire transfer" (R-1012) for $1,000,000 (R-1018). When Central Bank determined "the funds weren't available," it declined to complete the wire transfer form. (R-1019-1020). Nevertheless, later on November 15, 2006 Farr faxed to Scott Crisler a typed fabricated statement on Central Bank letterhead which in part stated that settlement funds "were posted for

wiring on November 14" and would be wired out of a Law Firm trust account no "later than November 17 . . . ." (R-610). Farr admitted at this point his fabrications were "irrational." (R-616).

After first agreeing to cut his fee ten percent and pay interest to the Crislers (R-317-318; R-363), on November 17th because of Scott Crisler's complaints that he had been misled into thinking it was a $2,000,000 settlement, Farr told Crisler that because he had "screwed up" (R-311), he would not take any fee out of the fictitious $1,000,000 settlement until he collected another $1,000,000 (R-327; R-614-615).

3. The Events Culminating in the Haugabook Fraud.

After Farr made his first attempt to wire the $1,000,000 out of the firm trust account at Central Bank on November 15th, the CEO of Central Bank called Barnes and told him Farr had attempted to wire $1,000,000 out of the Law Firm trust account, and Barnes' reaction was to relate he did not know anything about it, but Farr must have a reason for wanting to wire the money. (R-982-983).

Two days later on Wednesday, November 22nd, Farr started his kite by writing check #5495 (R-1247) on the Law Firm's Sumter Bank trust account for $1,000,015 payable to "Barnes, Farr & NeSmith, P.C. Trust Account" and at 8:38

a.m. depositing that check (R-1268) into the Law Firm's trust account at Citizens Bank. (R-651-652). At the point the $1,000,015 check was written, the Sumter Bank trust account had a balance of $37,429.94. (R-1269-1271). Farr then wrote check #9603 (R-1314) on the Law Firm's Citizens Bank trust account for $1,000,015 also payable to "Barnes, Farr & NeSmith, P.C. Trust Account" and at 9:04 a.m. deposited that check (R-1313) into the Law Firm's trust account at Central Bank (R-653). At the point he wrote the $1,000,015 check on Citizens Bank, it had an approximate balance of $141,240 but for the deposit of the $1,000,015 check from Sumter Bank. (R-879; [Farr dep., Exhibit 121]). But for the kited $1,000,015 check deposited in the Law Firm's trust account at Central Bank, it had an approximate balance of $1,699.00. (R-1304). Farr admitted the obvious, that his purpose in writing and depositing check #5495 and check #9603 on November 22nd was to create more time for the checks to clear (R-652) and to fund with the kited checks the $1,000,000 wire transfer he planned to make that same day to the Crislers. (R-546). The $15 in both checks was to cover the wire fee. (R-654).

At the point on November 22nd Farr gave the instructions for the $1,000,000 wire, the $1,000,015 deposit that had just been made was uncollected

funds. (R-34; R-28). Consequently, the CFO of Central Bank called Citizens Bank about the $1,000,015 Citizens Bank check (#9603) Farr had just deposited (R-1075-1076; R-1035-1036) "to verify funds" and was told the check was "good" (R-1075-1077). However, in truth, it only appeared to be good because of the kited Sumter Bank check (#5495) deposited in the Citizens Bank trust account that morning. (R-1267-1268; R-881; R-850-851). The CFO then called his bank's CEO because "It is an unusual event, especially when it's uncollected funds." (R-1099-1100). (Emphasis added). The CFO related what he knew to the CEO, and the CEO said he would call Barnes to see if he knew what was going on. (R-1101). According to Barnes in the subsequent call from the Central Bank CEO, the CEO related what had transpired, expressed that he was baffled about the way Farr was handling the transaction but told Barnes the bank had verified the funds at Citizens Bank. (R-1624). Barnes response was: "And I said, well, as long as the money is there, you've verified it, that's the most important thing . . . ." (R-1624). (Emphasis added).

Barnes testified that while he recognized that a significant amount of money was involved and understood the reason for the CEO's concerns, he had known Farr to wire money in the past; Barnes had done it in connection with real

estate closings, and Barnes "assumed that what he [Farr] was doing was legitimate" and that he "trusted Paul Farr." (R-1625; R-1628). (Emphasis added).

After his conversation with Barnes, the CEO called the CFO and related what Barnes had said (R-1101-1102), and the CFO authorized the wire (R-1102).

When the CFO was asked why didn't he just refuse to authorize the wire until the funds were collected, he responded, "Because it was on a lawyer's trust account and Barnes, Farr & NeSmith are good customers, and assuming it's for a closing." (R-1100). (Emphasis added). He said because it was a lawyer's trust account "The check's bound to be good. If it's not good, somebody's going to lose their license." (R-1085). (Emphasis added).

After Farr left the Central Bank on November 22nd, he continued his kite by writing another $1,000,015 check (#9602) (R-1244) also drawn on the Citizens Bank trust account also payable to "Barnes, Farr & NeSmith, P.C. Trust Account" and deposited that check at 12:32 p.m. back into the trust account at Sumter Bank on which the first kited $1,000,015 check had been drawn. (R-1243).

The day after Thanksgiving on November 24th when Central Bank found out that the $1,000,000 wire had been rejected (R-659; R-1144), it contacted

Farr and told him it would take three wires to transfer the $1,000,000 and it would be $15 per wire. (R-1143-1144). Farr then continued the kite by writing a $1,000,045 check #1206 (R-1250) on the firm's petty cash account at Sumter Bank (which had a balance of approximately $27,290) (R-1274) and depositing that check into the trust account at Citizens Bank on November 24th at 8:43 a.m. (R-877, 878). Farr explained, ". . . I was concerned one of those, the checks I had already written was going to bounce." (R-668). (Emphasis added). Farr then went to Central Bank and gave the information on how to split the $1,000,000 for the three wires. (R-1144-1145). The Central Bank employee who had previously dealt with Farr did not attempt to verify as she ordinarily would that the funds for the wire were collected funds, she "just assumed they were" because they had tried the wire on November 22nd. (R-1145). (Emphasis added). Consequently, the wires went out at 9:47, 9:45 and 9:47 a.m. on November 24th. (R-1146; R-1290-1292).

On November 24th the first $1,000,015 Sumter Bank check #5495 had not been presented back to Sumter Bank by Citizens Bank for payment. (R-933). However, on that date the second $1,000,015 Citizens Bank check #9603 had been presented back to Citizens Bank by Central Bank at 1:48 p.m. (R-826), had been

debited to the Law Firm's Citizens Bank account (R-1104; R-851), and Central Bank received the credit for that $1,000,015 on November 24th.[2] (R-933; R-1096-1097). On November 24th the third $1,000,015 check, Citizens Bank check #9602, was also presented back to Citizens Bank by Sumter Bank at 1:48 p.m. (R-839), the Law Firm's account was debited (R-851) and Sumter Bank received credit.[2] (R-1096). Of course, Citizens Bank's payment of checks #9603 and #9602 on November 24th was based on the deposited uncollected Sumter Bank check #5495 for $1,000,015 and the deposited uncollected Sumter Bank check #1206 for $1,000,045, neither of which had been presented back to Sumter Bank for payment as of November 24th. (R-933-934).

According to Ty Turner, a vice president at Sumter Bank, he was called by Farr on November 24th to see if Turner could cover an overdraft of $1,000,000. (R-1191-1192). Turner told him he didn't have that authority but in

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[2] These were provisional credits that could have been reversed because of the so-called "midnight deadline" that allows a bank to dishonor and return a check until midnight of the next "banking" day after it is presented for payment. (R-812; R-941, 960 and see O.C.G.A. § 11-4-104(a)(10)).

the conversation Farr told him an "insurance check" was going to be coming in "to cover" the $1,000,000 check, and he could give Turner some "documentation" it was coming. (R-1192, 1194).

On Monday, November 27th Farr again tried to get Turner to agree to cover or delay funding the $1,000,045 check drawn on the petty cash account. (R-1200; R-210). Turner testified that from the research he did on November 27th, "I could see a kite. . . . I could see a million dollar check drawn on us going to Citizens and I could see that check [also a million dollars] from Citizens coming to us." (R-1202, 1206). (Emphasis added). Of course, Turner, at that time, was also aware of check #1206 for $1,000,045 that was on the verge of bouncing. (R-1207).

Turner on November 27th told Barnes he could see a kite taking place. (R-1204). At some point that day, Turner received from Farr a purported but totally fabricated November 27, 2006 letter from Zurich North America (R-1211) to Farr stating in part, ". . . funds in the amount of $1,000,045 were mailed to your office on Monday, November 27, 2006 in connection with the Maryland Casualty Company claim . . . ." (R-1261). (Emphasis added).

In a conversation between Farr and Barnes on the afternoon of November 27th, Farr offered the totally fabricated explanation that Ms. Crisler had $2,000,000 of life insurance, he had received $1,000,000 which he had forwarded to the Crislers, that the Crislers had been pushy about the second $1,000,000 so he had written the check out of petty cash because he had a letter from Zurich Insurance Company saying the second $1,000,000 was coming. (R-1643-1644). In fact, the letter was a fabrication and there was no life insurance. (1/3/07 Transcript, T-84; R-216).

4. The Fraud of Haugabook.

Farr first decided to approach his father-in-law Haugabook about his situation on Monday, November 27th after he had spoken with Ty Turner and Barnes (R-680) and "panic" set in (R-681). Per Haugabook, as admitted by Farr, Farr told Haugabook he had made "a terrible mistake" . . . "had a law case and it was settled and the insurance company was to – was to send the check out and [he] had a settlement with the insurance company and they were to send the check on and so [he] went ahead and gave the clients a check for a million dollars" (1/3/07 Transcript, T-33; R-526), but the insurance company check "would not be there in time to cover the check that he had written" (1/3/07 Transcript, T-34; R-528) out of

the trust account and "there wasn't any money in the trust account to cover the check." (1/3/07 Transcript, T-34; R-528). (Emphasis added) Of course, almost every single word of what Farr said to Haugabook was a lie, i.e. there had been no settlement, the insurance company had not sent a check, he had not given "the client a check for a million dollars" but rather had wired funds, there were four $1,000,000 checks, etc., etc. (Emphasis added).

Haugabook, a seventy-three year old retired Montezuma businessman, understood that a trust account was "a very sacred thing with the law people" and if the check bounced "Paul would probably be ruined and maybe the firm." (1/3/07 Transcript, T-35). Farr told Haugabook it was too late to stop payment on the check. (1/3/07 Transcript, T-35). Haugabook told Farr he would try to raise the money. (1/3/07 Transcript, T-35).

Anticipating quick repayment of the $1,000,000, Haugabook obtained short-term loans from his other son-in-law, his wife, his business and Smith Barney along with an IRA withdrawal. (1/3/07 Transcript, T-36-38).

After Haugabook had made all the arrangements and had deposited the $1,000,000 into his own Flag Bank account, he called Farr on November 28th and told him that he wanted to meet with him and his two partners. (1/3/07

Transcript, T-38). The purpose for the meeting was that Haugabook "wanted some assurance from them [Barnes, a State Court Judge (R-1622), and his nephew, NeSmith (R-446)] that the money would be coming in when Paul [Farr] said it was coming in." (1/3/07 Transcript, T-38).

At the meeting on November 28, 2006 at the offices of Barnes, Farr & NeSmith (1/3/07 Transcript, T-39), Haugabook was shown a fabricated letter from Zurich to Farr dated November 20, 2006 which stated $1,000,000 would be forwarded so as to be received by Farr's office "on December 8, 2006." (R-12). Farr explained that he had fabricated this letter on Tuesday, November 28 (R-620) "to show to my law partners and my father-in-law representing that the million dollars from the life insurance company would arrive at my office on December 8, 2006." (R-618-619). Barnes and NeSmith were shown the letter along with Haugabook and his son. (1/3/07 Transcript, T-40; R-619). Haugabook testified that at the meeting "I just asked Bill [NeSmith] and Russ [Barnes], I said are y'all sure this money is coming in, and they said yes, they were sure it was coming in, ..." (1/3/07 Transcript, T-41). Haugabook was also shown a fabricated and forged release executed by Scott Crisler (1/3/07 Transcript, T-40; R-13) which supported

the payment of the money. Barnes' recollections of the meeting are more detailed but not in conflict with Haugabook's. (R-1661).

Based on the fabricated documents, the lies and his trust of Farr, the reassurances he received from Barnes and NeSmith that the $1,000,000 he was handing over to the Law Firm would be repaid with the $1,000,000 from the insurance company, Haugabook signed and handed over his $1,000,000 check #10337 (1/3/07 Transcript, T-43; R-1661-1662) and accepted Farr's personal note for $1,000,000 (R-1662). Farr immediately deposited Haugabook's check in the Law Firm's petty cash account at Sumter Bank on November 28th at 4:00 p.m. (R-1662, 1665; R-1251-1254) to cover the check that "needed to be covered" (R-528), i.e. the $1,000,045 check #1206 written out of that petty cash account on November 24th (R-528; R-1248-1250). That last check in the kiting chain for $1,000,045 had not presented back to Sumter Bank for payment until that Tuesday, November 28th. (R-962). Consequently, under the "midnight rule"/"midnight deadline" (R-963), Sumter Bank had until at least midnight November 29th to return that check (R-3289). However, Sumter Bank honored check #1206 and paid it (R-962) because "On the 28th when this was presented, we [Sumter Bank] had already received a deposit that was being posted into that [the petty cash] account

at four o'clock in that afternoon." (R-963; R-3288-3290). (Emphasis added). That deposit was Haugabook's check #10337 drawn on Flag Bank for $1,000,000. (R-1254; R-962-963; R-3289).

5. The Discovery that the $1,000,000 Would Not be Coming From Any Insurance Company.

After Barnes had some additional conversations with Farr on November 28th, Barnes said he ". . . knew that that million dollars that Mr. Haugabook had loaned to Paul [Farr] that he had put into the petty cash account is ultimately what cleared all these trust account checks that had transpired." (R-1677). (Emphasis added). As a consequence of a subsequent investigation by Barnes (R-1679; R-1680) and finally a call by NeSmith on December 8th to Zurich/ Maryland Casualty, the Law Firm realized that the settlement had all been a fabrication by Farr (R-1692-1693).

NeSmith called Haugabook on December 8th and told him no money was coming and that it was all a fabrication. (R-1694). Haugabook and his son then met on December 8th with Barnes and NeSmith. (R-1693). Barnes advised that he would go to South Carolina the next day to demand the Crislers return the money and after the meeting Barnes called Scott Crisler, explained the entire

sequence of events and how it had all been made up by Farr and that "the money they had belonged to Mr. Dick Haugabook." (1/3/07 Transcript, T-45-46; R-8; R-1695). (Emphasis added). Scott Crisler told Barnes they were not prepared to pay the money back. (R-1696).

On December 9th NeSmith filed a wrongful death action for the Crislers (R-1699), and Barnes flew to South Carolina to meet with Scott Crisler (R-1700), "explained the checks that had transpired between the trust accounts and the petty cash," showed Crisler "copies of those checks," told Crisler "again the money had come from Mr. Haugabook," showed him Haugabook's check and told him that "Mr. Haugabook was going to come after him for the money" and "If he and his brothers were planning on keeping the money they needed to get a lawyer because they were going to have to fight like hell to do it." (R-1700-1703 and see R-222-223, 228, 232). Barnes further related to Crisler that Farr had "cracked up" (R-224; R-244) and was going to be "psychiatrically evaluated." Farr was hospitalized and diagnosed as having a bipolar disorder on December 14, 2006. (R-474).

Geoffrey Crisler, after paying off a student loan and credit card totaling approximately $18,000 (R-407), kept the $315,000 balance in a money

market account. (R-438). Scott and Christopher Crisler purchased $409,000 of a single mutual fund (R-1778; R-1818) and then on December 12, 2006 purchased $120,030 of shares in a single Real Estate Investment Trust. (R-1783; R-1819; R-399; R-345). Christopher Crisler kept the balance of his $333,000 in money market funds. Scott Crisler, with his cash balance, paid off credit card debt and spent some of the money on household expenses. (1/3/07 Transcript, T-111). He also spent $75,000 of the money to pay counsel to defend this case and prosecute the wrongful death action filed on December 9, 2006. (R-904-906; R-1699).

PART TWO

ENUMERATIONS OF ERROR

1.

The Trial Court erred in its Order of September 21, 2007 in granting the Appellees Crislers' motion for summary judgment on all claims of Haugabook. (R-3303-3351 at 3325-3350).

2.

The Trial Court erred in its Order of September 21, 2007 in failing to grant Appellant Haugabook's motion for summary judgment. (R-3303-3351 at

3341-3350).

This Court rather than the Supreme Court has jurisdiction of this case because the Order is directly appealable under O.C.G.A. § 5-6-34 and the case is not in the class of cases within the jurisdiction of the Supreme Court under Article 6, § 6, ¶ 3 of the Constitution of the State of Georgia.

PART THREE

ARGUMENT AND CITATIONS OF AUTHORITY

A. Introduction.

In reviewing the grant or denial of summary judgment, the standard of review is de novo and the evidence and all reasonable inferences therefrom are to be construed in favor of the party opposing summary judgment. *CPD Plastering, Inc. v. Miller*, 284 Ga. App. 172 (2007). Consequently, for argument purposes Haugabook's two enumerations of error are essentially inseparable with the exception of the grant of summary judgment on Haugabook's conversion claim on which he did not seek summary judgment.

The undisputed facts are complex, but the following fundamentals are simple and mandate summary judgment for Haugabook, not the Crislers.

(1) As Scott Crisler had to admit under oath (1/3/07 Transcript, p. 114) and the Trial Court correctly concluded, the Crislers "gave up nothing" (Order, R-3336) for the $1,000,000 they received from the Law Firm's trust account as a consequence of the fraudulent check kiting by Farr. As the Trial Court also correctly found on good authority the money the Crislers received was "in essence the proceeds of a crime." (Order, R-3333).

(2) Haugabook, on the other hand, was defrauded of $1,000,000 by Farr to cover the Law Firm's last check in the kiting scheme that was still in progress and which Farr had used to fund the $1,000,000 wire transfer to the Crislers.

(3) There was never a real $1,000,000 in any of the accounts to fund the wires. It was all smoke and mirrors with provisional credits and debits of uncollected funds that did not exist until Haugabook's $1,000,000 was deposited in the Law Firm's account.

(4) Farr's fraud to get the $1,000,000 to the Crislers that they were not owed had one author, one theme and ultimately only one victim, Dick Haugabook.

What represents justice on these indisputable, fundamental facts? Is the obvious, common sense answer to be altered by the fact that the $1,000,000 from the Law Firm's trust account was received by the Crislers on November 24th, and Farr did not complete his $1,000,000 fraud of Haugabook until one and a half business days later on November 28th? The Trial Court said "yes" to this question, but this Court should conclude "no" and again demonstrate both the wisdom of the common law and its inherent limitation that it mends as it goes because as Justice Weltner observed in his concurring opinion in *M. L. King, Jr. Center v. AM. Heritage Prod.*, 250 Ga. 135 (1982):

> "Our ancient maxim – 'for every right a remedy' – is, in truth, stated hind part before. The *reality* of the judicial process is this: wherever there *ought* to be a remedy, the Court will declare a corresponding right." *Id.* at 149. (Emphasis added).

B. The Legal Cause of Action for Money Had and Received Fits This Case.

1. The Test for the Validity of a Money Had and Received Claim.

There are only two necessary components for the legal cause of action for money had and received, and they both involve equitable criteria. The Georgia Supreme Court in 1846 put it this way in *Whitehead v. Peck*, 1 Ga. 140 (1846), "It

[an action for money had and received] lies in all cases where money is in the hands of another, which, [1] *ex aequo et bono*, the plaintiff is entitled to recover, and [2] which the defendant is not entitled in *conscience* to retain." These two components for testing the validity of this legal cause of action on equitable principles are still the law. For example, see *Jasper School District v. Gormley*, 184 Ga. 756, 758 (1937), Justice Weltner's opinion in *M. L. King, Jr. Center v. AM. Heritage Prod.*, supra at 150 and most recently in the Supreme Court, *Decatur Federal v. Gibson*, 268 Ga. 362, 363 (1997). This Court's opinions have necessarily followed the Supreme Court's lead:

> " 'An action for money had and received lies in <u>all</u> cases where another has received money which [1] the plaintiff, ex aequo et bono, is entitled to recover and which [2] the defendant is not entitled in good conscience to retain.'" *Dobbs v. Pearlman*, 59 Ga. App. 770 (2) (1939); *Stein Steel &c. Co. v. K. & L. Enterprises*, 97 Ga. App. 71, 73 (1958); *William N. Robbins, P.C. v. Burns*, 227 Ga. App. 262, 265 (1997). (Emphasis added).

We do not have to look up "in good conscience" to know the grounds for a defendant's non-entitlement; it was explained at our mother's knee, "it's not

yours, give it back." It is what drives the people our culture applauds to turn in the billfold or diamond ring they found, i.e. a good conscience, which says, "how could you possibly keep what is not yours; do the right thing, give it back." The meaning of the Latin phrase defining the basis for the plaintiff's contrasting entitlement can be sensed by the grounds for the defendants' non-entitlement, but the real meaning is broader. "Ex aequo et bono" means "in justice and fairness; according to what is just and good; according to equity and good conscience." Black's Law Dictionary, 4th Ed. (Emphasis added).

In *Culbreath v. Culbreath*, 7 Ga. 64 (1849), the Supreme Court boiled it down to, "If there is [1] justice in the plaintiff's demand, and [2] injustice or unconscientiousness in the defendant's withholding it, the action lies." *Id.* at 68.

This Court in *Dobbs v. Perlman*, 59 Ga. App. 770 (1939) summed it all up well:

> "The rule in Georgia is well established. It follows the principle laid down in the leading case of Moses v. McFarland, 2 Burrow 1005, where Lord Mansfield said: 'If the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action founded in the equity of the plaintiff's

case, as if it were upon a contract.' Judge Nisbet, in *Culbreath v. Culbreath*, 7 Ga. 64 (50 Am. D. 375), used this language: 'If authorities were balanced – we feel justified in kicking the beam, and ruling according to that naked and changeless equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing; an equity which is natural – which savages understand – which cultivated reason approves, and which Christianity not only sanctions, but in a thousand forms has ordained.' This court in *Citizens Bank of Fitzgerald v. Rudisill*, 4 Ga. App. 37 (60 S.E. 818), said: 'An action for money had and received lies, in case [1] the defendant has taken to his use money which [2] ex aequo et bono belongs to the plaintiff. It needs for its support no actual contractual relation, for the law will imply a quasi-contractual relation to uphold it, whenever the circumstances so require.' See also *Whitehead v. Peck*, 1 Ga. 140; *Bell v. Hobbs*, Ga. Dec. Part 2, 144; *O'Neal v. Deese*, 23 Ga. 477; *Rudisill v. Handley*, 9 Ga. App. 789 (72 S.E. 189); *Haupt v. Horovitz*, 31 Ga. App. 203 (120 S.E. 425)." *Id.* at 774. (Emphasis added).

From the two components of the cause of action, it is patently obvious that the evaluation template is neither technical nor rigid; rather, it mandates that the Court cut to the chase and arrive at a disposition based on natural justice, what is good, fair, equitable, a matter of conscience. Obviously, there would be no need for the common law to have fashioned such an inexact equitable criteria focused on result if the action was about the technicalities of legal title or the timing of the receipt by the defendants versus the loss by the plaintiff, and, as we will later see, the cases which have some factual parallels to the bizarre facts of this case, confirm that deduction.

2. The Test of Validity Applied.

(a) The Crislers Have $1,000,000 Which They are Not Entitled in Good Conscience to Retain.

The issue of whether a defendant like the Crislers can in equity and good conscience retain the money often boils down to simply whether the defendant gave up anything for the money as opposed to how and from whom he acquired possession. As the Supreme Court noted in *McCay v. Barber & Son*, 37 Ga. 423 (1867) it is elementary that, "The defendant having received the money of

the plaintiff, without giving any valuable consideration therefor, is not, in equity and good conscience, entitled to keep it." *Id.* at 423. (Emphasis added).

As we noted previously, Scott Crisler admitted (1/3/07 Transcript, T-114) and the Trial Court found, the Crislers "gave up nothing of value" for the $1,000,000. (Order, R-3333). The Crislers thought they were surrendering their wrongful death claim, but they were not; no settlement or insurance payment had occurred and the executor's release of the wrongful death claim was a legally deficient fabrication. The wrongful death action purportedly released is being prosecuted by the Crislers' counsel of record. (R-904-906). The money the Crislers actually received, as the Trial Court aptly put it, on good authority, was "the proceeds of a crime" (Order, R-3333), and we would add a crime in progress since the kiting continued until Haugabook's check picked up the tab for the banks and Law Firm.

The short-lived innocence of the Crislers on their receipt of the $1,000,000 avails them nothing. The defendant in *Bill Heard Chevrolet Company, Inc. v. Atlantic Discount Company, Inc.*, 120 Ga. App. 388-389 (1969) was an innocent victim of fraud, as was the plaintiff, but summary judgment for the plaintiff was appropriate because again: ". . . an action lies in all cases where one

has [1] received money which another, ex aequo et bono, is entitled to recover and [2] which the recipient is not entitled in good conscience to retain." *Id.* at 388-389. (Emphasis added).

In the Restatement of the Law of Restitution[3] it provides:

> "A person who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account to the other for the direct product of the subject matter and the value of the use to him, if any, and in addition, to: (a) return the subject matter in specie, if he has it; (b) pay its value to him, if he has non-tortiously consumed it in beneficial use; (c) pay its value or what he received therefor at his election, if he has disposed of it." *Id.* at § 123, p. 506 (1937).

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[3] The Georgia Supreme Court has previously cited with approval sections of the Restatement of the Law of Restitution (1937). See e.g. *Beavers v. Weatherly*, 250 Ga. 546, 548 (1982)(citing §§ 40-42).

One of the examples the Restatement gives for application of the rule is where "a mercantile instrument payable to bearer is received from a thief by an innocent person, who may be a donee, an innocent agent of the thief, or other person who has not given value." *Id.* Comment a., p. 507. (Emphasis added).

It would be hard to imagine a better example than the Crislers of defendants holding money to which they are not in good conscience entitled!

(b) Haugabook is Entitled *Ex Aequo et Bono* to Recover the $1,000,000 Obtained by the Crislers.

(i) Lack of Privity or even a Relationship between Haugabook and the Crislers is not an Impediment.

Dobbs v. Perlman, supra, noted that a cause of action for money had and received "needs for its support no actual contractual relation, for the law will imply a quasi-contractual relation to uphold it, whenever the circumstances so require." *Id.* at 774. (Emphasis added). The law implies a promise to repay as the vehicle for getting the money back to the true owner (*Central Bank v. First National Bank*, 73 Ga. 383, 385), i.e. he who is entitled to recover it *ex aequo et bono*. *Fain v. Neal*, 97 Ga. App. 497 (1958), further notes unequivocally that in an action for money had and received,

"It is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner." *Id.* at 498-499 (1958). (Emphasis added).

(ii) The Money for which Recovery is Sought from the Crislers does not (1) have to be the Exact Money the Plaintiff lost or (2) have come into the Defendants' Possession only after the Plaintiff's loss.

The Crislers have maintained from the inception of this case that they do not have Haugabook's money because they received $1,000,000 on November 24th before Haugabook lost his $1,000,000 on November 28th. There are at least three money had and received cases which have some parallel to our bizarre facts and demonstrate that it is not necessary that what the defendants received in the form of money or its equivalent be technically the plaintiff's money at the time of receipt or even recovery, and the defendants do not have to receive the money only sequentially after the plaintiff's loss.

The Supreme Court in *O'Neal v. Deese*, 23 Ga. 477 (1857), was faced with a situation where (a) one Yopp had sent five bales of cotton to a Railroad's agent to be shipped to Washburn, et al., (b) the defendant O'Neal sent forty-five bales to the Railroad also for shipment to Washburn, et al. and (c) while Yopp's cotton was at the station, rain washed off its identifying marks, and the cotton was remarked as O'Neal's, sold and O'Neal received the money. Yopp called on the Railroad, and it paid Yopp for his cotton. The Railroad then called on its agent Deese for the money, and he paid it. The defendant O'Neal refused Deese's demand and was sued. We note that (a) O'Neal never had Deese's money per se, (b) at the time O'Neal came into possession of the money it was really Yopp's, and Deese had not experienced a loss, and (c) it was actually Deese's mistake that resulted in the unearned payment by Washburn to O'Neal for the combined fifty bales. Despite those realities, the Supreme Court, citing *Culbreath v. Culbreath*, supra, upheld Deese's cause of action for money had and received and observed:

> "It is supposed that there is no precedent in the books for such a proceeding. We think, and have endeavored to show, that there is; but if not, principle requires that one should be established. It would argue a great defect in the moral administration of justice, if one man

could retain the money of another, for which he had given nothing, and which he received by mistake." *Id.* at 479-480. (Emphasis added).

It is notable the Supreme Court had no difficulty characterizing the overpayment to O'Neal as Deese's money even though when the defendant O'Neal came into possession of the money "of another" it was not the plaintiff Deese's money. In terms of the sequence, O'Neal, like the Crislers, got money for which he gave nothing and which at that point the plaintiff Deese, like Haugabook, had not yet lost. Like Haugabook picking up the tab for the banks and the Law Firm, Deese later picked up the tab by paying the Railroad.

Citizens Bank v. Rudisill, 4 Ga. App. 37 (1908) and *Rudisill v. Handley*, 9 Ga. App. 789 (1911) are also instructive in assessing our bizarre facts. Rudisill, as cashier of Citizens Bank, made a number of incorrect entries in booking one Handley's purchase of capitol stock, giving Handley credit for $500 for the purchase of fifteen shares when Handley had only paid $300 for thirteen shares. Rudisill checked up short $200, and the directors insisted he pay the shortage which he did under protest. Handley, who insisted he had paid for all fifteen shares, was then issued the stock. *Citizens Bank*, at 38-39. Rudisill sued

the bank for the $200. In refusing to allow Rudisill to proceed against the bank for money had and received, the Court explained that Rudisill had sued the wrong defendant because the bank had given value for the $200, and "The controversy is therefore shifted, and if Rudisill has a cause of action against any one it is against Handley; for he, if any one, has ultimately received that which ex aequo et bono belongs to the plaintiff." *Id.* at 42-43. (Emphasis added). The reason the Crislers cannot in good conscience retain the $1,000,000 is because, unlike *Citizens Bank*, the Crislers gave up nothing to get the $1,000,000; there was no quid pro quo for the Crislers' receipt of the $1,000,000. When Haugabook's $1,000,000 was put in the till on November 28, 2006, to paraphrase the Court in *Citizens Bank*, "the controversy [was] therefore shifted, and if [Haugabook] has a cause of action . . . [for money had and received] it is against [the Crislers]; for [they] . . . ultimately received that which ex aequo et bono belongs to [Haugabook]." *Id.* at 43. (Emphasis added).

Rudisill later took the Court's advice and sued Handley even though Rudisill had paid his $200 to the bank, not Handley, not unlike Haugabook's payment to Farr and the Law Firm, not the Crislers. In *Rudisill v. Handley*, supra, the Court "[h]eld, that in an action in the nature of an action for money had and

received, the cashier [Rudisill] may recover the $200 from the customer [Handley] who took the benefit of the cashier's payment of that sum to the bank" (*Id.* at 789) primarily because Handley had gotten something for nothing. *Id.* at 789.

The Crislers did not initially and literally get Haugabook's money on November 24th, but neither did Handley literally get Rudisill's money, and the defendant in *O'Neal v. Deese*, supra, not only did not initially get the plaintiff's money, he never had that money per se because it was paid to the railroad. If money had and received requires title, identity of the money or its equivalent lost, received and sought to be recovered, neither Handley nor O'Neal would have been allowed to prevail. Furthermore, Rudisill and Deese were both at fault in the money or its equivalent coming into the possession of the defendants whereas Haugabook was the ultimate victim of the same fraud that put the $1,000,000 into the hands of the Crislers. Fraud tops mistake as an initiator of the transfer.

> "An action for money had and received will lie where there is no actual fraud. It will all the more lie when the defendant is in possession of money which ex aequo et bono, because of fraud, belongs to the plaintiff. *Rhodes Furniture Co. v. Jenkins*, 2 Ga. App. 475 (58 S.E. 897); *Knight v. Roberts*, 17 Ga. App. 527 (87 S.E. 809)."

Herrington v. City of Dublin, 50 Ga. App. 769, 773 (1934). (Emphasis added).

When all is said and done, only Haugabook is out $1,000,000, and it is only the Crislers who are up $1,000,000! Based on cases that are as factually close as we can get to our bizarre facts, it matters not to the principles of money had and received that the Crislers got $1,000,000 on November 24th, and Haugabook lost $1,000,000 one and a half days later on November 28th. The equitable principles that determine the validity of the claim should rather focus on the dual realities that the Crislers obtained $1,000,000 for which they gave nothing as a consequence of Farr's check kiting scheme and the parallel reality that because of Farr's same check kiting scheme and related fraud of Haugabook, he lost $1,000,000 for which he received nothing and to which he is *ex aequo et bono* entitled.

> "In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff OR to which he is in equity and good conscience entitled." *Cutright v. National Union Fire Ins. Co.*, 65 Ga. App. 173, 177 (1941). (Emphasis added).

C. The Trial Court's Right and Wrong Reasoning in Reaching its Decision to Grant Summary Judgment to the Crislers and Deny Summary Judgment to Haugabook.

1. The Trial Court's Correct Rulings.

The Trial Court correctly rejected the Crislers' contention that the voluntary payment doctrine of O.C.G.A. § 13-1-13 bars Haugabook's recovery because the evidence was uncontradicted that everyone involved had "misplaced confidence in Farr" (Order, R-3328-3329) and likewise it is beyond debate "that all the facts" were not known until after the Crislers got the $1,000,000 and Haugabook lost the $1,000,000. See, *Gulf Life Insurance Company v. Folsom*, 256 Ga. 400 (1986).

The Trial Court also rejected the Crislers' contention that O.C.G.A. § 23-1-14 barred Haugabook's claim. (Order, R-3337-3338 and see *Nowell v. Mayor &c. of Monroe*, 177 Ga. 648, 656 (1933); *McDonald v. Peoples Auto Loan*, 115 Ga. App. 483 (1967); *Woods v. Colony Bank*, 114 Ga. App. 683 and *Gulf Life Insurance v. Folsom*, supra at 402-404).

The Trial Court correctly rejected the Crislers' fanciful contention that they had given value for the $1,000,000. (R-2014-2015; Order, R-3336-3337 and

see *Godat v. Mercantile Bank of Northwest County*, 884 S.W.2d 1, 13-14 (Mo. App. 1994); *American Federal Sav. and Loan Ass'n v. Madison Valley Properties, Inc.*, 958 P.2d 57 (Mont. 1998)).

The Trial Court further totally rejected the Crislers' contention that because the money was wired Article 4A of the UCC (O.C.G.A. § 11-4A-101, et. seq.) preempted Haugabook's claims for money had and received and unjust enrichment. (Order, R-3343-3345 and see *First Georgia Bank v. Webster*, 168 Ga. App. 307, 308 (1983) (it is only "where the Code provides a comprehensive remedy for parties to a transaction, [that] a common law action would be barred"); *City Dodge v. Gardner*, 232 Ga. 766 (1974); *Woodard v. First National Bank*, 159 Ga. 769 (1981); *Decatur Auto Center, Inc. v. Wachovia Bank*, 276 Ga. 817 (2003) and *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1278-1279 (11th Cir. 2003)).

2. The Trial Court's Erroneous Reasoning.

The Trial Court in its Order states that, "In ruling upon both the Defendants' and Plaintiff's pending motions, the Court has conducted its own review of the money had and received case law and has concluded that there is a conflict in the case law." (Order, R-3331). (Emphasis added). The Court then

undertakes to demonstrate that conflict by contrasting the holdings of *Dobbs v. Perlman*, supra, *Citizens Bank of Fitzgerald v. Rudisill*, supra, *William M. Robbins, P.C. v. Burns*, supra, cited by Haugabook with an 1892 decision of the Supreme Court and four decisions of this Court. (Order, R-3332-3333). The Court then concludes:

> "In resolving this conflict, the Court has tried to construe the holdings together, but has ultimately concluded that the most recent pronouncements of our appellate courts control – and accordingly, as indicated by the citation of authority set out above, in a money had and received action, the plaintiff must prove that the money at issue was his own and/or was funded by him (or in someway linked to the plaintiff and/or his efforts). See Hilliard v. State, 226 Ga. App. 478, 480 (1997) ('. . . the most recent Supreme Court pronouncement on the issue, controls.'). In essence, the real question is, as indicated by the case law, *supra*, whether the Plaintiff is the 'true owner' of the money at issue, i.e., whether the money at issue can be linked to the Plaintiff." (Emphasis added).

The Court then on nothing more than the timing of the transaction concludes Haugabook is not a "true owner," did not fund the transaction that placed the money into the Crislers' possession and apparently that he is not even linked to the money at issue. (Order, R-3335).

In the first instance it is entirely proper to characterize Haugabook as "funding," as the Trial Court mandated, the payment made to the Crislers in a very real sense and in the legal sense of *O'Neal v. Deese*, supra, etc. Further, there is factual and legal "linkage" between what the Crislers have and Haugabook lost. We also do not believe it to be sophistry to say the Crislers have the money of another for which they gave up nothing and that Haugabook under the undisputed facts is *ex aequo et bono* the "true owner" of that money. However, the Trial Court's reconstruction of the requirements for recovery as applied make a mockery of the equitable principles and criteria on which money had and received claims turn, and he has done that on, at best, very weak authority of this Court in conflict with Supreme Court precedent handed down before and reaffirmed after the cases the Trial Court relies on.

Secondly, before we deal with the Court's specific assessment of the decisions supposedly in conflict, we note the obvious; this Court's decisions

cannot overrule the Georgia Supreme Court. The most recent pronouncement by the Georgia Supreme Court of the equitable components for determining the validity of money had and received claims was in 1997 in *Decatur Federal v. Gibson*, supra, and is verbatim with *Dobbs v. Perlman*, supra, *Citizens Bank v. Rudisill*, supra, etc. The Trial Court cites only one Supreme Court decision it deems in conflict with *Dobbs v. Perlman*, et al., *Estes v. Thompson*, 90 Ga. 698 (1892), which is not the most recent pronouncement of the Supreme Court on money had and received. In *Estes* the facts are convoluted, but the plaintiff had not paid anybody any money! In this context the Court can hardly be considered as rewriting the fundamentals of the cause of action with its aside comment without citation that "Besides, when one sues for money had and received for his use, he must prove that the money was his own; and the plaintiff failed to do this." *Id.* at 700-701. (Emphasis added). We also note that proof by a plaintiff that he is entitled *ex aequo et bono* to the money in the defendant's possession which he in good conscience is not entitled to retain necessarily makes the money the plaintiff's "own" money without regard to legal title.

The other decisions cited by the Trial Court are decisions of this Court which in the context of their particular facts and decisional hierarchy do not add to

or alter the fundamentals of money had and received as articulated by the Supreme Court. The first case the Trial Court quotes from, *International Indem. Co. v. Bakco Acceptance*, 172 Ga. App. 28 (1984), is easily distinguished because the two defendants there (a general insurance agent and an insurance company) never received any money from anyone at any time because the plaintiff, a premium finance company, loaned the money for the insurance premiums to the local insurance agent who absconded with that money and never paid it to the general agent for forwarding to the insurance company. *Id.* at 29. Furthermore, we would note that the Court in *International Indem.* was only likening the statutory action for the recovery of unearned premiums to an action for money had and received, and it noted that it was not clear whether "the legislature intended [by the statute] to authorize such a recovery where, as in the instant case, the premiums paid by the premium finance company were never actually paid over to the insurer." *Id.* at 32. (Emphasis added). We do not disagree with the Court's loosely worded conclusion and the Trial Court's summary of it that " '. . . there is no basis upon which equity and good conscience would require that [the defendant] return money to [plaintiff] when [defendant] never received nor held any money which was funded by [plaintiff].' " *Id.* at 32 and Order, R-3332. We also note that in a real sense

Haugabook ultimately funded the fraudulent check-kiting scheme which funded the Crislers.

The third case the Trial Court cited was *Eastside Carpet Mills v. Dodd*, 144 Ga. App. 580 (1978) which turned on the issue of unjust enrichment, a cause of action analogous to but not the same as one for money had and received (*Pickelsimer v. Traditional Builders, Inc.*, 183 Ga. App. 709, 710 (1987)) even though with some frequency in a money had and received case the defendant will have been unjustly enriched as were the Crislers. In *Eastside Carpet* the Court actually states the two-part test for the validity of the cause of action almost verbatim with *Dobbs v. Perlman* (*Id.* at 774) but then adds from the Trial Court's fourth citation, *Cohen v. Garland*, 119 Ga. App. 333 (1969), "When one sues for money had and received for his use, he must prove that the money was his own." *Id.* at 333. (Emphasis added). That statement is close to being true if "is" is substituted for "was," but if this was literally essential to prove at the moment of the defendant's receipt neither Deese nor Rudisill could have prevailed. Furthermore, in *Cohen* the $5,000 the Court was ruling was not the plaintiff's "own" money had not been paid by the plaintiff to anyone. There is no issue in this case but that Haugabook is personally out of pocket $1,000,000.

The fifth case cited by the Trial Court, *J. C. Penney Company v. West*, 140 Ga. App. 110 (1967), to support its conclusion of a conflict, states the two-part test correctly (*Id.* at 111) and really is supportive of Haugabook's contentions because it upheld the plaintiff's claim almost exclusively on the basis that because of the plaintiff's unilateral mistake the defendant had been paid money he was not entitled to and despite there being some question as to whether the plaintiff or a separate entity had paid out the money in question. *Id.* at 113. The *J. C. Penney* case does not hold that at the point of receipt by the defendant legal title to the funds must be in the plaintiff. It is elementary, given the test for the cause of action, that with some frequency the defendant will have legal title to the funds, and the plaintiff's right will be based on equitable title and/or principles. See O.C.G.A. § 53-12-93.

D. Haugabook's Constructive Trust and Unjust Enrichment Claims.

As a claim related to both his money had and received and unjust enrichment claims, Haugabook asserted a claim for imposition of a constructive trust pursuant to O.C.G.A. § 53-12-93.

> "A constructive trust is a trust implied whenever the circumstances are such that the person holding legal title to property,

either from fraud or otherwise, cannot enjoy the beneficial interest in the property without violating some established principle of equity." O.C.G.A. § 53-12-93. (Emphasis added).

The principle of equity being violated by the Crislers is that they are in possession of money or its equivalent which they are "not in good conscience entitled to" because they gave no value and the funds are the proceeds of a crime. " '. . . [T]he fact that an action might have been brought at law for damages or that the plaintiff may in his suit to establish the trust also seek a money judgment for the proceeds of the trust property, will not divest equity of jurisdiction.' " *Whiten v. Murray*, 267 Ga. App. 417, 424 (2004) citing *Bateman v. Patterson*, 212 Ga. 284, 285 (1956).

This Court in *Jonas v. Jonas*, 280 Ga. App. 155 (2006) upheld the validity of a claim for the imposition of a constructive trust on funds in the hands of a grandmother who had been sued by her granddaughter for "life insurance proceeds the grandmother had [innocently] received from the grandfather's estate, which the grandfather himself had [innocently] received from the life insurance company based on [an] uncle's failure to contest that the parents' [of the plaintiff granddaughter] deaths were simultaneous" (*Id.* at 161-162) because the uncle was

the eventual heir of the grandfather and grandmother (*Id.* at 161). This Court concluded the grandmother, like the grandfather, was not an innocent purchaser for value (like the Crislers are not), and, consequently, "the grandmother would have been unjustly enriched by receiving the money that was paid out due to the uncle's breach of fiduciary duty . . . ." *Id.* at 162. (Emphasis added). Consequently, the insurance funds were potentially subject to a constructive trust under O.C.G.A. § 53-12-93 (a).

The Trial Court granted summary judgment on Haugabook's unjust enrichment claim because it concluded, ". . . an unjust enrichment claim has a requirement of conferring a benefit," and that Haugabook had not conferred a benefit on the Crislers. (Order, R-3336). The Court went on to say that it reached that "result with some hesitancy and reluctance – this is due to the Defendants having received money for which they gave up nothing for . . ." (Order, R-3337), and we would add the Trial Court's other key finding that the money was "the proceeds of a crime" (R-3333). (Emphasis added). While often the plaintiff directly conferring a benefit does occur in unjust enrichment cases, that is not always required in Georgia jurisprudence as demonstrated by *Jonas v. Jonas*, supra. In *Jonas v. Jonas*, supra, the plaintiff had nothing whatsoever to do with the

grandmother being unjustly enriched and where on disputed facts about the uncle's motivation, this Court held there was a valid cause of action against the grandmother to impose a trust because of the potential unjust enrichment of the grandmother. We have undisputed facts of an unjust enrichment and logically Haugabook's indirect conferring of that benefit on the Crislers. The wording of O.C.G.A. § 53-12-93 on constructive trusts fits our facts like a glove. We also offer for persuasive authority the holding in *Bank of America v. Gibbons*, 173 Md. App. 261, 918 A.2d 565 (2007) that the unjust enrichment benefit "may be conferred by the wrongdoer or the plaintiff seeking restitution" citing Restatement (First) of Restitution § 123 (1937). *Id.* at 277.

E. The Alternative of Equitable Subrogation.

In *Jasper School District v. Gormley*, 184 Ga. 756 (1937), the Supreme Court explained the relationship between the doctrine of equitable subrogation and the legal cause of action for money had and received:

> "The reasons underlying the adoption of the doctrine of subrogation by courts of equity are to a great extent substantially the same as the reasons underlying the adoption of the remedy of money had and received by courts of law. Subrogation is not, strictly

speaking, a remedy, but is rather an equitable principle engendering a cause of action enforceable in equity. Money had and received is an action or remedy at law for the enforcement of legal as contradistinguished from equitable rights, although both arise out of equitable principles. The same facts and circumstances may give rise to a cause of action enforceable as a legal right in a court of law as for money had and received, or as an equitable right to subrogation enforceable in a court of equity. In the one a judgment for money only is sought, based upon the duty to repay which the circumstances imply; in the other the substitution to the rights of the creditor whose debt has been paid is the relief sought. While a money judgment may be the final goal in the latter instance, the mode of arriving to that end is different in the two cases." *Id.* at 759. (Emphasis added).

Haugabook contended alternatively that if the Trial Court concluded he had no right to maintain his claim for money had and received or unjust enrichment in his own right, Haugabook should be equitably subrogated (Order, R-3334) to the position and claim of the Law Firm whose debt to the bank for the money the Crislers received Haugabook paid, because as the Trial Court found when a bank

pays on uncollected funds as Central Bank did and in turn Citizens Bank, it is viewed legally as a loan of those funds to the account owner. (Order, R-3333). Haugabook's $1,000,000 paid off the last kited check based loan from Citizens Bank to the Law Firm by funding check #1206 drawn on the Law Firm petty cash account. The Trial Court's method of dealing with Haugabook's contention was to note that the subrogee's rights were subject to any defenses that might have been urged against the subrogor (Order R-3334), and then to assert that the Law Firm could not recover because of the voluntary payment doctrine since Farr had made the payment voluntarily as a gift and not by mistake. (R-3335).

The Trial Court overlooked the reality, acknowledged by the Crislers (R-2008), that the "transferor" and "payor" of the funds to the Crislers was the Law Firm, a professional corporation, not Farr. The Trial Court also ignored that even in Farr's irrational reasoning the $1,000,000 was not a gift and was in fact the proceeds of a crime. The Law Firm did not voluntarily make the payment, rather because its members "trusted" Farr, and in their mistaken belief it was a "legitimate" transaction, the Law Firm did not object to the wire going through (R-1625; R-1628), and the Law Firm and two of its members did not know the facts, and there was fraud. Those realities show there was no voluntary payment per

O.C.G.A. § 13-1-13 and *Gulf Life Insurance Company v. Folsom*, supra. Furthermore, the wire was only authorized on uncollected funds because it was the trust account of the bank's good customer, the Law Firm, and the bank was mistakenly informed because of the kiting fraud that the check deposited was good when it in fact at that moment was not. (R-1267-1268; R-881; R-850-851). Fraud was the driving force for the transfers achieved through multiple mistakes, and the entire transaction was, in truth, because of the fraud one huge mistake.

The underlying transaction for the payment was a non-reality for everyone. There is a line of cases which stand for the proposition that when the money was paid on a deal that never became reality a money had and received claim is appropriate. *Reid v. Hemphill*, 82 Ga. App. 391 (1950); *Magyer v. Brown*, 116 Ga. App. 498 (1967) and *Goldgar v. Jetter*, 135 Ga. App. 589 (1975). The Law Firm and the Crislers both thought a claim had been settled that had not.

On this record, the Crislers have no defenses to the Law Firm's claim that Haugabook alternatively should be equitably subrogated to as a matter of law. You have $1,000,000 stolen from the Law Firm that was obtained by a criminal enterprise of which the Law Firm was the victim until Haugabook was substituted by fraud into that role.

In the Restatement of Agency, 2d it provides that when a person receives a principal's property from his agent, even "one who receives such property, non-tortiously and without notice but who is not a bona fide purchaser, is subject to liability to the extent to which he has been unjustly enriched." *Id.* at § 314, p. 55 (1937). On example given is, "Thus where the agent makes a gift of his principal's money to an innocent donee, the latter is liable to the principal for the amount, if he has not changed his position before learning the facts." *Id.* Comment, p. 56.

F. Haguabook's Conversion Claim.

Haugabook did not seek summary judgment on his tort claim for conversion, and the only reason the Trial Court granted summary judgment was because it had ruled the $1,000,000 was not Haugabook's money. However, it was and is Haugabook's money ex aequo et bono, and the Crislers converted it to their own use. See *Page v. Braddy*, 255 Ga. App. 124, 126 (2002). Per the Georgia Law of Torts, 2007 ed. § 207, Conversion and Trover: "The elements of a conversion claim are as follows: (1) title in the plaintiff in the disputed property, OR plaintiff's right to immediate possession of the property . . ." *Id.* at 69.

CONCLUSION

Obviously, we do not have a money had and received or unjust enrichment or constructive trust case factually on all fours with the bizarre facts of this case. However, the undisputed facts do fit the equitable principles of all three causes of action and:

> " 'It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.' [Cites deleted]. The familiar statement that no rule of the common law can survive the reason on which it is founded is but a corollary of the greater truth that the common law springs from reason and necessity, shaping its rules to accomplish the ends of justice, in the light of usage and custom." *Hubert v. Harpe*, 181 Ga. 168, 176-177 (1935).

Respectfully submitted, this 18th day of December, 2007.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the Brief of Appellant upon counsel of record in this matter:

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by depositing same in the United States Mail with sufficient postage affixed thereon to ensure delivery.

This 18th day of December, 2007.

H. JEROME STRICKLAND

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JUN 18 2008

FILED BY CERTIFIED MAIL
JAN 04 2008
CLERK COURT OF APPEALS OF GA

IN THE COURT OF APPEALS
STATE OF GEORGIA

S08A1662

RICHARD C. HAUGABOOK,

Appellant,

v.

GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER,

Appellees.

APPEAL CASE

NO. A08A0688

BRIEF OF APPELLEES

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FILED IN OFFICE
6/18/08
SUPREME COURT OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

RICHARD C. HAUGABOOK,	)	
	)	
Appellant,	)	
	)	**APPEAL CASE**
v.	)	
	)	**NO. A08A0688**
GEOFFREY CRISLER,	)	
CHRISTOPHER CRISLER, and	)	
TIMOTHY SCOTT CRISLER,	)	
	)	
Appellees.	)	
	)	

BRIEF OF APPELLEES

COME NOW Geoffrey Crisler, Chistopher Crisler, and Timothy Scott Crisler, (hereinafter, the "Crislers"), and file this Brief of Appellees and respectfully show the Court as follows:

I. STATEMENT OF FACTS

A. Brief Introduction.

This case arises from Appellant loaning One Million Dollars ($1,000,000) to his son-in-law, attorney Paul Farr ("Farr"), on November 28, 2006, in exchange for

which Appellant received a legitimate unsecured promissory note of equal amount. (R-446-447; R-457-458; MT-51-52, January 3, 2007). Appellant asserts that his son-in-law fraudulently obtained the loan proceeds. (R-448). Appellant admits that he has no knowledge of anything that the Crislers have "done wrong or improper." (MT-61, January 3, 2007). Amazingly, Appellant has not sued Farr, Barnes, NeSmith or the Firm[1], which together took his money and received the benefit of the loan. Instead, Appellant asserts his claims against the innocent Appellees who had nothing to do with the misrepresentations to Appellant or the loan Appellant made to Farr. Stated simply, Appellant has sued the wrong parties. In truth, a recovery by Appellant would ultimately serve to benefit Farr, the Firm, and its members because it would relieve Farr from liability on the promissory note and will relieve Farr, the Firm, and its members from claims of negligent misrepresentation and/or fraud.

Upon considering the essentially undisputed facts, the trial court properly determined as a matter of law that there is "an absence of evidence showing that the money at issue had previously belonged to [Appellant], as well as evidence showing

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[1]Barnes, Farr & NeSmith, P.C., is referred to herein as the "Firm."

the [Crislers] received the money at issue as a result of [Appellant's] actions. ...[T]he record shows that final payment of the funds transfer originating with the Firm was made on November 24, 2006, while the [Appellant] did not loan the one million dollars to Paul Farr and the Firm until November 28, 2006." (R-3027). Regardless of the title placed upon Appellant's cause of action, he cannot overcome the fact that Appellant neither conferred a benefit nor caused a benefit to be conferred upon the Crislers. Appellant's loan to Farr did not cause any change in the Crislers' position relative to the final payment received from the Firm prior to Appellant's loan to Farr. Conversely, Appellant suffered no loss resulting from the payment made by the Firm to the Crislers on November 24, 2006. Instead, Appellant's loss was suffered as a result of the fraudulent representations inducing him to loan money on November 28, 2006. Therefore, the trial court properly granted summary judgment to the Crislers on all of Appellant's claims.

B. Procedural Posture.

Appellant asserts claims against the Crislers for Money Had and Received (Count I), Unjust Enrichment (Count II), Temporary and Permanent Injunctive Relief (Count III), Conversion (Count IV), Expenses of Litigation (Count V), Punitive

Damages (Count VI), and Constructive Trust (Count VII). (R-444-460). The parties filed cross-motions for summary judgment, which resulted in the Court properly granting the Crislers' motion for summary judgment on all of Appellant's claims.[2] (R-3003-3051). Appellant filed a timely notice of appeal to this Court and filed its Brief of Appellant on December 18, 2007.

C. The Wrongful Death Claim.

Following the death of their mother on December 14, 2004, when she was struck by a hit and run motorist as she attempted to cross the parking lot of Hunter's Mill Shopping Center, the Crislers retained the Firm, consisting of principals Russ Barnes ("Barnes"), Paul Farr and Bill NeSmith ("NeSmith"), to pursue a wrongful death claim. (Addendum 2, R-159; R-1182; MT-32, January 3, 2007; R-505). Barnes

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[2]Given the public policy issues related to the finality of funds transfers governed by Article 4A of the Uniform Commercial Code, Appellees submitted the expert affidavit of Professor Julian McDonnell in support of their motion for summary judgment. (R-1948-1958). Upon Appellant's motion to exclude Professor McDonnell's testimony, the trial court exercised its discretion and chose not to consider the affidavit and deposition testimony of Professor McDonnell. (R-3350.)

and NeSmith knew the Crislers were clients of the Firm regarding the death of their mother. (R-1686; R-530). At all times when dealing with the Crislers, Farr was acting on behalf of the Firm. (R-560). Prior to retaining the Firm, Timothy Scott Crisler ("Scott Crisler") had never employed a lawyer nor been involved in litigation. (MT-94, January 3, 2007). Farr told Scott Crisler that he thought their case was very strong. (R-233).

Despite admitting that in a "John Doe" hit and run wrongful death case where property owners are accused of negligently maintaining their property or otherwise posing a risk of harm to business invitees it is prudent to investigate all potential leads as soon as possible before evidence can get lost or people can forget things, Farr never identified the shopping center tenants or their employees. (R-593; R-531-532). Farr did not obtain the coroner or medical examiner's files or otherwise attempt to determine Ginny Crisler's cause of death. (R-532, 594). Farr never spoke with the District Attorney's investigator in charge of the investigation, nor did he interview potential witnesses. (R-532, 556). He never determined whether the owners of the shopping center had any knowledge of prior parking lot accidents, nor did he interview any of the news reporters regarding the sources for their reports. (R- 557,

563). Farr never consulted with nor retained anyone as an expert witness. (R-532). He never determined whether Hunter's Mill Shopping Center violated any city, county or state codes or ordinances. (R-532-533).

On June 17, 2005, Farr emailed Scott Crisler and advised that he had received a response to a Freedom of Information Act (FOIA) request. However, Farr never sent an FOIA request and obviously, never received the purported response. His email to Scott Crisler was not truthful. (R-570). On July 8, 2005 and July 22, 2005, Farr emailed Scott Crisler a purported demand letter, which was a fabrication that was addressed to a fictitious person at Liberty Mutual Insurance Company. Farr had no idea who provided the liability insurance for the owners of the shopping center. (R-572-573; R-577-578).

On August 19, 2005, Farr emailed Scott Crisler and advised that he was in telephone communications with the potential defendants' liability insurance carrier and that he was preparing a lawsuit. The contents of that email were not truthful. (R-579-580.) On November 7, 2005, Farr emailed Scott Crisler and suggested that he had drafted a complaint and interrogatories. (R-583-584). On November 13, 2005, Farr emailed Scott Crisler and advised he had received a general denial to the lawsuit.

In truth, no answer had been filed because no lawsuit had been filed. (R-584).

On November 29, 2005, Farr forwarded to Scott Crisler a Complaint, an Answer and Plaintiff's First Interrogatories and Plaintiff's Request for Production of Documents, but all of these documents were fabricated by Farr. (R-585). On December 7, 2005, Farr emailed Scott Crisler and confirmed a specially set trial and advised of depositions. These statements were not truthful. (R-588). On January 13, 2006, Farr emailed Scott Crisler and advised that depositions were starting in one week. This representation was not truthful. (R-590). On January 19, 2006, Farr emailed Scott Crisler and advised that the scheduled depositions had been cancelled because the insurance company lawyer had an unexpected death in the family. In fact, there was no lawsuit, no depositions, and no defense lawyer. (R-590).

On February 23, 2006, Farr emailed Scott Crisler and advised that the depositions had gone well and gave plaintiffs an opportunity for summary judgment as to liability. (R-590-591). Thereafter, on April 25, 2006, Farr advised Scott Crisler that the court had granted summary judgement as to liability in favor of the plaintiffs. (R-591-592). On July 20, 2006, Farr sent a series of emails to Scott Crisler advising of impending mediation; however, these were also untruthful. (R-593-595). On

September 11, 2006, Farr called Scott Crisler and advised that the Crislers had been offered policy limits to settle the claim.[3] Scott Crisler was relieved and accepted what Farr knew to be a fictitious settlement offer. (MT-97, January 3, 2007; R-303; R-598).

On September 20, 2006, Farr emailed Scott Crisler and advised that settlement documents were expected the following week. (R-596, 598). On September 29, 2006, Farr emailed Scott Crisler and advised that he had talked to the "other side" and that settlement funds would be wired and settlement documents would be overnighted. (R-597-598). On October 13, 2006, Farr wrote Scott Crisler and enclosed a liability Release of All Claims purporting to release the owners of the shopping center, which Scott Crisler, as Executor of the Estate of Ginny Crisler, executed. (R-599-601).

At some point after Farr told Scott Crisler that the case was settled, Scott Crisler advised Farr that financial advisor Keith Ledford of Triad Advisors was setting up accounts for the settlement funds. (R-658-659). On November 7, 2006,

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[3]Scott Crisler understood that the policy limits were two million dollars from two different insurance carriers. (MT-95, January 3, 2007; R-306)

Scott Crisler forwarded wiring instructions prepared by Mr. Ledford to Farr. (R-606-607; R-1548-1549). On November 15, 2006, Scott Crisler received a fabricated document from Farr, using the letterhead of Central Bank, that blamed the wiring delay on Federal Homeland Security Law. (R-608-609). On November 15, 2006, in an email to Keith Ledford and Scott Crisler, Farr advised that the wire would be funded on Friday. (R-609). On November 17, 2006, in an email to Scott Crisler, Farr advised that the total wire would be $702,427.35, which e-mail was the first time Farr had discussed disbursement amounts with Scott Crisler. (R-610-611). Scott Crisler told Farr that he believed the whole time that the gross settlement was two million dollars, and asked Farr to forward both of the insurance policies. (R-611; R- 309). Farr then advised Scott Crisler that he had "screwed up" and had only settled with one insurer for one million dollars, but because of the misunderstanding, there would be no attorney fees deducted from the first one million dollar settlement and Farr would aggressively pursue the second million. (R-309,315-316, 323, 325; R-612-613).

Significantly, from the perspective of Scott Crisler, Farr had a reasonable sounding explanation or excuse for everything that occurred. (R-295). If Farr said he had done something, Scott Crisler believed he had done it. (R-296-297).

D. Final Payment to the Crislers.

Farr decided on the morning of November 22, 2006, to begin writing checks on the Firm's accounts as a vehicle to get the bank to fund a wire transfer to the Crislers. (R-621). The Firm maintained a trust account and a petty cash account at Sumter Bank and Trust (SB&T). (R-512-513, 541). The Firm maintained a trust account at Central Bank (Central). (R-512; R-1159). The Firm also maintained a trust account at Citizens Bank of Americus (Citizens). (R-512, 538-539). The Firm's three partners each had check signing authority on all accounts. (R-515-516). Farr was the Firm's managing partner. (R-1728-1729).

On November 22, 2006, having just deposited a check in the amount of $1,000,015.00 drawn on the Firm's trust account at Citizens, Farr signed a Wire Transfer Form directing Central to wire a total of one million dollars to the Crislers. (R-544-545; R-1053). In preparation for executing the wire, Central Vice President Ken Phillips telephoned Jean Heath at Citizens to verify that the check Farr was depositing would not be returned for insufficient funds. (R-1076, 1082-1083). Central's policy was to not wire on uncollected funds unless there was approval by a bank officer. Vice President Phillips approved the wire because he had verification

from Citizens and because he was familiar with lawyer trust accounts. Mr. Phillips testified that wires happen all the time on uncollected funds, especially in real estate closing transactions. (R-1099). Central employee Janet Porch "keyed in" the wire on November 22, 2006, and then left for the day. (R-1134, 1141). Central received confirmation that the wire transfer had been sent in the form of an Outgoing Wire Advice. (R-1042-1043). By way of an Incoming Wire Advice, at 5:20 p.m., on November 22, 2006, Central received notice that the previously sent wire had been returned. (R-1042-1043).

When Central employee, Ms. Porch, returned to work on Friday, November 24, 2006, the day after Thanksgiving, she found that the November 22, 2006 wire transfer had failed and she advised Farr. (R-1142-1143). The wire failed because the Wire Transfer Form identified that each Crisler brother was to receive funds but did not contain instructions as to how much each brother was to receive. (R-545). The single wire should have been processed as three separate wires. (R-1142). Farr gave Ms. Porch the breakdown for the three new wires as being $334,000 to Scott Crisler, $333,000 to Geoffrey Crisler and $333,000 to Christopher Crisler and Ms. Porch "re-keyed it". (R-1143-1145, 1163). The wire transfer reports indicate that Central was

the originating bank and that the receiving bank was J.P. Morgan Chase Bank. (R-1308-1310). Mr. Ledford had established a separate account for each Crisler brother at National Financial Services (NFS). (R-1522-1523, 1531). NFS owned an account at J.P. Morgan Chase Bank and it was that account into which the funds were transferred. (R-1308-1310). Significantly, the funds wired from Central were received into the NFS accounts on November 24, 2006, and were available to the Crislers that same day as cash or cash equivalent. (R-1610-1612).

E. Farr's Check Kiting.

On November 22, 2006, Farr wrote check #5495 for $1,000,015.00 drawn on the Firm's trust account at SB&T and deposited it into the Firm's trust account at Citizens. (R-538-539). He then wrote check #9602 for $1,000,015.00 drawn on the Firm's trust account at Citizens and deposited it into the Firm's trust account at SB&T. (R-540-542). Farr then wrote check #9603 for $1,000,015.00 drawn on the Firm's trust account at Citizens and delivered it to Central where a Central employee deposited it into the Firm's trust account at Central. (R-543-543; R-665; R-820). Central gave the Firm immediate credit for this deposit. (R-1050).

On the morning of November 24, 2006, Mr. Farr wrote check #1206 for $1,000,045.00 drawn on the Firm's petty cash account at SB&T and deposited it into the Firm's trust account at Citizens. (R-546-547). Also on November 24, 2006, Farr asked SB&T vice president, Ty Turner, if SB&T could cover a one million dollar overdraft in the Firm's petty cash account because of a family emergency or a client problem and that there was going to be an insurance check that would cover it. (R-1190-1192). Mr. Turner called Barnes on November 24, 2006, and described his conversation with Farr. Mr. Turner asked Barnes why SB&T needed to cover an overdraft of one million dollars. (R-1195). Barnes' thought was ... "Oh hell. I didn't know why in the world he had written a million dollar check out of our petty cash account." (R-1635).

None of the checks written by Farr were dishonored. (R-933; R-1103; R-828-829; R-2978-2981). Citizens check #9602 was presented to Citizens by SB&T on November 24, 2006, and was paid by Citizens on the same day. (R-838; R-933). Citizens check #9603 was presented to Citizens by Central for payment on November 24, 2006, and was paid by Citizens on the same day. (R-823-825; R-828-829; R-1103). SB&T check #5495 was presented to SB&T by Citizens for payment on

November 27, 2006 and was paid. (R-1205-1206; R-933; R-2978-2981). SB&T check #1206 was also presented to SB&T by Citizens for payment on November 27, 2006, and was also paid. (R-2978-2981).

On November 27, 2006, Mr. Turner called Barnes two or three times and told him there was a million dollar check kite involving the Firm's accounts and Farr. Barnes advised Mr. Turner that Barnes, Farr and NeSmith had met and that Farr was going to get the check covered. Barnes also told Mr. Turner that he would be contacting the Georgia Bar Association because of rules governing "fooling with" trust accounts. (R-1199-1205).

By the evening of November 27, 2006, Barnes had told NeSmith what he had learned earlier that day from Mr. Turner. After talking with Farr that evening, Barnes knew that the Firm clients that had received the million dollars were the Crislers. However, Barnes denied being told by Mr. Turner earlier that day that Farr was kiting checks involving the Firm's trust accounts. (R-1641-1644).

F. Unsecured Loan from Appellant to Farr.

On the evening of Monday, November 27, 2006, Farr, knowing that the wire transfers to the Crislers were successfully completed on November 24, 2006,

approached Appellant asking to borrow one million dollars. Farr told Appellant that he had settled a case for clients with an insurance company, had written firm trust account checks for one million dollars to the clients before he had received funds from the insurance company and that there wasn't any money in the trust account to cover the checks. (MT-32-35, 69, January 3, 2007; R-535-536).

On November 28, 2006, Appellant met with Barnes, Farr and NeSmith at the Firm's office. (MT-38-39, January 3, 2007). Appellant agreed to loan Farr one million dollars, which Farr indicated would be used to cover the Firm's account. While Farr, Barnes and NeSmith assured Appellant that if he provided a loan to cover the money that Farr had disbursed to the Crislers, Appellant would be repaid by December 8, 2006, Appellant exercised no due diligence to find out what had really happened before loaning the one million dollars. (MT-62, 66, January 3, 2007). In order to explain why the Firm wasn't going to get any attorney fees, Farr presented a fictitious life insurance release to his law partners and Appellant.[4] During the meeting, Farr also showed his law partners and Appellant a second bogus Zurich

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[4]Scott Crisler possessed no knowledge of the fake life insurance release. (R-601-604, 614-616; MT-119-121, January 3, 2007).

letter, which he created by cutting and pasting the Zurich logo on content he created, to explain that life insurance proceeds would be delivered by December 8, 2006. Significantly, this fabricated letter from Zurich was unsigned. (R-616-617). Unfortunately, Appellant did not ask to see a signed original, and made no effort to look at any documents other than what he was shown by Farr. (MT-36, 68-69, January 3, 2007). Appellant admits that had he done any diligence at all in trying to find out about the true need for the loan, there would have been "red flags" indicating that he should not have loaned the money. (MT-77, January 3, 2007).

At the November 28, 2006, meeting, Appellant delivered a check in the amount of one million dollars made payable to Farr. (MT-52, January 3, 2007). Barnes and NeSmith knew Farr was going to deposit the check into the Firm's petty cash account at SB&T, and Appellant knew the check was going to be deposited into a Firm account because the Firm had as much of a problem as Farr did. (R-1719; MT-53-54, January 3, 2007). Farr signed an unsecured promissory note to Appellant at Appellant's request. The promissory note is a legal and personal obligation by Farr to repay one million dollars ($1,000,000) bearing a rate of interest of eight percent (8%) per annum, with the principal and interest due and payable on December 28,

2006. The promissory note is commercially reasonable containing provisions such as one for recovery of attorney's fees in the amount of fifteen percent (15%) of the principal and interest, if the note is collected through an attorney. (R-534; R-457-458). Appellant testified that the promissory note is a legitimate instrument. (MT-50-52, January 3, 2007).

Appellant's check was deposited by Farr into the Firm's petty cash account at SB&T at 4:00 p.m. on November 28, 2006. (R-1215; R-963-964). Appellant's check was paid by his bank through the Federal Reserve on December 1, 2006, which was seven days after the funds transfer was made to the Crislers. (R-2978-2981; R-1610-1612). Farr borrowed money from Appellant for the single purpose of covering SB&T check numbered 1206 to prevent the Firm's petty cash account from becoming overdrawn by approximately one-million dollars. The loan proceeds were <u>not</u> deposited to fund the wire transfer to the Crislers. (R-525-526).

<u>G. Discovery of Farr's Actions</u>.

At some point after November 27, 2006, Barnes learned from Farr that no

lawsuit had been filed by Farr on behalf of the Crislers. (R-1688).[5] On December 8, 2006, NeSmith advised Appellant that there had never been a suit filed, that there had never been a settlement and there was no money coming from an insurance company. (MT-45, January 3, 2007). Later that morning, Barnes convened a meeting with NeSmith and Appellant wherein Barnes laid out for Appellant what he had learned from the documents and his various investigative conversations about how the transaction had occurred. (R-1693-1694).

Later on December 8, 2006, Barnes called Scott Crisler and advised him of what Barnes had learned. Scott Crisler seemed stunned and shocked. Barnes arranged to meet Scott Crisler the next day in South Carolina. (R-1695-1696). On December 9, 2006, Barnes met with Scott Crisler and his wife at the airport in South Carolina. (R-1699-1700). Barnes showed Scott Crisler a summary of the checks written by Farr and told Scott Crisler that Farr had kited checks in order to fund the

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[5]Interestingly, the computers at the Firm were networked so that any lawyer could access the electronic file of any client to review its contents. Mr. Barnes and Mr. NeSmith had the ability to access the electronic Crisler file even if the paper file was unavailable. (R-521-522).

Crisler's settlement. He showed Scott Crisler a copy of Appellant's check and told Scott Crisler that the real lawsuit regarding Ginny Crisler's wrongful death had just been prepared and filed by NeSmith. Barnes advised Scott Crisler that he had checked Farr's computer and that the legal pleadings Farr had earlier provided to Scott Crisler were all there, but they had been fabricated. (MT-112-113, January 3, 2007; R-221, 225-226; R-1705). Scott Crisler was stunned. Barnes told Scott Crisler that the Appellant was coming after him for the money and if he and his brothers planned on keeping the money they needed a lawyer. (R-1701-1703). According to Scott Crisler, Barnes told him that he should hold onto the money and "fight like hell to keep it." (MT-116, January 3, 2007).

H. The Crislers Neither Participated In Nor Had Knowledge of Farr's Actions.

Defendants are innocent victims of the actions of their lawyer, Paul Farr, and are not guilty of any wrongdoing. Surprisingly, while Appellant possesses a legitimate promissory note executed by Farr, and apparent fraud and/or negligent misrepresentations claims against Farr, the Firm, Barnes, and NeSmith, Appellant has neither made a demand upon, nor sued, Farr, Barnes, NeSmith or the Firm to repay the loan or to reimburse his damages from the alleged fraud. (MT-70-71, January 3,

2007; R-1721). Instead, Appellant pursues his claims against only the Crislers, innocent parties who had nothing to do with the misrepresentations to Appellant or the loan Appellant made to Farr.

Appellant never met the Crislers before filing suit. Appellant had never spoken with the Crislers, nor received any correspondence, emails or faxes from the Crislers. Appellant admits he did not give, loan, pay or transfer any money to the Crislers. (MT-54, 63-64, January 3, 2007). In return for loaning a million dollars to Farr and the Firm, Appellant did not receive anything from the Crislers. (MT-64-65, January 3, 2007).

Farr intended for the Crislers to get the money that they, in fact, received as a consequence of the "manufactured settlement." (R-479). There was no mistake. (R-3328). Farr was the managing partner and authorized agent for the Firm to order a wire transfer. (R-1728-1729; R-515-516). Farr manufactured a settlement in the Crisler case as he had done on seven prior occasions. (R-478-479). Farr admitted that the duty owed by a lawyer to a client is a fiduciary duty. (R-559). Farr agreed that he breached the fiduciary duty owed to his clients by deception and misrepresentation in the manufactured settlement cases. (R-487-488).

Farr always represented to Scott Crisler that the source of the settlement funds was a liability insurance company. (R-507). Farr never told the Crislers that he was writing checks on the Firm's various accounts to facilitate the wire transfer. (R-507). Farr never advised the Crislers that he was fabricating letters to facilitate his deception, nor did he tell them anything about Appellant. (R-507-508). Stated simply, the Crislers did not participate in Farr's fraudulent actions, nor did they have knowledge of any fraud being committed.

II. ARGUMENT AND CITATION OF AUTHORITY

A. Introduction.

Having not sued the parties against whom it seems Appellant has valid claims, Appellant asks this Court to create a right of action for him against the Crislers when no such right currently exists under well-established Georgia law. In an effort to entice the Court to accommodate his request, Appellant emphasizes Justice Weltner's observation that "wherever there *ought* to be a remedy, the Court will declare a corresponding right." (Brief of Appellant, p. 21, citing, M.L. King Jr. Center v. A.M. Heritage Prod., 250 Ga. 135, 149 (1982), concurrence). However, this legal maxim is wholly inapplicable in this case because Appellant is not without a legal remedy.

Appellant possesses multiple legal remedies in the form of causes of action against those persons and the entity that actually made misrepresentations to him and actually received the benefit of his loan.

In asking that a cause of action be molded to fit these facts, Appellant would require this Court to ignore the legal realities of the commercial banking system and eviscerate the legal claim for money had and received and the equitable claim of unjust enrichment. This Court should not accept Appellant's invitation to rewrite well established legal and equitable claims.

Appellees acknowledge that common law principles and claims are not necessarily precluded by the Uniform Commercial Code (UCC); however, such claims should only serve to supplement its provisions and may not ignore or contradict the legal effect of the provisions of the UCC. See O.C.G.A. § 11-1-103. Therefore, in seeking equitable relief against the Crislers, Appellant cannot ignore the legal implication of wire transfers under Article 4A of the UCC. In other words, Appellant cannot ignore the fact that the wire transfers were a non-recourse transaction completed and final on November 24, 2006, and that Appellant's action in loaning funds several days later to rescue his son-in-law from a one m

overdraft conferred no benefit upon the Crislers.[6]

Furthermore, a recovery by Appellant against the Crislers would significantly undermine the finality policy precluding involuntary reversal of funds transfers embodied in Article 4A after acceptance by the beneficiary's bank. See U.C.C. § 4A-211(b) and (c); See also, Regions Bank v. Provident Bank, Inc., 345 F.3d 1267 (11th Cir. 2003).

With his enumerations of error, Appellant asserts, without detail, that the trial court erred in granting summary judgment to the Crislers and in failing to grant

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[6]It is very illustrative that in setting forth four "fundamentals," which Appellant argues mandate summary judgment for him rather than the Crislers, Appellant errantly asserts that "it was all smoke and mirrors" until Appellant's $1,000,000 was deposited in the Firm's account. (Brief of Appellant, pp. 19-20). While there was unquestionably a check kite in progress, under the UCC, the final payments, credits and debits between the banks are very "real." Similarly, the $1,000,000 that was deposited into the NFS account at J.P. Morgan Chase for the benefit of the Crislers was very "real money" that could be withdrawn and used as they directed on November 24, 2006.

summary judgment to Appellant.[7] Appellant further explains that his two enumerations of error are essentially inseparable.

B. Money Had and Received.

"An action for money had and received is a legal action, founded upon the equitable principle that no one ought to unjustly enrich himself at the expense of another, and it is a substitute for an equity action. [Cit.] .... Plaintiff can recover for money had and received only where it appears that the defendants have received money **belonging to the plaintiff** which, in equity and good conscience, the defendants are not entitled to retain. [Cit.]" Cochran v. Ogletree, 244 Ga. App. 537, 538-539 (2000)(emphasis added). "The elements of such action are: a person has received **money of the other** that in equity and good conscious he should not be permitted to keep; demand for repayment has been made; and the demand was refused." Taylor v. Powertel, Inc., 250 Ga. App. 356, 359-360 (2001) (emphasis added.)

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[7]Appellant's Brief does not address or assert error to the trial court's grant of summary judgment as to punitive damages; therefore, this argument is deemed abandoned. Rule 25, Rules of the Court of Appeals of the State of Georgia.

Appellant asserts that the single "test" for the validity of an action for money had and received is that articulated by the Georgia Supreme Court in Whitehead v. Peck, 1 Ga. 140 (1846), wherein the Court stated that the action "lies in all cases where money is in the hands of another, which *ex aequo et bono*, the plaintiff is entitled to recover, and which the defendant is not entitled in conscience to retain." Significantly, Appellees do not dispute that this is the fundamental basis of the legal claim for money had and received, but, as with most common law claims, through the years Georgia appellate decisions have refined and provided guidance for courts to appropriately analyze this claim. Appellant is asking this Court to ignore approximately one hundred and seventy years of precedent that should guide all Georgia courts in the application of the broad principles stated in Whitehead. The weight of authority clarifies that, in addition to the elements articulated by Appellant, a plaintiff may only recover in an action for money had and received (or unjust enrichment) if the plaintiff can show that the either conferred a benefit or caused a benefit to be conferred upon the defendant.

1. The missing element of Appellant's "Test"

Georgia courts have described the requirement that a benefit must be conferred

or caused by a plaintiff in numerous ways, but the essence of the requirement remains consistent. In most cases, the benefit conferred by the plaintiff is the payment of money that previously belonged to the plaintiff; therefore, Georgia Courts have often stated this requirement in reference to the plaintiff showing that the money being "recovered" previously belonged to the plaintiff. For example, while stated differently, each of the below descriptions of an action for money had and received contains this requirement:

(1) "Plaintiff can recover for money had and received only where it appears that the defendants have received money **belonging to the plaintiff** which, in equity and good conscience, the defendants are not entitled to retain." Cochran v. Ogletree, 244 Ga. App. 537, 538-539 (2000) (emphasis added); see also, J. C. Penney Co. v. West, 140 Ga. App. 110, 111-112 (1976);

(2) "Recovery is authorized against one who holds the money **of another** which he ought in equity and good conscience to **refund**." Time Ins. Co. v. Fulton-Dekalb Hospital Authority, 211 Ga. App. 34, 35(1993)(emphasis added); see also, William N. Robbins, P.C. v. Burns, 227 Ga. App. 262, 265 (1997);

(3) "The fact that the money was received from a third person will not affect the liability of the defendant, if in equity and conscience, he is not entitled to hold it against the **true owner**." Citizens' Bank of Fitzgerald v. Rudisill, 4 Ga. App. 37, 41 (1908)(emphasis added).

In some instances, Georgia Courts have stated the requirement far more directly. In International Indem. Co. v. Bakco Acceptance, Inc., 172 Ga. App. 28 (1984), this Court explained that "[a]t the heart of the theory of recovery for money had and received is the principle of unjust enrichment. Having never received any money **belonging to [plaintiff]**, [defendant] has not been unjustly enriched by [plaintiff]." Id. at 32 (emphasis added). Similarly, in Eastside Carpet Mills, Inc. v. Dodd, 144 Ga. App. 580(1978), the Court unequivocally stated, "[w]hen one sues for money had and received for his use, **he must prove that the money was his own.**" Id. at 581 (emphasis added). This Court has also explained that "'[a]n action for money had and received is founded upon the equitable principle that no one ought unjustly to enrich himself at the expense of another. . . .' [Cit.] 'The theory of unjust enrichment applies when as a matter of fact there is no legal contract . . . but where the party sought to be charged has been conferred a benefit **by the party contending**

an unjust enrichment which the benefitted party equitably ought to return or compensate for.' [Cits.]" Pickelsimer v. Traditional Builders, 183 Ga. App. 709, 710 (1987). Even as he attempts to argue that no such requirement exists, Appellant quotes McCay v. Barber & Son, 37 Ga. 423 (1867), stating "[t]he defendant having received **the money of the plaintiff**, without giving any valuable consideration therefor, is not, in equity and good conscience, entitled to keep it."[8] Together, these appellate decisions set forth simple criteria for a claim for money had and received or unjust enrichment, which Appellant cannot satisfy.

Appellees readily acknowledge that there are cases of money had and received where a plaintiff is permitted to recover when the defendant did not actually receive money previously belonging to the plaintiff, but in those cases, such as Rudisill v. Handley, 9 Ga. App. 789 (1911), the plaintiff was permitted to recover from the defendant because the plaintiff conferred some benefit or took some action that caused a benefit to be unjustly conferred upon the defendant.

Stated simply, a plaintiff is permitted to recover on a theory based in unjust enrichment, including the legal claim for money had and received, only when the

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[8]See Brief of Appellants, pp. 25-26.

plaintiff made some payment, delivered some service, or took some action that ultimately resulted in a benefit to the defendant. There is a causation element to these claims that cannot be ignored. To hold otherwise would defy both logic and well-established case precedent.

2. Applying the missing element of Appellant's "Test"

a. The Crislers do not possess Appellant's money.

The Crislers did not receive money from Appellant, nor did they receive money that had previously belonged to Appellant, nor did they receive money as a result of Appellant's actions. Instead, it is without dispute that final payments of the fund transfers originating with the Firm were made on November 24, 2006, before Appellant was even contacted by his son-in-law, Farr, regarding a loan.

"'Funds transfer' means the series of transactions, beginning with the originator's payment order, made for the purpose of making payment to the beneficiary of the order. The term includes any payment order issued by the originator's bank or an intermediary bank intended to carry out the originator's payment order. **A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's**

payment order." O.C.G.A. § 11-4A-104(a) (emphasis added). "After a payment order has been accepted, cancellation or amendment of the order is not effective unless the receiving bank agrees or a funds-transfer system rule allows cancellation or amendment without agreement of the bank." O.C.G.A. § 11-4A-211(c).

In the instant case, the funds transfers of November 24, 2006, from the Firm, as originator, to the Crislers, as beneficiaries, were final and complete under Article 4A when J.P. Morgan Chase accepted the payment orders on that date. Acceptance by the beneficiary's bank is the crucial point in the funds transfer process. The originator pays the beneficiary in a wire transfer by causing the beneficiary's bank to become liable to the beneficiary. See O.C.G.A. § 11-4A-404. That liability arose when the beneficiary's bank accepted the payment orders. After acceptance by J.P. Morgan Chase, the Crislers held the beneficial ownership interest in the transferred funds. On November 24, 2006, the Firm was liable to Central Bank for any overdraft that was caused by these transfers just as the Firm would have been liable to the bank if the bank had paid an insufficient funds check. See O.C.G.A. § 11-4A-402. In other words, on November 24, 2006, the Crislers were the valid and legal owners of the funds transferred from the Firm's account. See, e.g., Regions Bank v. Provident

Bank, Inc., 345 F.3d 1267 (11th Cir. 2003).

b. Appellant neither conferred a benefit nor caused a benefit to be conferred upon the Crislers.

Appellant did not create, cause, or in any way impact the funds transfers received by the Crislers, as they occurred prior to any involvement by Appellant. If Appellant had never made a loan to Farr on November 28, 2006, the Crislers would still have received and legally possess the one million dollars wired by the Firm on November 24, 2006. Significantly, Appellant did not cause Farr to transfer funds on behalf of the Firm to the Crislers by way of assurances or promises that Appellant would make the loan. Instead, Appellant's loan served only to pay off the Firm's debt to SB&T. The only parties benefitting from Appellant's loan were Farr, the Firm and its members, and SB&T. Therefore, the legal cause of action for money had and received does not "fit this case," as urged by Appellant. Instead, Appellant cannot recover on these claims against the Crislers to whom he neither conferred a benefit or caused a benefit to be conferred.

c. Privity of contract is not required, but some relationship to the Crislers is absolutely necessary.

Appellees have never asserted that the lack of privity between Appellant and the Crislers precludes Appellant's recovery. An action for money had and received may lie in a case where a party received some benefit as a result of an action by a plaintiff, yet no contract or direct "privity" exists between the parties.[9] However, as thoroughly addressed above, the "impediment" to the Appellant's recovery is not the lack of privity, which could be implied, but instead, it is the fact that Appellant neither conferred a benefit nor caused a benefit to be conferred upon the Crislers. This is clearly evidenced by the indisputable fact that Appellant suffered no loss on November 24, 2006, when the Crislers received the funds transfers from the Firm.

As determined by the trial court, Appellant's claim for money had and received or unjust enrichment requires some evidence of linkage between the Appellant and the Crislers and/or an ability to trace the money to the Appellant. (R-3331). Even though it is not actually described by courts as a requirement that a benefit was

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[9]Taylor v. Powertel, Inc., 250 Ga. App. 356, 359-360 (2001) ("An action for money had and received sounds in assumpsit and grows out of privity of contract, express or implied; but absent an actual contractual relationship, the law will imply a quasi contractual relationship to support the action.") (emphasis added).

conferred or caused, some relationship must exist between a plaintiff seeking to recover for money had and received or unjust enrichment and the defendant subject to suit. In the instant case, Appellant has absolutely no relationship whatsoever with the Crislers; thus, his claims for money had and received and a claim for unjust enrichment fail.

d. Appellant's errant interpretation of case law.

In the face of clear precedent contrary to his position, Appellant argues that his claims are supported by "three money had and received cases," which Appellant states "have some parallel to our bizarre facts." (Brief of Appellant, p. 29.) Appellant's reliance upon O'Neal v. Deese, 23 Ga 477 (1857) and the related cases of Citizens Bank v. Rudisill, 4 Ga. App. 37 (1908), and Rudisill v. Handley, 9 Ga. App. 789 (1911), is misplaced.

The Court's decision in O'Neal v. Deese, 23 Ga 477 (1857), is distinguished from the instant facts in two essential ways: (1) the payment to the defendant therein was a mistake; and (2) the plaintiff caused a benefit to be conferred upon the defendant. In O'Neal, the defendant was mistakenly paid for five bales of cotton that did not belong to him, and the mistake was caused by the plaintiff, as the "agent of

the road" at the railroad station. A cause of action existed because of the mistake. The Court reasoned, "[i]t would argue a great defect in the moral administration of justice, if one man could retain the money of another, for which he had given nothing, **and which he received by mistake.**" Id. at 479-480 (emphasis added). In contrast, the payment received by the Crislers from the Firm was not a mistake. The payment was made just as the authorized agent for the Firm intended; therefore, O'Neal was decided based upon a fact not existing in the instant case.

Furthermore, the plaintiff, Deese, was the party who caused a benefit to be conferred upon the defendant, O'Neal. Specifically, it was Deese's mistake that caused the overpayment to O'Neal, so that having caused the benefit to be conferred upon O'Neal, Deese was entitled to recover the value of that benefit. Additionally, Deese conferred a further benefit to O'Neal by tendering the amount of the overpayment to the railroad, thus extinguishing the railroad's obvious claim for reimbursement against O'Neal, with whom the railroad was in direct privity. Therefore, because Appellant has neither conferred a benefit or caused a benefit to be conferred upon the Crislers, O'Neal provides no authority for Appellant.

Similarly, Appellant errantly relies upon Citizens Bank v. Rudisill, 4 Ga. App.

37 (1908), and Rudisill v. Handley, 9 Ga. App. 789 (1911). In these cases, a cashier of a bank (Rudisill), who acted also as bookkeeper, incorrectly recorded how much money a subscriber paid for shares of the bank's capital stock. The mistake resulted in the bank being short $200. The cashier, insisting that some mistake had been made, but being unable to explain the matter satisfactorily, paid the bank the $200, and the bank, on the faith of the false entry, delivered to the subscriber (Handley) additional shares of stock with a value of $200. In other words, Handley was issued $200 worth of stock for which he had not paid. After a professional accountant was able to document the error, Rudisill first brought an action for money had and received against the bank to recover what he had paid on behalf of Handley. In Citizens Bank v. Rudisill, 4 Ga. App. 37 (1908), it was held that Rudisill had no cause of action against the bank for his voluntary payment, but instead may have a cause of action against Handley. Thereafter, Rudisill brought an action for money had and received against Handley, who received the benefit of Rudisill's payment to the bank in the form of additional stock for which he had not paid. In Rudisill v. Handley, 9 Ga. App. 789 (1911), the Court held, "that in an action for money had and received, the cashier may recover the $200 from the customer **who took the benefit**

of the cashier's payment of that sum to the bank." Id. Therefore, because Rudisill made a payment to the bank of $200, which resulted in Handley receiving a benefit equal to $200 in the form of shares, Rudisill was entitled to recover the money he paid from Handley, the person who benefitted from the payment. Contrary to Appellant's suggestion, this holding reinforces that an essential element of a claim for money had and received and for unjust enrichment is that the defendant must have received some benefit from the action of the plaintiff.

In stark contrast to the defendant in Rudisill v. Handley, the Crislers received absolutely no benefit or "unjust enrichment" from any action taken by Appellant. If the last check in the kiting scheme had "bounced," it would have had absolutely no impact upon the payment the Crislers received from the law firm. Appellant's action in covering that check benefitted only Farr, the Firm and its members, and the bank.

3. Appellant's errant reasoning relative to his claim for money had and received.

While Appellant's failure to confer or cause the conferral of a benefit upon the Crislers is the decisive fact with respect to Appellant's claims, Appellant's reasoning is otherwise flawed.

a. Appellant received bargained for value

Appellant placed particular emphasis upon language contained within Dobbs v. Perlman, 59 Ga. App. 770 (1939), wherein the Court stated, "Judge Nisbet, in *Culbreath v. Culbreath*, 7 Ga. 64 (50 Am. D. 375), used this language: 'If authorities were balanced--we feel justified in kicking the beam, and ruling according to that naked and changeless equity which forbids that one man should retain **the money of his neighbor**, for which he paid nothing, and **for which his neighbor received nothing**; an equity which is natural--which savages understand--which cultivated reason approves, and which Christianity not only sanctions, but in a thousand forms has ordained.'" Id. at 774(emphasis added.) Interestingly, Judge Nisbet identified two important requisites for the success of a claim for money had and received or unjust enrichment, namely: (1) that the defendant has the plaintiff's money, and (2) that the plaintiff received nothing for the money that was paid. In the instant case, neither of these facts are present. First, as thoroughly set forth above, the Crislers have never possessed money previously belonging to Appellant. Secondly, Appellant received exactly what he bargained for and expected to receive upon delivery of the check to Farr. He received a "legitimate" commercially reasonable unsecured promissory note

reflecting the personal obligation of Farr. As a result, Appellant cannot even satisfy the requirement that the plaintiff receive nothing, as set forth within in Dobbs v. Perlman, a case he purports to rely upon.

b. The Crisler's retention of the funds received from the Firm does not violate equity and good conscience.

Appellant argues that "we do not have to look up 'in good conscience' to know the grounds for a defendant's non-entitlement; it was explained at our mother's knee, 'it's not yours, give it back.'" (Brief of Appellant, pp. 22-23). While Appellant attempts to call upon some higher moral ground in this case, resorting to this argument merely illustrates the lack of legal precedent to support his position. Furthermore, had Appellant "looked up" the expression "in good conscience," he would have found that the Georgia Supreme Court has defined the term as it relates to an action for money had and received. In Gulf Life Ins. Co. v. Folsom, 256 Ga. 400 (1986), the Supreme Court explained, "the expression, 'in equity and good conscience,' as above used, refers only to the acts and intentions of the person receiving the money as affecting the other party **to the transaction.** If he has acted in good faith and in good conscience with **the person paying the money**, he is

entitled to retain it . . . ." Id. at 404-405 (emphasis added).

The Crislers have acted in good faith and good conscience at all times with respect to the Firm, from which they received payment. Additionally, Appellant admits that he has no knowledge of anything that the Crislers have "done wrong or improper." Even as to Appellant, from whom the Crislers received nothing, there is no evidence that the Crislers have acted other than in good faith and good conscience.

Furthermore, considering the actions of their attorney, Farr, it cannot be said that the Crislers cannot in equity and good conscience keep the money received from the Firm. For twenty-two months, Farr was not only admittedly negligent in handling the Crislers' case, but it is undisputed that he was intentionally deceiving and misrepresenting the facts to his clients in breach of his fiduciary duty. As a result of Farr's misfeasance and failure to appropriately handle and prosecute the Crislers' wrongful death action, the likelihood of any significant recovery on that claim has been greatly diminished, if not extinguished.

Appellant repeatedly argues that the Crislers gave up nothing when they received the funds transfer from the Firm. However, the Crislers have given value. Since Article 4A does not define or address "value," it is appropriate to look to the

UCC Article 3 definition of "value" for guidance. Pursuant to O.C.G.A. § 11-3-303, an instrument is issued or transferred for value if, among other things, "[t]he instrument is issued or transferred as payment of, or as security for, an antecedent claim against any person, whether or not the claim is due."

The value paid by the Crislers is admittedly not of the kind generally existing in a commercial transaction, but it does meet the definition provided within Article 3 of the UCC. On November 24, 2006, when the Crislers received the funds transfer from the Firm, the Crislers possessed an undiscovered malpractice claim against Farr and the Firm. While the value of that malpractice claim, including punitive damages, is yet unknown; the Crislers' actual damages resulting from Farr's malpractice have been reduced by the one million dollars received from the Firm. In other words, the one million dollar payment had the very real effect of serving to pay-off or partially satisfy the then existing malpractice claim against Farr and the Firm. Therefore, under the above quoted Article 3 definition, the funds transfer was made for "value" because it served "as payment of... an antecedent claim against" Farr and the Firm, "whether or not the claim [was] due." See O.C.G.A. § 11-3-303. It is immaterial that the claim was not yet discovered, was not yet due, or that the Crislers were unaware

of the true impact of the payment from the Firm. The practical effect of the payment by the Firm is unquestionable. The payment reduces the damages that can be recovered against the Firm, so that the Crislers have given up some portion of their claim against Farr and the Firm. Based upon the bizarre facts, the Crisler's retention of money paid by the firm is not counter to equity and good conscience.

C. The Trial Court Properly Applied Legal Precedent.

Georgia courts have provided significant guidance regarding claims for money had and received and unjust enrichment that could not be ignored by the trial court. While Appellees describe an essential element of Appellant's claims using different language, the trial court reviewed the body of case law and appropriately determined that Appellant's claims for money had and received and unjust enrichment require some evidence of "linkage" between the Appellant and the Crislers "and/or an ability to trace the money" to the Appellant. (R-3331). However, Appellees disagree with the trial court's assertion that there is a conflict in the cases setting forth a proper claim for money had and received. Instead of a conflict, the fundamental basis of the legal claim for money had and received remains consistent and is that which is set forth in Whitehead v. Peck, 1 Ga. 140 (1846). Rather than being in conflict with

Whitehead, Georgia courts have refined and clarified the general principles set forth therein so that the elements of the claim can be more easily measured against the facts of each case.

Appellant claims that the trial court made a "mockery of the equitable principles and criteria on which money had a received claims turn." However, it is Appellant that would have this Court, against the great weight of authority, find a cause of action for money had and received under circumstances where Appellant neither conferred a benefit, nor caused a benefit to be conferred upon the Crislers. This element is consistently and repeatedly found in all Georgia cases directly evaluating a claim of money had and received. See, e.g. O'Neal v. Deese, 23 Ga. 477 (1857); McCay v. F. C. Barber & Son, 37 Ga. 423(1867); Rudisill v. Handley, 9 Ga. App. 789 (1911); Herrington v. Dublin, 50 Ga. App. 769 (1935); Dobbs v. Perlman, 59 Ga. App. 770(1939); Cutright v. National Union Fire Ins. Co., 65 Ga. App. 173 (1941); International Indem. Co. v. Bakco Acceptance, Inc., 172 Ga. App. 28 (1984);Time Ins. Co. v. Fulton-Dekalb Hospital Authority, 211 Ga. App. 34(1993); William N. Robbins, P.C. v. Burns, 227 Ga. App. 262 (1997); Cochran v. Ogletree, 244 Ga. App. 537(2000); Taylor v. Powertel, Inc., 250 Ga. App. 356 (2001).

Appellant endeavors to distinguish some of the cases referenced by the trial court. While these cases may be factually distinct from the instant matter, the factual distinctions do not remove the precedential value of these cases for the proposition that a claim of money had and received requires more than Appellant is able to prove. The cases cited by the trial court clearly indicate that claims for money had and received and unjust enrichment require that Appellant confer a benefit or cause a benefit to be conferred (or as the trial court described it, a linkage element or ability to trace the money) before he can recover against the Crislers.

D. Appellant's Unjust Enrichment and Constructive Trust Claims Fail.

Unjust enrichment applies when as a matter of fact there is no legal contract, but when the party sought to be charged has been conferred a benefit **by the party contending an unjust enrichment** which the benefitted party equitably ought to return or compensate for. The measure of damages under this concept is based upon the benefit conferred upon the unjustly enriched party. Stoker v. Bellemeade, LLC, 272 Ga. App. 817, 819 (2005); Engram v. Engram, 265 Ga. 804 (1995); White v. Arthur Enterprises, 219 Ga. App. 124 (1995); Zampatti v. Tradebank Int'l Franchising Corp., 235 Ga. App. 333 (1998).

In this case, there is no practical distinction between Appellant's claim for money had and received and his claim for unjust enrichment. As thoroughly set forth, the claim for money had and received grows out of the equitable principle of unjust enrichment, and the Brief of Appellant failed to address any way in which his claim for unjust enrichment differs from the claim for money had and received. Significantly, like the claim for money had and received, there must be evidence that Appellant conferred a benefit or caused a benefit to be conferred upon the Crislers before he can recover. See Stoker v. Bellemeade, LLC, 272 Ga. App. 817 (2005); See also, Brown v. Cooper, 237 Ga. App. 348, 350-351 (1999).

In support of his claim for unjust enrichment and constructive trust, Appellant errantly relies upon Jonas v. Jonas, 280 Ga. App. 155 (2006). Jonas is a case with a claim for imposition of a constructive trust, but most significantly, the predicate claim is not for money had and received or for unjust enrichment, but rather breach of fiduciary duty and fraud. The Jonas Court reversed a judgment for the plaintiff and remanded with instructions that the jury be appropriately instructed that it must first find that the uncle committed either a breach of fiduciary duty or fraud to considering the imposition of a constructive trust. As a result of the

different facts and existence of the distinct predicate claims of breach of fiduciary duty and fraud, Jonas fails to provide any support for Appellant's theory of recovery.

A constructive trust is a remedial device created by a court of equity in order to prevent unjust enrichment. See Lee v. Lee, 260 Ga. 356, 357 (1990). Appellant, through counsel, concedes that if he "doesn't have a prima facie claim for money had and received ... then [Appellant] certainly [is] not entitled to any sort of injunctive relief or any sort of imposition of a constructive trust." (MT-9, March 16, 2007). Therefore, Appellant's claims for Injunctive Relief and Constructive Trust must fail with his claims for Money Had and Received and Unjust Enrichment.

E. Equitable Subrogation.

This legal theory is yet another attempt by Appellant to circumvent the fact that he has not sued the correct parties. As an initial matter, Appellant did not plead a claim for equitable subrogation, nor did Appellant offer any argument or citation of authority to the trial court in support of a claim for equitable subrogation. (R-5-16; R-44-460; R-2704-2768; R-2886-2904; R-3238-3244; MT-55-106, July 30, 2007). Instead, in its order, the trial court responded to one sentence contained within Appellant's Brief in Support of his Motion for Summary Judgment, wherein

Appellant was discussing the case of Rudisill v. Handley, and stated, "[t]he Crislers did not literally get Dick Haugabook's money, but they get the benefit of it because he stands in the shoes of the bank and the law firm." (R-2737). While neither party argued or offered citation of authority relative to equitable subrogation, the trial court's order states, "[t]he Plaintiff argues, *inter alia*, that the Court should permit him to 'stand in the shoes' of the banks and/or Law Firm in order to establish his linkage to the money." (R-3334). The trial court, on its own accord, went on to explain that "standing in the shoes" of another is known as equitable subrogation. Thereafter, the trial court briefly discussed equitable subrogation and determined that Appellant was not entitled to recover from the Crislers by claiming a right to "stand in the shoes" of the Law Firm and/or the Banks.

Appellant now falsely represents that he argued to the trial court that he should be "equitably subrogated to the position and claim of the Law Firm," if he is not entitled to maintain his claims "in his own right." (Brief of Appellant, p. 46.) Stated simply, this issue was not properly raised in the trial court, as Appellant did not refer to equitable subrogation, point out any facts supporting equitable subrogation, or cite any authority relative to the issue. Therefore, Appellant should not be permitted to

raise this issue for the first time in this Court. See H. W. Ivey Constr. Co. v. Transamerica Ins. Co., 119 Ga. App. 794, 795 (1969).

Notwithstanding that this argument is not properly before this Court, Appellant is not entitled to recover from the Crislers under a theory of equitable subrogation for one simple reason: Appellant's payment to Farr was voluntary.[10] "Two kinds of subrogation are known to the law, legal and conventional.[11] Legal subrogation arises by operation of law. Conventional subrogation depends upon a lawful contract, and occurs where one having no interest or any relation to the matter pays the debt of another, and by agreement is entitled to the securities and rights and remedies of the creditor so paid." Lee v. Holman, 52 Ga. App. 543, 544 (1936). Equitable

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[10]Even if procured by fraud, it was unquestionably voluntary. Furthermore, equitable subrogation fails Appellant because Appellant paid money to Farr, so he could only be subrogated to Farr's rights against the Crislers, and the Crislers' have multiple defenses to a claim asserted by Farr or the Law Firm, including, but not limited to, those addressed by the trial court. (R-3335).

[11]While potentially confusing, "legal subrogation" and "equitable subrogation" are one in the same. See generally, Lee v. Holman, 52 Ga. App. 543 (1936).

subrogation will arise in only two instances: "(1) where the person advances money to pay a debt which, upon the default of the principal debtor, the person advancing the money would be bound to pay; (2) where a person advancing the money had an interest to protect." Lee v. Arlington Peanut Co., 176 Ga. 816, 818 (1933); See also, Lutes v. Warren, 146 Ga. 641, 642 (1917). "Subrogation is never applied for the benefit of a mere volunteer who pays the debt of another without any assignment or agreement for subrogation, and who is under no legal obligation to make the payment, and is not compelled to do so for the preservation of any rights or property of his own." Franco v. Cox, 265 Ga. App. 514, 515 (2004); See also, Bankers Trust Co. v. Hardy, 281 Ga. 561, 564 (2007).

Appellant does not satisfy the criteria wherein equitable subrogation could arise. Instead, Appellant made a voluntary payment to Farr, so that Farr could satisfy an obligation to the Firm. Absent the payment to Farr, Appellant would not have been bound to pay Farr's obligation (or the Firm's for that matter), nor did he make the payment to protect his own interest. Therefore, Georgia law does not permit Appellant to claim equitable subrogation.

F. Conversion.

"To establish a prima facie case for conversion, the plaintiff must show 'title to the property [in the plaintiff], possession by the defendant, demand for possession, and refusal to surrender the property, or an actual conversion prior to the filing of the suit.' [cit.]" Habel v. Tavormina, 266 Ga. App. 613, 615 (2004). Appellant argues that showing "plaintiff's right to immediate possession of the property" is an alternative to proving title in the property. However, under either standard, Appellant's claim for conversion fails. First, as already explained herein, Appellant cannot show that he possesses legal title to the funds that the Crislers received via funds transfer. Pursuant to Article 4A of the UCC, the Crislers possess valid legal title to the money received from the Firm on November 24, 2006. See Regions Bank v. Provident Bank, Inc., 345 F.3d 1267 (11th Cir. 2003). Secondly, Appellant cannot show any direct or indirect connection to the $1,000,000 paid by the Firm, which would entitle him to immediate possession thereof.

III. CONCLUSION

The funds transfers received by the Crislers on November 24, 2006, did not cause any loss to Appellant. Likewise, the loan Appellant made to Farr on November

28, 2006, did not cause any benefit to be bestowed upon the Crislers. Unquestionably, Appellant neither conferred a benefit, nor caused a benefit to be conferred upon the Crislers; therefore, he cannot recover on any theory based in unjust enrichment. This Court should affirm summary judgment for the Crislers on all of Appellant's claims.

Respectfully submitted this 4th day of January, 2008.

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JUN 23 2008

IN THE COURT OF APPEALS OF GEORGIA

ORIGINAL

APPEAL CASE NO. A08A0688 S08A1662

RICHARD C. HAUGABOOK,

Appellant JUN 18 2008 FILED BY CERTIFIED MAIL

v.

JAN 23 2008

GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER, CLERK COURT OF APPEALS OF GA

Appellees

On Appeal from the Superior Court
of Athens-Clarke County

REPLY BRIEF OF APPELLANT RICHARD C. HAUGABOOK

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FILED IN OFFICE
JUN 23 2008
SUPREME COURT OF GEORGIA

IN THE COURT OF APPEALS
STATE OF GEORGIA

RICHARD C. HAUGABOOK,	:	
Appellant,	:	
vs.	:	APPEAL CASE NO. A08A0688
GEOFFREY CRISLER, CHRISTOPHER CRISLER and TIMOTHY SCOTT CRISLER	:	
Appellees	:	

REPLY BRIEF OF APPELLANT

I. INTRODUCTION

By the law's mandate, this case is supposed to be resolved on the basis of what is "fair," "just," "good" and "equitable," but the Appellees ("Crislers"), in truth, are (a) striving to retain $1,000,000 of stolen money they obtained from a thief and for which they gave nothing and (b) to keep that $1,000,000 away from the man whose $1,000,000 was stolen by that same thief as part and parcel of the same deceptions that put the $1,000,000 into the hands of the Crislers! Consequently, it is not surprising that counsel for the Crislers would be compelled to attempt to contest what their other arguments contend is immaterial,

i.e. that they "gave up nothing" in the Trial Court's words for the $1,000,000 they received (R-3336) and that Haugabook received nothing for the $1,000,000 he lost. Appellees' brief, pp. 39-41; p. 37. Beyond their obvious significance to the equitable principles governing the cause of action of whether the Crislers are "entitled in good conscience to retain" the stolen $1,000,000 and whether "in justice and fairness," per what is "good" "according to equity and good conscience" Haugabook is entitled to the stolen $1,000,000,[1] the two contested propositions are also significant because, if true, they fit the classic illustration used by Judge Nisbet in *Culbreath v. Culbreath*, 7 Ga. 64 (1849), i.e. that there is a ". . . naked and changeless equity which forbids that one man should retain the money of his neighbor, for which he paid nothing, and for which his neighbor received nothing . . . . " *Id.* at 67.[2] (Emphasis added). Therefore, we will first address in this reply the Crislers' contentions that they gave value for the $1,000,000, and Haugabook received what he bargained for.

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[1] *Decatur Federal v. Gibson*, 268 Ga. 362, 363 (1997).

[2] Obviously, "neighbor" was used by Judge Nisbet in the same broad sense as it was used by Christ in Matthew 22:39.

Secondly, we will address the effort by the Crislers' counsel to reformulate the cause of action for money had and received by conjuring up a new essential requirement that the plaintiff proximately confer a "benefit" on the defendant, a requirement that has never been recognized by a single Georgia appellate decision as a condition for recovering on a claim for money had and received.[3] We will deal with the Crislers' effort to do "end runs" around Haugabook's money had and received and unjust enrichment claims with their Article 4A UCC "finality" contentions that the Trial Court rejected (R-3345), and

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[3] In some per se unjust enrichment cases like *Regional Pacesetters v. Halpern Enterprises*, 165 Ga. App. 777, 782 (1983), this Court has said the theory of unjust enrichment "applies . . . where the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the benefited party equitably ought to return or compensate for" (*Id.* at 782) (emphasis added), because we would submit that describes the typical unjust enrichment case. However, this is not always a requirement even for an unjust enrichment/ constructive trust claim as demonstrated most recently by *Jonas v. Jonas*, 280 Ga. App. 155, 162 (2006).

no Georgia case has ever recognized. Lastly, we will demonstrate the falsity of the Crislers' claim that Haugabook did not ". . . offer any argument or citation of authority to the Trial Court in support of a claim for equitable subrogation" and, therefore, "should not be permitted to raise this issue for the first time in this Court." (Appellees' brief, pp. 45, 47).

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. The Crislers Have $1,000,000 for Which They Gave up Nothing and Which, Therefore, They are Not Entitled in Good Conscience to Retain.

The incontestable backdrop to this issue, which the Crislers' brief conveniently ignores, is that the $1,000,000 they received was, as the Trial Court found, "in essence, the proceeds of a crime." (Order, R-3333). No one can or does contest that Paul Farr engaged in a check-kiting scheme extraordinaire in getting the $1,000,000 that was not in any of the Law Firm's accounts to the Crislers. In *Bishop v. State*, 223 Ga. App. 285 (1996) cited by the Trial Court in support of its conclusion (Order, R-3333), the defendant was convicted of theft by deception accomplished by a "check 'kiting' scheme in which he participated." *Id.* at 285. This Court upheld that conviction even though the bank had ultimately sustained no monetary loss (*Id.* at 286) not unlike the banks and Law Firm in this case who

sustained no losses because Haugabook's stolen $1,000,000 covered the last $1,000,000 check in Farr's check-kiting theft.

Surely as a matter of common sense, establishing a good conscience entitlement to stolen funds would require some doing, and there is only one way. Such a defendant must have given up something of comparable value for the stolen money. The Crislers' counsel make that effort with a bizarre argument rejected by the Trial Court (Order, R-3336-3337), i.e. "the million dollar payment had the very real effect of serving to pay-off or partially satisfy the then existing malpractice claim against Farr and the Firm." (Appellees' brief, p. 40). (Emphasis added). This marvel of distortion produced by the necessity of trying to fit O.C.G.A. § 11-3-303 (a) evoked an admission that "[t]he value paid by the Crislers is admittedly not of the kind generally existing in a commercial transaction (and the assertion), but it does meet the definition provided within Article 3 of the UCC." (Appellees' brief, p. 40). (Emphasis added). O.C.G.A. § 11-3-303 (a) (3) dealing with "negotiable instrument" transfers (not wire transfers under Article 4A to which it specifically does not apply per O.C.G.A. § 11-3-102 (a)) clearly contemplates that at the time of issuance or transfer the parties must have in fact intended/understood the negotiable instrument to be in payment of an antecedent claim. Of course,

neither of the two parties to the transfer, the Law Firm and the Crislers, had any such intent, understanding nor agreement and neither did Farr!

While there are no Georgia cases interpreting O.C.G.A. § 11-3-303 (a) (3), to confirm the obvious we offer *Godat v. Mercantile Bank of Northwest County*, 884 S.W.2d 1 (Mo. App. 1994) where the plaintiff contended he had given value for a cashier's check fraudulently obtained by his broker because "he believed at the time that he received the check that [his broker] owed him money [and therefore] he gave value for the check under [303] (b)" which is identical to O.C.G.A. § 11-3-303 (a) (3). The Court said, " 'One can only take "for value" by giving in return something "of value" to the one from whom the instrument is taken.' 'Good faith' is in large part a subjective test but 'for value' is objective. . . . He [the plaintiff] gave nothing of value for the cashier's check, he was not a holder in due course, and the bank may assert any defenses it has, including fraud and theft, which were undisputed." (*Id.* at 13-14). (Emphasis added).

In another approach to try to prove they in "good conscience" are entitled to the $1,000,000 of stolen funds for which they gave up nothing, the Crislers quote from *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400 (1986), "If he has acted in good faith and in good conscience with the person paying the money, he is

entitled to retain it . . . . *Id.* at 405." (Appellees' brief, pp. 38-39). However, the Supreme Court immediately follows that quote from the strange case of *Stern v. Howell*, 33 Ga. App. 693 (1925) [where no authority is cited for the statement] with what the Supreme Court acknowledges is a seemingly contradictory proposition, i.e. "where money belongs to the plaintiff, and the defendant has no right to retain it, it is irrelevant that the defendant may have acted at all times in good faith," citing *Bill Heard Chevrolet Co. v. Atlantic Discount Co.*, 120 Ga. App. 388, 389 and which the Court noted was a case which involved "artifice, deception or fraudulent practice" (*Id.* at 405) unlike the facts in *Gulf Life Ins.*

B. Haugabook Received Nothing for the $1,000,000 He Lost.

The Crislers' counsel argue that Haugabook "received exactly what he bargained for" "a 'legitimate' commercially reasonable unsecured promissory note" and therefore Haugabook "cannot even satisfy the requirement that the plaintiff received nothing, as set forth in *Dobbs v. Perlman.*" (Appellees' brief, p. 38). (Emphasis added). Apparently counsel in searching for rhyme and reason for this position forgot that thirty-five pages previous to this mind-boggling contention they had admitted Haugabook's "loss was suffered as a result of the fraudulent

representations inducing him to loan money on November 28, 2006." (Appellees' brief, p. 3). (Emphasis added).

> "Even though terms of agreement may indicate existence of valid contract, it will not stand in face of proof evidencing fraud in the procurement of contract, since if fraudulent misrepresentations induced execution of contract it would fail to evidence true intent of parties and similarly if fraud was established contract would lack mutuality and consideration." *Cone Mills Corporation v. A. G. Estes, Inc.*, 377 F.Supp. 222 (6) (N.D. Ga. 1974).

C. The Plaintiff's Conferring of a "Benefit" on the Defendant is not a Mandatory Requirement for a Money Had and Received Claim.

While it has been dressed up in different guises, the Crislers have only one argument. The Crislers received on November 24, 2006 the stolen $1,000,000 for which they gave nothing and by which they have been unjustly enriched, and Farr, the architect and sole implementer of the check-kiting scheme that provided those funds, did not steal the $1,000,000 from Haugabook to cover the last check in that scheme until one and a half business days later on November 28, 2006, and, therefore, because of the timing, the Crislers assert the stolen money they have

cannot be money "belonging to the plaintiff" Haugabook, citing such cases as *J. C. Penney Co. v. West*, 140 Ga. App. 110 (1976) and *International Indem. Co. v. Bakco Acceptance, Inc.*, 172 Ga. App. 28 (1984)[4] nor can he be the "true owner" citing such cases as *Time Ins. Co. v. Fulton-Dekalb Hospital Authority*, 211 Ga. App. 34, 35 (1993).[5] (Appellees' brief, pp. 26-27).

The first problem with this contention is there is precedent in the Supreme Court and this Court for the proposition that it does not literally have to be money "belonging to the plaintiff" at the moment of transfer to the defendant, and the defendant's acquisition of funds before the plaintiff's loss is not a barrier to recovery. *O'Neal v. Deese*, 23 Ga. 477 (1857); *Rudisill v. Handley*, 9 Ga. App. 789 (1911) and *Laurens County v. Gay*, 117 Ga. App. 793 (1968). Indeed, the Crislers in a drop of candor in a sea of obfuscation ". . . acknowledge that there are

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[4] These two cases were distinguished in Appellant's original brief at 40 and 42.

[5] Often the decisions utilizing this language turn on the fact that the defendant actually gave value for the money at issue, and, consequently, the plaintiff could not legally be the true owner, e.g. *Time Ins. Co. v. Fulton-Dekalb Hospital*, supra at 36; *Eastside Carpet Mills, Inc. v. Dodd*, 144 Ga. App. 580 (1978).

cases of money had and received where a plaintiff is permitted to recover when the defendant did not actually receive money previously belonging to the plaintiff." (Appellees' brief, p. 28). (Emphasis added). Consequently, they should, as a matter of logic, abandon as controlling all of the cases cited where the Court has myopically or loosely suggested, per the Crislers' counsel, that at the time the money came into the defendants' possession it must belong to the plaintiff, i.e. he must legally be the true owner. This point of logic that wastes the Crislers' supposed authority was the mother of their bastard contention based on the same cases that a plaintiff to prevail on a money had and received claim must have "conferred on" or "caused" a "benefit" to the defendant. The Crislers' counsel in another of their obfuscations state, "Georgia courts have described the requirement that a benefit must be conferred or caused by a plaintiff in numerous ways, but the essence of the requirement remain consistent." (Appellees' brief, pp. 25-26). (Emphasis added). What they are really admitting is they are not able to cite a single Georgia money had and received case which says the plaintiff conferring a benefit is a mandatory requirement for the cause of action.[6] What they are really

[6] The Trial Court said it "has reviewed the relevant case law and is unable to find

touting is in some of the cases, the defendant got what he got (like in most unjust enrichment cases) by the plaintiff's actions. However, who conferred the "benefit" in *O'Neal v. Deese*, supra? Washburn made the overpayment to O'Neal, not the plaintiff. The railroad reimbursed Washburn, and the plaintiff Deese reimbursed the railroad and sued O'Neal. To suggest that because of Deese's mistaken relabeling of the cotton after the rain washed off the identifying mark, he "conferred a benefit" on O'Neal is really a bigger reach than saying Haugabook in picking up the tab for the on-going check kiting that put the money into the Crislers' hands conferred a "benefit" that has clear linkage with what the Crislers received since it was the first real money in the Law Firm's account.

D. Article 4A of the UCC is Inapplicable.

There are no cases anywhere, much less in Georgia, holding Article 4A of the Uniform Commercial Code operates to displace, alter, limit or reconstruct the common law actions for money had and received or unjust enrichment, much less the claim of Haugabook who was not a party to the wire

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specific authority stating that the conferring of a benefit is an element of a money had and received cause of action . . . ." (Order, R-3331).

transfer on November 24, 2006.

The only case cited by the Crislers, *Regions Bank v. Provident Bank, Inc.*, 345 F.3d 1267, 1278-1279 (11th Cir. 2003), does not support their so-called "finality" argument supposedly based on O.C.G.A. § 11-4A-211(c)(2). To the contrary, it shows that under Ohio law even the parties to the wire transfer are not cut off from their common law claims if they can marshal the evidence to support those claims. *Id.* at 1270. The trial court in granting the defendant Provident Bank's summary judgment had ruled Regions Bank's state law claims were preempted by Article 4A of the Ohio Uniform Commercial Code and that no issues of material fact existed regarding whether the defendant Provident Bank knew or should have known the funds it received from Morning Star bankers by means of a wire transfer were fraudulently obtained. However, the Eleventh Circuit refused to uphold the trial court's rulings relative to Regions' state law claims being preempted by 4A. *Id.* at 1270. To the contrary, it only ruled the plaintiff Regions Bank had failed to present the evidence ". . . necessary to support a judgment on each of Regions' state law claims [of conversion, unjust enrichment and unlawful set off against the defendant Provident Bank who, of course, was a party to the wire transfer]." *Id.* at 1279.

For a UCC provision to displace a common law legal or equitable cause of action in Georgia, it must provide a remedy, just as O.C.G.A. § 11-1-109 rationally and literally says. This Court in *First Georgia Bank v. Webster*, 168 Ga. App. 307, 308 (1983) expressed it this way, it is only "where the code provides a comprehensive remedy for parties to a transaction [that], a common law action would be barred." *Id.* at 308. (Emphasis added). Likewise the Georgia Supreme Court in *Boss v. Bassett Furniture Industries*, 249 Ga. 166 (1982) said,

> "We find nothing in the UCC to indicate that [the plaintiff] may not proceed on any common law or equitable cause of action he may have against the transferee, notwithstanding the bulk transfer law. On the contrary, the UCC provides that unless displaced by particular provisions, the principles of law and equity, including fraud, etc., shall supplement its provisions." *Id.* at 169-170.

Since the Crislers interjected that they had submitted an affidavit of a law professor on the UCC (Appellees' brief, p. 4) and thereby suggests he supports their position, we point out that the good professor admitted in his deposition Article 4A does not provide a remedy for Haugabook's common law claims but rather is "entirely silent" as to those claims. (R-3024-3025).

E. Haugabook's Counsel Raised the Alternative Issue of Equitable Subrogation in the Trial Court.

As our first witness, we offer the Trial Court: "The Plaintiff argues, *inter alia*, that the Court should permit him to 'stand in the shoes' of the banks and/or Law Firm in order to establish his linkage to the money." (R-3334). (Emphasis added). This alternative contention by Haugabook the Trial Court equated with "equitable subrogation." (R-3334). Furthermore in Haugabook's response to the Crislers' motion for summary judgment counsel made the following argument: "While we do not believe it is necessary to consider in resolving this case, Georgia does recognize equitable subrogation (*Gilbert v. Dunn*, 218 Ga. 531, 532-533 (1962); *Jones Motor Company v. Anderson, et al.*, 268 Ga. App. 458, 459 (2004) and *Wilkinson Homes v. Stewart Title Guar. Co.*, 271 Ga. App. 577, 581 (2005)), and there is an implicit admission in the defendants' argument about value that they have the law firm's money." (R-2900).

III. CONCLUSION

"The action [for money had and received] is liberal in form and is greatly favored by the courts. It aims at the abstract justice of the case and is less restricted and fettered by technical rules and

formalities than any other form of action. It is not dependent upon an express promise, or even upon one implied in fact, but lies on a contract implied in law or a quasi-contract." 66 AmJur 2d 748, Restitution and Implied Contracts, § 172 and see also *Jasper School District v. Gormley*, 184 Ga. 756, 758 (1937).

The Crislers are the right defendants (and practically speaking the only defendants since the other prospects do not have the money); the action for money had and received was tailor made for just such circumstances as the undisputed facts of this case present; anything short of Haugabook prevailing on his motion for summary judgment would be, not to overstate it, a shame and a disgrace, an elevation of fuzzy unjust form over clear equitable substance.

Respectfully submitted, this 23rd day of January, 2008.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the Reply Brief of Appellant Richard C. Haugabook upon counsel of record in this matter:

Mr. F. Gregory Melton
Davis & Melton, P.C.
P.O. Box 988
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Mr. J. Edward Allen
Fortson, Bentley and Griffin, P.A.
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by depositing same in the United States Mail with sufficient postage affixed thereon to ensure delivery.

This 23rd day of January, 2008.

H. JEROME STRICKLAND

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CLERK/COURT ADMINISTRATOR
COURT OF APPEALS OF GA.

Court of Appeals
of the State of Georgia

ATLANTA, June 13, 2008

The Court of Appeals hereby passes the following order:

A08A0688. HAUGABOOK v. CRISLER et al.

In this case an attorney defrauded his firm and the firm's banks into wiring $1 million to firm clients on a Friday. On the following Tuesday he defrauded his father-in-law, appellant herein, into lending the firm $1 million to compensate for insufficient funds in the firm accounts as a result of the wire transfer. The appellant filed suit against the firm's clients to recover the money. Although the appellant contends he is entitled to recover under theories of unjust enrichment and/or money had and received (actions at law)[1], the central issue on appeal is whether he is entitled to be subrogated to the position of the banks and the law firm vis-a-vis the clients, which issue was plead generally, argued, and ruled on by the trial court.

> Whether an action is an equity case for the purpose of determining jurisdiction on appeal depends upon the *issue* raised on appeal, not upon how the case is styled nor upon the kinds of relief which may be sought by the complaint. That is, "equity cases" are those in which a substantive issue on appeal involves the legality or propriety of equitable relief sought in the superior court-whether that relief was granted or denied.

(Emphasis in original.) *Beauchamp v. Knight*, 261 Ga. 608, 609 (409 SE2d 208) (1991). See also *Redfearn v. Huntcliff Homes Ass'n*, 271 Ga. 745 (524 SE2d 464)

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[1] *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 402-403 (349 SE2d 368) (1986) (money had and received); *U.S. Cas. Co. v. Peachtree Roxboro Corp.*, 103 Ga. App. 532 (120 SE2d 161) (1961) (unjust enrichment).

LC number(s): SU06CV2803

(1999). Where the issue on appeal involves legal subrogation, the Supreme Court has jurisdiction. *U.S. Cas. Co. v. Peachtree Roxboro Corp.*, 103 Ga. App. 532 (120 SE2d 161) (1961), following *Jasper School District v. Gormley*, 184 Ga. 756 (193 SE 248) (1937). Because we conclude that this is an equity case within the general appellate jurisdiction of the Supreme Court, the appeal is hereby *transferred* to the Supreme Court for disposition. Ga. Const. of 1983, Art. VI, § VI, ¶ III (2) .

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta JUN 13 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Willie L. Hulett, III , *Clerk.*

SUPREME COURT OF GEORGIA
Case No. S08A1662

Atlanta July 7, 2008

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

RICHARD C. HAUGABOOK v. GEOFFREY CRISLER et al.

From the Superior Court of Athens-Clarke County.

Appellant appeals those portions of a lengthy order in which, among other things, the trial court denied appellant's motion for summary judgment and granted appellees' motion for summary judgment. The Court of Appeals transferred the appeal to this Court, acknowledging that the case, which arises from appellant's allegations of fraud by appellees, involves actions at law including unjust enrichment and money had and received, but nevertheless finding that because the case also involves what the Court of Appeals deemed "legal subrogation," jurisdiction rests in this Court, see U. S. Cas. Co. v. Peachtree Roxboro Corp., 103 Ga. App. 532 (120 SE2d 161) (1961); Jasper School District v. Gormley, 184 Ga. 756 (193 SE2d 248) (1937). In Peachtree Roxboro, the Court of Appeals defined legal subrogation as follows: "'Legal' subrogation which is cognizable only in a court of equity seeks equitable substitution of the plaintiff to the rights of the creditor whose debt has been paid," 103 Ga. App. at 532. It thus essentially is the same principle as equitable subrogation, and in the instant case the trial court and the parties refer only to equitable subrogation. The cases on which the Court of Appeals relied to transfer the appeal to this Court predate Redfearn v. Huntcliff Homes Assn., 271 Ga. 745 (524 SE2d 464) (1999) and Beauchamp v. Knight, 261 Ga. 608 (409 SE2d 208) (1991). In Redfearn, the Court noted that "[t]he concept of 'equity' has been evolving for many years, and today much of what used to be considered substantive principles of equity have merged into our law to the extent that they no longer retain their uniquely equitable character," 271 Ga. at 746. Accordingly, in recent years this Court consistently has transferred to the Court of Appeals cases involving equitable subrogation where, as here, the grant or denial of the equitable relief is ancillary to the trial court's resolution of the underlying

legal issues, see Secured Equity Financial, LLC v. Washington Mut. Bank, S08A0010 (transferred Oct. 10, 2007; Carley and Melton, JJ., dissenting); Direct Mortgage Lenders Corp. v. Long Beach Mortgage Co., et al., S07A1791 (transferred Sept. 5, 2007; Carley and Melton, JJ., dissenting); Waller v. HomeQ Servicing Corp., S07A0025 (transferred Oct. 2, 2006). Therefore, this appeal hereby is returned to the Court of Appeals.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Lynn Stinchcomb, ~~Chief~~ Deputy Clerk

Court of Appeals of the State of Georgia

ATLANTA, July 23, 2008

The Court of Appeals hereby passes the following order:

A08A0688. HAUGABOOK v. CRISLER et al

The above styled case having been transferred to this Court by the Supreme Court of Georgia, it is hereby ordered that the case be hereby reinstated as a September 2008, Term case. See *C C Financial, Inc. v. Ross,* 250 Ga. 832, 834 (3) (1983).

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta JUL 23 2008

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Willie L. Martin, III

FOURTH DIVISION
SMITH, P. J.,
MIKELL and ADAMS, JJ.

March 26, 2009

In the Court of Appeals of Georgia

A08A0688. HAUGABOOK v. CRISLER et al.

ADAMS, Judge.

Richard C. Haugabook filed suit against three brothers primarily alleging money had and received and unjust enrichment arising out of an unusual set of events. The Crisler brothers had hired Paul Farr, a lawyer, to pursue claims arising out of their mother's untimely death, but Farr never filed suit and lied when he told them their case had settled. In a bizarre and perhaps good-hearted attempt to get the fictitious settlement proceeds to the Crislers, Farr then employed an illegal, check-kiting scheme with his law firm's bank accounts, which resulted in an actual wire transfer of $1 million to the Crislers on a Friday. On the following Monday and Tuesday, Farr then defrauded Haugabook, his father-in-law, into lending the same amount to cover the shortage in the firm bank accounts. When the fraud was discovered, the firm filed

a real wrongful death suit on behalf of the Crislers to protect their rights, and Haugabook demanded the Crislers return the money. When they refused, he filed this suit. On cross-motions for summary judgment, the trial court held in favor of the Crislers and ruled that Haugabook's claims against them were legally flawed. Haugabook now appeals.

Summary judgment is proper when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. OCGA § 9-11-56 (c). We review a grant or denial of summary judgment de novo and construe the evidence in the light most favorable to the nonmovant. *Home Builders Assn. of Savannah v. Chatham County,* 276 Ga. 243, 245 (1) (577 SE2d 564) (2003).

The material facts are not dispute; Haugabook does not contend that the trial court erred with regard to the facts. On December 14, 2004, Ginny Crisler died after she was struck by a hit and run motorist. On January 12, 2005, Scott Crisler employed Paul Farr and his firm – Barnes, Farr and NeSmith – to pursue a wrongful death claim on behalf of the three brothers.[1] Nevertheless, for a period of almost two years Farr did very little to pursue the claims. He did not fully investigate the case, he did not file

[1]At all times when dealing with the Crislers, Farr, the firm's managing partner, was acting on behalf of the firm.

suit, and he never settled the case. When dealing with Scott Crisler, however, he concocted a steady stream of lies claiming that the suit was progressing, and he fabricated correspondence, pleadings, and other documents and sent them to the Crislers to support his story. Eventually, Farr told the Crislers that he had been offered policy limits to settle the claim, which the Crislers understood to be $1 million each from two different carriers. Scott Crisler, who had no knowledge of the fraud, accepted the fictitious offer.

Farr and Scott then began to discuss how the settlement proceeds would be wired, and Farr had Scott sign a fake release of the wrongful death claim. At one point, Farr told Scott that he had "screwed up" and had only settled with one carrier for $1 million, and he added a couple of lies to explain how he would settle with the remaining carrier and how no attorney fees would be deducted from the first million. At this point, the Crislers expected to receive a wire transfer of $1 million.

On November 22, 2006, the day before Thanksgiving, Farr began writing checks on the firm's accounts as a vehicle to get one of the banks to fund a $1 million wire transfer to the Crislers. Over the next two days, Farr wrote four $1 million checks

payable from one firm account to another.[2] At the time, the firm had four accounts at three banks (two of the accounts were in Sumter Bank – a trust account and a petty cash account), and the four accounts lacked sufficient funds, either alone or combined, to cover a $1 million check. But by confusing the banks with multiple checks and other means, Farr managed to have a wire transfer drawn on a firm account sent to the Crislers by Friday afternoon. Thus, by November 24, the Crislers had received $1 million in the form of a wire transfer to their accounts; it is undisputed that they had full access to the money that afternoon. But at the same time, one of the banks, Citizens Bank of Americus ("Citizens"), was waiting to be paid on two separate $1 million checks from Sumter, one from each account, and neither of those accounts had sufficient funds.

On Monday, November 27, Sumter paid Citizens $1 million from the trust account. Meanwhile, Farr was taking steps to try to prevent the last check (No. 1206 drawn on the Sumter petty cash account) from being dishonored, including calling Sumter to try to get it to agree to cover or delay funding the check. It was on that same day that Farr approached Haugabook, his father-in-law, asking to borrow $1 million

[2]The checks were actually for slightly more than $1 million because they included certain fees.

because he knew but did not disclose that "[t]here was a check involved hanging out there that needed to be covered." Farr told Haugabook that he had settled a case, had written firm trust account checks for $1 million to the clients before he had received funds from the insurance company, and that he needed the money to cover the checks. Farr defrauded Haugabook by lying about an imminent payment from the insurance company and other details and by fabricating documents including a letter from the alleged insurance company that stated that $1 million would be received by December 8, 2006. Haugabook also relied on Farr's partners who told him that they were sure that the insurance payment was coming in. Haugabook essentially admits, however, that he did not fully investigate the underlying circumstances to verify Farr's story. Ultimately Haugabook wrote a check that same day payable to Farr for $1 million. In exchange, Farr gave an unsecured promissory note to Haugabook to repay the money plus interest at eight percent, due and payable on December 28, 2006. Haugabook, Farr, and Farr's partners all knew that Farr would deposit the check into a firm account; and he in fact deposited it into the petty cash account at SB&T that day, covering the last of the $1 million checks.

By December 7 or 8, the entire house of cards tumbled. After finding out the real story, one of Farr's partners told the Crislers everything and the firm filed a

wrongful death action on their behalf within the statute of limitations. The Crislers, however, declined to return the money. On December 14, Farr was hospitalized and diagnosed as having a bipolar disorder.

Haugabook filed suit against the Crislers asserting claims of money had and received, unjust enrichment, subrogation, constructive trust, and conversion, and Haugabook also sought injunctive relief, punitive damages, and expenses of litigation. At the time of the trial court's ruling, Haugabook had not sued the firm or Farr over the money. On cross-motions for summary judgment, the trial court held that each of Haugabook's claims was legally flawed. It therefore granted summary judgment in favor of the Crislers and denied Haugabook's cross-motion. Haugabook appeals those rulings.

In a detailed 49-page order, the trial court made findings of fact and conclusions of law, including that the money the Crislers received on Friday did not come from Haugabook nor result from any of his actions. Rather, the money was "in essence, the proceeds of a crime." The court also found that the Crislers "received money for which they gave up nothing."

Money Had and Received. The trial court reviewed the relevant case law and determined that "in a money had and received action, the plaintiff must prove that the

money at issue was his own and /or was funded by him (or in someway linked to the plaintiff and/or his efforts)." The court added, "In essence, the real question is . . . whether the Plaintiff is the 'true owner' of the money at issue, i.e., whether the money at issue can be linked to the Plaintiff." The court then determined that the money the Crislers received on Friday was in fact the proceeds of the crime of check-kiting and not linked to Haugabook. Thus, the money came from one of the banks or the law firm, neither of which is a party to the action. The court found that Haugabook's loan to Farr in exchange for a promissory note was a separate event that occurred four days later. The court noted that the law affords Haugabook a remedy against "the person/entity that actually received [his] money."

Haugabook contends that the doctrine of money had and received fits this case. We agree. "An action for money had and received is founded upon the equitable principle that no one ought unjustly to enrich himself at the expense of another, and is maintainable in all cases where one has received money under such circumstances that in equity and good conscience he ought not to retain it, and ex aequo et bono it belongs to another. [Cits.]" *Jasper School Dist. v. Gormley*, 184 Ga. 756, 758 (193 SE 248) (1937). See also *Decatur Fed. S&L Ass'n v. Gibson*, 268 Ga. 362, 363 (1) (489 SE2d 820) (1997).The phrase "ex aequo et bono" means "in justice and fairness."

Hodges v. Community Loan & Inv. Corp., 234 Ga. 427, 433 (216 SE2d 274) (1975) (Hall, J., concurring), overruled on separate grounds, *Southern Discount Co. v. Ector*, 246 Ga. 30 (268 SE2d 621) (1980). See also Black's Law Dictionary 581 (7th ed. 1999) ("According to what is equitable and good. A decision-maker . . . who is authorized to decide *ex aequo et bono* is not bound by legal rules and may instead follow equitable principles.") In an early case before the Georgia Supreme Court addressing a claim of money had and received, the court quoted common law for these principles:

> "If the defendant be under *an obligation,* from the ties of *natural justice,* to refund, the law implies a *debt*, and gives this action, founded in the *equity of the plaintiff's case,* as if it were upon contract."

And,

> "One great benefit derived to a suitor from the nature of this action is, that he need not state the special circumstances from which he concludes that, *ex aequo et bono, the money received by the defendant ought to be deemed belonging to him.* [Cit.]"

(Emphasis in original.) In *Culbreath v. Culbreath*, 7 Ga. 64, 68 (1849).[3]

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[3]"Although legal in form, being an action in implied assumpsit, [an action for money had and received] is founded on the equitable principle that no one ought to unjustly enrich himself at the expense of another, and it is a substitute for a suit in

The undisputed facts of this case show that Farr defrauded the banks and the firm and that the Crislers received the proceeds of the crime. Farr then defrauded his father-in-law in order to protect himself and his firm from liability to the banks. The firm and the banks received the proceeds of that fraud, and, as a consequence, neither is out any money. Although Farr misled the Crislers about their wrongful death suit, they ultimately received $1 million to which they were not entitled. Their wrongful death suit has since been filed and is being prosecuted, and Scott Crisler admitted in his deposition that the Crislers had not given up anything for the $1 million.[4] In short, Haugabook has presented facts to show that the defendants have been unjustly enriched and that Haugabook is "in justice and fairness" the true owner of the $1 million.

The Crislers strongly urge that the trial court was correct because the law requires that the plaintiff show that the defendant is literally in possession of the plaintiff's money or that the plaintiff conferred a benefit on the defendant. But, the

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equity." *J. C. Penney Co. v. West*, 140 Ga. App. 110, 111-112 (2) (230 SE2d 66) (1976).

[4]That the Crislers' may have had "an undiscovered malpractice claim against Farr and the Firm" at the time they received the money cannot be construed to mean that they gave up value in exchange for the $1 million.

true requirement is that the plaintiff show that he is in equity and good conscience entitled to the money:

> "In order to maintain an action for money had and received it is necessary to establish that defendants have received money belonging to the plaintiff *or* to which he is in equity and good conscience entitled." 2 Elliott on Contracts, 623, § 1375.

(Emphasis supplied.) *Cutright v. National Union Fire Ins. Co.*, 65 Ga. App. 173, 177 (15 SE2d 540) (1941). Furthermore, "[i]t is immaterial how the money may have come into the defendant's hands, and the fact that it was received from a third person will not affect his liability, if, in equity and good conscience, he is not entitled to hold it against the true owner." (Citations and punctuation omitted.) *Fain v. Neal*, 97 Ga. App. 497, 498 (103 SE2d 437) (1958).

In an early case, a plaintiff was allowed to proceed with a claim even though the defendant was not literally in possession of the plaintiff's money. See *O'Neal v. Deese*, 23 Ga. 477 (1857). In that case, a man named Yopp sent five bales of cotton to the railroad station with instruction that they be shipped to a cotton broker. When rain washed away the identification on the bales, they were mistakenly marked as belonging to O'Neal and sent to the same broker along with O'Neal's bales. O'Neal collected the total payment when the broker sold the cotton. Yopp called upon the

railroad to account and the railroad paid him the value of the five bales. The railroad then recovered the money from its own station agent, Joel Deese, whose mistake had caused the loss. Despite the fact that Deese did not pay out any money until sometime after O'Neal wrongfully came into possession of Yopp's money, the Supreme Court held that Deese was able to proceed against O'Neal with a claim of money had and received. Id. Indeed, the court noted that O'Neal needed to explain "why he apparently holds on to money which does not belong to him, and which an innocent man has had to pay to the rightful owner." Id. at 479.

Nothing in the discussion in that case suggests that Deese's claim for money had and received was dependent on the fact that Deese's initial mistake triggered the erroneous payment. Id. And, accordingly, we do not believe that the result would have been different if someone else had caused the mistake and Deese had somehow been forced to pay for it. Nor do we find any difference in the equities of the two scenarios. The proper plaintiff in a claim of money had and received is not the person who by mistake set in motion a series of events that ultimately unjustly enriched the defendant; it is the person who in justice and fairness is entitled to the money.

It is true that the cases cited by the Crislers sometimes use terminology suggesting that the plaintiff in a case of money had and received must show that the

money was his own. But each of the cases is distinguishable on its facts, and each decision can be justified based on the above-quoted principles of money had and received. In *International Indem. Co. v. Bakco Acceptance*, 172 Ga. App. 28 (322 SE2d 78) (1984), the plaintiff's money was stolen, and it never ended up in anybody's hands who was a party to the action, let alone the defendants. Therefore, the defendants in that case had not been unjustly enriched. Id. at 32. See also *Gibson*, 268 Ga. at 363 (1) (claim not properly characterized as an action for money had and received where defendant received no money). In *Eastside Carpet Mills v. Dodd*, 144 Ga. App. 580 (241 SE2d 466) (1978), the court cited *Cohen v. Garland*, 119 Ga. App. 333 (2) (167 SE2d 599) (1969), for the proposition that "(w)hen one sues for money had and received for his use, he must prove that the money was his own." *Dodd*, 144 Ga. App. at 581. Yet the court decided *Dodd* on the reasoning that the defendant was not unjustly enriched because it had received only what it was entitled to as a part of a separate business transaction. Id. And in *Cohen*, 119 Ga. App. 335 (2), the plaintiff's claim was denied because he was not out any money at all; he had attempted to bring a claim for money had and received for funds that his father had paid to the defendant. Id. In *J. C. Penney Co. v. West*, 140 Ga. App. 110, 112 (230 SE2d 66) (1976), an issue was raised as to whether the plaintiff was the "true owner" of the funds that had

unjustly enriched the defendant. But the issue only arose because it was unclear whether a related but different entity was the party who ex aequo et bono was entitled to some of the money. Id. at 112 (3). The question was whether the plaintiff was the real party in interest for all of the money; not whether the plaintiff had the right kind of proprietary interest in the money. Id. Finally, in *Estes v. Thompson*, 90 Ga. 698, 700 (17 SE 98) (1892), the plaintiff was not out any money that was related to money received by the defendant.

Although there may be issues of fact in this case regarding whether the firm should have known about Farr's actions and whether the banks should have been able to stop the kite, these issues are not relevant to Haugabook's claim for money had and received.[5] With regard to his own failure to fully investigate the facts and circumstances when Farr defrauded him into lending $1 million, Haugabook's negligence could prevent relief in equity in some cases. See OCGA § 23-2-32 (a). But the Georgia Code specifically provides an exception in that "[r]elief may be granted even in cases of negligence by the complainant if it appears that the other party has not been prejudiced thereby." OCGA § 23-2-32 (b). That rule is "subject to a

[5]Farr's partners had access to the firm's computer accounts, including Farr's client files, which possibly could have led them to discover the fraud earlier.

weighing of the equities between the parties by the trier of fact." *Gulf Life Ins. Co. v. Folsom*, 256 Ga. 400, 406 (349 SE2d 368) (1986). As shown above, the Crislers have not been prejudiced by Haugabook's alleged negligence. Accordingly, the Crislers have no defense on this ground. See also *Bill Heard Chevrolet Co. v. Atlantic Discount Co.*, 120 Ga. App. 388, 389 (170 SE2d 740) (1969) (plaintiff's negligence did not defeat action for money had and received where it did not violate a positive legal duty owed to the defendant).

For all of the above reasons, we hold that the trial court erred by granting summary judgment in favor of the Crislers on the claim of money had and received.

With regard to Haugabook's motion for summary judgment, we must construe the facts in favor of the Crislers and consider their defenses to the action. Without repeating them, we find all material facts to be undisputed and supportive of Haugabook's claim. With regard to the defenses, the Crislers may defend themselves by showing "every thing which shows that the plaintiff, *ex aequo et bono,* is not entitled to the whole of his demand, or to any part of it." *Culbreath*, 7 Ga. 68. Although the Crislers were also the victim's of Farr's fraud, they have not shown any equitable considerations regarding why Haugabook should not be entitled to the money. Accordingly, the trial court also erred by failing to grant summary judgment

in favor of Haugabook on the claim of money had and received. See, e.g., *Bill Heard Chevrolet*, 120 Ga. App. at 389 (summary judgment properly granted in favor of plaintiff on claim of money had and received); *Gulf Life*, 256 Ga. at 404 (summary judgment proper when indisputable facts clearly establish liability). We reverse and remand for entry of an order awarding summary judgment in favor of Haugabook on this claim.

Because Haugabook is entitled to judgment on this claim, we need not address the merits of his other legal and equitable claims to the same money. Finally, Haugabook did not argue that the trial court erred by entering summary judgment on his claim for punitive damages, and therefore that aspect of the trial court's order stands.

Judgment affirmed in part and reversed in part, and case remanded with direction. Smith, P. J., and Mikell, J., concur.

IN THE COURT OF APPEALS
STATE OF GEORGIA

JANICE B. HAUGABOOK, GAIL B. HAUGABOOK COOGLE, AND RICHARD C. HAUGABOOK, JR., as Co-Executors of the Estate of Richard C. Haugabook,	)	
Appellant,	)	
v.	)	APPEAL CASE
GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER,	)	NO. A08A0688
Appellees.	)	

APPELLEES' MOTION FOR RECONSIDERATION

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IN THE COURT OF APPEALS
STATE OF GEORGIA

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Appellants,	)	APPEAL CASE
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GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER,	)	
Appellees.	)	

APPELLEES' MOTION FOR RECONSIDERATION

COME NOW Appellees Geoffrey Crisler, Christopher Crisler, and Timothy Scott Crisler (the "Crislers"), pursuant to Rule 37 and file this Motion for Reconsideration requesting that the Court reconsider that portion of its opinion dated March 26, 2009, which reversed the trial court's grant of summary judgment to the Crislers and directed that the trial court award summary judgment in favor of Appellants. Reconsideration is necessary because this Court has overlooked

material facts in the record, entered a three-judge panel decision which is inconsistent with prior Court of Appeals precedent, and has exceeded is appellate jurisdiction.

ARGUMENT AND CITATION OF AUTHORITY

I. The Court overlooked material facts in the record showing the significant inequity caused by a judgment for Haugabook against the Crislers.

In reversing the trial court and directing the grant of summary judgment to Appellants, this Court held, "Although the Crislers were also the victim's of Farr's fraud, they have not shown any equitable considerations why Haugabook should not be entitled to the money." (Opinion at p. 14). This statement reveals that the Court failed to consider significant facts in the record while making an equitable determination in this case.

The Crislers' mother was killed by a hit and run driver on December 14, 2004. In the wake of that tragedy, the Crislers went to a law firm, Barnes, Farr and NeSmith, and asked for help. Since that time, all that the Crislers have done is follow the advice of their counsel and look to the courts for direction. While they have not participated in any wrongdoing, instead relying upon attorneys and the

judicial system to deliver justice, the Crislers now face the prospect of financial ruin as a result of this Court's opinion. Upon receipt of what they believed to be settlement proceeds, Scott Crisler paid off $34,000 of debt and Geoffrey Crisler paid off $18,000 of student loans and credit card debt. (R-744). A substantial portion of the money the Crislers received was invested through a financial advisor, Keith Ledford, and was invested in real estate trusts, mutual funds, and a brokerage account. (MT-110, 114-115, January 3, 2007). As of February 22, 2007, the remaining balance of the funds received by the Crislers totaled $931,133.53. (MT-6, March 16, 2007). The trial court granted Haugabook's request for an interlocutory injunction preventing the Crislers from having any control over their funds. (R-741-755). Therefore, the Crislers were prohibited from taking any steps to manage and protect the funds as the markets have spiraled downward. As a result, the Crislers, who are innocent of any wrongdoing, are faced with a judgment of one million dollars that they do not have.

In contrast, Haugabook is not without responsibility for his circumstances. Haugabook has taken every possible step to protect the true wrongdoers in this

bizarre set of facts, his son-in-law Paul Farr, and Farr's law firm.[1] Haugabook believed that the $1,000,000 loan to his son-in-law was for the purpose of covering up a violation of the rules and law governing the law firm's trust account. In fact, Haugabook understood "that if the overdraft was not covered his son-in-law and his law firm would be ruined and his son-in-law could be disbarred." (R-6). Haugabook knowingly and willingly participated in an attempt to conceal a clear violation of the State Bar Rules and Georgia law governing handling of trust account monies. Furthermore, Haugabook exercised **no due diligence** to find out what had really happened before loaning the one million dollars. (MT-62, 66, January 3, 2007). Farr showed Haugabook a bogus letter purporting to be from Zurich to explain that life insurance proceeds would be delivered by December 8, 2006, to cover the loan. Significantly, Haugabook admitted that this fabricated Zurich letter did not have an addressee, but instead merely began "Dear Mr. Farr." Additionally, Haugabook admitted that the bogus Zurich letter was unsigned. (MT-

[1] Mr. Haugabook is related to two of the three members of the law firm by marriage. In addition to Mr. Farr, Mr. NeSmith is the son-in-law of Haugabook's brother. (MT-12, January 3, 2007).

68, January 3, 2007). Amazingly, Haugabook did not ask to see a signed original, and made no effort to look at any documents other than what he was shown by Farr. (MT-36, 68-69, January 3, 2007). Haugabook admits that had he performed **any diligence** at all in trying to discover the true purpose for the loan, there would have been "red flags" indicating that he should not have loaned the money. (MT-77, January 3, 2007).[2]

Haugabook's pattern of protecting his son-in-law and the law firm of Barnes, Farr and Nesmith has continued in this litigation. Rather than bringing suit on the promissory note and for fraud against Farr and the law firm, the basis for which is clear from his testimony and the record, Haugabook chose to pursue his action against the Crislers, innocent parties who had absolutely no involvement with Haugabook's loan transaction with Farr and the firm. By doing so, Haugabook circumvents the proper legal process whereby he should have

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[2] "When one of two innocent persons must suffer by the act of a third person, he who put it in the power of the third person to inflict the injury shall bear the loss." O.C.G.A. §23-1-14. "If a party, by reasonable diligence, could have had knowledge of the truth, equity shall not grant relief." O.C.G.A. § 23-2-29.

instigated a suit against the wrongdoers, Farr and the law firm. The law firm could have then sought to recover the money it paid to the Crislers; however, the Crislers would have had additional defenses and counterclaims against Paul Farr and the law firm in that action.[3]

Haugabook knew that his son-in-law had done something that he was not supposed to do and Haugabook sought to help him cover it up. Furthermore, it is undisputed that by the exercise of **any** diligence at all, Haugabook would have known not to make the one million dollar loan to Paul Farr and the law firm. It is clear that the Court overlooked these facts when it concluded that there were not any equitable considerations showing why Haugabook should not be entitled to a judgment against the Crislers. See also, O.C.G.A. § 23-2-29.

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[3] Additionally, Haugabook possesses a legally valid and enforceable promissory note received from Paul Farr. As evidence of the inequity of a Haugabook recovery against the Crislers, such a recovery does not extinguish his contractual right to transfer, assign, or demand payment under that promissory note.

II. The Court misconstrued controlling case authority requiring the existence of some connection or link between a plaintiff and defendant to make out a proper case of money had and received.

"Equity is ancillary, not antagonistic, to the law; hence, equity follows the law where the rule of law is applicable and follows the analogy of the law where no rule is directly applicable." O.C.G.A. §23-1-6. Contrary to well-established authority, in the name of equity, the Court's opinion in this case creates a precedent whereby the claim of money had and received is available even in the complete absence of any connection or link between a plaintiff and defendant. In doing so, the Court's opinion reverses significant and long-standing precedent.[4]

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[4] The Court's opinion reverses, among others, the following holdings: "Plaintiff can recover for money had and received **only** where it appears that the defendants have received money **belonging to the plaintiff** which, in equity and good conscience, the defendants are not entitled to retain. [Cit.]" Cochran v. Ogletree, 244 Ga. App. 537, 538-539 (2000)(emphasis added); see also, J. C. Penney Co. v. West, 140 Ga. App. 110, 111-112 (1976). "A suit for money had and received must grow out of privity of contract, express or implied. [cit]" Cohen v. Garland,

Generally, "(w)hen one sues for money had and received for his use, he must prove that the money was his own." Eastside Carpet Mills, Inc. v. Dodd 144 Ga. App. 580, 580 (1978).[5] In those cases of money had and received where a plaintiff is permitted to recover when the defendant did not actually receive money previously belonging to the plaintiff, recovery was permitted because the plaintiff conferred some benefit or took some action that caused a benefit to be unjustly conferred upon the defendant. See Rudisill v. Handley, 9 Ga. App. 789 (1911). Stated simply, a plaintiff is permitted to recover on a theory based in unjust

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119 Ga. App. 333, 335 (1969); "The elements of such action are: a person has received **money of the other** that in equity and good conscious he should not be permitted to keep; demand for repayment has been made; and the demand was refused." Taylor v. Powertel, Inc., 250 Ga. App. 356, 359-360 (2001) (emphasis added); see also, Time Ins. Co. v. Fulton-Dekalb Hospital Authority, 211 Ga. App. 34, 35(1993); William N. Robbins, P.C. v. Burns, 227 Ga. App. 262, 265 (1997).

[5] Contrary to the attempt to distinguish this case in the Opinion, the Court in Dodd did base its decision upon a finding that "**no relationship of any kind was shown to exist between Garrison and the bank.**" Id.

enrichment, including the legal claim for money had and received, only when the plaintiff made some payment, delivered some service, or took some action that ultimately resulted in a benefit to the defendant. There is a causation element in every prior case allowing a claim of money had and received is being ignored and overruled by this Court's opinion.

For purposes of illustrating the result of this holding, the Court's opinion would permit a recovery in the following case: A individual member of a local church decides to make a substantial contribution to the church's building fund. The church member makes a one million dollar donation to the church. Based upon this donation, the church begins its construction. Subsequently, the church member realizes that this contribution made him insolvent. Therefore, the church member goes to a local bank and falsifies a financial statement in order to obtain a one million dollar loan. The bank fails to run a credit check or verify any of the holdings shown on the financial statement, but instead, makes the one million dollar loan because the church member is known in the community. Immediately thereafter the bank discovers that it was defrauded into making the loan and that the church member used the money to pay other creditors. Under the Court's

ruling in the instant case, the bank would be entitled to recover on a claim of money had and received against the church even though the two parties were complete strangers, had no contact or relationship with each other, and the donation to the church was in no way caused nor impacted by the subsequent loan made by the bank to the church member.

Instead of the result allowed by this Court's opinion, established precedent requires that a plaintiff seek its recovery from a party with whom it has some connection. In the instant case, there is absolutely no causal connection between the receipt of funds by the Crislers and the actions of Haugabook in loaning money to his son-in-law. Instead, the final payments of the fund transfers to the Crislers under Article 4A were made on November 24, 2006, before Haugabook was even contacted by his son-in-law. If Haugabook had never made a loan to Farr, the Crislers would still have received and legally possess the one million dollars wired by Farr. Georgia's longstanding precedent does not permit Haugabook to recover against defendants upon whom he conferred no benefit and with whom he has no connection.

III. The Court has exceeded its appellate jurisdiction by balancing the equities in this case.

The Court of Appeals may NOT reverse a trial court on the grounds that "the relative balance of equities militates against" the trial court's ruling. Only the Supreme Court may do that. See Douglas v. Wages, 271 Ga. 616, 619 (1999)(Carley J. concurring). Thus, when the Supreme Court declined to accept jurisdiction over the instant case, it indicated to this Court that the case had to be decided on legal grounds, not on a new balancing of the equities, as such a balancing of the equities is outside the jurisdiction of this Court. Id. Furthermore, it is not the role of any appeals court to weigh the evidence. Upon a party pointing out any contrary evidence going to the equities, as Appellees have done, the Court of Appeals may only address legal error and may not reweigh the evidence. See, e.g. Locke v. Vonalt, 189 Ga. App. 783, 785 (1989). Any difference between reweighing the evidence and rebalancing the equities is too fine to be detected by the human eye.

CONCLUSION

While the reconsideration of an opinion is an extraordinary measure for the Court to take, reconsideration is proper here because the Court's Opinion overrules significant case precedent and removes the requirement that there exist some element of causation or connection between a plaintiff and a defendant in a lawsuit. Furthermore, the Court's opinion overlooked significant facts showing the inequity of a judgment against the Crislers, and in balancing the equities, this Court exceeded its appellate jurisdiction.

Respectfully submitted this 2nd day of April, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within and foregoing APPELLEES' MOTION FOR RECONSIDERATION upon all parties to this matter by depositing a true copy of same in the U. S. Mail, proper postage prepaid, addressed to counsel of record as follows:

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IN THE COURT OF APPEALS OF GEORGIA

APPEAL CASE NO. A08A0688

JANICE B. HAUGABOOK, GAIL B. HAUGABOOK COOGLE and RICHARD C. HAUGABOOK, JR., as Co-Executors of the Estate of Richard C. Haugabook

Appellants

v.

GEOFFREY CRISLER, CHRISTOPHER CRISLER, and TIMOTHY SCOTT CRISLER,

Appellees

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APPELLANTS' RESPONSE TO APPELLEES' MOTION FOR RECONSIDERATION

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STATE OF GEORGIA

JANICE B. HAUGABOOK, GAIL B. HAUGABOOK COOGLE and RICHARD C. HAUGABOOK, JR., as Co-Executors of the Estate of Richard C. Haugabook	:	
Appellants,	:	
vs.	:	APPEAL CASE NO. A08A0688
GEOFFREY CRISLER, CHRISTOPHER CRISLER and TIMOTHY SCOTT CRISLER	:	
Appellees	:	

APPELLANTS' RESPONSE TO APPELLEES' MOTION FOR RECONSIDERATION

I. INTRODUCTION

While Appellees' motion for reconsideration is really nothing more than a rehash of the facts and law already addressed, they do attempt to fly the new flags of this Court supposedly overlooking in its recent opinion "material facts" and that it somehow "has exceeded is (sic) appellate jurisdiction." (Motion, pp. 1-2). We will strive to avoid a rehash, and, consequently, we will limit our response

to addressing these two contentions appearing as Sections I and III of Appellees' Motion.

II. ARGUMENT AND CITATIONS OF AUTHORITY

A. No Material Facts were Overlooked by this Court in Reaching its Decision.

The section of the motion dealing with the supposed overlooked material facts begins with a quote from the Court's opinion that the Appellees "have not shown any equitable considerations why Haugabook should not be entitled to the money." (Opinion, p. 14; Motion, p. 2). Appellees contend this single statement in the opinion "reveals that the Court failed to consider significant facts in the record while making an equitable determination in this case" (Motion, p. 2) (emphasis added) which they later contend it has no authority to make (Motion, p. 11).

Ignoring the contradiction in the Appellees' schizophrenic contention, we would first observe that finding an absence of facts to support the Appellees' contention that Haugabook is not entitled to the money at issue does not represent an equitable determination of this case although it was an equitable and legally required result given the facts this Court had already found when it made the

statement complained of. The Court had found that Appellees had given up nothing for the $1,000,000 of stolen money they received as a consequence of the bank fraud of Paul Farr. This was admitted by the Appellee Scott Crisler (1/3/07 Transcript, T-114), and the record authorizes no other possibility as both this Court and even the trial court found. (Opinion, p. 4; Order, R-3333). Secondly, Haugabook's $1,000,000 obtained by the fraud of Paul Farr prevented the last $1,000,000 kited check on the Barnes, Farr & NeSmith, P.C. account from bouncing (Opinion, p. 5) so that Haugabook became the sole victim of Farr's criminal scheme while the Appellees remain the sole beneficiaries of that crime (Opinion, p. 9). These are the material facts key to a determination that Haugabook *ex aequo et bono* is entitled to recover the $1,000,000 and that the Appellees are not entitled in good conscience to retain that $1,000,000. *Stein Steel &c. Co. v. K. & L. Enterprises*, 97 Ga. App. 71, 73 (1958); *William N. Robbins, P.C. v. Burns*, 227 Ga. App. 262, 265 (1997). These material facts support the inherent equities, if you will, on Haugabook's side of the ledger. As the Court's analysis concludes there are no material facts with corresponding equities on Appellees' side of the ledger.

What Appellees, with no authority, have attempted to do is to redefine what are the material facts that bear on the equitable principles that form the criteria for evaluating the cause of action. They now maintain without case authority that Scott Crisler and Geoffrey Crisler using part of the $1,000,000 to retire their debts and to make investments are "material facts" the Court overlooked, but isn't it revealing that those facts were not even included in the Appellees' 50-page original brief! The reason for their omission is obvious. Whether the Appellees in good conscience, i.e. equitably, can retain the $1,000,000 has to be determined based on facts material to that issue. Those facts don't include what they did with the money. Per the Restatement of the Law of Restitution a party "who, non-tortiously and without notice that another has the beneficial ownership of it, acquires property which it would have been wrongful for him to acquire with notice of the facts and of which he is not a purchaser for value is, upon discovery of the facts, under a duty to account . . . and in addition [has a duty] to (a) return the subject matter in specie, if he has it; (b) pay its value to him, if he has non-tortiously consumed it in beneficial use; and (c) pay its value or what he received therefor at his election, if he has disposed of it." Restatement of the Law of Restitution, § 123, p. 506 (1937). (Emphasis added). Thus, the

Restatement is at total opposites with the Appellees' new position. A party spending the money that it would have been wrongful for him to acquire with notice of the true facts does not dissolve or equitably impact the duty to surrender the funds; it rather imposes the duty to account and specifies the appropriate remedy.

> "It would argue a great defect in the moral administration of justice, if one man could retain the money of another, for which he had given nothing, and which he received by mistake." *O'Neal v. Deese*, 23 Ga. 477, 479-480 (1857). (Emphasis added).

The second set of what the Appellees now contend are overlooked material facts are that (a) the trial court's interlocutory injunction prevented the Appellees from having any control "over their funds" and, consequently, (b) they couldn't manage and protect the funds and (c) are now faced with a judgment for a million dollars they don't have.[1] (Motion, p. 3). First we note that Appellees again cite no authority for the proposition that these are material facts to a determination as to who should prevail on a money had and received claim. Secondly, they are a total distortion of what occurred. Haugabook first sought a restraining order and

[1] There is no evidence in the record to support this last claim.

then a temporary injunction in part requiring the Appellees to pay the money into the registry of the Court pending a resolution of the case. (R-9, R-17, R-1315, R-1331). Appellees opposed those efforts and the trial court entered a temporary restraining order and later an interlocutory injunction which only required the appellees "to cease any act that would dissipate the funds received by the defendants . . . ." (Order, R-18 and Order, R-755). Appellees never sought to modify the interlocutory injunction except to get the trial court to allow the payment of their attorneys' fees. (R-149). Specifically, they never asked the Court to allow two of them to sell the securities they purchased with part of the $1,000,000 or to modify in any way the investments they made. Given the obvious risks associated with keeping the funds invested and Haugabook's repeated efforts to require the funds be paid into Court, the two Appellees who invested their share of the funds could easily have gotten permission from the Court to liquidate their investments and hold the cash subject to the Court's order – as their other brother in fact did. They and their counsel were repeatedly reminded of the potential consequences of the path they chose to stay invested and not pay the money into the Court. (R-1315-1338 and R-3249). For the Appellants, to now complain about

what they orchestrated is absurd and to try to lay the consequences of their foolish choice at Haugabook's door is reprehensible.

This Court actually reviewed and addressed the balance of the "material facts" Appellees contend it supposedly overlooked. (Motion, pp. 3-5; Opinion, pp. 5, 13). Appellees' counsel has mischaracterized those facts to be (a) Haugabook taking "every possible step to protect the true wrongdoers . . . his son-in-law Paul Farr, and Farr's law firm" and (b) Haugabook exercising "no due diligence to find out what had really happened before loaning the one million dollars." (Motion, pp. 3, 4). (Emphasis added). The facts conclusively demonstrate these are gross mischaracterizations, and more importantly the reality of what Haugabook did and didn't do in the particulars complained of are not legally material to his cause.

In terms of protecting wrongdoers, it cannot be contested that Haugabook thought, based on what his son-in-law told him and his two law partners confirmed that he was loaning $1,000,000 to keep a check from bouncing because his son-in-law had written a $1,000,000 check in the good faith belief that the $1,000,000 to cover it was in the mail from the insurance company. (1/3/07 Transcript, T-33-43; R-526-528; R-1661-1662). If that had been the truth,

Haugabook, by making the loan to cover the last check, would not have been guilty of protecting any wrongdoing. The fact that the supposed single check had been written without sufficient funds would have still been obvious from the bank records. Of course, Farr's fabrications turned out not to be true, and Haugabook has done nothing since to protect any wrongdoer. Yes, he sued the Appellees on the same logic that persuaded Willie Sutton to rob banks AND because Appellees had no rational basis, legal or factual to continue to hold onto the stolen money they gave nothing for. As this Court's decision has demonstrated, there was nothing wrong, inequitable, foolish or unwise about pursuing that course which was upon the advice of his counsel (1/3/07 Transcript, T-70) and not to protect any wrongdoers.

In terms of due diligence, Haugabook had the assurances of three men who because of their profession, reputation and their relationship to him it was reasonable for him to rely on. (1/3/07 Transcript, T-33-41; T-63; T-69; R-446; R-1622; R-1661). The fabricated documents exhibited to Haugabook passed muster with the two lawyers Haugabook was looking to for reassurance that the story Paul Farr had related was true. (R-1661).

While one approach for dealing with the Appellees' contentions as to Haugabook's claimed lack of due diligence is to apply the law that Haugabook's negligence in not discovering the fraud will not defeat his recovery if Appellees have not been prejudiced by that negligence (Opinion, pp. 13-14), the indisputable truth is Haugabook not being a lawyer, not having access to Farr's files (or reason to suspect they were material to his decision), not having access to the bank or law firm records, did all he could do in the little window of time available, and it was only in hindsight that he realized and admitted only that he should not have made the loan. (1/3/07 Transcript, T-77). This admission generated by stark honesty and a recognition that in hindsight he should not have trusted his son-in-law lawyer or his two law partners is simply not a material fact legally bearing on whether he should be able to recover the $1,000,000.

> "An action for money had and received will lie where there is no actual fraud. It will all the more lie when the defendant is in possession of money which ex aequo et bono, because of fraud, belongs to the plaintiff. *Rhodes Furniture Co. v. Jenkins*, 2 Ga. App. 475 (58 S.E. 897); *Knight v. Roberts*, 17 Ga. App. 527 (87 S.E. 809)."

Herrington v. City of Dublin, 50 Ga. App. 769, 773 (1934). (Emphasis added).

B. The Court Did Not Exceed its Appellate Jurisdiction by Reversing the Grant of Summary Judgment to the Appellees and Directing the Grant of Summary Judgment to the Appellants.

Appellees contend in Section III of their Motion that this Court balanced the equities between the Appellees and Haugabook. (Motion, p. 11). This Court's opinion does not even suggest, much less hold or disclose, that it attempted to balance the equities as between the Appellees and Haugabook. That presupposes there are equities on both sides to balance. Rather, this Court concluded in the first instance as a matter of law and contrary to the trial court's ruling that it was not necessary for the plaintiff in a money had and received case to show "that the defendant is literally in possession of plaintiff's money or that the plaintiff conferred a benefit on the defendant" and rather that the "true requirement is that the plaintiff show he is in equity and good conscience entitled to the money." (Opinion, pp. 9-10). Per the long recognized case law, a plaintiff does that on a motion for summary judgment by proving with uncontradicted evidence that the defendant ". . . has received money which [1] the plaintiff *ex aequo et bono*

is entitled to recover and which [2] the defendant is not entitled in good conscience to retain." *William N. Robbins, P.C. v. Burns*, 227 Ga. App. 262, 265 (1997). We are dealing with, as this Court recognized, a cause of action that is legal (Opinion, pp. 8-9) but which, nevertheless, from time immemorial is to be evaluated on criteria based on equitable principles (Opinion, pp. 7-8) and that evaluation is being done in the context of cross-motions for summary judgment on universally admittedly and found uncontradicted facts. While these realities may pose some linguistic dilemmas in the choice of the labels to use as the Court moves through the required analysis, the uncontradicted facts before the Court made that analysis easy. What is the demanded fair, just and equitable result simply bites you on the nose.

The defendants' innocence in receiving the money is not a fact that is to be balanced against the undisputed facts that the Appellees received $1,000,000 of stolen funds for which they gave nothing, and that Haugabook picked up the $1,000,000 tab for the bank fraud that supplied the Appellees with that $1,000,000. Summary judgment was obtained by the plaintiff in *Bill Heard Chevrolet Company v. Atlantic Discount Company*, 120 Ga. App. 388 (1969) despite the defendant's "innocence" and "good faith" and "regardless of the manner in which it may have

applied the proceeds because it had innocently acquired the money obtained by fraud and for which it had given up nothing." *Id.* at 389.

Since the uncontradicted facts establish there are no facts supporting the Appellees' contention that they have a right in good conscience to keep the money, there are no equities to balance over against the facts and inherent equities that the money in their possession they gave nothing for, and it was obtained by criminal bank fraud that Haugabook was defrauded into picking up the tab for.

While this Court did not do what Appellees have accused it of doing, the authority cited by Appellees in their motion does not actually support the proposition that "The Court of Appeals may NOT reverse a trial court on the grounds that 'the relative balance of equities militates against' the trial court's ruling." (Motion, p. 11). The part of the sentence Appellees quote was extracted from Justice Carley's concurring opinion in *Douglas v. Wages*, 271 Ga. 616, 619 (1999). (Motion, p. 11). In *Douglas*, the trial court had denied plaintiff's request for a temporary injunction and that ruling had been appealed. *Id.* at 617. The Court concluded that, "[s]ince the evidence did not demand a finding that the activities complained of constituted a statutorily-defined nuisance, the exercise of the trial court's discretion in refusing a temporary injunction will not be disturbed

on appeal." *Id.* at 618. What Justice Carley actually said in his special concurrence was:

> "If the trial court erred, it was not because of any ruling on a legal issue. An appellate reversal would have to be based upon a holding that the trial court abused its discretion in ruling that, under the circumstances, *the relative balance of equities militates against* the grant of an interlocutory injunction." *Id.* at 619. (Emphasis added).

Justice Carley then observed that, "The Court of Appeals has absolutely no constitutional basis for exercising appellate jurisdiction over a case presenting such an equitable issue." *Id.* at 619. (Emphasis added). Thus, what Justice Carley was addressing simply has no application to what this Court purportedly did in its ruling or what actually took place. As it develops, Justice Sears in her concurring opinion took issue with Justice Carley's characterization and in the process made a couple of points applicable to this case, i.e.

> "Contrary to what the special concurrence asserts, this is not a case where the availability of injunctive relief turned on 'the trial court's exercise of its sound discretion in balancing the procedural

benefit and detriment to the respective parties.' [Special concurrence at 619.] Rather, the record shows that the trial court's denial of injunctive relief turned on the resolution of *legal* issues – whether the actions complained of constituted a statutorily-defined nuisance, and whether those same actions violated the restrictive covenants *as a matter of law*. Nothing in the record indicates that the trial court engaged in a traditional 'balancing of the equities' before denying the injunction sought. Furthermore, the only issues raised and resolved on appeal are legal; appellant asserts no equitable issues." *Id.* at 618. (Emphasis added).

Rather than balance equities, what this Court actually did appears in a case cited by the Appellees at page 11 of their motion. That case not only does not hold what Appellees suggest it holds, it articulates both what this Court has been accused of doing versus what it in fact engaged in.

"Of course, an appellate court does not weigh the evidence, but determines sufficiency." *Locke v. Vonalt*, 189 Ga. App. 783, 785 (1989). (Emphasis added).

III. CONCLUSION

Per this Court's Rule 37 (e), "A reconsideration will be granted on motion of the requesting party, only when it appears that the Court overlooked a material fact in the record, a statute or a decision which is controlling as authority and which would require a different judgment from that rendered or has erroneously construed or misapplied a provision of law or a controlling authority." (Emphasis added). Appellees' motion does not meet this criteria and should be denied.

Respectfully submitted, this 7th day of April, 2009.

H. JEROME STRICKLAND
State Bar No. 687700
MATTHEW T. STRICKLAND
State Bar No. 687774
Attorneys for Janice B. Haugabook, Gail B. Haugabook Coogle and Richard C. Haugabook, Jr., as Co-Executors of the Estate of Richard C. Haugabook

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served a true and correct copy of the Appellants' Response to Appellees' Motion for Reconsideration upon counsel of record in this matter:

Mr. F. Gregory Melton
Davis & Melton, P.C.
P.O. Box 988
Dalton, Georgia 30722-0988

Mr. J. Edward Allen
Fortson, Bentley and Griffin, P.A.
2500 Daniell's Bridge Road
Building 200, Suite 3A
Athens, Georgia 30606

by depositing same in the United States Mail with sufficient postage affixed thereon to ensure delivery.

This 9th day of April, 2009.

H. JEROME STRICKLAND

Court of Appeals
of the State of Georgia

ATLANTA, APRIL 10, 2009

The Court of Appeals passed the following order

Case No. A08A0688

JANICE B. HAUGABOOK ET AL V. GEOFFREY CRISLER ET AL

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta APR 10, 2009

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Willie L. Martin, II

CLERK'S OFFICE
SUPREME COURT of GEORGIA
244 Washington Street, Room 572
Atlanta, Georgia 30334
(404) 656-3470
Business Hours: Monday - Friday, 8:30 a.m. to 4:30 p.m.

Docketing Date: April 29, 2009

To the Clerk of the Court of Appeals of Georgia:

You are hereby notified that there has been filed in this office on this day a petition to the Supreme Court for a writ of certiorari to the Court of Appeals in the case of **S09C1361**

GEOFFREY CRISLER et al. v. JANICE B. HAUGABOOK et al.

Clerk, Supreme Court of Georgia

Case No. A08A0688

Court of Appeals of Georgia

Notice of Petition for Certiorari

filed in office

APR 30 2009

Clerk, Court of Appeals of Georgia

5503

SUPREME COURT OF GEORGIA

Remittitur, Case No. S09C1361 Atlanta, October 5, 2009

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GEOFFREY CRISLER et al. v. JANICE B. HAUGABOOK et al.

Upon consideration of the petition for certiorari filed to review the judgment of the Court of Appeals in this case, it is ordered that the writ be hereby denied.

All the Justices concur, except Hines, Melton and Nahmias, JJ., who dissent.

Bill of Costs, $300.00
Court of Appeals Case No. A08A0688

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta October 23, 2009

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

Date: October 05, 2009

Case No. S09C1361

GEOFFREY CRISLER et al. v. JANICE B. HAUGABOOK et al.

COURT OF APPEALS CASE NO. A08A0688

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur, except Hines, Melton and Nahmias, JJ., who dissent.

Therese S. Barnes, Clerk

REMITTITUR

Court of Appeals of the State of Georgia

ATLANTA, MARCH 26, 2009

The Court of Appeals having met, the following judgment was rendered:

COURT OF APPEALS CASE NO. A08A0688
JANICE B. HAUGABOOK ET AL V. GEOFFREY CRISLER ET AL

This case came before this court on appeal from the SUPERIOR Court of CLARKE County; it is considered and adjudged that

THE JUDGMENT OF THE COURT BELOW BE AFFIRMED IN PART, REVERSED IN PART AND CASE REMANDED WITH DIRECTION.

SMITH, P.J., MIKELL AND ADAMS, JJ., CONCUR.

LC NUMBERS: SU06CV2803

Court of Appeals of the State of Georgia
Clerk's Office, Atlanta, **OCT 28, 2009**

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

Court of Appeals Cost $300.00. O.C.G.A. Sec. 5-6-10. No costs are payable to the Court of Appeals.

COURT OF APPEALS OF GEORGIA
47 Trinity Avenue, SW, Suite 501
ATLANTA, GEORGIA 30334
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APPEAL SUMMARY PAGE

CLASSIFICATION: TORT/DAMAGES

CASE NUMBER: A08A0688 DATE OF DOCKETING: NOVEMBER 28, 2007

STYLE: RICHARD C. HAUGABOOK V. GEOFFREY CRISLER ET AL

LOWER COURT SUMMARY INFORMATION:

CLARKE County SUPERIOR COURT SU06CV2803

TRIAL JUDGE: HON. STEVE C. JONES

RECORDS	DESCRIPTION:	PARTS:
2007-11-28	LOWERCOURT RECORDS.	09
2007-11-28	TRANSCRIPTS.	01

DATE OF JUDGMENT: 2007-09-21 NOTICE OF APPEAL DATE: 2007-09-28

COURT OF APPEALS CODE: 94-032
TERM: Jan. Cal. Mo.: MAR/08

DIVISION 4 PANEL CIR PATH: 90, 92, 94.
DIVISION 4 PANEL CIR PATH: 90, 92, 94, 95, 97, 99, 96.

COURT OF APPEALS OF GEORGIA
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APPEAL SUMMARY PAGE

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STYLE: RICHARD C. HAUGABOOK V. GEOFFREY CRISLER ET AL

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APPEAL CASE NUMBER: A08A0688 DATE OF DOCKETING: NOVEMBER 28, 2007

STYLE: RICHARD C. HAUGABOOK V. GEOFFREY CRISLER ET AL

IMPORTANT RULE REQUIREMENTS AND INFORMATION

Appellant's brief, including as Part II an Enumeration of Errors, shall be filed within 20 days of docketing. No appellant's brief shall be received for filing without the $80.00 filing fee or sufficient pauper's affidavit.

Appellee's brief shall be filed within 40 days after the docketing date or 20 days after the filing of the appellant's brief, whichever is LATER.

Failure to timely file briefs or to follow any Court rules or orders may cause the appeal to be dismissed or may cause non-consideration of the brief, and may subject the offender to contempt.

The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on MAR 27, , , ,2008.
before the FOURTH Division: Smith,P.J., Mikell,, J., Adams, J.
A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.
IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.

WILLIAM L. MARTIN, III, CLERK

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APPEAL CASE NUMBER: A08A0688 DATE OF DOCKETING: NOVEMBER 28, 2007

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The contents of a properly addressed registered or certified mailing shall be deemed filed on the U.S. Postal Service hand stamped, postmark date if it is stamped on the envelope or container. A document received from an overnight delivery service is deemed filed on the date it was delivered to the Post Office or a commercial delivery company as shown by the receipt of the U.S. Postal Service or overnight delivery company.

Motions for reconsideration are deemed filed on the date actually received in the clerk's office.

If oral argument is requested and approved by this Court this case will be scheduled for oral argument on MAR 27, , , ,2008. before the FOURTH Division: Smith,P.J., Mikell,, J., Adams, J. A printed calendar showing the exact date of argument will be mailed to counsel of record. If a calendar is not received at least ten days prior to the tentative oral argument date, contact the Clerk's Office.

There shall be no communications relating to pending appeals to any judge or member of the judge's staff.

FOR MORE INFORMATION CONTACT OUR WEBSITE AT WWW.GAAPPEALS.US.
IF YOU HAVE A QUESTION OR PROBLEM, PLEASE CALL THIS OFFICE.

WILLIAM L. MARTIN, III, CLERK