IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-01853-COA

CENTURY CONSTRUCTION COMPANY, LLC **APPELLANT**

v.

BANCORPSOUTH BANK, A MISSISSIPPI BANKING CORPORATION **APPELLEE**

DATE OF JUDGMENT:	11/10/2011
TRIAL JUDGE:	HON. JOHN ANDREW GREGORY
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	KEN R. ADCOCK
ATTORNEYS FOR APPELLEE:	JAMES PATRICK CALDWELL KEVIN B. SMITH CHRISTOPHER ROYCE SHAW
NATURE OF THE CASE:	CIVIL - CONTRACT
TRIAL COURT DISPOSITION:	SUMMARY JUDGMENT GRANTED TO APPELLEE
DISPOSITION:	AFFIRMED: 06/11/2013
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

LEE, C.J., FOR THE COURT:

¶1. This appeal arises from Century Construction Company LLC's claim against BancorpSouth Bank for negligence, breach of warranty, and wrongful conversion as a result of almost $500,000 in checks having been forged by Century's bookkeeper from its corporate checking account with BancorpSouth. BancorpSouth moved for summary judgment, arguing that the deposit agreement signed when Century opened the checking account contained a sixty-day notice provision for fraudulent activity rather than the statutory one-year notice.

The trial court agreed that as a matter of law the notice provision could be contractually shortened, and granted BancorpSouth's motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

¶2. On August 15, 1997, Century opened a corporate checking account with BancorpSouth. The authorized signors on the account were Clarence Chapman Jr. and Jo Lynn Chapman.

¶3. In late October 2004, Century's newly hired bookkeeper, Vicki Smith, began forging checks drawn on Century's corporate account with BancorpSouth. The checks were made payable to vendors with whom Century did business; however, the spellings of the vendors' names were altered. Additionally, Smith, who was not authorized to sign checks, forged the authorized signors' names.

¶4. According to Century, BancorpSouth contacted Clarence Chapman in August 2005, regarding a requested payment made on the account by phone. Chapman then called the Richland, Mississippi branch of BancorpSouth and instructed the bank to disallow the requested payment and to pay items only upon the authorized signature on the account. BancorpSouth asserts that it has no record of either telephone conversation.

¶5. On September 20, 2005, after thirty-two checks totaling $450,002.55 to three separate payees had been payed, the forgeries ended. Century requested BancoprSouth provide the bank statements for the past year, because Smith had destroyed all of the bank statements to conceal the fraud. On September 29, 2005, Century received the statements and conducted an audit of the account.

¶6. According to Century, it contacted the Richland branch of BancorpSouth and reported that there had been several forgeries on the account, instructed the branch manager to notify BancorpSouth's fraud department, and instructed that only checks signed by authorized signors should be paid. Again, BancorpSouth asserts that it has no record of this telephone conversation.

¶7. On October 12, 2005, Century faxed a letter to the branch manager of the Richland branch of BancorpSouth. This letter stated that "unauthorized parties" had been signing checks that were in turn paid by the bank. Century requested that BancorpSouth "only pay checks signed by authorized signors." Century also informed BancorpSouth that it was currently auditing the activities of the account and "[would] let [BancorpSouth] know immediately of any miss appropriated [sic] funds." And on August 30, 2006, Century, through its counsel, sent a letter to BancorpSouth regarding its claim against BancorpSouth for breach of warranty.

¶8. On April 23, 2008, Century filed suit against BancorpSouth for negligence, breach of warranty, and wrongful conversion. BancorpSouth moved for summary judgment, which the trial court granted. This appeal followed.

STANDARD OF REVIEW

¶9. Mississippi Rule of Civil Procedure 56(c) governs motions for summary judgment. "When reviewing a trial court's grant of summary judgment, our standard of review is de novo." *Webb v. Braswell*, 930 So. 2d 387, 395 (¶12) (Miss. 2006). For its review, this Court "must examine all the evidentiary matters . . . including . . . admissions in pleadings, answers to interrogatories, depositions[,] and affidavits." *Id.* The Court views the evidence in the

light most favorable to the nonmoving party. *McCullough v. Cook*, 679 So. 2d 627, 630 (Miss. 1996). To succeed on a motion for summary judgment, the moving party must prove that no genuine issue of material fact exists. *Id.*

DISCUSSION

I. SIXTY-DAY NOTICE PROVISION

¶10. When Century opened its corporate checking account with BancorpSouth, it signed a deposit agreement, stating in relevant part:

> Statements – You must examine your statement of account with "reasonable promptness." If you discover (or reasonably should have discovered) any unauthorized payments or alterations, you must promptly notify [BancorpSouth] of the relevant facts.
>
> . . . .
>
> You further agree that if you fail to report any unauthorized signatures, alterations, forgeries, or any other errors in your account within sixty (60) days when [BancorpSouth] make[s] the statement available, you cannot assert a claim against [BancorpSouth] on any items in that statement, and the loss will be entirely yours.

¶11. Century contends that the one-year notice statute of repose under Mississippi Code Annotated section 75-4-406(f) (Rev. 2002) cannot be contractually reduced. Section 75-4-406(f) states:

> Without regard to care or lack of care of either the customer or the bank, a customer who does not within one (1) year after the statement or items are made available to the customer (subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration.

This section clearly limits the liability of the bank to one year after the statement was made available to the customer. However, this section must be read in conjunction with

Mississippi Code Annotated section 75-4-103(a) (Rev. 2002), which provides, "The effect of the provisions of this chapter may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure." From a plain reading of the statute, the one-year notice provision established by section 75-4-406(f) "may be varied" by the deposit agreement.

¶12. Although this is an issue of first impression in Mississippi, the Wisconsin Court of Appeals addressed this very issue in *Borowski v. Firstar Bank Milwaukee, N.A.*, 579 N.W.2d 247 (Wisc. Ct. App. 1998). In *Borowski*, the deposit agreement shortened the one-year notice provision to fourteen days. Borowski asserted that the reduction in time was ineffective because section 404.103(1) of the Wisconsin Statutes, the comparable statute to Mississippi Code Annotated section 75-4-103(a), "prevent[ed] any agreement between a bank and its customer from 'disclaiming a bank's responsibility for its own lack of good faith or failure to exercise ordinary care or limiting the measure of damages for such lack or failure.'" *Borowski*, 579 N.W.2d at 251. The Wisconsin Court of Appeals disagreed with this contention, stating:

> [I]t is not the *agreement* between Borowski and Firstar Bank that gives the bank immunity even if it is negligent[;] it is [section] 404.406(4) [(the comparable statute to Mississippi Code Annotated section 75-4-406(f))]; all the agreement does is reduce the time within which the customer must notify the bank of an unauthorized signature or an alteration from one year to fourteen days.

Borowski, 579 N.W.2d at 251.

¶13. The *Borowski* court looked to *Parent Teacher Association v. Manufacturers Hanover Trust Company*, 524 N.Y.S.2d 336 (N.Y. Civ. Ct. 1998), which also approved the reduction of the notice provision from one year to fourteen days without regard to the bank's negligence or lack thereof. The court noted:

> In upholding the fourteen-day period, the court in *Parent Teacher* [*Association*] stated:
>
> > Conditions precedent and shortened periods of limitation similar to those at issue here have been routinely accepted in the banking relationship. Such provisions are not only compatible with statute and case law; they are in accord with public policy by limiting disputes in a society where millions of bank transactions occur every day.

Borowski, 579 N.W.2d at 252 (citing *Parent Teacher Ass'n*, 524 N.Y.S.2d at 340).

¶14. Numerous jurisdictions have also upheld the contractual shortening of the notice provision. *See Graves v. Wachovia Bank, Nat'l Ass'n*, 607 F. Supp. 2d 1277, 1281 (M.D. Ala. 2009) (approving the limiting of the notice provision to forty days); *Am. Airlines Emp. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 98 (Tex. 2000) (upholding the shorting of the notice provision to sixty days); *Frees v. Regions Bank, N.A.*, 644 S.E.2d 549, 552 (Ga. Ct. App. 2007) (finding a thirty-day notice provision not manifestly unreasonable); *Napleton v. Great Lake Bank, N.A.,* 945 N.E.2d 111, 119 (Ill. App. Ct. 2010) (approving the limiting of the notice provision to thirty days); *Nat'l Title Ins. Corp. v. First Union Nat'l Bank*, 559 S.E.2d 668, 672 (Va. 2002) (upholding a sixty-day notice provision); *Peters v. Riggs Nat'l Bank, N.A.,* 942 A.2d 1163, 1168 (D.C. 2008) (approving the shorting of the notice provision to sixty days); *Stowell v. Cloquet Co-Op Credit Union*, 557 N.W.2d 567, 574 (Minn. 1997) (approving a twenty-day notice provision). Century fails to cite one jurisdiction that has

addressed this issue and found the contractual shortening of the notice provision to be improper. Therefore, we find that section 75-4-406(f) "may be varied" by the deposit agreement.

II. NOTICE REQUIREMENTS

¶15. Section 75-4-406(f) places the burden on the customer to "discover and report the customer's unauthorized signature on or any alteration on the item . . . ." An item is defined as "an instrument or a promise or order to pay money handled by a bank for collection or payment." Miss. Code Ann. § 75-4-104(a)(9) (Supp. 2012). Century asserts that section 75-4-406(f) does not require specific notice of each check but that constructive notice is sufficient. Century claims it gave BancorpSouth constructive notice on three different occasions: (1) by a telephone call to the Richland branch in August 2005; (2) by another telephone call to the Richland branch in September 2005; and (3) by a letter faxed to the Richland branch on October 12, 2005. Century gave specific notice in a letter sent to BancorpSouth's registered agent in Tupelo, Mississippi, on August 30, 2006.

¶16. When interpreting a statute, the Court does "not . . . decide what a statute should provide, but . . . determine[s] what it does provide." *Lawson v. Honeywell Int'l, Inc.*, 75 So. 3d 1024, 1027 (¶7) (Miss. 2011) (citations omitted). We must do so without broadening or restricting the statute. *Id.* "If the words of a statute are clear and unambiguous, the Court applies the plain meaning of the statute and refrains from using principles of statutory construction." *Id.* Here, section 75-4-406(f) plainly states the customer has a duty to "discover and report the customer's unauthorized signature on or any alteration on *the item*

. . . .” (Emphasis added). Under the unambiguous language of the statute, the customer must report the item; therefore, the statute requires specific notice.

¶17. Although the Mississippi Supreme Court has not interpreted if section 75-4-406 requires specific notice, the court stated in *Union Planters Bank, National Association v. Rogers*, 912 So. 2d 116, 121 (¶13) (Miss. 2005):

> Because the customer is more familiar with his own signature, and should know whether or not he authorized a particular withdrawal or check, he can prevent further unauthorized activity better than a financial institution which may process thousands of transactions in a single day. Section 4-406 acknowledges that the customer is best situated to detect unauthorized transactions on his own account by placing the burden on the customer to exercise reasonable care to discover and *report such transactions*.

(Emphasis added).

¶18. Although the statute is silent as to the specifics of these items or transactions that must be reported, the Illinois Court of Appeals has stated that “common sense indicates that the report should be sufficient to at least identify the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted.” *Watseka First Nat’l Bank v. Horney*, 686 N.E.2d 1175, 1179 (Ill. App. Ct. 1997) (addressing *Knight Commc’ns, Inc. v. Boatmen’s Nat’l Bank of St. Louis*, 805 S.W.2d 199 (Mo. Ct. App. 1991)).

¶19. Viewing the facts in the light most favorable to Century, the nonmoving party, we must assume that Chapman made both phone calls to the BancorpSouth branch in Richland. According to Century, during the August 2005 phone call, Chapman instructed BancorpSouth “to disallow the wire transfer and . . . to only pay checks confirmed to be an authorized signature on the account.” Also according to Century, during the September 2005

phone call, Chapman notified BancorpSouth that forgeries on the account had occurred, "instructed the branch manager to notify [BancorpSouth's] fraud department," and again asked that "only corporate checks with authorized signatures should be paid." During these phone calls, Century never spoke about "the item,"as required by section 75-4-104(a)(9), or "such transaction," as required by *Rogers*, 912 So. 2d at 121 (¶13). In fact, Century never stated "the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted." *Horney*, 686 N.E.2d at 1179.

¶20. On October 12, 2005, Chapman faxed a letter to BancorpSouth, stating:

> It has come to our attention that unauthorized parties have been signing check[s] on our account named above[,] and the bank has been paying those. Please make sure to only pay checks signed by authorized signors.
>
> We are currently auditing this account and will let you know immediately of any miss appropriated [sic] funds.

Again, Century did not inform BancorpSouth of "the item" or "such transactions," nor did it state "the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted." Miss. Code Ann. § 75-4-104(a)(9); *Rogers*, 912 So. 2d at 121 (¶13); *Horney*, 686 N.E.2d at 1179.

¶21. Instead of letting BancorpSouth know immediately of any misappropriated funds, Century did not contact the bank again until August 30, 2006, when it sent a letter through its counsel to BancorpSouth's registered agent. Century enclosed in the letter "a ledger listing the checks which were paid by BancorpSouth which were forged and contain

unauthorized signatures." This ledger informed BancorpSouth of "the item(s)" and "such transactions," under the requirements of section 75-4-406(f). We find that Century did not give the notice required under section 75-4-406(f) until it sent the ledger to BancorpSouth on August 30, 2006.

III. TIMELINESS OF NOTICE

¶22. The forgeries ended on September 20, 2005. Under the deposit agreement, Century had sixty days after receiving notice to inform BancorpSouth of these forgeries. As stated above, Century did not report the specific items to BancorpSouth until August 30, 2006, almost one year after the forgeries ended.

¶23. Because Century failed to report the specific items to BancorpSouth within the sixty-day notice period mandated by the deposit agreement, we find that the trial court's grant of summary judgment was proper.

¶24. **THE JUDGMENT OF THE LAFAYETTE COUNTY CIRCUIT COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

BARNES, ISHEE, ROBERTS AND FAIR, JJ., CONCUR. CARLTON, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY IRVING AND GRIFFIS, P.JJ., AND JAMES, J. MAXWELL, J., NOT PARTICIPATING.

CARLTON, J., DISSENTING:

¶25. I respectfully dissent from the disposition of the majority's opinion. I agree with the majority that the reporting period may be modified to sixty days.[1] However, I submit that

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[1] Jurisdictions have enforced shortened notice periods ranging from fourteen to sixty days. *See Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 97 (Tex. 2000); *see also ADC Rig Serv., Inc v. JPMorgan Chase Bank, N.A.*, 641 F. Supp. 2d 617, 623 (S.D. Tex. 2009).

in light of the standard of review applicable to summary judgment, we should reverse and remand the trial court's grant of summary judgment in this case since genuine issues of material fact exist as to whether BancorpSouth failed to exercise its duty of due care or good faith as to any unauthorized checks or withdrawals occurring within the sixty-day reporting period wherein the bank possessed actual knowledge of unauthorized signatures on checks and transactions. Chapman and Century attest that they provided the bank with telephonic notice of unauthorized checks and faxed a letter to the bank due to unauthorized signatures on checks.[2] I further submit that a genuine issue of material fact exists as to whether Chapman's oral notice and Century's faxed letter complied with the deposit agreement's requirement of notice to the bank of forgeries, particularly in light of the evidence that the bank possessed actual knowledge of unauthorized signatures on checks, which caused the bank to alert Chapman of fraud in August 2005.[3] *See Am. Airlines Emps. Fed. Credit Union v. Martin*, 29 S.W.3d 86, 97 (Tex. 2000).

¶26. I would instruct the trial court to determine upon remand what particular disputed checks, if any, fall within the sixty-day reporting period after the bank received notice of unauthorized checks or forgeries in August 2005, when notified by Chapman after the bank called him; on September 29, 2005, when notified by Century; and on October 12, 2005, when Century reported unauthorized checks by faxed letter to the bank. I respectfully submit

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[2] Signature cards establish a contract between the customer and the bank. *Martin*, 29 S.W.3d at 96; *see generally JPMorgan,* 641 F. Supp. 2d at 623.

[3] *Freese v. Regions Bank, N.A.*, 644 S.E.2d 549, 552 (Ga. Ct. App. 2007) (parties may vary notice period by agreement if shortened period is not manifestly unreasonable, but bank still liable for any failure to exercise due care).

that the claims regarding unauthorized checks or forgeries, if any, posted before that reporting period are time-barred, and summary judgment is proper as to those. As stated, a review of the record, including deposition testimony therein, reflects that a genuine issue of material fact exists as to whether Century complied with its agreement by providing sufficient notice of the forgeries by Chapman's telephonic notice in August 2005; the telephonic notice provided by Century in September 29, 2005; or the faxed letter sent to the bank by Century on October 12, 2005. The trial court as well as this Court must view the evidence in the light most favorable to the nonmoving party in reviewing the summary-judgment motion.[4]

¶27. Viewing the facts in the light most favorable to the nonmoving party, the record in this case shows that in response to an inquiry by the bank about a potential forgery, Chapman, an authorized signatory of Century's account, provided that he called the bank to disallow a check and notified the bank to pay items only upon an authorized signature. The signature cards possessed by the bank reflect that only two persons were authorized to sign and authorize transactions on the account. Century also asserts that after its September 2005 audit of the account, the Richland branch of the bank was contacted and notified of several forgeries on the account. Then, on October 12, 2005, Century faxed a letter to the branch manager of the Richland branch of the bank again notifying the bank of the forgeries, and Century sent another letter to the bank a year later in August 2006, regarding its claim of breach of warranty.

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[4] *See Webb v. Braswell,* 930 So. 2d 387, 395 (¶12) (Miss. 2006) (setting forth the standard of review employed when considering a trial court's grant of summary judgment).

¶28. The bank bears the responsibility of ensuring only authorized signatures approve of transactions on an account, as reflected by the signature cards and account agreement. In applying the law to the sufficiency of the telephonic notice provided regarding the forgeries in this case, I find instructive the case of *ADC Rig Serv., Inc. v JPMorgan Chase Bank, N.A.*, 641 F. Supp. 2d 617 (S.D. Tex. 2009). In that case, the court found that for summary-judgment purposes, sufficient evidence was presented to show that oral notice to the bank of forgeries substantially complied with the contractual provisions even though the contract required written notice. *Id.* at 624-26. More specifically, the *JPMorgan* court found that the facts presented provided sufficient evidence as to when the possible forgeries had first been reported to the bank to enable a jury to conclude that the reporting requirement of the contract had been satisfied. *Id.* The court then determined that summary judgement was improper as to the unauthorized checks posted during the reporting period when the bank received the oral notice of possible forgeries. *Id.* The court, however, found summary judgment proper as to any unauthorized checks posted before the reporting period wherein the bank received oral notice of possible forgeries. *Id.*[5]

¶29. With respect to the law allowing the reporting period to by varied by agreement, the plain language of Mississippi Code Annotated section 75-4-103(a) (Rev. 2002), as well as precedents of other jurisdictions applying mirror images of this statute, clearly establishes

[5] The court in *JPMorgan* also found that the statutory prohibition on recovery by a bank customer who fails to detect and report within a certain number of days of the first unauthorized transaction in a series by the same wrongdoer failed to apply when the bank failed to exercise ordinary care in paying the items. *JPMorgan,* 641 F. Supp. 2d at 622-23. Signing signature cards establishes a contract. *Id*. at 623.

that the notice provision at issue may be contractually shortened. However, cases applying similar statutes provide that a bank and a customer may shorten the statute-of-repose period for reporting unauthorized checks or withdrawals as long as the shortened period is not manifestly unreasonable.[6] Neither the Mississippi statutes nor statutes of sister jurisdictions define when a shortened period is manifestly unreasonable. However, as noted in *Martin*, 29 S.W.3d at 96-97, shortened notice periods from fourteen to sixty days have been enforced by the courts.

¶30. While courts have found reporting periods of fourteen, thirty, and sixty days to not be manifestly unreasonable, the courts in those cases clearly determined that the bank was not excused from its duty of due care and good faith when contractually shortening the period.[7] In *Martin,* 29 S.W.3d at 95-97, the court explained that a reporting period shortened too much would in effect disclaim the bank's liability for lack of ordinary care and therefore void the provision.[8] *See* Miss. Code Ann. § 75-4-103(a) (prohibiting the parties to the agreement from disclaiming a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limiting the measure of damages). I respectfully submit that the plain language of section 75-4-103(a), consistent with precedent of sister jurisdictions, prohibits the provision in this instant contract from disclaiming the bank's liability for lack of due care and good faith. *See Phillips Home Furnishings Inc v. Continental Bank*, 331 A.2d 840, 844-

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[6] *JPMorgan*, 641 F. Supp. 2d at 622; *Martin,* 29 S.W.3d at 95, 97.

[7] *See Peters v. Riggs Nat'l Bank, N.A.,* 942 A.2d 1163, 1168 (D.C. 2008) (sixty days); *Freese*, 644 S.E.2d at 550 (thirty days).

[8] *Martin*, 29 S.W.3d at 95-97; *see also Freese*, 644 S.E.2d at 550.

45 (Pa. Super. Ct. 1974) (reversed on other grounds) (finding exculpatory provision in contract against public policy and providing that bank cannot exculpate itself from negligence due to its own lack of due care or good faith because of great need for professional and competent banking services and because justifiable reliance on integrity and safety of financial institutions is too strong to permit a bank to contract away its liability for failure to provide service and protections its customers expect).[9]

¶31. In applying section 75-4-103(a) to this case, the disclaimer provision regarding good faith and the duty of due care in the contract is void by operation of law due to its conflict with section 75-4-103(a), and this disclaimer is therefore inconsistent with reasonable commercial practices as defined by the Mississippi Legislature in that enactment. However, as acknowledged, I concur with the majority opinion in finding that parties indeed may vary the reporting period by agreement. *Best v. Dreyfus Liquid Assets, Inc.,* 521 A.2d 352, 354-55 (N.J. Sup. Ct. App. Div. 1987); *Freese*, 644 S.E.2d at 550 (thirty-day time period agreed to by the parties was not manifestly unreasonable nor inconsistent with commercial practices since the agreement did not excuse the bank from its duty of ordinary care); *Martin*, 29 S.W.3d at 97 (if customer complies with notice period, regardless of whether it is the statutory period or a shorter period, the bank is still liable for any failure to exercise due care). With the duty of due care and good faith in issue in this case, the trial court must have determined the sufficiency of notice to the bank by Chapman's telephonic response to the bank in August 2005, particularly in light of the testimony that the bank

[9] Contracts against liability for negligence are not favored by the law. *Dilks v. Flohr Chevrolet, Inc.*, 192 A.2d 682, 687 (Pa. 1963).

called Chapman to notify him of a fraudulent wire transaction to a credit card. In his deposition, Chapman explained that he confirmed with the bank that the transaction was not authorized. The bank's call to Chapman shows that the bank possessed actual knowledge and notice of suspected unauthorized withdrawals and forgery sufficient to survive summary judgment. As discussed, Chapman confirmed the bank's suspicion. If this notice is sufficient to survive summary judgment – and I respectfully submit that the deposition testimony of Chapman and of BancorpSouth's representative, Cathy Talbot, shows that sufficient facts indeed were presented – then the bank's duty of good faith and due care is in issue.[10]

¶32. One treatise provides the following helpful commentary based upon statutory provisions and judicial decisions construing the statutes at issue in this case:

> [T]he Uniform Commercial Code . . . obligate[s] banks to act in good faith and exercise ordinary care in dealing with customers and prohibits banks from disclaiming the duty to use ordinary care or from limiting their liability for the failure to use ordinary care. The Code provision is in conformity with case law which had begun to hold stipulations exonerating banks from liability invalid either as against public policy or for lack of consideration. While the Code provision prohibits a bank from disclaiming its duty to use ordinary care or from limiting its liability for the failure to use ordinary care, it allows the parties by agreement to set the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.

[10] The deposition of BancorpSouth representative Talbot, at exhibit G in the record, explains that only two individuals possessed authority to sign checks on Century's accounts. The individuals were Clarence and Jo Lynn Chapman. Talbot admitted in her deposition that the signatures on check numbers 3338, 3362, and other checks did not "agree" with the signatures on file at BancorpSouth. Therefore, not only were these unauthorized transactions on Century's accounts, but the signatures were unauthorized. Talbot's testimony reflects that these checks with unauthorized signatures were on the July 2005 statement, and she confirmed that had the forgeries and unauthorized transactions been discovered at that time, then most of the forgeries would have been prevented.

> Federal Regulation CC provides that the effect of the provisions regarding the collection of checks may be varied by agreement, except that no agreement can disclaim the responsibility of a bank for its own lack of good faith or failure to exercise ordinary care or can limit the measure of damages for such lack or failure. As with the Code, the Regulation does allow the parties to determine by agreement the standards by which the responsibility of the bank is to be measured so long as those standards are not manifestly unreasonable.

8 *Williston on Contracts* § 19:30 (4th ed. 2010).

¶33. Based upon the foregoing, I would reverse and remand the grant of summary judgment by the trial court because genuine issues of material fact exist as to whether Century complied with the notice provisions of its deposit contract/checking account by the oral notice of Chapman in August 2005 and by Century in September 2005, or by the letter faxed by Century to the bank in October 2005. I respectfully submit that genuine issues of material fact also exist as to whether the bank complied with its duty of ordinary care and good faith in performing its banking services.

IRVING AND GRIFFIS, P.JJ., AND JAMES, J., JOIN THIS OPINION.