2013 IL App (1st) 120611-U

FOURTH DIVISION
JUNE 28, 2013

No. 1-12-0611

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA,	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County.
v.	)	09 L 004017
FIRST AMERICAN BANK,	)	The Honorable Mary A. Mulhern,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin and Justice Epstein concurred in the judgment.

ORDER

HELD: The trial court erred in barring the testimony of the plaintiff's expert in an action against the defendant bank for breach of ordinary care under section 3-404 of the Uniform Commercial Code (810 ILCS 5/3-404 (West 1994)), where the expert indicated the standard of care was uniform at the relevant time. The trial court also erred in directing a verdict based on its erroneous determination that expert testimony was necessary to establish a case for statutory bank institutional negligence under section 3-404. The court

also erred in directing a verdict where it weighed the evidence in determining the motion for a directed verdict in a jury trial, which entails a different standard than motions for a directed finding in a bench trial. The court further erred in granting a motion *in limine* barring the plaintiff's alternative theory of the case when the evidence excluded was not shown to be inadmissible. The court reversed and remanded for a new trial.

¶ 1 BACKGROUND

¶ 2 An employee of American Airlines, Gary Aumann, conspired with Donald Down (not an employee of American Airlines) to embezzle money from American Airlines by submitting false invoices from two fictitious business entities: A&D Supplies (A&D) and Addison Business Supplies (ABS). Neither of these entities legally existed or provided any services to American Airlines. Down opened bank accounts at First American Bank. First American Bank titled the accounts solely in the names of "A&D Supplies" and "Addison Business Supplies." The A&D account was opened by Donald Down on August 9, 1994, and the ABS account was opened by Down on January 10, 1995. Neither A&D nor ABS were legitimate companies. Both were fictitious entities.

¶ 3 Numerous fraudulent checks were deposited into the A&D and ABS accounts through December 2007. Aumann processed invoices for payment to these entities, American Airlines issued checks made payable to the fictitious entities, and Down deposited the checks into the accounts. The record reveals that copies of the checks show no signature indorsement on the back, but rather were stamped on the back, "PAY TO THE ORDER OF FIRST AMERICAN BANK FOR DEPOSIT ONLY A&D SUPPLIES" and, where the checks were deposited into the ABS account, "PAY TO THE ORDER OF FIRST AMERICAN BANK FOR DEPOSIT ONLY ADDISON BUSINESS SUPPLIES." The checks were deposited in the accounts at First

American Bank that were opened by Down and titled in the names of "A&D Supplies" and "Addison Business Supplies." The American Airline checks were not made payable to either Down or Aumann individually, or to Down doing business as (DBA) A&D Supplies or Addison Business Supplies. Rather, they were made payable to solely to the order of the fictitious entities, A&D and ABS. The checks were deposited in the accounts by First American Bank and were paid.

¶ 4 American Airlines retained Apex Analytix to review its vendor contracts and identify potentially duplicative or fraudulent vendor payments. American Airlines discovered the embezzlement and reported it to the Federal Bureau of Investigation (FBI) in September 2007. Aumann and Down were arrested and pled guilty to embezzling money from American Airlines, along with other individuals involved in the fraudulent scheme. American Airlines notified its insurer, National Union Fire Insurance Company of Pittsburgh, PA (National Union), of its loss and National Union, after conducting its own investigation, paid American Airlines on its claim in exchange for an assignment of all its rights against Aumann, Down, and First American Bank. National Union thereafter brought the instant suit in 2009 against First American Bank, alleging that First American Bank violated the banking industry standard of ordinary care in (1) opening the fictitious business accounts and (2) accepting the fraudulent checks for deposit.[1] National Union specifically alleged that First American Bank opened the accounts without verifying that A&D and ABS existed or that Down had any relationship with those entities.

[1] The record reveals that, due to the statute of limitations, damages were sought for fraudulent checks between April 2006 and December 2007.

¶ 5 Both National Union and First American Bank filed jury demands and the case proceeded to a jury trial. At trial, National Union called four witnesses to testify: Donald Down; Sara Savanelli; Carolyn Gibson; and Edward Potter. Sara Savanelli was First American Bank's corporate representative. Carolyn Gibson was an internal auditor at American Airlines. Edward Potter was National Union's designated expert witness. For purposes of resolving the specific issues in this appeal, only the relevant testimony by Savanelli and Potter will be summarized.

¶ 6 Prior to trial, First American Bank brought a motion *in limine* seeking to bar any reference to depositing corporate checks into personal accounts, which the court granted. The court reasoned as follows:

> "THE COURT: Let's start with the thickest of National Union's – I'm sorry, First American's Motion with Regard to Depositing Corporate Checks into Personal Accounts.
>
> As I said before, I've read the depositions of Mr. Potter, Ms. Savinelli [sic], Mr. Fitzgibbon and maybe somebody else, and nowhere do any of those witnesses describe the First American Bank accounts opened in the name of Addison Business Supplies and A and D Supplies as personal accounts.
>
> It is true that Ms. Savinelli [sic] and then Mr. Fitzgibbon and perhaps even Mr. Potter all testified that these accounts were opened and the account holder name on each of the two accounts was a sole proprietorship. That's how it was described by Mr. Down to the bank, and that's how all the witnesses described the accounts.
>
> And Ms. Savinelli [sic], based on the documents she reviewed and her experience as a banker, testified that the application process for a sole proprietorship is similar or

identical to the application process for a personal account because sole proprietorships are run by individuals.

There are no corporate minutes. There are no corporate resolutions. There are no articles of incorporation and all those other documents that evidence the existence of a corporation. And so I don't have a reference in Mr. Potter's deposition transcript as to where he expresses his opinion that these are commercial accounts.

But Ms. Savinelli [sic], in her deposition at Page 125 described those accounts as commercial checking accounts.

* * *

*** And that's why I have ruled that as a matter of law these are not personal accounts and may not be referred to as personal accounts. They must be referred to as commercial accounts."

¶ 7 Sara Savanelli, the senior vice president of First American Bank, testified that in 1994 she was the branch manager of the Riverside branch of First American Bank. In 1995 she became a regional manager and vice president. Savanelli was not personally involved with the opening of the accounts but, rather, testified to the information on the application to open the accounts and also testified to the bank's procedures.

¶ 8 Savanelli testified that when First American Bank was developing polices from 1994-1996, the bank was insured by the Federal Deposit Insurance Corporation (FDIC) but was not involved in any FDIC examinations of the bank at that time and did not know if the FDIC made any recommendations to banks regarding policies and procedures.

¶ 9 During discovery, in its answers to National Union's interrogatories asking what procedures applied and what steps First American Bank took to verify the sole proprietorships, First American Bank stated that it "followed the account opening procedures for new *personal* accounts (emphasis added) since the owner identified ABS and A&D as sole proprietorships," and that "[t]he Bank followed the procedures for *personal* accounts (emphasis added)." At trial, counsel for National Union asked Savanelli who was considered the account holder, Down or the businesses, and Savanelli responded, "[w]ell, Donald Down is the sole proprietor, and he is the owner of those businesses, so he would be an account owner." However, Savanelli testified that First American Bank's "customers" were ABS and A&D. Savanelli testified that First American Bank "had procedures for how to title accounts." First American Bank's policy was to title sole proprietorships as, "John Doe DBA Suburban Auto." However, neither the ABS nor the A&D account were titled in this manner.

¶ 10 Savanelli testified that a credit report for Down was requested when he opened the ABS account and the credit report indicated that Down's current employer was "Earth, Inc." A&D and ABS were not present anywhere in Down's credit report. In fact, Down's occupation was listed as "[m]echanic." There was no mention of any supply business. Also, Down's home address on his credit report was the same address he was using for the fictitious business on his application. A credit report was also obtained on August 9, 1994 when Down opened the A&D account, but Savanelli did not find that credit report and could not testify to its contents. Down's January 10, 1995, application to open the ABS account stated that the business had started a little over a month earlier, December 1, 1994, but already had annual sales of "$50K."

¶ 11 Savanelli testified that although there was an application by Down for an assumed name certificate attached to Down's application to open the account of ABS, First American Bank never received any assumed name certificates for either A&D or ABS. However, the accounts were opened without receiving any assumed name certificates. According to Savanelli's trial testimony, First American Bank never received any documents regarding the existence of A&D or ABS. Savanelli testified, "I don't have any records for A&D Supplies, but it was not part of our procedure to investigate the business."

¶ 12 Regarding the bank's procedures regarding opening new accounts in 1994 and 1995, Savanelli testified as follows:

> A. Okay. I was able to locate procedures for completing a new account application, and for taking the data from a new account application and entering it into our computer system at the time, which was known as ISC.
>
> Q. And is that Plaintiff's Exhibit No. 4 and Plaintiff's Exhibit No. 6?
>
> A. Yes.
>
> Q. And those policies do not specifically talk about what to do to verify an account owner when opening an account for a sole proprietorship, do they?
>
> A. The new account application procedure discusses a personal new account application procedure. I believe there was also a commercial account application procedure that I was not able to find. However, the steps for verifying the individual are the same.

* * *

A. *** The procedure, which is Exhibit 6, is the procedure for completing the application and taking the steps to verify the individual's identity. No. 5 is the steps taken to take the data from the application that the customer has provided and that we've completed through our investigation and enter that information into our computer system.

Q. Okay. Well –

A. And it deals with all types of accounts, including business accounts, commercial accounts, sole proprietorships."

¶ 13 Specifically, when questioned as to what First American Bank did to verify that Down was in fact the sole proprietor of the two businesses, Savanelli testified as follows:

"Q. What was done that would enable the bank to determine whether, in fact, Mr. Down was the sole proprietor of either entity?

A. Our procedures called for the individual to be identified.

Q. I asked a slightly different question, ma'am. My question was, what did the bank do to determine that Mr. Down was who he said he was, the sole proprietor of two businesses?

A. We didn't do anything."

¶ 14 National Union also presented the testimony of Edward Potter, its expert. Potter had experience in the banking industry as a systems analyst and in management at Manufacturers Hanover Trust beginning in 1980, where he analyzed the source of checks being deposited in accordance with federal regulations by the Federal Reserve Bank. Potter became assistant vice president and served on the merger team when Manufacturers Hanover Trust merged with

Chemical Bank. He was promoted to vice president of the newly merged Chemical Bank in 1990. Chemical Bank then merged with Chase Manhattan Bank, followed by a merger between Chase Manhattan Bank with JP Morgan, which became JP Morgan Chase. During the merger between Manufacturers Hanover Trust and Chemical Bank Potter served on internal committees such as the check fraud committee to address check fraud.

¶ 15 Potter also participated in industry groups and had attended Bank Administration Institute, which is headquartered in Chicago. Potter had worked with the American Bankers Association, which is the industry representative for all banks, from the 1980s. Potter chaired a conference in Orlando in 1994 or 1995, and formed the American Bankers Association Deposit Account Fraud Committee, which was comprised of 13 banks from across the country, which Potter testified came to be known as the "Orlando 13." Included in this group were Chase, Citibank, First Boston (representing the Northeast), Harris Trust and First Banks of Minnesota (representing the Midwest), and First Union (from the South). From there, more banks joined and eventual became a national group. The goal of the group was to share experiences in successfully combating bank fraud. The group laid the groundwork of common definitions through the American Bankers Association. Potter was his bank's representative on the American Bankers Association Deposit Account Fraud Committee. The group discussed banking procedures. What Potter found was that "across the board and regardless of region, account opening is a *** very significant event. And it's a great place to stop fraud." Potter further testified: "There was a consensus on some of the [automated] processes and procedures used commonly among the banks." Another way to prevent new account fraud was to identify

the individual opening the account. In the mid-1990s, banks were warned of opening account fraud. Potter's group began publishing a document of fraud statistics and recommendations for opening new accounts beginning in 1995.

¶ 16 Potter also served on two other committees in 1994 and 1995, the Banking Industry Technology Secretariat (BITS), and at the Bank Administration Institute, where Potter presented findings of the Deposit Account Fraud Committee.

¶ 17 Potter testified that he was familiar with industry standards as of 1994 for opening both a new business account and for opening an individual account. Potter also testified that there were different standards for opening a business or commercial account versus an individual account in 1994. Potter found that common practices for banks had evolved.

¶ 18 National Union attempted to introduce Potter's expert opinion as to the industry standard regarding the opening of accounts during the relevant period the accounts in this case were opened, 1994 to 1995. However, the trial court barred his expert opinion testimony. During examination of Potter, First American Bank repeatedly objected on the basis of foundation.

¶ 19 The record reveals that, at first, the trial court overruled numerous objections by First American Bank based on both lack of qualifications as an expert and foundation and allowed Potter to continue testifying. The trial court made repeated references to whether Potter was qualified to render an opinion as to the standard for a midwest regional bank with assets of under $1 billion. No rationale was stated by the court for this limitation. After Potter attempted to testify regarding the industry standard for opening sole proprietorship accounts in 1994 and 1995, First American Bank again objected on the basis of foundation and moved for a directed verdict.

The trial court sustained the objection and also entered a directed verdict in favor of First American Bank, ruling:

> "He does not have the – he has not established a foundation upon which he could base opinions about the propriety of the account opening procedures in place at First American Bank in 1994 and 1995.
>
> Inasmuch as Mr. Potter – Mr. Potter then would not be able to testify and remain an expert to draw the nexus between the acts of the bank and the losses to American Airlines and its assignee – and hence, its assignee [sic], the motion for a directed verdict is granted."

¶ 20 National Union did not complete its examination of Potter and did not complete its case-in chief before the entry of the directed verdict. This appeal followed.

¶ 21 ANALYSIS

¶ 22 National Union argues: (1) the trial court abused its discretion in refusing to allow the expert opinion testimony of Potter; and (2) the trial court's entry of a directed verdict was error; (3) the trial court abused its discretion in barring the FDIC's Manual of Examination on banking standards; and (4) the trial court abused its discretion in granting First American Bank's motion *in limine* prohibiting any reference to the accounts as personal bank accounts. We agree as to the first, second and fourth contentions and reverse and remand for a new trial. We find, due to the lack of any argument or citation to relevant authority, National Union forfeited the third issue.

¶ 23 In its second amended complaint, National Union alleged a cause of action in Count IV against First American Bank pursuant to statutory negligence under section 3-404 of the Uniform

Commercial Code (UCC). 810 ILCS 5/3-404 (West 1994) (amended by Pub. Act 87-1135, eff. Sept. 17, 1992). This is the only claim at issue in this appeal. National Union had also brought a claim against First American Bank pursuant to UCC section 3-405 (810 ILCS 5/3-405 (West 1994)) in Count III of its first amended complaint, but the trial court granted First American Bank's motion to dismiss that count. National Union does not appeal the dismissal of count III for liability against First American Bank under UCC section 3-405.[2]

¶ 24 In order to resolve the issues on appeal, some background on a bank's liability under the relevant Uniform Commercial Code (UCC) provisions (810 ILCS 5/1-101 *et seq*. (West 1994)) as adopted in Illinois is necessary. In 1992, the Illinois legislature amended the UCC to provide for comparative negligence under which a depositary bank that fails to exercise ordinary care can be liable to bear a proportionate share of the loss for checks with fictitious payees. See 810 ILCS 5/3-404(d) (amended by Pub. Act 87-1135, eff. Sept. 17, 1992). A "depositary bank" is defined as "the first bank to take an item even though it is also the payor bank, unless the item is presented for immediate payment over the counter." 810 ILCS 5/4-105(2) (West 2006). Here First American Bank is the depositary bank for the fraudulent checks.

¶ 25 National Union's cause of action against First American Bank was brought under UCC section 3-404, known as the "fictitious payee rule." Section 3-404 provides as follows:

"§ 3-404. Impostors; fictitious payees.

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[2] We note that section 3-405 was renumbered by the legislature as section 3-404. Section 3-405 governs employer responsibility for fraudulent indorsement by an employee. 810 ILCS 5/3-405 (West 2006).

(a) If an impostor, by use of the mails or otherwise, induces the issuer of an instrument to issue the instrument to the impostor, or to a person acting in concert with the impostor, by impersonating the payee of the instrument or a person authorized to act for the payee, an indorsement of the instrument by any person in the name of the payee is effective as the indorsement of the payee in favor of a person who in good faith, pays the instrument or takes it for value or for collection.

(b) If (i) a person whose intent determines to whom an instrument is payable (Section 3-110(a) or (b)) does not intend the person identified as payee to have any interest in the instrument, or (ii) the person identified as payee of an instrument is a fictitious person, the following rules apply until the instrument is negotiated by special indorsement:

(1) Any person in possession of the instrument is its holder.

(2) An indorsement by any person in the name of the payee stated in the instrument is effective as the indorsement of the payee in favor of a person who in good faith, pays the instrument or takes it for value or for collection.

(c) Under subsection (a) or (b), an indorsement is made in the name of a payee if (i) it is made in a name substantially similar to that of the payee or (ii) the instrument, whether or not indorsed, is deposited in a depositary bank to an account in a name substantially similar to that of the payee.

(d) With respect to an instrument to which subsection (a) or (b) applies, if a person paying the instrument or taking it for value or for collection fails to exercise

ordinary care in paying or taking the instrument and that failure substantially contributes to loss resulting from payment of the instrument, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss." 810 ILCS 5/3-404 (West 1994).

¶ 26 The Official Comments to UCC section 3-404 state the rationale of this section:

"If a check payable to an impostor, fictitious payee, or payee not intended to have an interest in the check is paid, the effect of subsections (a) and (b) is to place the loss on the drawer of the check rather than on the drawee or the Depositary Bank that took the check for collection. Cases governed by subsection (a) always involve fraud, and fraud is almost always involved in cases governed by subsection (b). The drawer is in the best position to avoid the fraud and thus should take the loss. *** But in some cases the person taking the check might have detected the fraud and thus have prevented the loss by the exercise of ordinary care. In those cases, if that person failed to exercise ordinary care, it is reasonable that that person bear loss to the extent the failure contributed to the loss. Subsection (d) is intended to reach that result. It allows the person who suffers loss as a result of payment of the check to recover from the person who failed to exercise ordinary care. *** The amount of loss to be allocated to each party is left to the trier of fact.

*** [I]n some forged check cases the depositary bank is in a position to detect the fraud. Those cases typically involve a check payable to a fictitious payee or a payee not intended to have an interest in the check. Subsection (d) applies to those cases." 810

ILCS 5/3-404, Official Comment 3 (West 1994).

¶ 27 National Union had two theories of its case: (1) if the accounts for the fictitious entities were viewed as business accounts, then First American Bank failed to exercise ordinary care in: (a) opening the A&D and ABS accounts in the first place without verifying that these were real, legitimate businesses and that Down had authority to act for those businesses[3]; and (b) later taking the multiple fraudulent checks for deposit into those accounts for the fictitious entities;[4] or (2) First American Bank failed to exercise ordinary care because it treated the accounts as personal accounts and thereafter improperly deposited the American Airlines checks made payable to the A&D and ABS businesses into Down's personal accounts.

¶ 28 Section 3-103(a)(7) of the UCC defines "ordinary care" as follows:

> " 'Ordinary care' in the case of a person engaged in business means observance of reasonable commercial standards, prevailing in the area in which the person is located with respect to the business in which the person is engaged. In the case of a bank that takes an instrument for processing for collection or payment by automated means, reasonable commercial standards do not require the bank to examine the instrument if the failure to examine does not violate the bank's prescribed procedures and the bank's procedures do not vary unreasonably from general banking usage not disapproved by this Article or Article 4." 810 ILCS 5/3-103(a)(7) (West 1994).

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[3] Citations to the UCC for provisions concerning the opening of the accounts are for 1994, as the accounts were opened beginning in 1994.

[4] Citations to the UCC for provisions regarding the depositing of the checks are for 2006, as the checks were deposited between 2006 and 2007.

¶ 29 This definition applies to banks under Article 4 of the UCC pursuant to section 4-104(c). 810 ILCS 5/4-104(c) (West 1994). Uniform Commercial Code Comment 5 to section 103(a)(7) clarifies:

> "Subsection (a)(7) is a definition of ordinary care which is applicable not only to Article 3 but to Article 4 as well. See Section 4-104(c). The general rule is stated in the first sentence of subsection (a)(7) and it applies both to banks and to persons engaged in businesses other than banking. Ordinary care means observance of *reasonable commercial standards of the relevant business prevailing in the area in which the person is located*. The second sentence of subsection (a)(7) is a particular rule limited to the duty of a bank to examine an instrument taken by a bank for processing for collection or payment by automated means. This particular rule applies primarily to Section 4-406 and it is discussed in Comment 4 to that section. Nothing in Section 3-103(a)(7) is intended to prevent a customer from proving that the procedures followed by a bank are unreasonable, arbitrary, or unfair." (Emphasis added.) 810 ILCS 5/3-103 (West 1994), Uniform Commercial Code Comment 5.

¶ 30 While the UCC permits parties to vary the terms of the UCC by agreement, it expressly provides that "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." 810 ILCS 5/4-103(a) (West 1994).

¶ 31 I. Barring Expert Testimony of Potter

¶ 32 National Union first argues that the trial court abused its discretion in refusal to allow

Potter to give his expert opinion testimony. The trial court refused to allow Potter to testify as an expert witness because, in the court's view, the definition of "ordinary care" required knowledge of the standards in 1994 and 1995 in a midwest regional bank "*with assets of lower than $1 billion*." (Emphasis added.) First American Bank argues that National Union waived this issue by failing to make an offer of proof, and that Potter was not qualified and foundation was not established in order for him to give an expert opinion on the standard of care for a bank in the Chicago area.

¶ 33 A. Offer of Proof

¶ 34 We first address First American Bank's argument that National Union waived any error concerning the trial court's refusal to allow Potter to testify as to his expert opinion because National Union never made an offer of proof. As National Union correctly points out in reply, the Illinois Supreme Court has rejected the argument that an offer of proof regarding an expert witness must be made in *Dillon v. Evanston Hospital*, 199 Ill. 2d 483 (2002). In *Dillon*, the Illinois Supreme Court held that an offer of proof is not necessary where the expert testimony concerned the standard of care and "the trial court understood" that the experts would testify as to the standard of care. *Dillon*, 199 Ill. 2d at 495. The Court explained the general rule regarding offers of proof and when the rule does not apply:

> "When a trial court excludes evidence, no appealable issue remains unless a formal offer of proof is made. The failure to do so results in a waiver of the issue on appeal. The purpose of an offer of proof is to inform the trial court, opposing counsel, and a reviewing court of the nature and substance of the evidence sought to be introduced. However, an

offer of proof is not required where it is apparent that the trial court clearly understood the nature and character of the evidence sought to be introduced." *Dillon*, 199 Ill. 2d at 495 (citing *People v. Peeples*, 155 Ill. 2d 422, 457-58, 186 Ill. Dec. 341, 616 N.E.2d 294 (1993); see also *In re A.M.*, 274 Ill. App. 3d 702, 709, 210 Ill. Dec. 832, 653 N.E.2d 1294 (1995); M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 103.7, at 23-24 (7th ed. 1999)).

¶ 35 See also *Guski v. Raja*, 409 Ill. App. 3d 686, 698-99 (2011) ("Although defendants claim that this issue is also forfeited because plaintiff failed to make a formal offer of proof in the hearing on the motions *in limine*, our review of the transcript reveals that the circuit court understood the nature and character of the evidence plaintiff sought to introduce and, thus, we will relax forfeiture here and address the merits."); *First National Bank of Mount Prospect v. Village of Mount Prospect*, 197 Ill. App. 3d 855, 864-65 (1990) (offer of proof unnecessary where expert's opinion testimony was obvious).

¶ 36 In this case the court was clearly aware that Potter would testify to the standard of care in opening bank accounts. An offer of proof was unnecessary. The issue regarding the erroneous ruling barring Potter's expert testimony was not waived by National Union. We proceed to review the issue.

¶ 37 B. Foundation: Scope of Area

for Standard of Ordinary Care Under the UCC

¶ 38 In addressing the merits of this issue, we note that the circuit court did not deny that Potter had sufficient banking experience to qualify as an expert, but refused to allow his expert

opinion on foundation. In the court's view, Potter could not testify to the standard of care because the definition of "ordinary care" required knowledge of the standards employed by a small midwest regional bank with assets of under $1 billion. First American Bank argues that Potter was both unqualified to render his expert testimony and that there was no foundation for his testimony because he "had no experience with the account opening procedures employed by similarly sized banks located in the Chicago area." Although First American Bank argues that Potter was properly barred because he was not qualified to give his opinion, the basis of its objection at trial and the court's refusal to allow him to testify was only lack of foundation. We hold that the exclusion of Potter's testimony on this basis was erroneous.

¶ 39 "Expert testimony is admissible if the proffered expert is qualified by knowledge, skill, experience, training, or education, and the testimony will assist the trier of fact in understanding the evidence." *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003); *Reed v. Jackson Park Hospital Foundation*, 325 Ill. App. 3d 835, 842 (2001). "The decision of whether to admit expert testimony is within the sound discretion of the trial court, and a ruling will not be reversed absent an abuse of that discretion." *Reed*, 325 Ill. App. 3d at 842.

¶ 40 "Expert testimony is admissible if 'the expert is qualified by knowledge, skill, experience, training, or education in a field that has at least a modicum of reliability, and if the testimony would aid the jury in understanding the evidence.' " (Internal quotation marks omitted.) *Baley v. Fed. Signal Corp.*, 2012 IL App (1st) 093312, ¶ 74 (quoting *Fronabarger v. Burns*, 385 Ill. App. 3d 560, 565 (2008). " ' " [T]he admission of an expert's testimony requires the proponent to lay an adequate foundation establishing that the information upon which the expert bases his opinion

is reliable.'" *Baley*, 2012 IL App (1st) 093312, ¶ 74 (quoting *Safford*, 392 Ill. App. 3d at 221, quoting *Hiscott v. Peters*, 324 Ill. App. 3d 114, 122 (2001), citing *Soto v. Gaytan*, 313 Ill. App. 3d 137, 146 (2000)). The trial court must determine if the foundational standards have been met. *Baley*, 2012 IL App (1st) 093312, ¶ 74 (citing *Safford*, 392 Ill. App. 3d at 221). "After proper foundation has been laid, 'the weight to be assigned to that testimony is for the jury to determine.' " *Baley*, 2012 IL App (1st) 093312, ¶ 74 (citing *Fronabarger*, 385 Ill. App. 3d at 565). *Baley*, 2012 IL App (1st) 093312, ¶ 74.

¶ 41 The Illinois Supreme Court's discussion of section 4-103(3) in *Wilder Binding Co. v. Oak Park Trust & Savings Bank*, 135 Ill. 2d 121 (1990), provides good guidance as to the relevant area sufficient to establish a banking standard for ordinary care:

> " '[I]n the absence of special instructions, action or nonaction consistent * * * *with a general banking usage* not disapproved by this Article, *prima facie constitutes the exercise of ordinary care*.' *** Ill. Rev. Stat. 1985, ch. 26, par. 4-103(3).
>
> The term *general banking usage* 'is not defined but *should be taken to mean a general usage common to banks in the area concerned*.' (Emphasis added.) (Ill. Ann. Stat., ch. 26, par. 4-103, Uniform Commercial Code Comment, at 441 (Smith-Hurd 1963).) Additionally, '[w]here the adjective "general" is used, the intention is to require a usage broader than a mere practice between two or three banks but it is not intended to require anything as broad as a country-wide usage. *A usage followed generally throughout a state, a substantial portion of a state, a metropolitan area or the like would certainly be sufficient*.' " *** (Ill. Ann. Stat., ch. 26, par. 4 -- 103, Uniform Commercial

Code Comment, at 441 (Smith-Hurd 1963).)" (Emphasis in original.) *Wilder Binding Co.*, 135 Ill. 2d at 128-29.

¶ 42 To the extent First American Bank argues that Potter was not qualified as an expert, we find, based on both parties' submissions and a review of the record, that Potter was qualified as an expert and there was sufficient foundation for his expert testimony. Potter had substantial involvement in the banking industry and participated and led committees on fraud prevention policies, specifically fraud in the opening of bank accounts. Contrary to First American Bank's assertion, Potter had relevant experience during the time the accounts in this case were opened, 1994 and 1995. Potter specifically testified that there was a general banking usage regarding the opening of accounts and that verifying an account holder was uniform practice. Potter had experience with industry standards regarding opening new accounts and check fraud from the early 1990s. Even without taking into account Potter's banking committee experience beginning in 1994, Potter testified that when he became vice president of Chemical Bank in 1990 after it merged with Manufacturers Hanover Trust he served on the internal check fraud committee to address check fraud.

¶ 43 Regarding foundation, the court's exclusion of Potter's expert testimony on this basis was an abuse of discretion. There is no basis for the trial court's limitation of the area necessary for the standard of ordinary care to midwest regional banks in the absence of any evidence that banking standards were different in different regions, and where Potter indicated the minimum standard of ordinary care was uniform.

¶ 44 There also is no basis for the trial court's limitation requiring a particular size of the bank

as part of establishing the scope of the standard of ordinary care. The trial court made repeated references to the standard of ordinary care for a bank "*with assets of lower than $1 billion*." (Emphasis added.) The trial court did not state the basis for this supposed requirement. There is nothing in the UCC to support any such limitation regarding the size of individual banks.

¶ 45 First American Bank would further restrict the area of the standard for ordinary care to "similarly sized, Chicago-area banks." The only authority cited by First American Bank for such a restriction in industry standard of care is a case from California, *Espresso Roma Corp. v. Bank of America*, 124 Cal. Rptr. 2d 549, 553 (Cal. Ct. App. 2002), and a practitioner treatise, White, James J. & Summers, Robert S., Uniform Commercial Code, § 19-3(d) (6th Ed. 2010). Illinois has not adopted an express, limited rule regarding the standard for ordinary care. Rather, deviation of a bank's procedures from a "general banking usage" can be shown. See 810 ILCS 5/3-103(a)(7) (West 1994).

¶ 46 Contrary to First American Bank's assertion that Potter himself testified at his deposition that banks in different regions had different policies in effect at the time the Down accounts were opened, this did not apply to the banking usage for *opening an account*. Potter's testimony was that the minimum standard of ordinary care in opening an account was a uniform general banking usage, and it was an abuse of discretion to exclude his expert testimony.

¶ 47 The reasoning of the trial court and the argument of First American Bank is akin to the so-called "similar locality" rule regarding the standard of care in medical malpractice cases. A similar argument regarding the necessity of a standard of care for a "similar locality" was presented in *Purtill v. Hess*, 111 Ill. 2d 229 (1986), in the context of medical malpractice. There,

in an appeal from a grant of summary judgment in favor of the defendants, the main contention of the defendant treating physician was that the plaintiff's expert was not qualified to testify as an expert witness because he was not familiar with the standard of care in Rantoul (Champaign County) or a similar community. *Purtill*, 111 Ill. 2d at 244. However, the Illinois Supreme Court was persuaded by the reasoning of other courts that allowed expert medical testimony concerning uniform "minimum" standards. *Purtill*, 111 Ill. 2d at 249. Therefore, the Court held, the plaintiff's expert's statement that he was familiar with the minimum standards of medical practice at issue in the case and that those minimum standards were uniform throughout the country, localities similar to Rantoul were included and his qualifications were sufficient. *Purtill*, 111 Ill. 2d at 250. Similarly here, Potter testified that in his experience on the banking industry committees, the standard of care for opening accounts by verifying the accountholder's identity was uniform in 1994.

¶ 48 First American Bank has not pointed to any evidence even suggesting that the commercial standards were different for different regional or metropolitan-area banks. Therefore, it was an abuse of discretion for the trial court to rely on this basis to find that the expert opinion testimony of Potter lacked foundation and was inadmissible.

¶ 49 II. Entry of Directed Verdict

¶ 50 First American Bank makes the argument that the trial court appropriately granted the directed verdict due to the insufficiency of the evidence without expert testimony. "A motion for directed verdict will not be granted unless all of the evidence so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Krywin v. Chicago*

Transit Authority, 238 Ill. 2d 215, 225 (2010) (citing *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). "On review, all of the evidence must be construed in the light most favorable to the nonmoving party." *Krywin*, 238 Ill. 2d at 225 (citing *Thacker v. UNR Industries, Inc*., 151 Ill. 2d 343, 353-54 (1992)). The standard of review of an order disposing of a motion for directed verdict is *de novo*. *Krywin*, 238 Ill. 2d at 225 (citing *Evans v. Shannon*, 201 Ill. 2d 424, 427 (2002)).

¶ 51 National Union argues that the trial court erred in granting a directed verdict based on the lack of expert testimony after it barred Potter, as expert testimony is not required to establish a breach of the standard of ordinary care in a statutory case under UCC section 3-404 against a bank. First American Bank argues that the trial court appropriately granted the directed verdict because expert testimony was necessary to establish the standard of ordinary care. We agree with National Union. The entry of a directed verdict based on the lack of an expert witness was erroneous.

¶ 52 First American Bank argues, "[e]xpert testimony is necessary to establish the standard of care applicable to a professional," citing to *Studt v. Sherman Health Systems*, 2011 IL 108182. However, this is not professional negligence case, such as a medical or legal malpractice case against individual professionals. The claim against First American Bank is a statutory cause of action pursuant to the UCC, section 3-404, not as an ordinary common law negligence case, and certainly not as a professional negligence case. The claim is against the bank as an institution for its institutional negligence and expert testimony is not required but, rather, can be established by a wide array of evidence. According to First American Bank's own citation to *Studt*, the Illinois

Supreme Court has explicitly held that even in the context of hospital institutional negligence, "[i]n contrast to professional negligence, institutional negligence does not necessarily require expert testimony and may be established by a wide array of evidence. *Studt*, 2011 IL 108182, ¶ 21. Entry of a directed verdict based solely on the lack of any expert testimony was erroneous in this case.

¶ 53 In a jury trial, the correct standard for a motion for a directed verdict is the *Pedrick* standard. "[V]erdicts ought to be directed and judgments *n.o.v.* entered only in those cases in which all of the evidence, when viewed in its aspect most favorable to the opponent, *so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand*." (Emphasis added.) *Pedrick*, 37 Ill. 2d at 510. This is a very high standard. The standard a trial court must employ in ruling on a motion for a directed verdict is whether a plaintiff has proffered at least " '*some* evidence on every element essential to [the plaintiff's underlying] cause of action.' " (Emphasis added.) *Cooper*, 2012 IL App (3d) 120524, ¶ 25 (quoting *Cryns*, 203 Ill. 2d at 275). Whether each of those elements were established is for the jury to determine. "[I]t is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony." *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). On our *de novo* review, we must determine whether there is at least some evidence on every elemental essential to National Union's cause of action.

¶ 54 First American Bank's own witness, Savanelli, testified that First American Bank's own procedure required it to verify the identity of the individual opening the account (to guard against identity theft when opening new accounts) but did not require it to investigate the business of that

individual prior to opening an account. First American Bank did not title the accounts appropriately as sole proprietorship accounts, but rather solely in the name of the fictitious businesses.

¶ 55 It cannot be said that the evidence presented, even without Potter's expert testimony, was so deficient that *no* verdict in favor of National Union could ever stand, particular when we view the evidence in the light most favorable to National Union as we must. Furthermore, issues regarding whether a defendant failed to exercise ordinary care are for the jury to determine. See, *e.g.*, *Wilder*, 135 Ill. 2d at 129-30 ("the question of whether a bank exercised ordinary care in paying a check presents a genuine issue of material fact which should be answered by the trier of fact"). A directed verdict in this case was inappropriate and so we reverse and remand for a new trial.

¶ 56 III. Exclusion of FDIC Manual of Examination

¶ 57 National Union includes the trial court's refusal to admit the FDIC Manual of Examination Procedures dated May 14, 1996, at trial as one of its issues on appeal. National Union states in its statement of the issues presented for review that the third issue on appeal is the following: "Did the circuit court err in prohibiting the jury from considering the FDIC's Manual of Examination as evidence of banking standards, where defendant's expert admitted that the manual was an authoritative source on banking procedure and the manual is, as a government publication, self-authenticating?"

¶ 58 However, National Union includes no argument and presents no authority in the body of its argument in its brief on appeal, thereby forfeiting our review of this issue. See Ill. S. Ct. R.

341(h)(7) (eff. July 1, 2008). The only citation National Union provides is to the website address of the FDIC Manual of Examination Policies, May 14, 1996, and cites to it only in arguing that Potter's expert opinion was supported. National Union does not provide any Illinois authority or make any argument as to why the trial court abused its discretion in barring admission of the manual or cite to any authority for the proposition that the manual is self-authenticating. "It is well settled that '[a] reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented ([Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006]), and it is not a repository into which an appellant may foist the burden of argument and research.' " *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App. 3d 1077, 1098-99 (2007) (quoting *Obert v. Saville*, 253 Ill. App. 3d 677, 682 (1993)). An appellant who fails to present cogent arguments supported by authority forfeits those contentions on appeal. *People v. Ward*, 215 Ill. 2d 317, 332 (2005). Further, because we are reversing and remanding for a new trial, we need not address the merits of the issue.

¶ 59 IV. Motion *In Limine* Barring Reference to the Accounts as "Individual Accounts"

¶ 60 Finally, National Union argues the court abused its discretion in granting First American Bank's motion *in limine* barring any reference to the accounts as individual accounts as opposed to business accounts. National Union attempted to present its case against First American Bank under either of two theories: (1) that First American Bank negligently opened a commercial business account without conducting any due diligence into the existence and legitimacy of the account holders, and thereafter also negligently deposited the checks into those accounts; or (2) that First American Bank negligently deposited checks payable to a business into a personal

account.

¶ 61 In ruling on First American Bank's motion *in limine*, the trial court reviewed and weighed the depositions of the witnesses in the case, including National Union's expert, Potter, and found that all of the witnesses testified that the accounts were commercial, and not personal, accounts. The court ruled, "these are not personal accounts and may not be referred to as personal accounts. They must be referred to as commercial accounts." The trial note further ruled that the use of the term "corporate checks" would be misleading because "none of the checks at issue here were made payable to a corporation." First American Bank argues that National Union "presented no evidence at trial, or before trial, to establish that the accounts in question were 'personal accounts.' "

¶ 62 " 'A motion *in limine* is addressed to the trial court's inherent power to admit or exclude evidence,' and, generally, this 'court will not disturb the trial court's ruling on a motion *in limine* absent a clear abuse of discretion.' " *Chicago Exhibitors Corp. v. Jeepers! of Illinois, Inc.*, 376 Ill. App. 3d 599, 606 (2007) (quoting *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (2001), citing *People v. Williams*, 188 Ill. 2d 365, 369 (1999)). " 'However, a trial court must exercise its discretion within the bounds of the law.' " *Chicago Exhibitors Corp*., 376 Ill. App. 3d at 606 (quoting *Beehn*, 321 Ill. App. 3d at 680). Where, however, a trial court's exercise of discretion relies on an erroneous conclusion of law our review is *de novo*. *Chicago Exhibitors Corp*., 376 Ill. App. 3d at 606 (citing *Beehn*, 321 Ill. App. 3d at 680-01).

¶ 63 A good summary of the proper resolution of a motion *in limine* is found in *Pyskaty v. Oyama*, 266 Ill. App. 3d 801 (1994):

> "The basic rules governing whether a motion *in limine* should be granted are: (1) The court must decide whether, as the moving party asserts, the rules of evidence require exclusion of the subject matter of the motion; and (2) If they do not, the motion must be denied. However, if the rules require the exclusion of this evidence, the circuit court has discretion to grant the motion and to enter an order before trial excluding the evidence, or to deny the motion and to leave to the moving party the procedure of objecting to the evidence when it is offered at trial." *Pyskaty*, 266 Ill. App. 3d at 818-19 (citing *Department of Public Works & Buildings v. Roehrig*, 45 Ill. App. 3d 189 (1976)).

¶ 64 The purpose of a motion *in limine* is not to exclude all prejudicial evidence but, rather, to exclude inadmissible evidence that would be prejudicial. The fact that evidence may be prejudicial does not render it inadmissible. *People v. Lucas*, 132 Ill. 2d 399, 428 (1989) (citing *People v. Foster*, 76 Ill. 2d 365, 374 (1979)). "It is improper for a court to allow a motion *in limine* which limits or precludes the introduction of relevant evidence." *Rush*, 255 Ill. App. 3d at 365 (citing *Mack v. First Security Bank*, 158 Ill. App. 3d 497, 504 (1987)). "Motions *in limine* are not designed to obtain rulings on *dispositive* matters but, rather, are designed to obtain rulings on *evidentiary* matters outside the presence of the jury." (Emphasis added) *Cannon v. William Chevrolet/Geo, Inc.*, 341 Ill. App. 3d 674, 681 (2003) (citing *People v. Owen*, 299 Ill. App.3d 818, 822 (1998)). It is a fundamental principle that, "[a]s a general rule, each party is entitled to present evidence which is relevant to its theory of the case." *Sekerez v. Rush Univ. Medical Center*, 2011 IL App (1st) 090889, ¶ 70; *People ex rel. Department of Transportation v. Kotara, L.L.C.*, 379 Ill. App. 3d 276, 286 (2008); *People v. Molsby*, 66 Ill. App. 3d 647, 657 (1978).

¶ 65 Here, the trial court improperly granted the motion *in limine* without making any admissibility determination. The trial court improperly excluded evidence directly relevant to one of National Union's theories of its case. Evidence at trial indicated that the accounts were not properly titled as sole proprietorship accounts according to First American Bank's own procedures, that First American Bank followed the procedures regarding a personal account, and that First American Bank considered *Down* the accountholder as the sole proprietor of A&D and ABS. "It is well settled that a sole proprietorship has no legal identity separate from that of the individual who owns it." *Vernon v. Schuster*, 179 Ill. 2d 338, 347 (1997). "The individual who does business as a sole proprietor under one or several names remains one person, personally liable for all his or her obligations." *Id*. at 347-48. The excluded evidence was relevant and First American Bank cited to no evidentiary rule supporting any assertion that the evidence was inadmissible. The grant of the motion *in limine* was error and on retrial National Union should be allowed to present both its theories of the case.

¶ 66 CONCLUSION

¶ 67 The trial court erred in barring the testimony of National Union's expert, in directing a verdict instead of allowing the case to be determined by the jury, and in granting a motion *in limine* barring an alternative theory of the case when the evidence was not shown to be inadmissible. Therefore, we reverse and remand for further proceedings not inconsistent with this order.

¶ 68 Because we are remanding for a new trial, this includes reopening all pre-trial matters. "When a new trial is ordered, that includes all phases of a trial, including all pretrial matters."

People ex rel. Department of Transportation v. Firstar Illinois, 365 Ill. App. 3d 936, 940 (2006). Should National Bank wish to retain a new expert or supplement Potter's opinion, it may seek to do so, subject to the court's discretion. Any ruling by the circuit court on expert witness matters must be in accordance with our order.

¶ 69 Reversed and remanded.