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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

T. MORRISSEY CORPORATION, Plaintiff and Appellant, v. THE CHECK CONNECTION, INC., et al. Defendants and Respondents.	B283341 (Los Angeles County Super. Ct. No. BC595796)

APPEAL from a judgment of the Superior Court of Los Angeles County, Alan S. Rosenfield, Judge. Affirmed.

Walker Law Office and Charles F. Walker for Plaintiff and Appellant.

Spencer & Mulally and Eric A. Spencer for Defendants and Respondents.

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Appellant T. Morrissey Corporation (Morrissey) asserted negligence and aiding-and-abetting claims against respondents The Check Connection, Inc. (TCC) and its owner Robert S. Milman, alleging that they improperly cashed checks that Morrissey was induced to issue as the result of a fraudulent scheme. At trial, following presentation of Morrissey's case-in-chief, the court granted respondents' motion for nonsuit. Morrissey contends the trial court improperly excluded evidence at trial and erred in granting nonsuit. We reject those contentions, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Pretrial Proceedings*

During the pertinent period, Morrissey was a general contractor offering construction services nationwide. Milman was owner and president of TCC, which provided check cashing services. Milman and Paul Hovis worked in TCC's office in downtown Los Angeles, where the check cashing operation was located.

In 2015, Morrissey commenced the underlying action against respondents and other defendants. Morrissey's first amended complaint (FAC), filed March 14, 2016, asserted claims for negligence and aiding and abetting the torts of fraud and conversion. The claims were predicated on allegations regarding a fraudulent scheme perpetrated by Morrissey's employee Frank Andrade and his brother, Noe Andrade.[1] According to the FAC, Frank arranged for Morrissey to pay sham or fictitious subcontractors by issuing checks, some of which Noe cashed at

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[1] For simplicity, we refer to the Andrades by their first names.

TCC. The FAC sought an award of damages against respondents totaling $276,716.

Morrissey's claims against respondents were severed from those against the other defendants for a separate trial. Prior to trial, respondents sought judgment on the pleadings with respect to the negligence claim, contending they owed Morrissey no duty of care in cashing the checks it issued. The trial court denied the motion without prejudice to a motion for nonsuit based on the same ground.

B. *Morrissey's Case-In-Chief*

At trial, Morrissey offered evidence that in 2010, after hiring Frank as a project manager, it began renovating Rite Aid drugstores. The Andrades created a fraudulent scheme involving an "imposter" subcontractor, that is, a sham entity masquerading as an existing construction firm called "Serviceline Providers Unlimited, Inc." (SPU). The Andrades recruited a person named Milton Hasley to open a bank account for the sham SPU by posing as its principal, and established a business address for the sham SPU differing from that of the real SPU. Frank then arranged for the sham SPU to be hired as a key subcontractor in the Rite Aid renovations. Frank also arranged for the hiring of two fictitious independent contractors, Michael Barba and Sammy Torres, one of whom -- Barba -- shared a name with a person known to Noe. At Frank's request, Morrissey paid SPU, Barba, and Torres for services they purportedly rendered.[2] From 2010 to 2013, Morrissey issued $2,484,961.45 in checks to SPU,

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[2] According to Morrissey's evidence, the services attributed to SPU were actually performed by unlicensed workers whom Noe paid.

$196,716.33 in checks to Barba, and $26,800 in checks to Torres. Checks totaling $300,991.33 were cashed at TCC.

Narvelle Pledger testified that from 2010 to 2013, he operated a company called "SPU Construction." Pledger stated that his company did not participate in Morrissey's renovation of the Rite Aid drugstores, that he received no checks from Morrissey relating to the projects, and that he never cashed any checks at TCC. He denied authorizing the Andrades' use of his company's name and his contractor's license number, and denied knowledge of their fraud. Pledger further stated that he was unaware of Hasley prior to the underlying litigation.

Barba testified that he had known Noe since the 1980's. According to Barba, he never worked for Morrissey, never received any checks from Morrissey, and never authorized the Andrades to use his name.

Deborah Santoro-Stieber testified that in 2011, she was employed by Independence Bank as a vice president. In November 2011, she opened a bank account for Hasley, who identified himself as a construction contractor doing business as SPU. Later, she began to work for Noe.

Forensic document examiner David Oleksow testified that he examined SPU-related documents, including Morrissey-issued checks payable to SPU that were cashed at TCC. Oleksow opined that Noe was responsible for the indorsements on those checks.[3]

John Antony Caglia, a Rite Aid construction manager, testified that he knew the Andrades. According to Caglia, during

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[3] Oleksow also opined that Noe forged Hasley's indorsements on SPU-issued checks cashed at TCC. He was unable to determine who forged Pledger's signatures on other documents relating to the sham SPU.

the Rite Aid renovation project, he suspected that Noe was using the name "Michael Barba" because it frequently appeared in Noe's e-mails. Caglia also testified that on one occasion, while accompanying Noe, he saw Noe enter TCC with several checks, including Morrissey checks payable to SPU. When Noe left TCC, Caglia told him, "'That is tax evasion type of stuff. They didn't get Al Capone on murder. They got him on tax evasion.'" Noe replied, "'Don't worry about it,'" and "'I know the guy that works there.'" On cross-examination, Caglia acknowledged that he did not, in fact, see Noe cash any checks at TCC.

Morrissey's owner, Thomas Morrissey, testified that he trusted Frank because he seemed to be a very good project manager. At Frank's recommendation, Morrissey hired SPU, Barba, and Torres. In 2013, when Morrissey experienced cash flow problems, Thomas Morrissey unsuccessfully attempted to contact SPU, Barba, and Torres. In December 2013, after numerous accounting irregularities were discovered in the Rite Aid projects, Morrissey fired Frank.[4] Later, Morrissey discovered that numerous checks issued by the sham SPU also had been cashed at TCC.

Thomas Morrissey acknowledged that from 2010 to 2013, he was aware that checks payable to SPU, Barba, and Torres were being cashed at TCC. At the time, he regarded that activity as "odd" and "concerning." He further testified that TCC never contacted Morrissey to inquire whether it should cash the checks.

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[4] Jhoie Cruz, Morrissey's chief financial officer, testified that in 2013, she found that Morrissey was losing money on the Rite Aid projects, even though Morrissey had expected to earn a 15 percent gross profit on them.

Milman, TCC's owner and president, testified that he seldom dealt with check cashing customers. When Milman was in the office, Hovis usually conducted the check cashing. According to Milman, in order to comply with the federal Banking Secrecy Act (BSA), he implemented certain policies, including requiring check cashing customers to present valid identification, and maintaining records of cashed checks. When asked why TCC had cashed Morrissey-issued checks presented by Noe but payable to Barba, Milman stated, "It shouldn't have happened."[5] Milman further testified that in 2014, after he closed TCC permanently, a demolition contractor accidently removed or destroyed its records.

Milman provided conflicting testimony regarding when he learned that Noe was cashing checks payable to other parties. At trial Milman acknowledged that Noe was a familiar customer, but denied any knowledge that prior to 2014, Noe was cashing checks payable to Barba, SPU, or other third parties. When deposed, Milman stated that he saw Noe present Hovis with checks payable to Barba.

Mark Nierman testified regarding certain customs and practices within the check cashing industry, which he ascribed to "good business" -- that is, avoiding the risk that a check's maker will stop payment on the check -- and the requirements of the BSA. Nieman stated that a check casher, when presented with a check payable to the individual seeking to cash it, should require valid identification. When presented with a check payable to a business, a check casher should also request documentation that the person offering the check is authorized to cash it. If a person

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[5] Milman also stated that TCC should not have cashed certain checks issued by the sham SPU to various third parties.

frequently cashes checks for substantial amounts under $10,000, the check casher should file a "suspicious activity report," that is, a report that the customer may be attempting to evade BSA requirements. Additionally, under federal law, the check casher is required to keep records of transactions for five to seven years.

Morrissey also presented testimony from David Ryan, a bank employee who conducted "due diligence" inquiries into TCC's compliance with the BSA, and Matthew Steinberg, who purchased TTC's office building when it closed its operations. Ryan stated that in 2012, when Milman admitted that he was allowing customers to cash checks payable to other parties, Ryan told him to stop. Steinberg denied the existence of any demolition operations that might have affected TCC's records.[6]

C. *Nonsuit and Judgment*

Following Morrissey's case-in-chief, respondents sought nonsuit, contending that the negligence claim failed because they owed no duty of care to Morrissey, and that the aiding-and-abetting claim failed for want of evidence that they knew of the Andrades' tortious conduct. The trial court agreed with both contentions and granted nonsuit. On June 6, 2017, the court entered a judgment in favor of respondents and against Morrissey on its claims.

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[6] Morrissey also offered testimony from Frank, who stated that he never visited the Rite Aid jobsites. According to Frank, he prepared check requests, which were processed through Morrissey's accounting department. He denied any personal knowledge of SPU or Torres, but acknowledged that he knew Barba. He also acknowledged giving Noe checks payable to Barba and Torres.

DISCUSSION

Morrissey contends the trial court erred in granting nonsuit and in excluding evidence at trial. For the reasons discussed below, we disagree.

A. *Nonsuit*

Morrissey asserted several challenges to the grant of nonsuit. Morrissey contends that respondents owed a duty of care to it, for purposes of a claim for negligence. Morrissey further contends its evidence supported two distinct theories sufficiently alleged in the FAC, namely, that respondents converted its funds, and that they aided and abetted the Andrades' conversion of those funds.

1. *Standard of Review*

"'A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in his favor.' [Citation.] In determining the sufficiency of the evidence, the trial court must not weigh the evidence or consider the credibility of the witnesses. Instead, it must interpret all of the evidence most favorably to the plaintiff's case and most strongly against the defendant, and must resolve all presumptions, inferences, conflicts, and doubts in favor of the plaintiff. If the plaintiff's claim is not supported by substantial evidence, then the defendant is entitled to a judgment as a matter of law, justifying the nonsuit. [Citation.]" (*Saunders v. Taylor* (1996) 42 Cal.App.4th 1538, 1541, quoting *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291 (*Nally*).) We review rulings on motions for nonsuit de novo, applying the same standard that governs the trial court. (*Saunders v. Taylor*, *supra*, at pp. 1541-1542 & fn. 2.)

2. *Governing Principles*

As Morrissey's claims arise from respondents' check cashing services, we summarize the principles applicable to that activity. Under the California Uniform Commercial Code (CUCC), a check is a negotiable instrument of a specific type, namely, "an unconditional . . . order to pay a fixed amount of money." (Cal. U. Com. Code, § 3104, subd. (a); see *id*. at subds. (c), (f).)[7] Ordinarily, a check involves three parties: (1) the """drawer""" or "maker" who writes the check, (2) the """payee,""" to whose order the check is made out, and (3) the """drawee""" or """payor""" bank, the bank which has the drawer's checking account from which the check is to be paid. (*Mills v. U.S. Bank* (2008) 166 Cal.App.4th 871, 881, fn. 10 (*Mills*); *HH Computer Systems, Inc. v. Pacific City Bank* (2014) 231 Cal.App.4th 221, 227 (*HH Computer*).)

"'In form, a check is an order to the drawee bank to pay the face amount of the check to the payee. After receiving the check, the payee typically indorses it on the back in the payee's own name, and then deposits it in the payee's account in a different bank, the "depositary bank." The depositary bank credits the check to the payee's account, and sends the check through the check clearing system to the payor bank for ultimate payment from the drawer's account. Any bank through which the check passes in the clearing process is an "intermediary bank." Any bank handling the check for collection, including the depositary bank but excluding the payor bank, is referred to as a "collecting bank.""' (*Mills*, *supra*,166 Cal.App.4th at p. 881, fn. 10, quoting

[7] All further statutory references are to the California Uniform Commercial Code, unless otherwise indicated.

In re McMullen Oil Co. (Bankr. C.D.Cal. 2000) 251 B.R. 558, 566-567.)

Generally, check cashing businesses offer a particular check-related financial service in exchange for a fee. (*HH Computer*, *supra*, 231 Cal.App.4th at pp. 230-231; *People v. Smith* (2016) 1 Cal.App.5th 266, 273.) "A person in possession of a check made out in his or her name can endorse the check to the check cashing business and receive the proceeds in cash, less a commission paid to the check cashing business. The check cashing business then redeems the check from the issuing bank for the full amount of the check." (*People v. Smith*, *supra*, 1 Cal.App.5th at p. 273.) The fees charged by check cashing businesses reflect the risk that the checks they attempt to redeem may be "bad." (See Barr, *An Inclusive, Progressive National Savings and Financial Services Policy* (2007) 1 Harv. L. & Pol'y Rev. 161, 163-164.) Under California law, check cashing service providers are required to operate under a permit and are subject to statutory limitations regarding their fees. (*Karen Kane, Inc. v. Bank of America* (1998) 67 Cal.App.4th 1192, 1203 (*Karen Kane*); *HH Computer*, *supra*, at p. 232 & fn. 11; Civ. Code, § 1789.30 et seq.)

Although check cashing businesses "facilitate financial services for large numbers of people who are not now connected to traditional banking institutions," they differ in function from those institutions. (*HH Computer*, *supra*, 231 Cal.App.4th at pp. 230-231.) As noted in *HH Computer*, check cashing businesses "feel like banks in a loose sense of the word. A customer takes a check written on someone's account at a bank and gets money for it. Real banks do that all the time. But so do liquor stores and markets and desperate landlords." (*Id*. at p. 232, italics omitted.)

However, "functionally, check cashing companies are not banks. . . . Taking deposits is fundamental to the '"business of banking."' [Citations.] . . . [¶] One does not deposit money into a check cashing company. In fact, the main point of check cashing companies for most of their customers . . . is that they don't need an account at a real bank in order to obtain cash from checks, which are usually payroll checks or government benefit checks." (*Id*. at p. 232, italics omitted.)

3. *Negligence*

Regarding Morrissey's negligence claim, the key issue concerns whether a check cashing service provider owes a duty of care to the maker of a check.[8] Viewed in the light most favorable to Morrissey, the trial evidence showed that respondents were familiar with Noe, and knew that he was presenting Morrissey-issued checks payable to other parties, that is, Barba, Torres, and SPU. Furthermore, although the checks usually displayed the payee's purported indorsement, none facially authorized Noe to cash them, and some lacked an indorsement altogether. Morrissey contends respondents were subject to a "minimal" duty of care to Morrissey, namely, to inquire of Morrissey whether Noe was authorized to cash the checks.

Morrissey proposes two sources of such a duty, namely, the common law duty of care and section 3405. We separately examine each potential source.

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[8] "'[I]n order to prove facts sufficient to support a finding of negligence, a plaintiff must show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.' [Citations.] Thus, duty is a critical element of negligence liability." (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629, quoting *Nally*, *supra*, 47 Cal.3d at p. 292.)

a. *Common Law Duty of Care*

We begin with the common law duty of care. Although the law imposes a general duty of care, that duty is subject to recognized limitations, including that "a person is 'ordinarily not liable for the actions of another and is under no duty to protect another from harm, in the absence of a special relationship of custody or control.'" (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 487 (*Burns*), quoting *Nally*, *supra*, 47 Cal.3d at p. 293.) The determination whether a duty exists in a specific context requires an assessment of policy considerations, as reflected in the multi-factored test stated in *Rowland v. Christian* (1968) 69 Cal.2d 108, 113 (*Rowland*). (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472-473.) The factors include "'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]'" (*Parsons v. Crown Disposal Co.*, *supra,* at p. 473, quoting *Rowland*, *supra,* at p. 113.)

The aim of the *Rowland* test is to gauge whether a duty is properly imposed in the specific type of situation presented. As explained in *Burns*, "'[t]he foreseeability of a particular kind of harm plays a very significant role in this calculus [citation], but a court's task -- in determining "duty" -- is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party.' [Citation.] In other words, '[e]xamining whether a legal duty exists and whether a particular defendant was negligent [are not] coterminous . . . . Fulfilling the court's responsibility to determine if a legal duty exists necessarily requires consideration and balancing of sometimes competing public policies which may be irrelevant to the factual determination of whether the challenged conduct fell below the prevailing standard of care.' [Citation.]" (*Burns*, *supra*, 173 Cal.App.4th at p. 488.)

We find the decision in *Karen Kane, supra*, 67 Cal.App.4th 1192, dispositive of Morrissey's contention. There, a clothing manufacturer asserted negligence claims against a bank and a check cashing service provider, alleging that they improperly accepted checks that the manufacturer issued due to a fraud. (*Id.* at pp. 1195-1196). According to the complaint, one of the manufacturer's managers arranged for the submission of fraudulent invoices from six fictitious suppliers, which the manufacturer paid by check. (*Ibid.*) During a three-year period, the manager cashed at least 76 checks totaling $760,000 at the check cashing service provider, which deposited them in its account at the bank. (*Id.* at p. 1196.) The manufacturer alleged that the checks exhibited "multiple danger signals and indicia of wrongdoing" alerting the defendants to possible fraud, including that the checks were numerous, payable to business entities that ordinarily did not rely on cash check service providers, and indorsed by individuals not expressly authorized by the payees. (*Ibid.*)

After the defendants successfully demurred to the complaint, the appellate court affirmed, concluding that they owed no duty of care to the manufacturer. (*Karen Kane*, *supra*, 67 Cal.App.4th at pp. 1197-1203). The court determined that the circumstances surrounding the cashing of the checks -- their volume, aggregate amount, payees, and "unorthodox" indorsements -- did not render foreseeable that the manufacturer was subject to internal fraud; at most, those facts suggested fraud against the payees. (*Id*. at pp. 1197-1199.) As the court noted, there was, in fact, *no* fraud against the payees: the checks were genuine, and the check cashing service provider paid funds to the designated -- but fictional -- payees when presented with the indorsed checks. (*Id*. at p. 1199.)

The court further found that even if the circumstances made internal fraud foreseeable, other *Rowland* factors weighed against the imposition of a duty. (*Karen Kane*, *supra*, 67 Cal.App.4th at pp. 1199-1201.) The court reasoned that the connection between the defendants and the manufacturer's injury was remote, as the true culprits were the manager and his accomplices; that moral blame attached solely to them; that requiring check cashing service providers and banks to inquire into "internal fraud" against the maker of a check would impede commerce while doing little -- if anything -- to deter such fraud; and that the manufacturer was better positioned to avert internal fraud. (*Id*. at p. 1199.) In so concluding, the court observed that the defendants had no preexisting relationship with the manufacturer enabling them to detect departures from the manufacturer's ordinary financial practices. (*Ibid*.)

We find *Karen Kane* compelling regarding the issue before us, notwithstanding certain gaps in the facts underlying that decision. Because *Karen Kane* involved the sustaining of a demurrer, the appellate court applied the *Rowland* test to the facts alleged in the complaint, which did not describe precisely how the manager cashed the checks at the check cashing service provider. (See *Karen Kane*, *supra*, 67 Cal.App.4th at pp. 1195-1997.) In contrast, Morrissey's trial evidence filled that gap, as it showed that respondents knew Noe, yet they cashed the checks that he offered, even though their indorsements -- when present -- were ostensibly by other parties.

In our view, that evidence does not unsettle the *Rowland* analysis set forth in *Karen Kane.* As in *Karen Kane*, certain features of the checks offered by Noe -- their volume, aggregate amount, payees, and "unorthodox" indorsements -- implied no internal fraud at Morrissey. The additional facts available to respondents -- their knowledge that Noe was not among the indorsees and the missing indorsements on some checks -- also did not reasonably imply any such fraud against Morrissey, although they may have suggested fraud against the payees. Accordingly, those facts do not materially alter the weight assigned the *Rowland* factors in *Karen Kane*.

Morrissey contends it was reasonably foreseeable that respondents' conduct would cause injury to it because their failure to investigate Noe's checks resulted in nonpayment of *the payees*, that is, SPU, Barba, and Torres. The crux of Morrissey's contention is that due to respondents' conduct, the funds Morrissey intended to be paid to SPU, Barba, and Torres were ultimately drawn from Morrissey's bank account in order to repay respondents.

We reject the argument, as the fraud perpetrated by the Andrades is essentially identical to the fraud in *Karen Kane*. In issuing the checks, Morrissey's clear intent was to pay the three fictitious contractors Frank had arranged for Morrissey to hire, as it believed they were providing services. Although two of the three fictitious payees -- SPU and Barba -- shared names with real entities, the latter were not improperly denied payment because Morrissey owed them nothing. As in *Karen Kane*, respondents' payments to Noe were to the fictitious payees because there was no meaningful difference between Noe and those payees. That respondents ultimately recouped the funds they paid Noe from Morrissey's bank account does not alter the fact that respondents paid funds to the designated -- but fictional -- payees.[9]

Morrissey's reliance on *Sun 'n Sand, Inc. v. United California Bank* (1978) 21 Cal.3d 671 (*Sun 'n Sand*) and three decisions applying its holding -- *Joffe v. United California Bank* (1983) 141 Cal.App.3d 541 (*Joffe*), *E.F. Hutton & Co v. City National Bank* (1983) 149 Cal.App.3d 60 (*E.F. Hutton*), and *Sehremelis v. Farmers & Merchants Bank* (1992) 6 Cal.App.4th 767 (*Sehremelis*) -- is misplaced. As explained below, *Sun 'n*

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[9] In a related contention, Morrissey urges us to examine the existence of a duty of care under the test set forth in *Biakanja v. Irving* (1958) 49 Cal.2d 647 (*Biakanja*), which discussed the circumstances under which a professional owes a duty of care to a nonclient. As Morrissey observes, the *Biakanja* test resembles the *Rowland* test, but places emphasis on an additional factor, namely, "the extent to which the transaction was intended to affect the [nonclient]." (*Id.* at p. 650.) Pointing to that factor, Morrissey argues that respondents' cashing of the checks "directly affect[ed] Morrissey" as the checks' maker because the payees -- SPU, Barba, and Torres -- were denied the funds from the checks. For the reasons discussed above, the argument fails.

Sand and its progeny stand for the proposition that a bank owes a duty of care to a check's maker in a limited set of circumstances, namely, when an individual seeks to deposit a check payable to another into the individual's personal account at the bank. Because TCC did not accept deposits, that proposition is inapplicable here.

In *Sun 'n Sand*, a business's employee duped her employer into issuing checks for small sums payable to the bank at which she maintained an account. (*Sun 'n Sand*, *supra*, 21 Cal.3d at pp. 678-679.) She then altered the check to increase their amount and caused the bank to deposit them in her personal account, even though the bank was the named payee. (*Ibid.*) Applying the *Rowland* test, our Supreme Court held that a bank owes a maker of checks a "narrowly circumscribed" duty of care -- specifically, a duty of inquiry -- "activated only when checks, not insignificant in amount, are drawn payable to the order of a bank and are presented to the payee bank by a third party seeking to negotiate the checks for his own benefit." (*Sun 'n Sand*, *supra*, at p. 695.) Following *Sun 'n Sand*, the appellate courts in *Joffe*, *E.F. Hutton*, and *Sehremelis* ruled that a bank owed such a duty to a maker -- or a closely aligned party -- upon depositing into a person's account a check payable to another person, designated for deposit into another account, or lacking adequate indorsements. (*Joffe*, *supra*, 141 Cal.App.3d at p. 556 [bank owed duty of care in depositing a check into an account different from the trust account the maker specified on the check]; *E.F. Hutton*, *supra*, 149 Cal.App.3d at pp. 65-68 [bank owed duty of care in permitting maker's employee to deposit into his own account checks payable to other employees]; *Sehremelis*, *supra*, 6 Cal.App.4th at pp. 771-776 [bank owed duty of care to hirers of a contractor in accepting for deposit into the contractors' account checks drawn on hirers' account and exhibiting inadequate or forged indorsements].)

In *Karen Kane*, the appellate court concluded that the situation before it fell outside the narrow circumstances triggering the *Sun 'n Sand* duty of care. (*Karen Kane*, *supra*, 67 Cal.App.4th 1192.) We agree with that conclusion because -- as discussed further below (see pt. A.3.b., *ante*) -- check cashing service providers are *not* banks, and do not accept checks for deposit.

In a related contention, relying on Nierman's expert testimony, Morrissey suggests that check cashing service providers are "already" under a minimal duty to ensure that a person presenting a check is the payee. That contention fails, as Nierman testified regarding the requirements of the federal BSA. Generally, "for a statute or ordinance . . . to be relevant to a determination of negligence, not only must the injury be a proximate result of the violation, but the plaintiff must be a member of the class of persons the statute or order was designed to protect, and the harm must have been one the statute or order was designed to prevent." (*Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324.) In *Karen Kane*, the appellate court concluded that the BSA and its regulations were not designed to prevent harm to employers resulting from check-related fraud by employees, and thus imposed no duty of care on a check cashing service provider. (*Karen Kane*, *supra*, 67 Cal.App.4th at p. 1203.) In sum, nonsuit was properly granted on Morrissey's negligence claim, insofar as it relied on a common law duty of care.

b. *Section 3405*

We turn to Morrissey's contention that respondents were subject to a duty of care under section 3405. That provision falls within Division 3 of the CUCC, which regulates negotiable instruments. (*Lee Newman, M.D., Inc. v. Wells Fargo Bank* (2001) 87 Cal.App.4th 73, 81-82 (*Lee Newman*); § 3102.) In addition to checks, negotiable instruments include certain promissory notes and other instruments that function as "money substitutes," that is, may be negotiated by a sequence of parties, each of which acquires rights to enforce payment by the original maker or debtor. (See *Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1447; see also *id*. at pp. 1445-1447.)

Section 3405 governs the rights and liabilities of persons taking or paying such instruments in a specific context, namely, when they bear fraudulent indorsements "made by an employee who has been given 'responsibility' by his or her employer for such instruments." (*Lee Newman*, *supra*, 87 Cal.App.4th at p. 82.) "Section 3405 covers both forged indorsements made in the name of the employer to instruments payable to the employer [citation] and indorsements made in the name of payees of instruments issued by the employer. [Citation.] 'Responsibility' is a specifically defined term and includes the authority to sign or indorse [instruments] on behalf of the employer, to process [instruments] received for bookkeeping purposes and to prepare or process [instruments] for issue in the name of the employer. [Citation]." (*Ibid*., fn. omitted.)[10]

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[10] Subdivision (a) of section 3405 provides: "In this section: [¶] . . . [¶]

Subdivision (b) of section 3405 contains two key provisions regarding employer-related instruments with fraudulent indorsements. As explained in *Lee Newman*, the first allocates primary responsibility for the risk of loss due to such an instrument, and the second tempers that allocation with a "comparative negligence" principle. (*Lee Newman*, *supra*, 87 Cal.App.4th at p. 83.) The subdivision states: "For the purpose of determining the rights and liabilities of a person who, in good faith, pays an instrument or takes it for value or for collection, if an employer entrusted an employee with responsibility with respect to the instrument and the employee or a person acting in concert with the employee makes a fraudulent indorsement of the instrument, the indorsement is effective as the indorsement of the person to whom the instrument is payable if it is made in the name of that person. If the person paying the instrument or

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(2) 'Fraudulent indorsement' means (A) in the case of an instrument payable to the employer, a forged indorsement purporting to be that of the employer, or (B) in the case of an instrument with respect to which the employer is the issuer, a forged indorsement purporting to be that of the person identified as payee.

(3) 'Responsibility' with respect to instruments means authority (A) to sign or indorse instruments on behalf of the employer, (B) to process instruments received by the employer for bookkeeping purposes, for deposit to an account, or for other disposition, (C) to prepare or process instruments for issue in the name of the employer, (D) to supply information determining the names or addresses of payees of instruments to be issued in the name of the employer, (E) to control the disposition of instruments to be issued in the name of the employer, or (F) to act otherwise with respect to instruments in a responsible capacity. . . ."

taking it for value or for collection fails to exercise ordinary care in paying or taking the instrument and that failure contributes to loss resulting from the fraud, the person bearing the loss may recover from the person failing to exercise ordinary care to the extent the failure to exercise ordinary care contributed to the loss." (§ 3405, subd. (b).)

Under subdivision (b) of section 3405, an employer may assert a claim for negligence against a depositary bank -- that is, the first bank to accept a check for processing in the check clearing system (*HH Computer*, *supra*, 231 Cal.App.4th at p. 229) -- when the employer is not a customer of that bank. In *Lee Newman*, employees stole checks payable to their employer and employer-issued checks payable to others, placed fraudulent endorsements on them, and deposited the checks in their accounts at a bank. (*Lee Newman*, *supra*, 87 Cal.App.4th at pp. 75-76.) The appellate court held that section 3405 supported a statutory negligence claim by the employer against the bank, even though it was not the payor bank with respect to any of the checks and the employer maintained no accounts at it. (*Id*. at pp. 76, 84-85.) In so concluding, the court determined that section 3405 displaced the *Sun 'n Sand* rule. (*Id*. at p. 80.)

The issue here is whether the statute supports an employer's negligence claim against a check cashing service provider. We find guidance regarding that issue from *HH Computer, supra*, 231 Cal.App.4th 221, which involved an employer's negligence action against three check cashing service providers and three depositary banks. The employer's complaint alleged that an employee stole checks payable to the employer, placed fraudulent indorsements on them, and cashed them at the defendant check cashing services, which deposited them in their own accounts at the defendant banks. (*Id*. at pp. 225-226.) The banks demurred to the complaint, which the trial court sustained without leave to amend. (*Id*. at p. 227.)

As the check cashing service providers did not participate in the appeal, the appellate court focused on a narrow issue regarding section 3045, namely, whether the banks were potentially subject to liability as depositary banks in processing the employer's checks, even though the check cashing services cashed those checks before they were deposited with the banks. (*HH Computer*, *supra*, 231 Cal.App.4th at pp. 225, 238.) The court concluded that for purposes of section 3405, the check cashing services were not banks, as they are not "depositary" institutions, and they do not fall under the statutory definitions of "'[b]ank'" (§ 4105). The court thus held that "a . . . depositary bank is included within the ambit of ordinary care envisaged by section 3405, even if check cashing companies get between the fraudulent employee and the . . . depositary bank." (*HH Computer*, *supra*, at p. 238.) In so holding, the court expressly noted that it did not decide whether check cashing service providers were "persons for purposes of section 3405 liability." (*Id*. at p. 231, fn. 9, italics omitted.)

The question not resolved in *HH Computer* is presented here, namely, whether a check cashing service provider, in cashing a check, may be subject to liability under section 3405 as a "person paying the instrument or taking it for value or for collection." At the outset, we note that because section 3405 applies broadly to "instruments" -- which include money-substitutes that need not be processed through the check clearing system (see, e.g., *Mann v. Leasko* (1960) 179 Cal.App.2d 692, 695-700 [purchaser of negotiable promissory note given by individuals was entitled to enforce payment on the note]) -- it is unsurprising that subdivision (b) of section 3405 refers to a "person," rather than a bank.[11] Accordingly, the key question is whether in the context of the processing of checks, the term "person" includes parties other than banks. For the reasons explained below, we conclude that it does not.

Because the question before us is one of statutory interpretation, we must determine the legislative intent underlying subdivision (b) of section 3405. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) In enacting section 3405 in 1993, the Legislature adopted Uniform Commercial Code section 3-405, as proposed by the National Conference of Commissioners on Uniform State Laws (National Commission). (*Lee Newman*, *supra*, 87 Cal.App.4th at pp. 81-82.) The Legislature further directed that the statute be interpreted and applied in accordance with the official comments of the National Commission. (*Ibid.*)

The comment accompanying Uniform Commercial Code section 3-405 singles out checks for special attention, and sets forth the principles in subdivision (b) solely in terms of employers and banks. The comment states: "This section applies to instruments generally but normally the instrument will be a check. Section 3-405 adopts the principle that the risk of loss for fraudulent indorsements by employees who are entrusted with responsibility with respect to checks should fall on the employer rather than *the bank* that takes the check or pays it, if the bank was not negligent in the transaction. Section 3-405 is based on the belief that the employer is in a far better position to avoid the

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[11] Under the CUCC, the term "'person'" includes individuals and organizations. (§ 1201, subd. (27).

loss by care in choosing employees, in supervising them, and in adopting other measures to prevent forged indorsements on instruments payable to the employer or fraud in the issuance of instruments in the name of the employer. If *the bank* failed to exercise ordinary care, subsection (b) allows the employer to shift loss to the bank to the extent the bank's failure to exercise ordinary care contributed to the loss." (Italics added.) The remaining portion of the comment explains the application of section 3-405 in several situations, none of which involve entities other than the employer, the wrongdoing employee, and a bank.

In our view, the comment's silence regarding parties involved in the check cashing process between the employer and the depositary bank supports the conclusion that the section does not encompass those parties. Aside from check cashing service providers, many businesses take checks before they are first deposited in a bank, including "liquor stores and markets and desperate landlords." (*HH Computer*, *supra*, 231 Cal.App.4th at p. 230.) The imposition of liability on those entities would discourage their check cashing services, and in the case of check cashing service providers, would promote an increase in the fees charged to their customers, who are often dependent on those service providers (see *id*. at pp. 230-231 & fn. 7). In view of those significant consequences, had the Legislature or the National Commission intended to impose liability on such a broad range of entities, they would likely have expressed that intent. (See *Goebel v. City of Santa Barbara* (2001) 92 Cal.App.4th 549, 559.) As check cashing service providers lack liability under the common law (*Karen Kane*, *supra*, 67 Cal.App.4th at pp. 1197-1203), we decline to construe the statute to so broadly expand their liability, absent clear evidence of a legislative intent to do so. Accordingly, nonsuit was properly granted on Morrissey's negligence claim, insofar as it relied on section 3405.

4. *Conversion*

Morrissey contends the trial evidence was sufficient to support a claim of conversion against respondents. Generally, conversion is """any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.""" (*Messerall v. Fulwider* (1988) 199 Cal.App.3d 1324, 1329.) Morrissey argues that respondents, in cashing the checks payable to SPU, Barba, and Torres, engaged in conversion because they "seriously interfered with Morrissey's right to possession of the funds within the checks." As explained below, that contention fails.

"The elements of a conversion claim are: (1) the plaintiff's ownership or right to possession of the property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages. Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066.)

The application of these principles in the context of check cashing is explained in *Allied Concord etc. Corp. v. Bank of America* (1969) 275 Cal.App.2d 1 (*Allied Concord*). There, a business issued a check payable to a particular individual. (*Id*. at p. 2.) The payee's brother intercepted the check, forged the payee's indorsement, and obtained payment for the check from a depositary bank, which forwarded it to the drawee bank. (*Ibid*.)

When the business asserted a conversion claim against the depositary bank, the trial court sustained the depositary bank's demurrer to the claim without leave to amend. (*Id.* at p. 3.) Affirming, the appellate court explained that a depositary bank, in cashing a check with a forged indorsement, pays out its own funds, not the drawer's funds: "[W]hen a depositary or collecting bank pays out money on a forged endorsement, it has converted nothing of the drawer's and done no more than part with its own money, an act which quite possibly may damage no one but itself. [Citation.] The only conversion which adversely affects the drawer occurs when the drawee bank charges his account, and the drawer's cause of action for such conversion only runs against the drawee bank." (*Id.* at p. 8.)

The same rationale applies here, even though TCC was not a depositary bank. In cashing the Morrissey-issued checks, TCC paid out its own funds, not Morrissey's. Accordingly, respondents' check cashing did not constitute conversion.[12]

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[12] The three decisions upon which Morrissey relies are inapposite. Two are distinguishable, as they did not address a conversion claim by a check's drawer against a party providing check cashing services. (*Welco Electronic, Inc. v. Mora* (2014) 223 Cal.App.4th 202, 211-212 [employee engaged in conversion against her employer by depositing funds in her bank account through misuse of employer's credit card]; *Los Angeles Federal Credit Union v. Madatyan* (2012) 209 Cal.App.4th 1383, 1386-1388 [payee's indorsement of check constituted conversion against holder of lien on check funds because it facilitated misappropriation of lienholder's interest in check funds].) The remaining decision is of no assistance to Morrissey because the appellate court found no act of conversion. (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395-396 [plaintiffs failed to show

5. *Aiding and Abetting Liability*

Morrissey contends the trial evidence established that respondents aided and abetted Noe's conversion of Morrissey's funds. We disagree. Generally, "[l]iability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person. [Citations.]" (*Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 846.) As Morrissey has not demonstrated that respondents directly breached a duty they owed to Morrissey (see pts. A.3. & A.4., *ante*), our focus is on the first alternative.

The first alternative requires "proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1145 (*Casey*).) Before the trial court, Morrissey acknowledged that it had offered no evidence that respondents knew of the Andrades' fraudulent scheme, but contended the respondents knew that Noe was engaged in conversion against it. Morrissey reasserts that contention on appeal.

The contention fails, as there is no evidence that respondents knew that Noe, in cashing the Morrissey-issued checks to SPU, Barba, and Torres, was engaged in conversion against Morrissey. As explained above (see pt. A.3. *ante*), Noe's suspicious conduct suggested only that he may have been

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that law firm, in taking possession of certain funds on behalf of client, engaged in conversion].)

engaged in wrongdoing against the payees. The conduct was therefore insufficient to provide respondents with knowledge that Noe was engaged in conversion directed at Morrissey. (*Casey*, *supra*, 127 Cal.App.4th at p. 1149 [for purposes of aiding-and-abetting liability, banks' awareness that customers were depositing forged checks in accounts opened for businesses with false tax numbers did not establish bank's knowledge that customers were stealing funds from corporation].) Furthermore, the funds that respondents paid to Noe belonged to them, not to Morrissey. (See *Allied Concord*, *supra*, 275 Cal.App.2d at p. 8.) Accordingly, the trial evidence did not establish that respondents aided and abetted Noe's conversion of Morrissey's funds.

B. *Exclusion of Form Interrogatory Responses*

Morrissey contends the trial court erred under Evidence Code section 352 in excluding certain responses respondents provided to Morrissey's form interrogatories. Generally, that statute "vests discretion in the trial judge to exclude evidence where its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of prejudice, of confusion of issues, or of misleading a jury." (*Kessler v. Gray* (1978) 77 Cal.App.3d 284, 291.) As explained below, Morrissey has shown no abuse of discretion.

During discovery, Morrissey propounded form interrogatories, including form interrogatory No. 12, which asked respondents to identify all individuals who witnessed "the INCIDENT," made or heard statements "at the scene of the INCIDENT," or were claimed by respondents to "ha[ve] knowledge of the INCIDENT." In answering the interrogatory, respondents stated: "Since the INCIDENT, as defined by

[Morrissey] is vague, ambiguous and overly broad, and the term INCIDENT in this [f]orm [i]nterrogatory is vague, ambiguous and overly broad the following individuals and witnesses are set forth below to be inclusive of [the form interrogatory]. Further, *based on information from Morrissey*, the following individuals are necessarily set forth." (Italics added.) Respondents provided a seven-page list of individuals, some of whose names were accompanied by descriptions. Respondents characterized Barba as "[t]he individual whose identity was used by Noe . . . to carry out the fraud," Torres as "[a] fake identity used by [the Andrades] to carry out the fraud," Cesar Arana as a subcontractor to Noe's "fake business SPU Construction," and Hal Baradehi as the owner of the location where Noe operated SPU "using Milton Hasley as a front."

At trial, Morrissey sought to present the above-noted descriptions as evidence, arguing that they constituted admissions relevant to Morrissey's claims of aiding-and-abetting and conversion. In opposing the request, respondents' counsel contended the term "INCIDENT" was not well defined because the FAC alleged only a lengthy course of misconduct. Counsel asserted: "There's no admissions, no intent to admit. We [could not] answer [the form interrogatory] the way it was intended because we [did not] know what the incident is. So I just gave him as much information as I had available to me."

The trial court excluded the responses under Evidence Code section 352 on the ground that their potential for prejudice outweighed their probative value. The court concluded that the responses were likely to mislead the jury and result in an undue consumption of time, reasoning that the interrogatory did not seek information regarding an incident, but "a course of conduct involving . . . different people over a very extended period of time," and that respondents had expressly stated that their responses were based on information from Morrissey: "[B]ecause of the way the question was framed and answered and because . . . the subject matter of ["]incident["] is not well defined and is well objected to, the court disallows [the responses]."

We see no error in that ruling. As the trial court observed, respondents were obliged to supply complete and responsive answers to the interrogatory. (*Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 784.) Noting the vague and ambiguous subject of the information sought -- namely, witness information regarding the lengthy course of alleged misconduct -- respondents expressly stated that their responses were predicated on information that Morrissey had provided to them. The court thus reasonably concluded that presenting the responses to the jury as admissions regarding respondents' state of knowledge at the time of the alleged misconduct was misleading, and would "put into issue" why respondents had given the responses. (See *Nally*, *supra*, 47 Cal.3d at pp. 302-305 [trial court did not err in excluding tape recording of defendant's remarks two years after alleged tortious incident upon determining that the remarks were misleading and of limited probative value regarding defendant's conduct at the time of the incident].) In sum, the court did not abuse its discretion in excluding respondents' responses.[13]

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[13] Contending Morrissey's appeal is frivolous, respondents request monetary sanctions. Generally, sanctions for a frivolous appeal are granted only when the appeal was prosecuted for an improper motive or is indisputably meritless. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) We deny respondents' request for sanctions, as Morrissey's appeal does not meet the

DISPOSITION

The judgment is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, P. J.

We concur:

COLLINS, J.

MICON, J.*

*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

demanding standards set forth in *Flaherty* for the imposition of sanctions.