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SUPREME COURT OF ALABAMA

OCTOBER TERM 2019-2020

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Brad Dupree

v.

PeoplesSouth Bank

Appeal from Houston Circuit Court
(CV-14-900757)

MITCHELL, Justice.

Brad Dupree sued PeoplesSouth Bank ("PeoplesSouth"), alleging that PeoplesSouth wrongfully gave the proceeds of a \$100,000 certificate of deposit to his father, not him. The Houston Circuit Court entered a judgment for PeoplesSouth

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following a bench trial. Brad now appeals, arguing that he should have won on his breach-of-contract claim and been awarded damages in the amount of \$100,000. We affirm the judgment in favor of PeoplesSouth.

Facts and Procedural History

Jimmy Dupree is the father of Brad Dupree. On June 29, 1993, Jimmy deposited \$100,000 with Peoples Community Bank, now known as PeoplesSouth, and, in return, received a nonnegotiable certificate of deposit issued in the names of "Brad Dupree and Jimmy Dupree" ("the CD"). Handwritten edits on the CD later reversed the order of the names to "Jimmy Dupree and Brad Dupree" and also replaced Brad's taxpayer ID number with Jimmy's taxpayer ID number. A handwritten note, dated December 16, 1993, on the back of the CD stated "changed order of names to report interest under Jimmy's SS#." No evidence was offered as to who made the handwritten changes, and they were not initialed by either Jimmy or Brad.

Brad was a minor at the time the CD was issued and did not contribute any money to the purchase of the CD. He testified that he did not recall ever seeing or signing the CD. All interest derived from the CD was paid to Jimmy, and

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he, not Brad, reported that interest as income on his tax returns. After the CD was issued, it was immediately pledged to PeoplesSouth by Jimmy as collateral, along with five other \$100,000 certificates of deposit, for a business loan. PeoplesSouth maintained possession of the CD from its issuance until Jimmy withdrew the funds.

A. The 2010 Action

In November 2010, before filing this case against PeoplesSouth, Brad, his mother, and his stepbrother sued Jimmy in the Houston Circuit Court, alleging that Jimmy had wrongfully converted certain personal property, including the CD ("the 2010 action"). Both sides filed competing motions for a summary judgment. Rather than ruling on the motions for a summary judgment, however, it appears that the trial court ordered the parties to mediate.

On November 20, 2012, while the 2010 action was pending, Jimmy went to PeoplesSouth and cashed in the CD without notifying Brad. PeoplesSouth issued a cashier's check payable to the order of "Jimmy Dupree or Brad Dupree" for the amount of the CD less amounts set off by PeoplesSouth related to Jimmy's business loan. Jimmy cashed the check and then spent

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the funds. Brad learned during mediation of the 2010 action that Jimmy had cashed in the CD and was advised by the mediator to sue PeoplesSouth.

An order from the 2010 action, dated November 21, 2014, disposed of that case. That order stated: "The property issues in this case were resolved by mediation. Motion for summary judgment granted." It is not clear, however, which party's summary-judgment motion was granted.

B. The PeoplesSouth Litigation

On December 1, 2014, nine days after the order was entered in the 2010 action, Brad sued PeoplesSouth, asserting claims for breach of the Uniform Commercial Code, breach of contract, money had and received, negligence, and wantonness and seeking restitution. PeoplesSouth answered the complaint and added Jimmy as a third-party defendant. All parties filed motions for a summary judgment, which were all denied. The case then proceeded to a bench trial.

At trial, Brad testified that the CD was a gift to him from Jimmy. Brad's mother and stepbrother also testified that Jimmy told them that he added Brad's name to the CD to provide for Brad in the event something happened to Jimmy or Brad's

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mother. Jimmy testified, however, that the only purpose of adding Brad's name to the CD was to provide additional protection for the investment under Federal Deposit Insurance Corporation ("FDIC") regulations.

After hearing all the evidence, the trial court entered a judgment in favor of PeoplesSouth and Jimmy, holding that Brad's claims were barred by the doctrine of res judicata based on the order entered in the 2010 action. The trial court also held, as an alternative basis for its judgment in favor of PeoplesSouth, that there was no breach of contract because Jimmy never made an inter vivos gift of the CD to Brad.

Brad does not appeal the judgment in favor of Jimmy. Brad appeals only the judgment in favor of PeoplesSouth on his breach-of-contract claim.

Standard of Review

We review final judgments where ore tenus evidence has been taken by a court in a bench trial, not a jury trial, based on the following rule, referred to as the ore tenus rule:

"'[W]hen a trial court hears ore tenus testimony, its findings on disputed facts are

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presumed correct and its judgment based on those findings will not be reversed unless the judgment is palpably erroneous or manifestly unjust.' Philpot v. State, 843 So. 2d 122, 125 (Ala. 2002). 'The presumption of correctness, however, is rebuttable and may be overcome where there is insufficient evidence presented to the trial court to sustain its judgment.'" Waltman v. Rowell, 913 So. 2d 1083, 1086 (Ala. 2005) (quoting Dennis v. Dobbs, 474 So. 2d 77, 79 (Ala. 1985)). 'Additionally, the ore tenus rule does not extend to cloak with a presumption of correctness a trial judge's conclusions of law or the incorrect application of law to the facts.' Id."

Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005). See also Hall v. Mazzone, 486 So. 2d 408, 410 (Ala. 1986) ("The ore tenus rule is grounded upon the principle that when the trial court hears oral testimony it has an opportunity to evaluate the demeanor and credibility of witnesses."). Although we must presume that the trial court's findings of fact here, which are based on ore tenus evidence, are correct, to the extent we are reviewing the trial court's conclusions of law or its application of the law to the facts, our review is de novo. Fadalla, 929 So. 2d at 433.

In reviewing the trial court's judgment, we are not limited to the reasoning that the trial court applied but can affirm its judgment for any legal, valid reason. Brannan v. Smith, 784 So. 2d 293, 297 (Ala. 2000). Further, "a correct

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decision will not be disturbed even if the court gives the wrong reasons." Boykin v. Magnolia Bay, Inc., 570 So. 2d 639, 642 (Ala. 1990).

Analysis

We affirm the judgment in favor of PeoplesSouth, but do so on different grounds than those upon which the trial court principally relied in entering it. The trial court entered a judgment for PeoplesSouth based on the doctrine of res judicata, while also providing several alternative bases for its judgment if the doctrine of res judicata proved to be inapplicable. Having reviewed the law and the record in this case, we cannot agree that the doctrine of res judicata barred Brad's claims against PeoplesSouth. Nevertheless, as discussed below, PeoplesSouth was entitled to prevail on Brad's breach-of-contract claim because there was sufficient evidence from which the trial court could conclude that Brad is unable to prove any damages.

A. Res Judicata

PeoplesSouth asserted the doctrine of res judicata as an affirmative defense and had the burden of proving all four elements of that defense. See Stewart v. Brinley, 902 So. 2d

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1, 11 (Ala. 2004); see also Batchelor-Robjohns v. United States, 788 F.3d 1280, 1285 (11th Cir. 2015) ("The party asserting res judicata bears the burden of showing that the later-filed [claim] is barred."). "The essential elements of res judicata are (1) a prior judgment on the merits, (2) rendered by a court of competent jurisdiction, (3) with substantial identity of the parties, and (4) with the same cause of action presented in both actions." Equity Res. Mgmt., Inc. v. Vinson, 723 So. 2d 634, 636 (Ala. 1998).

Brad argues that the first element of res judicata was not met because no prior judgment on the merits was presented to the trial court. We agree. "'A judgment is on the merits when it amounts to a decision as to the respective rights and liability of the parties'" Mars Hill Baptist Church of Anniston, Alabama, Inc. v. Mars Hill Missionary Baptist Church, 761 So. 2d 975, 978 (Ala. 1999) (quoting 50 C.J.S. Judgment § 728 (1997)). PeoplesSouth submitted two documents as evidence of a prior judgment on the merits. The first document was a copy of the initial complaint in the 2010 action in which Brad alleged that Jimmy had wrongfully converted the CD. The second document was an order entered in

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the 2010 action after competing summary-judgment motions were filed in that action; the motions themselves, however, were not provided to the trial court. Despite that omission, PeoplesSouth argues that the order from the 2010 action had a preclusive effect and served to bar Brad's claim in this case.

PeoplesSouth's res judicata argument is unavailing. The order from the 2010 action merely states: "The property issues in this case were resolved by mediation. Motion for summary judgment granted." The order did not indicate the party or parties for whom summary judgment was entered. Nor did the order declare the respective rights and liabilities of the parties or state upon what basis the judgment was entered. The rights and liabilities of each party following the 2010 action are not clear from the evidence submitted to the trial court; therefore, PeoplesSouth does not satisfy the first element necessary to establish the defense of res judicata. Accordingly, its res judicata defense fails.

B. Breach-of-Contract Claim

We now consider the merits of Brad's breach-of-contract claim against PeoplesSouth. "'The elements of a breach-of-contract claim under Alabama law are (1) a valid contract

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binding the parties; (2) the plaintiffs' performance under the contract; (3) the defendant's nonperformance; and (4) resulting damages.'" Shaffer v. Regions Fin. Corp., 29 So. 3d 872, 880 (Ala. 2009) (quoting Reynolds Metals Co. v. Hill, 825 So. 2d 100, 105 (Ala. 2002)). To obtain a reversal of the trial court's judgment on his breach-of-contract claim, Brad must demonstrate a degree of error by the trial court sufficient to overcome the ore tenus rule. Fadalla, 929 So. 2d at 433 (noting that a trial court's judgment based on ore tenus testimony will be reversed only if the judgment is "palpably erroneous or manifestly unjust"). That is a high bar, and Brad does not clear it here.

It is first necessary to determine whether the trial court properly considered extrinsic evidence when adjudicating Brad's breach-of-contract claim. Alabama law does not allow courts to look beyond the four corners of an instrument unless the instrument contains an ambiguity. Kershaw v. Kershaw, 848 So. 2d 942, 955 (Ala. 2002). Generally speaking, two types of ambiguity may arise as to an instrument: patent or latent. A patent ambiguity is apparent on the face of the instrument when the language used is "defective, obscure or insensible."

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Jacoway v. Brittain, 360 So. 2d 306, 308 (Ala. 1978). A latent ambiguity, by contrast, exists when the "writing appears clear and unambiguous on its face, 'but there is some collateral matter which makes the meaning uncertain.'" Medical Clinic Bd. of City of Birmingham-Crestwood v. Smelley, 408 So. 2d 1203, 1206 (Ala. 1981) (quoting Ford v. Ward, 272 Ala. 235, 240, 130 So. 2d 380, 384 (1961)). In making the threshold determination of whether there is a latent ambiguity, a court may consider extrinsic evidence. Brown v. Mechanical Constructors, Inc. v. Centennial Ins. Co., 431 So. 2d 932, 942 (Ala. 1983). If it determines that a latent ambiguity exists, the court may then consider and rely upon extrinsic evidence to determine the true intentions of the parties to the contract. Mass Appraisal Servs., Inc. v. Carmichael, 404 So. 2d 666, 672 (Ala. 1981).

It is clear in this case that the trial court properly considered extrinsic evidence to determine whether there was a latent ambiguity in the CD with respect to the ownership and beneficiaries of the CD. Although Brad argues that the trial court should not have considered any extrinsic evidence to determine how to enforce the terms of the CD, Brad himself

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went beyond the four corners of the CD when he made the allegation in his complaint that Jimmy made a gift to him of the CD. Conversely, other extrinsic evidence, including handwritten changes on the face of the CD that resulted in attributing all interest income to Jimmy, Brad's testimony that he did not recall signing the CD, and the lack of any writings on or related to the CD regarding Jimmy's donative intent, indicated that there had been no inter vivos gift of the CD to Brad. With this body of conflicting extrinsic evidence before it, the trial court had a sufficient basis from which to find that the CD contained a latent ambiguity, and, thus, the court was entitled to consider additional extrinsic evidence in an effort to ascertain the true intentions of the parties and to adjudicate the merits of Brad's breach-of-contract claim.

The party asserting a breach-of-contract claim must prove every element of that claim; the failure to prove any one element necessarily results in a judgment for the opposing party. Ex parte Steadman, 812 So. 2d 290, 295 (Ala. 2001). Thus, even if there was undisputed evidence establishing a valid contract between Brad and PeoplesSouth -- or even a

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valid contract between Jimmy and PeoplesSouth to which Brad was a third-party beneficiary -- and that Brad and Jimmy performed their obligations under that contract but that PeoplesSouth failed to similarly do so, Brad still would not be entitled to relief unless he also established that he was damaged by PeoplesSouth's nonperformance. See State Farm Fire & Cas. Co. v. Williams, 926 So. 2d 1008, 1018 (Ala. 2005) (explaining that the defendant was entitled to a judgment in its favor because the plaintiffs had failed to prove "an essential element of their breach-of-contract claims -- damages").

As explained below, the trial court heard ore tenus evidence from which it could have concluded that Brad suffered no damage in connection with PeoplesSouth's alleged nonperformance, and, for that reason, the judgment entered in favor of PeoplesSouth is due to be affirmed. The issue of whether Brad suffered damage turns on whether he had any ownership interest in the CD or was otherwise entitled to any of its proceeds. The amount of damages in a breach-of-contract action is generally the "'sum which would place the injured party in the same condition he would have occupied if

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the contract had not been breached.'" Steadman, 812 So. 2d at 295 (quoting Brendle Fire Equip., Inc. v. Electronic Eng'rs, Inc., 454 So. 2d 1032, 1034 (Ala. Civ. App. 1984)). Brad argues that he had rights to the proceeds of the CD, either as an owner or as a third-party beneficiary, and that his damages resulting from the alleged breach were \$100,000, the full amount on the face of the CD. PeoplesSouth argues, on the other hand, that Brad is entitled to no damages because, it says, Brad was neither an owner nor a third-party beneficiary of the CD. Neither party asserts that Brad may have been entitled to an intermediate amount of damages.

This Court analyzed similar circumstances in Messer v. Kennedy, 574 So. 2d 788 (Ala. 1991). In Messer, several certificates of deposit were issued in the name of an 84-year old man ("the uncle") and his adult nephew. All the funds used to purchase the certificates of deposit were provided by the uncle or were intended for his benefit; the nephew put nothing toward the purchase of the certificates. The nephew kept possession of the certificates and had access to the interest generated by the funds because it was deposited in a joint account owned by him and the uncle. At some point, the

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uncle's adult children sought to wrest control of their father's financial affairs from the nephew. When the nephew resisted, the uncle filed suit seeking, among other remedies, rescission or reformation of the certificates. The trial court entered a partial summary judgment in favor of the uncle, finding that he was the rightful owner and ordering the nephew to return the certificates to the uncle.

This Court affirmed the judgment on appeal. In doing so, it expressly carried forward a principle in Ex parte Lovett, 450 So. 2d 116, 118 (Ala. 1984), and held that "where two parties' names appear on a CD and the funds used to purchase the CD belonged to one of the parties, unless there is evidence that the party whose funds were used to purchase the CD intended to make a gift or create a trust, the other party's claim to the funds must fail." 574 So. 2d at 790.

Although Messer and Lovett are factually distinguishable from this case, the principle applied in Messer and Lovett applies with equal force here. Because Brad undisputedly did not furnish any of the funds used to purchase the CD and because he is not a trustee over those funds, the only way he could prevail is if he established that the CD was

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an inter vivos gift to him from Jimmy. To prove the existence of such a gift, Brad was required to satisfy, by clear and convincing evidence, the following three elements: "[a]n intention to give and surrender title to, and dominion over, the property; delivery of the property to the donee; and acceptance by the donee." First Alabama Bank of Montgomery v. Adams, 382 So. 2d 1104, 1110 (Ala. 1980) (quoting Garrison v. Grayson, 284 Ala. 247, 249, 224 So. 2d 606, 608 (1969)).

The trial court properly found that Brad did not carry his burden of proving that an inter vivos gift was made. First, there was an absence of clear and convincing evidence indicating that Jimmy intended to give and surrender title to, and dominion over, the CD to Brad. If anything, the evidence indicated the opposite. It is undisputed that, immediately after purchasing the CD, Jimmy pledged the CD, along with five other certificates of deposit, as collateral for a business loan from PeoplesSouth. Once Jimmy pledged the CD as collateral, he did not have the authority to surrender the funds to Brad or the ability to deliver the CD to Brad. It is also undisputed that Jimmy received all interest payments on the CD and paid income tax on those financial gains. Further,

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Jimmy testified that putting Brad's name on the CD was not an indication that he was making a gift to Brad; Jimmy testified that it was merely an effort to ensure that there would be additional coverage under FDIC regulations for the funds that he had on deposit with PeoplesSouth.

Second, there is no evidence indicating that Jimmy ever delivered the CD to Brad. And even if Jimmy had wanted to make such a delivery, he was unable to do so because he had pledged the CD as collateral to PeoplesSouth for his business loan, and the bank had taken possession of the CD in accordance with Jimmy's pledge.

Finally, without surrender or delivery of the CD, there could be no acceptance by Brad. Thus, the trial court properly held that Brad failed to meet his burden of proving that the CD was an inter vivos gift.

Without any rights in the CD by virtue of an inter vivos gift, Brad cannot show he was damaged by PeoplesSouth's alleged nonperformance, and he is therefore unable to prevail on his breach-of-contract claim. For that reason, the judgment in favor of PeoplesSouth must be affirmed, and it is unnecessary to address any other issue.

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AFFIRMED.

Parker, C.J., and Shaw, Bryan, and Mendheim, JJ., concur
in the result.

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MENDHEIM, Justice (concurring in the result).

I agree with the main opinion that the trial court's judgment in favor of PeoplesSouth Bank ("PeoplesSouth") is due to be affirmed. I also agree that the trial court's application of the doctrine of res judicata in this case was not appropriate because there is no indication in the previous judgment as to in whose favor the judgment was entered or as to what claims were addressed. However, I disagree with the main opinion's approval of the trial court's consideration of extrinsic evidence. Specifically, the main opinion highlights the trial court's finding that there was a latent ambiguity in the certificate of deposit ("CD") with respect to the ownership and beneficiaries of the CD. I do not believe that any alleged latent ambiguity in the CD is relevant to Brad Dupree's claim of breach of contract against PeoplesSouth -- the bank -- as opposed to any claims he may have asserted against Jimmy Dupree, which are not before us in this appeal. Whether there is a latent ambiguity in the CD simply is not relevant to Brad's claim against PeoplesSouth.

The main opinion views the appropriateness of examining extrinsic evidence as relevant to discussing whether Jimmy had

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intended the CD as an inter vivos gift to Brad, which, in turn, allows for a discussion of the last element of a breach-of-contract claim, i.e., whether Brad sustained any damage as a result of PeoplesSouth's alleged breach. I write to express my view that Brad's breach-of-contract claim must fail because Brad did not establish the first element of such a claim: the existence of a contract between the relevant parties. See, e.g., Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1118 (Ala. 2003) (noting that "[o]ne of the elements of a breach-of-contract claim under Alabama law is the existence of 'a valid contract binding the parties'" (quoting Reynolds Metals Co. v. Hill, 825 So. 2d 100, 105 (Ala. 2002))).

As both parties to this appeal have observed: "A certificate of deposit represents a contractual relationship between the issuer of the certificate and the purchaser of it. Failure of the issuer to make good on its contractual duty to pay is a breach of the contract." SouthTrust Bank v. Donely, 925 So. 2d 934, 942 (Ala. 2005) (emphasis added). See also Montgomery v. Smith, 226 Ala. 91, 95, 145 So. 822, 826 (1933). (explaining that "[a] certificate of deposit is defined to be a written acknowledgment by a bank of the receipt of a sum of

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money on deposit which it promises to pay to the depositor, to his order, or to some other person or his order, whereby the relation of debtor and creditor between the bank and the depositor is created"). It is undisputed that Jimmy purchased the CD from PeoplesSouth solely with his own funds and that Brad never possessed the CD or received any interest from it. Therefore, a contract existed between Jimmy and PeoplesSouth that Jimmy had a right to enforce. Brad argues that he is a third-party beneficiary to that contract, but he does not cite any Alabama law establishing that a payee on a CD is a third-party beneficiary with a contractual right that is enforceable against the issuer.¹ Cf. Parke State Bank v. Akers, 659 N.E.2d 1031, 1034 (Ind. 1995) ("Certificates of deposit are contracts, and can create third-party beneficiary rights in those parties identified with rights of survivorship.");

¹In the trial court, Brad noted that a portion of the Uniform Commercial Code ("UCC") provides that "[i]f an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them." § 7-3-110(d), Ala. Code 1975. However, the trial court concluded that, because the CD conspicuously stated that it was "Non-Negotiable," "the CD is not a negotiable instrument and [Brad's] claim for breach of § 7-3-110 fails as § 7-3-110 only applies to negotiable instruments." Brad does not present an argument based on the UCC in this appeal.

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Peoples Bank v. Baxter, 41 Tenn. App. 710, 723, 298 S.W.2d 732, 738 (1956) ("A donee third-party beneficiary of a certificate of deposit may enforce his rights in a jurisdiction which holds that such contracts are valid.").

Likewise, the principle upon which the main opinion bases its rationale -- that "where two parties' names appear on a CD and the funds used to purchase the CD belonged to one of the parties, unless there is evidence that the party whose funds were used to purchase the CD intended to make a gift or create a trust, the other party's claim to the funds must fail" -- addressed a dispute between parties claiming ownership of a CD and its funds, not a dispute between an alleged beneficiary of a CD and the issuer. Messer v. Kennedy, 574 So. 2d 788, 790 (Ala. 1991). This distinction is critical. Indeed, Messer involved a dispute between the two named parties on a certificate of deposit, and the other case the main opinion cites for this proposition, Ex parte Lovett, 450 So. 2d 116, 118 (Ala. 1984), was a suit by a daughter against her mother's estate alleging ownership of the funds from some certificates of deposit. The principle applied in Lovett and Messer does not establish a contractual duty by an issuer to pay

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certificate-of-deposit funds to a particular party named on the certificate of deposit. Thus, as the trial court concluded in one of its alternative rationales: "[Brad] has failed to prove a contractual relationship between [PeoplesSouth] and him and therefore has failed to prove that [PeoplesSouth] breached a contract with him." Accordingly, I caution that I do not believe the Court endorses the main opinion's expansion of the Lovett/Messer principle to include the issuer of a certificate of deposit, as opposed to the individuals named on the certificate of deposit in question.

Furthermore, as the trial court also explained, it appears that the Uniform Multiple Persons Account Act, § 5-24-1 et seq., Ala. Code 1975 ("the UMPAA"), dictated that PeoplesSouth was not liable to Brad for paying the funds of the CD to Jimmy upon Jimmy's request.² The UMPAA is divided

²In his initial appellate brief, Brad argues that PeoplesSouth waived this affirmative defense by not raising the UMPAA in its answer. However, as PeoplesSouth notes, it did raise the defense of the UMPAA in its summary-judgment motion, and Brad did not object to this assertion on the ground of waiver. In fact, Brad addressed PeoplesSouth's UMPAA argument on the merits in his response to its summary-judgment motion. Accordingly, the defense was revived, and the trial court did not err in discussing it. See, e.g., Smith v. Combustion Res. Eng'g, Inc., 431 So. 2d 1249, 1251 (Ala. 1983) ("If an affirmative defense is not pleaded it is waived to the extent that the party who should have pleaded the

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into four articles: Article 1, §§ 5-24-1 through 5-24-6; Article 2, §§ 5-24-11 through 5-24-15; Article 3, §§ 5-24-21 through 5-24-27; and Article 4, §§ 5-24-31 through 5-24-34. The UMPAA defines a "multiple party account" as "an account payable on request to one or more of two or more parties, whether or not a right of survivorship is mentioned," § 5-24-1(8), and it defines an "account" as "a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, time deposit, certificate of deposit, and share account." § 5-24-1(1) (emphasis added). Section 5-24-6 explains that

"[t]he provisions of Article 2 concerning beneficial ownership as between parties or as between parties and beneficiaries apply only to controversies between those persons and their creditors and other successors, and do not apply to the right of those persons to payment as determined by the terms of the account. Article 3 governs the liability and set-off rights of financial institutions that make payments pursuant to it."

Thus, the UMPAA draws a clear distinction between claims between parties as to ownership of the subject account,

affirmative defense may not introduce evidence in support thereof, unless the adverse party makes no objection in which case the issues are enlarged, or unless an amendment to set forth the affirmative defense is properly made.'" (quoting 2A J. Moore, Federal Practice § 8.27[3] at 8-251 (2d ed. 1948) (emphasis added)).

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addressed in Article 2, and claims by parties against the financial institution that makes payments pursuant to the subject account, addressed in Article 3. Section 5-24-11(b), in Article 2, echoes the principle enunciated in Lovett and Messer: "During the lifetime of all parties, an account belongs to the parties in proportion to the net contribution of each to the sums on deposit, unless there is clear and convincing evidence of a different intent." But § 5-24-11 does not speak to a financial institution's liability toward a party on the subject account.

Section 5-24-21 authorizes a financial institution to "enter into a contract of deposit for a multiple-party account to the same extent it may enter into a contract of deposit for a single-party account." Section 5-24-22 provides, in part:

"A financial institution, on request, may pay sums on deposit in a multiple-party account to:

"(1) One or more of the parties, whether or not another party is disabled, incapacitated, or deceased when payment is requested and whether or not the party making the request survives another party
...."

The unofficial comment to this section notes that "[a] financial institution that makes payment on proper request

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under this section [is] protected unless the financial institution has received written notice not to."

Section 5-24-26 spells out a financial institution's liability in detail:

"(a) Payment made pursuant to this chapter in accordance with the type of account discharges the financial institution from all claims for amounts so paid, whether or not the payment is consistent with the beneficial ownership of the account as between parties, beneficiaries, or their successors. Payment may be made whether or not a party, beneficiary, or agent is disabled, incapacitated, or deceased when payment is requested, received, or made.

"(b) Protection of a financial institution under this section does not affect the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of sums on deposit in accounts or payments made from accounts."

(Emphasis added.) Section 5-24-26(b) once again emphasizes that a distinction exists between the financial institution's liability regarding payment on the account and the rights of the parties in disputes between themselves concerning ownership of the account, while § 5-24-26(a) makes it clear that the financial institution is not liable for "payment made pursuant to this chapter in accordance with the type of account" at issue.

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In his reply brief, Brad argues that the UMPAA does not apply because, he says, the payment to Jimmy was not made pursuant to a proper "request." See § 5-24-22. Section 5-24-1(15) defines a "request" in relevant part as "a request for payment complying with all terms of the account, including special requirements concerning necessary signatures and regulations of the financial institution." Section 5-24-1(19) states that "terms of the account" "includes the deposit agreement and other terms and conditions, including the form, of the contract of deposit." Brad contends that the request for payment by Jimmy did not comply with the terms of the account because "[a]ny 'request' for payment in the absence of Brad Dupree was a faulty request." Brad's reply brief, p. 8.

This argument against the application of the UMPAA is unavailing, however, because Brad did not raise it in the trial court or in his initial appellate brief. In the trial court, Brad argued that the UMPAA did not apply because it "only applies to claims by third parties." (Emphasis omitted.) In his initial appellate brief, Brad argued only that PeoplesSouth had waived the affirmative defense of the UMPAA. Therefore, Brad's new argument concerning the

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nonapplicability of the UMPAA is waived. See, e.g., Melton v. Harbor Pointe, LLC, 57 So. 3d 695, 696 n.1 (Ala. 2010) (noting that "this Court will not consider arguments made for the first time in a reply brief").

Moreover, deposition testimony from PeoplesSouth personnel indicated that the payment was made in accordance with the terms of accounts at PeoplesSouth. Debbie Kirkland, a customer-service representative who handled the payment, testified that she was trained to treat all joint accounts as "or" accounts rather than "and" accounts, meaning any party to the account could withdraw funds, unless special written instructions providing otherwise were given to PeoplesSouth. There were no such instructions noted in the computer system for the CD. PeoplesSouth assistant compliance officer Cindy Worsley also testified that in 2009 PeoplesSouth changed its computer systems such that they no longer recognized accounts with the conjunction "and"; all joint accounts were treated as not having conjunctions. In short, the payment to Jimmy was made according to the terms of the account, which includes the regulations of the financial institution. Therefore, under § 5-24-26, PeoplesSouth was discharged from any liability with

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respect to any party on the CD. This discharge did not affect any claim to ownership of the CD funds Brad may have had against Jimmy, but, as I have noted, Brad did not appeal the trial court's judgment with respect to any of those claims.

In sum, because I believe rationales not addressed by the main opinion better explain why the trial court's judgment should be affirmed, I concur in the result of the main opinion.

Parker, C.J., concurs.