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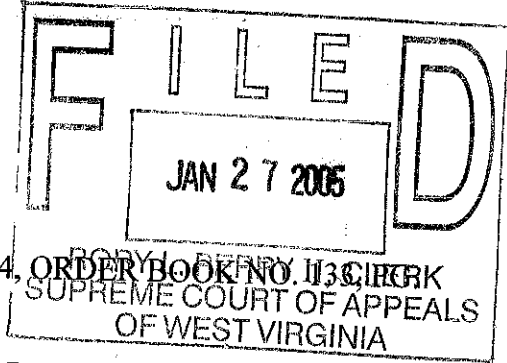
IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA
CIRCUIT COURT
OF OHIO COUNTY

DONNA M. MURRAY,)
)
 Plaintiff,)
)
 v.)
)
 STRAUB HONDA HYUNDAI,)
 (Par Enterprises, Inc.)
 DBA Straub Pontiac)
)
 Defendant.)

'05 JAN 14 PM 3 35

BRENDA L. MILLER

Civil Action No. 04-CAP-6



APPEAL OF COURT ORDER OF NOVEMBER 5, 2004, ORDER BOOK NO. 1136, CIRK
503, DISMISSAL OF CIVIL ACTION NO. 04-CA6
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

A. BACKGROUND - Defendant Obtained Duplicate of Check

**Plaintiff Was Holding, Forged Her Endorsement And
Cashed The Check.**

The Plaintiff had hail damage to her car in 1990 and was given State Farm check no.116 669741 Q dated 5-25-90 to cover that damage. However, State Farm made the check out to both the Plaintiff and the Defendant, (i.e., the estimator of the damage), and told the Plaintiff that she could either have her car fixed or hold the check until she dropped comprehensive coverage or dropped insurance with State Farm. State Farm stated that this was their policy in order to protect themselves from a second claim based on the same damage. This policy is acknowledged in State Farm's November 1, 2004 letter, which was included in the Plaintiff's evidence.

After the Plaintiff had held the check for years, the Defendant agreed to indorse the check in exchange for the Plaintiff paying cash for a paint job. The Plaintiff

wanted the indorsement in order to avoid problems in obtaining a replacement check, which seemed likely given the Plaintiff's awareness of the number of years that would elapse before the 1990 check was cashable under the terms of the agreement.

The Plaintiff continued to honor the terms of the agreement and did not attempt to cash the check until the conditions for cashing the check were met. The Plaintiff took State Farm's conditions seriously. The Plaintiff thought that, at the least, it would be embarrassing to be caught cheating; and it might actually be fraud to cash the insurance check without meeting the conditions for doing so.

In January, 2003, the Plaintiff contacted another insurance carrier and made arrangements to drop coverage with State Farm and drop collision. At that point, the Plaintiff attempted to cash the 5-25-90 State Farm check no. 116 669741 Q that she was holding. The check did not clear. After months of searching for what had become of the money, it was discovered that in 1997 State Farm had sent a letter addressed to both the Plaintiff and the Defendant, but mailed only to the Defendant.

The letter stated that the 1990 check had never been cashed and provided multiple options for addressing this situation. The Defendant checked the option of having a replacement check sent to them, (i.e., State Farm check no. 5 21 994821 dated 2-5-97).

The Defendant then forged the Plaintiff's signature on the replacement check and cashed it.

B. PLAINTIFF'S APPEAL

The Plaintiff wishes to appeal the Court Order for Dismissal of Civil Action No. 04-CAP-6, which is entered in Civil Order Book No. 133, Page 503. The appeal is based on the following:

1. The Court Decided The Case Based On Sec. 46-3-118(c) When Sec. 55-2-6 Was The Relevant Section.

The Court's reasoning for the dismissal is that West Virginia Code Section 46-3-118(c) does not apply to the 1990 check because the statute of limitations has expired for that check and does not apply to the 1997 check because Section 46-3-118(c) applies to unaccepted drafts and the 1997 check was not an unaccepted draft. However, as stated in the Plaintiff's Response to Motion to Dismiss, the Plaintiff's claim that a ten year statute of limitations applies to the 1997 State Farm check no. 5 21 994821 is based on West Virginia Code Section 55-2-6, [i.e., not Section 46-3-118(c)].

a. Based On Sec 55-2-6, Checks Have A Ten Year Statute Of Limitations.

Section 55-2-6 states that the statute of limitations on written contracts is ten years. Ky. Distillers v. Foloway, W.Va. Supreme Court of Appeals, 124 W.Va., 72, 19, S.E., 2d, 94, 139, A.L.R., 1277, (1942) found that checks are written contracts within the meaning of Code 55-2-6; and, therefore, are subject to the ten year statute of limitations.

Similarly, Houston v. Lawhead, 116 W.Va. 652, 182 S.E. 780, 781 said that an

indorsement on a note is regarded as if it contained in extenso the warranties imposed by law "according to the custom of merchants and for convenience of commerce."

Point three, syllabus, reads, in part, as follows: "An action for the recovery of money paid for a note, under a warranty imposed by law, is an action on a written contract."

In addition, *Houston v. Lawhead* found that the issuance of the check is itself rooted in the negotiable instruments law and the signature of the drawer carries with it the statutory engagement as if it were written on the check. Based on this reasoning, *Houston v. Lawhead* found that a check is a written contract within the meaning of Code 55-2-6; and, therefore, an action thereon is barred only after the lapse of ten years from the time when a cause of action thereon accrues.

There are also many other Court cases which similarly came to the conclusion that a check is a written contract. (See *Williams v. Lowe*, 62 Ind App 357, 113, N.E. 471; *Haynes v. Wesley*, 112 Ga. 668, 37 S.E. 990, 81 Am St Rep 72; *Connor v. Becker*, 56 Neb 343, 76, N.W. 893. Also, see *First Nat. Bank & T. Co. v. Price* (1940), 187 Okla. 380, 103, P(2d), 103, *Meherin v. Saunders* (*Meherin v. Ambrose*) (1901) 131 Cal 681, 63 P 1084, 54 LRA 272; *Culver v. Marks* (1890) 122 Ind 554, 23 N.E. 1086, 7 L.R.A. 489, 17 Am. St. Rep. 377; *Dean v. Iowa – DesMoines Nat. Bank & T. Co.* (1938) 227 Iowa 1239, 281 N.W. 714, 290 N.W. 664, 128, A.L.R. 137; *Jocque v. McRae* (1905) 142 Mich. 370, 105 N.W. 874; *Atlantic Trust Co. v. Woodbridge Canal & Irrig. Co.* (1897; CC) 86 F 975; 10 C.J.S., Bills and Notes, Section 5, p. 408.)

b. The ten year statute of limitations extends to anyone who indorses a check.

Not only have the Courts found that checks are written contracts; and, therefore, subject to the ten year statute of limitations, but the Courts have also found that the contract, and, therefore, the statute of limitations, extends to anyone who indorses the check. See *Houston v. Lawhead*, 116 W.Va. 652, 182 S.E. 780, 781 and *Ky. Distillers v. Foloway*, W.Va. Supreme Court of Appeals, 124 W.Va., 72, 19, S.E., 2d, 94, 139, A.L.R., 1277, (1942).

In addition, *First Nat. Bank & T. Co. v. Price*, Okla. 187, 380, 103, P(2d), 103, (1940), found that an indorser becomes a party to the paper when he places his signature on the check; and, therefore, becomes a party to the paper within the meaning of the statute governing written contracts.

Also, *Bank of America National Trust & Savings Association v. Security First National Bank* 32 Cal. App. (2d) 647, 90 P(2d) 335 (1939) found that the indorser by placing his indorsement stamp on the check becomes a party to the written contract; and, therefore, the statute of limitations for written contracts also applies to an indorser of the check.

c. Based On Sec. 55-2-6, Forged Indorsements Are Also Governed By The Ten Year Statute Of Limitations And An Indorsement Below A Forged Indorsement Guarantees The Forged Indorsement And Is Also Governed By The Ten Year Statute Of Limitations.

See *Borserine v. Maryland Casualty Co.*, CCA 8th, 112 F, (2d), 409 (1940), in which the Court found an action by the bank against an indorser of a check because of a forged indorsement of the name of the payee was subject to the ten year statute for written contracts and not the five year statute relevant to all other actions upon

contracts, obligations, or liabilities expressed or implied.

Moreover, the Court has found that even when the indorsement on the check is forged and then a company places its indorsement stamp below the forgery, the ten year statute of limitations applies. See *Guaranty Bond State Bank v. Fraternal Bank & T. Co.* (Tex. Civ. App.) 68 SW (2d) 305 (1933), in which the Court said, "Appellant (the defendant) indorsed in writing on the checks that it guaranteed the prior indorsement and signed its corporate name thereto. When, in reliance thereon, the drawee paid the checks, this suit was for a debt where the indebtedness is evidenced by a contract in writing." This is exactly what happened in this case. A forged signature was guaranteed by the indorsement stamp for Straub, which, thereby, guaranteed the prior forged indorsement; and, thereby, made Straub a party to a written contract with a statute of limitations of ten years. (See also *Bank of America National Trust & Savings Association v. Security First National Bank* 32 Cal. App. (2d) 647, 90 P(2d) 335 [1939]).

Similarly, *Home Ins. Co. v. Mercantile Trust Co.* 219, Mo App 645, 284, SW 834, (1926), applied the statute for written contracts to a check which contained a forged signature of the payee and found that the defendant had by their indorsement implied, if not expressly made a written promise that if the indorsement of the payee was not genuine, then they, the guarantors, would pay the money which was lost by a reliance upon such indorsement being genuine. *Home Ins. Co. v. Mercantile Trust Co.* also stated, "So it follows, in reason, that if the obligations implied by law to the written indorsement are part of the writing . . . then the obligations are a part of the written

contract to the extent that the same statute of limitations applies thereto that applies to written arguments.”.

Also see *United States Fidelity & G. Co. v. First National Bank* Tex Civ App 93 SW (2d) 562 (1936) & *National Surety Co. v. Columbia Nat. Bank* Mo. 153 S.W. (2d) 364 (1941), *infra*, under subhead “Where action brought by drawer or payee.”.

d. The Earliest Start For The Statute Of Limitations Is 2-11-97.

Under West Virginia Annotated Vol. 15, Section 55-2-8 an acknowledgement by new promise restarts the time frame for the statute of limitations. The 1997 check would represent a new promise; and, therefore, would restart the statute of limitations. In addition, the statute doesn't begin to run until the right to sue occurs. There was no right to sue until the Defendant forged the Plaintiff's signature; and, thereby, obtained money belonging to the Plaintiff. Therefore, the earliest that the statute can begin to toll is February 11, 1997, (i.e., the date when the Defendant deposited the second State Farm check with the forged signature of the Plaintiff).

e. With Respect To The Case In Contract The Statute Of Limitations Is Ten Years; And, Therefore, Has Clearly Not Expired.

Written contracts have a 10 year statute of limitations. The injury occurred 2-11- 97; and, so, regardless of when the plaintiff should have discovered the injury, the statute has not expired.

2. The Court Found That The Only Cause Of Action Is Fraud/Tort; But There Is Also A Cause of Action On Contract.

The Court found that the Plaintiff's only recourse against the Defendant is a case

of action for fraud which has a two year statute of limitations. The Plaintiff believes that this is not correct. Because this case involves cashing a check through forgery, there is a cause of action under fraud and there is a cause of action on contract.

Smith v. Stacy, 198, W.Va. 498, 482, S.E. 2d, 115, (1996), and Cochran et al v. Appalachian Power Co. #13788, Supreme Court of Appeals, W.Va., 7-11-78, 246, S.E. Reporter, 2d Series, both concluded that where an action can reasonably be construed as in tort or on contract, and construction of the tort action would result in a dismissal due to the statute of limitations, the action will be viewed as being on contract.

3. **The Plaintiff Disagrees With The Court's Decision That She Should Have Discovered Her Injury Before She Did.**
 - a. **Plaintiff Failed To Discover The Injury Because She Was Attempting To Play By The Rules Of The Contract.**

The third issue in this appeal is the Court's opinion that the Plaintiff "should reasonably have discovered her alleged injury long before she did.". The Plaintiff has repeatedly stated that she was told by State Farm that the check she was holding, (i.e., the 1990 check), was made out to both the Plaintiff and the Defendant in order to prevent the Plaintiff from cashing the check and not having the car repaired, thereby, exposing State Farm to a potential second claim for the same damage.

State Farm told the Plaintiff, that if she did not want to have the car repaired she needed to hold the check until she either dropped comprehensive coverage or dropped coverage with State Farm at which point they would issue her a replacement check in

just her name. The Plaintiff also submitted to the Court a letter from State Farm stating that the check was made "co-payable so as not to expose ourselves to paying for the same damage more than once".

When the Plaintiff obtained the signature of K. R. Straub on the 1990 State Farm check, which the Plaintiff was holding, it was for the purpose of allowing the Plaintiff to cash the State Farm check when she met the conditions for doing so without having to obtain a replacement check. The Plaintiff was concerned about the amount of time that was elapsing; and, therefore, the potential difficulty in obtaining a replacement check. However, the Plaintiff was also concerned about cashing the check before she was allowed to do so; and, therefore, held the check.

Checks are contracts. The Plaintiff was told that a condition of the contract was that the check could not be cashed in the absence of the repair of the car or dropping comprehensive coverage or dropping coverage with State Farm. The Plaintiff honored what she had been told were the conditions of the contract. It does not seem reasonable that this should now become the basis for her to be unable to collect on that contract.

b. Plaintiff Believes The Statute Should Not Begin To Toll Until 6-30-03 When The Plaintiff Discovered The Defendant Is In Possession Of The Plaintiff's Money.

The statute does not begin to toll until the injured party knows of the injury. See *Stemple v. Dobson*, W.Va. Supreme Court of Appeals, 184 W.Va. 317, 4C S.E. 2d 561, 564 (1990); also *Lillian Hill v. George R. Clarke, et al*, #13796, Supreme Court of W.Va. 2-28-78; also *Newman*, 518, F. 2d at 100; also *Hill v. Clarke* 161,

W.Va 258, 241, S.E. 2d, 572 (1978). Also Childers Oil Co. Inc. v. Exxon Corp., 960, F. 2d, 1265, 1271, (4th Cir. 1992) found that the statute of limitations doesn't begin until two questions are answered. That is, (1) Am I injured? and (2) Who injured me? Based on this criteria, the statute would not begin to toll until June 30, 2003, which is when State Farm informed the Plaintiff about the replacement check, which the Defendant had cashed by forging the Plaintiff's signature.

c. **The Law Requires That Sec. 55-2-6 Be Liberally Construed And The Person Making The Plea That The Statute Of Limitations Has Expired Has The Burden Of Proof By A Preponderance Of The Evidence.**

Beginning the toll on 6-30-03 would be consistent with State ex rel. Alderson v. Holbert, 133, W.Va., 807, 58, S.E. 2d, 796, 18 A.L.R., 2d, 1170, (1950), which found that the provisions of Section 55-2-6 should be liberally construed so that public officers and sureties will be held strictly liable. See also Home Ins. Co. v. Mercantile Trust Co. 219 Mo. App 645, 284 S.W. 834.

In addition, under Section 55-2-6, the burden rests on the party making the plea of statute of limitations to establish by a preponderance of the evidence that the claim of the Plaintiff is barred by the statute. (See Preston Co. Coke v. Preston Co. Light and Power Co., 146, W.Va. 231, 119 S.E. 2d, 420, (1961) and Culbertson v. Jno. McCall Coal Co., 275, F Supp, 662, (S.D. W.Va., 1967.).

d. **Defendant Submitted No Evidence To Support The Position That The Plaintiff Should Have Known Of Her Injury Earlier Than She Did.**

The Plaintiff does not believe any evidence has been presented to suggest it was unreasonable for the plaintiff to abide by what she was told were the conditions of the

contract, (i.e., that, if she did not want to repair the car, she had to hold the check until she dropped coverage with State Farm or dropped comprehensive coverage).

- e. **Plaintiff Did Submit Evidence To Support The Reasonableness Of The Plaintiff's Holding The State Farm Check Which Resulted In The Plaintiff's Delayed Discovery Of Her Injury.**

Documentary Evidence – Letter From State Farm

The Plaintiff submitted a letter from State Farm which supports the Plaintiff's claim that State Farm had purposely limited the Plaintiff's ability to cash the insurance check; and, thereby, had prevented her discovery of her injury.

Circumstantial Evidence

The evidentiary support of the circumstantial evidence was mentioned in the Plaintiff's Response To Motion To Dismiss.

There Are Three Sources Of Circumstantial Evidence.

- (1) **The State Farm check was made out to both the Defendant and the Plaintiff, which supports the Plaintiff's claim that State Farm had a policy of protecting themselves from a second claim on the same damage by making the insured/Plaintiff either repair the car or wait for the insurance payment until comprehensive coverage was dropped or the insured/Plaintiff dropped coverage with State Farm.**
- (2) **Plaintiff attempted to protect her interests by obtaining Defendant's indorsement on the original State Farm check, which placed Plaintiff in a position to more easily retrieve her money when she met the conditions for doing so.**

The fact that the Plaintiff did not attempt to cheat, (i.e., violate her understanding of the State Farm rules), by cashing the check before she met the conditions for doing so does not invalidate the Plaintiff's efforts to protect her interests and does not mean that the Plaintiff was not taking care of business.

Instead, obtaining the Defendant's endorsement and holding the check indicates that the Plaintiff attempted to take care of business without violating what she had been told were the rules governing the payment from State Farm.

- (3) The timing of the Plaintiff's attempt to cash the State Farm check supports the Plaintiff's claim that the check was being held to comply with State Farm's rules .**

Plaintiff deposited the State Farm check as soon as another insurer was contacted for coverage.

The Plaintiff would have had to try to cheat in order to discover the injury sooner. Therefore, the Plaintiff believes the statute should not begin to toll until 6-30-03.

f. Defendant's Actions Prevented The Discovery Of The Wrong.

There is an extensive legal basis for the statute of limitations starting with the discovery of the wrong in those cases where the wrongdoer has done something to prevent the discovery of the wrong. For example, *Matthews v. Dale*, 118 W.Va. 303,

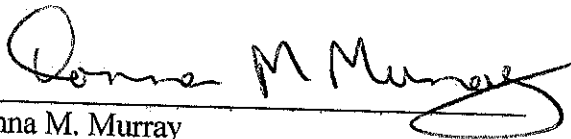
190, S.E. 338 (1937), found that concealment is a continuance of the original fraud; and, therefore, the timing of the start for the statute of limitations is the discovery of the fraud. See also *Merchants' Nat'l Bank v. Spates*, 41 W. Va. 27, 23 S.E. 681, 58 Am St. R. 828 (1895), overruled in part, *Houston v. Lawhead*, 116 W.Va. 652, 182 S.E. 780 (1935); *Boyd v. Beebe*, 64 W.Va. 216, 61 S.E. 304, 17 L.R.A. (n.s.) 660 (1908); *Harper v. Harper*, 252 F. 39 (4th Cir. 1918); *Pickett v. Aglinsky*, 110 F.2d 628 (4th Circ. 1940); *City Nat'l Bank v. Fidelity Mut. Life Ins. Co.*, 110 F. Supp. 510 (D. W.Va. 1953), aff'd, 206 F.2d 531 (1953), cert. Denied, 347 U.S. 903, 74 S. Ct. 428, 98 L. Ed. 1062 (1954); *State ex rel. Ashworth v. State Rd. Comm'n*, 147 W.Va. 430, 128 S.E. 2d 471 (1962).

In this case, the Defendant, in their response to State Farm, misrepresented their right to a replacement check. The Defendant then forged the Plaintiff's signature on the check in order to cash it. This forgery was only necessary if concealment was desired. That is, the Plaintiff was an ongoing customer of the Defendant at the time of the forgery. The Plaintiff submitted as evidence work orders dated slightly before and slightly after the forged signature. These work orders indicate that the Defendant was in possession of the Plaintiff's address and phone number; and, therefore, except for desire at concealment, the Defendant could have asked the Plaintiff to come in and sign the replacement check. The fact that forgery was used to cash the check rather than contacting the Plaintiff indicates an attempt to conceal the Defendant's possession of the second check.

In addition, the letter from State Farm requesting input regarding the initial check

was addressed to both the Plaintiff and the Defendant but the mailing address on the letter indicates that the letter was sent only to the Defendant. The Defendant was able to know from this letter that the Plaintiff had not received a copy of the letter.

The Defendant's use of forgery to cash the replacement check enabled the Defendant to hide their taking possession of the money from the Plaintiff. Had they felt entitled to the money, the forgery would have been unnecessary. Because the forgery was used to hide the Defendant's action, the Plaintiff believes the start of the statute of limitations should be the discovery of the fraud.

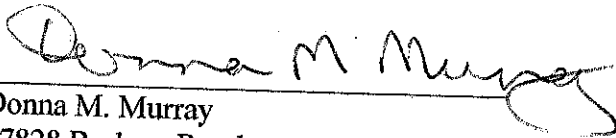


Donna M. Murray
67828 Brokaw Road
St. Clairsville, OH 43950
(740) 695-0446

DMM/rlk

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 14 day of January 2005, I served Donna M. Murray's Appeal of Court Order of November 5, 2004; Docket Statement, and Designation of Record upon Joseph J. John, Esq., attorney for Straub Honda Hyundai by placing a true and correct copy thereof in an envelope with proper postage affixed thereto, and depositing said envelope in a regular depository for the United States Mail, addressed to him at 200 Board of Trade Building, Wheeling, WV 26003, his last known address.



Donna M. Murray
67828 Brokaw Road
St. Clairsville, OH 43950

January 14, 2005

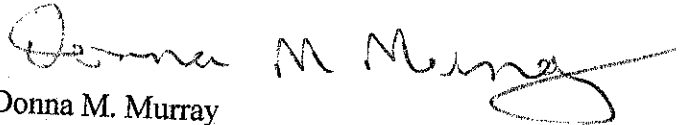
BRENDA MILLER
CLERK OF THE CIRCUIT COURT
OHIO COUNTY COURTHOUSE
1500 CHAPLINE STREET
WHEELING WV 26003

Re: Murray v. Straub,
Civil Action No. 04-CAP-6

Dear Ms. Miller:

Enclosed for filing in the above referenced matter please find appeal of court order of November 5, 2004; docket statement; and designation of record.

Sincerely,



Donna M. Murray
67828 Brokaw Road
St. Clairsville, OH 43950

DMM/rlk

Enclosures

Cc Atty. Joseph J. John