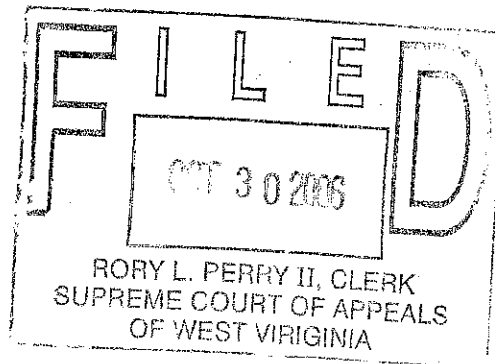


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No. 33099

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DONNA M. MURRAY,)	
)	
Appellant,)	From the Circuit Court of
)	Ohio County, West Virginia
v.)	Honorable Martin J. Gaughan
)	Civil Action No. 04-CAP-6
STRAUB HONDA HYUNDAI)	
(Par Enterprises, Inc.)	
DBA Straub Pontiac)	
)	
Appellee.)	

Response to Appellee's Brief

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ISSUES REGARDING STATUTE OF LIMITATIONS

The appellee argues that this case is governed by the two year tort statute of limitations, which has expired. However, this is a case that can be construed in tort or on contract. In addition, the appellant believes that the statute of limitations for both tort and contract have not expired.

**Arguments Regarding This Case Being Governed By The Ten
Year Statute of Limitations for Contracts**

The statute of limitations on contracts is 10 years. See Sec 55-2-6.

1. **The statute doesn't begin to run until the right to sue occurs.**

Therefore, the earliest start for the running of the statute is February 11, 1997 when the appellee deposited the second State Farm check with the forged signature of the appellant above their deposit stamp. Therefore, the statute of limitations under contract clearly have not expired.

2. **If a case can 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 is to be viewed as being on contract.** See 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.
3. **A check is a contract.** See 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). There are multiple other cases, which came to this same

conclusion. These other cases are cited in appellant's brief. (See pages 3 - 4.)

4. In addition, **anyone who indorses the check becomes a party to the contract; and therefore, an action based on an indorsement is barred only after the lapse of ten years from the time when a cause of action accrues.** See *Houston v. Lawhead*, 116 W. Va. 652, 183 S.E. 780, 781. My brief (pages 5 - 7) contains additional precedents supporting this issue including *Home Ins. Co. v. Mercantile Trust Co.* 219, Mo App 645, 284, SW 834, (1926 which states, "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."
5. Moreover, **forged indorsements are also governed by the ten year statute for contracts.** See *Borserine v. Maryland Casualty Co.*, CCA 8th, 112 F, (2d), 409 (1940).
6. Also an **indorsement below a forged indorsement both guarantees the forged indorsement and is governed by the ten year statute of limitations.** See *Guaranty Bond State Bank v. Fraternal Bank & T. Co.* (Tex. Civ. App.) 68 SW (2d) 305 (1933), which states that, when checks were indorsed below a forgery 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." Also see 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) 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.

**Arguments Regarding the Start Date For The Two Year Statute
Of Limitations For Tort Claims**

1. The appellee requested a replacement check for a check that the appellant was holding. The appellee then forged the appellant's signature on the replacement check and cashed it. **The appellee's actions prevented the appellant from knowing of the existence of the replacement check.**

2. At the time of the forgery, the appellant was an ongoing customer of the appellee; and the **appellee's computer automatically printed the appellant's address and phone number on the service orders** as can be seen from the service orders submitted with the appellant's brief, which means that the **appellee could have easily contacted the appellant** and requested the indorsement of the check had they believed they were entitled to the check. Instead, they used forgery to gain access. **The forgery was only necessary if concealment of the second check was desired.**
3. **The response to question 3 on the interrogatory completed by appellee (i.e., Ms. Martha B. Fato, the current owner of Straub's and the daughter of the previous owner) states that signing a customer's name to a check was outside of Straub's normal business procedures and to her knowledge there were no other occasions where this had occurred.**
4. **The forgery was an act of concealment.** The only advantage of the forgery was that it allowed the appellee to take possession of the funds represented by the check without the appellant's knowledge.
5. **There is an extensive legal basis for concealment being considered a continuance of the original fraud; and therefore, the statute of limitations starting with the discovery of the wrong. See**

Matthews v. Dale, 118 W.Va. 303, 190, S.E. 338 (1937). Other cases are cited in appellant's brief. See pages 12 & 13.

6. **The appellee's need for concealment was sufficient that appellee was willing to resort to a felony (i.e., forgery). This felony, in the presence of an easy legal alternative, implies both concealment and knowledge that the appellee was not entitled to the check.**
7. **Because the issuer of the check had told appellant that the check could not be cashed before dropping comprehensive coverage or dropping insurance through the issuer, the appellant continued to hold the original check, which had no expiration date on it and remained unaware of the second check.**
8. **The appellant was attempting to abide by the conditions (i.e., dropping comprehensive coverage or changing insurers) placed by the issuer on the contract (i.e., the check). The appellee's concealment combined with the appellant's attempt to do the right thing prevented the appellant from discovering her injury.**
9. **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) and Lillian Hill v. George R. Clark, et al, #13796, Supreme Court of W. Va 2-28-78 & Newman,**

518, F. 2d at 100 & Hill v. Clarke 161, W.Va. 258, 241, S.E. 2d, 572 (1978).

10. In addition, **the statute does not begin to toll until two questions are answered. That is, (1) Am I injured? and (2) Who injured me?** See Childers Oil Co. Inc. v. Exxon Corp, 960, F. 2d, 1265, 1271, (4th Cir. 1992). **Based on the Childers. criteria, the statute would not begin to toll until June 30, 2003, which is when the issuer of the check informed the appellant of the existence of the replacement check.**
11. Individuals often hold checks, which is one reason for the lengthy statute of limitations for checks. **While holding a check, a person would not normally assume that someone else might somehow obtain a copy of the check, forge the holder's name, and cash the check.** Therefore, there would be no reason to be checking to make sure this did not happen or to be feeling pressure to cash a check to prevent this set of circumstances. **Instead a normal person, having agreed to hold a check, might be expected to protect the check while keeping her word, especially when the person thought that cashing the check might constitute a fraud against the insurance company.**

- 12. The appellant took the normal precaution of placing the check in a safe place. In addition, when the opportunity arose, the appellant also took the precaution of having the appellee endorse the check. This endorsement meant that the check could be easily cashed when the conditions of the contract were met. This removed the risk of problems developing in obtaining a new check from State Farm many years down the road.**
- 13. To say that the appellant gave up her rights to recovery of her assets because she held a check takes the responsibility off the felonious conduct and places it on the person who was at tempting to do the right thing.**
- 14. Also, the law requires that Sec 55-2-6 be liberally construed so that public officers and sureties are held strictly liable. See State ex rel. Alderson v. Holbert, 133, W.Va. 807, 58, S.E. 2d, 796, 18 A.L.R., 2d, 1170, (1950) & Home Ins. Co. v. Mercantile Trust Co. 219 Mo App 645, 284 S.W. 834.**
- 15. If there is a question of when the appellant should have known of her injury, it is a matter of fact for a jury to decide. See Stemple v. Dobson, W. Va. Supreme Court of Appeals, 184, W.Va. 317, 4C, S.E. 2d, 561, 564 (1990) and Lillian Hill v. George R. Clarke et al. #13796,**

Supreme Court of W. Va. 2-28-78 and Newman, 518, F. 2d at 100 and Hill v. Clarke 161, W. Va., 258, 241, S.E. 2d, 572, (1978).

Arguments Regarding Appellee's Claim that Appellant Has Offered No Proof Of Appellant's Stated Reason For Holding The Original State Farm Check

Appellee has argued that appellant has offered no proof of her claims that State Farm (i.e., the issuer of the check) told her the original check was issued in both the appellant's and appellee's name to prevent the cashing of the check prior to the appellant dropping comprehensive coverage or dropping insurance coverage with State Farm; and that State Farm said this was their policy because it protected them from the same damage being used for a second claim.

- 1. The appellee, not the appellant, bears the burden of proof by a preponderance of the evidence.** See Preston Co. Coke v. Preston Co. Light and Power Co., 146, W.Va. 231, 119 S.E. 2d, 420, (1961) & Culbertson v., Jno McCall Coal Co., 275, F Supp, 662, (S.D. W.Va., 1967).
- 2. The appellant did submit both documentary evidence (i.e., a letter from State Farm) and circumstantial evidence (i.e., the dual payee on**

the check, the holding of the check, and the timing of the actual check cashing) to support her claim that she had been told and accepted that the check was not to be cashed prior to dropping comprehensive coverage or insurance coverage with State Farm. This evidence is discussed on pages 11 and 12 of the appellant's brief.

- 3. In addition, the absence of an expiration date on the original State Farm check provides additional circumstantial evidence. That is, insurance checks normally have an expiration date; but, in this case, an expiration date would have impeded the insurer's policy of requiring the check to be held until comprehensive coverage or insurance coverage in general was terminated. The lack of an expiration date is consistent with the insurer's expectation that the check might be held for a considerable period of time.**

**Arguments Regarding Appellee's Claim That Straub's Is Under
New Management Who Are Disadvantaged By This Claim
Surfacing After The Transfer In Management**

- 1. The new management is the previous owner's daughter who inherited the business from her father.**

2. The applicable statute of limitations has survivorship.

See Sec. 55-7-8a.

Regarding Appellee's Claim that Appellant Has Stated That Colin Whorton Was The Forger & Regarding Appellee's Responsibility

1. Colin Whorton did request a replacement check for the check that the appellant was holding. The request for the replacement check, which bears Colin Whorton's signature was submitted as part of the appellant's evidence.
2. Appellant has repeatedly told appellee's attorney that appellant does not know who forged the check; but that the forgery appears to be in a woman's handwriting and the check was deposited into appellant's bank account using appellant's Bank Deposit Stamp, to which all non-employees and most employees would not have access. In addition, it was my experience as a customer at Straub's that Colin Whorton did not handle the money. Instead, all payments were handled through the bookkeeper.
3. In an effort to discover information regarding the forgery, appellant attempted to serve an interrogatory on Ms. Kama Martin (i.e., the

appellee's bookkeeper); but appellee rejected the interrogatory on the basis that Ms. Martin "is not a party defendant in this case."

4. Since the check was deposited into appellee's bank account using appellee's Bank Deposit Stamp, whoever forged appellant's signature did so on behalf of appellee.
5. **Under the principle that the master is responsible for the acts of the servant within the scope of the servant's employment, even if the acts were not previously authorized or subsequently ratified by the master, appellee has a responsibility to make good on the misappropriated check regardless of which employee forged and deposited the check.** See *Downey v. Chesapeake & O.R. Co.*, 28 W.Va 732 (1886); *Ricketts v. Chesapeake & O.R. Co.*, 33 W.Va. 433, 10 S.E. 801 (1890); *Norfolk & W.R. Co. v. Anderson*, 90 Va. 1, 17 S.E. 757 (1893); *Norfolk & W.R. Co. v. Lipscomb*, 90 Va. 137, 17 S.E. 809 (1893); *Norfolk & W.R. Co. v. Neely*, 91 Va. 539, 22, S.E. 367 (1895); *Talbott v. West Virginia etc., R. Co.*, 42 W.Va. 560, 26 S.E. 311 (1896); *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S.E. 749 (1914); *Norfolk Southern R., Co. v. Tomlinson* 116 Va. 153, 81 S.E. 89 (1914); *Myers & Co. v. Lewis* 121 Va. 50, 92, S.E. 988 (1917); *Va. Ry. Etc. Co. v. Deaton*, 147, Va. 576, 137 S.E. 500 (1927); *Va. Ry. & P. Co. v. House*, 148 Va. 879, 139 S.E. 480 (1927); *Tri-State Coach Corp. v. Walsh*, 188 Va 299, 49 S.E.

2d 363 (1948); Freeman v. Sproles, 204 Va. 353, 131 S.E. 2d 410 (1963).

**Response To Appellee's Listed Reasons For The Dismissal Of
Appellant's Case**

1. **Appellee states** (page 3 of brief) that the **statute of limitations, failure to name an indispensable party, and failure to name and sue the proper party were factors in the dismissal of this case.**
2. **Appellant believes this misrepresents the basis of the dismissal.**
3. **The reasoning provided in the Circuit Court's decision was exclusively about the statute of limitations issue.** The Court based its decision not to apply the statute of limitation for contracts on Sec. 46-3-118 (c), which the Court then concluded did not apply to appellant's case. However, appellant also agrees that this was not the relevant statute. Prior to the Court's decision, 46-3-118 (c) was never mentioned by appellant or appellee in appellant's case. Appellant's claims were based on Sec. 55-2-6.
4. **Months before the pretrial conference, appellee did raise the issue of failure to name and sue the proper party but this issue was raised as a result of the appellant's failure to realize that Straub Honda Hyundai is a DBA and the correct name is PAR Enterprises, Inc.**

DBA Straub Pontiac. As a result of the appellee's request to dismiss based on the incorrect name, **appellant submitted a motion to amend the name of the appellee. In addition, this previous motion and response was not mentioned at the pretrial conference or in the judge's decision.**

- 5. Failure to name an indispensable party is also an issue that appellee brought up months before the pretrial conference but was not mentioned in the pretrial conference or in the judge's decision. Failure to name an indispensable party was based on not making Colin Whorton a party to the suit.**

As just discussed (see pages 12 & 14), although Colin Whorton is the employee who requested the duplicate check, the signature on the check appears to be in a woman's handwriting. In addition, when a car is repaired at Straub's, all the money transactions are handled by the bookkeeper. Also, the bookkeeper is the employee most likely to have access to the Bank Deposit Stamp and to make bank deposits.

Appellant has repeatedly mentioned these issues to appellee; and **appellant has repeatedly told appellee that appellant does not know the identity of the forger; and therefore does not want to accuse Colin Whorton or anyone else of the forgery.**

Appellant has also repeatedly told appellee that appellant knows that the forger was acting on behalf of the appellee because the money was deposited in appellee's bank account using appellee's Bank Deposit Stamp. In the absence of knowledge of the forger's identity and the presence of knowledge that the forger was acting in the capacity of servant to the master within the scope of the servants employment, appellant chose not to guess the identity of the forger; but instead to pursue recovery efforts with the master/ employer (i.e., Straub).

**Regarding Separation Of The Circuit Court Case From The
Magistrate Court Case**

- 1. Appellant requests that the Circuit Court Case be separated from the Magistrate Court Case.**
- 2. This case has yet to be tried.** Instead, prior to any trial, this case was dismissed with prejudice from the Magistrate Court because of the court's decision that the statute of limitations had expired. In addition, the Circuit Court also dismissed this case without trial based on the statute of limitations. Because there has been no previous trial on the facts of this case and because the appellant received none of the Magistrate Court benefits normally available to the lay person and be

cause the case now would have to be tried in Circuit Court and because the costs and work involved in pursuing this case can no longer be adequately compensated within the jurisdiction of the Magistrate Court, a separation from the Magistrate Court case is requested.

3. At the time of filing in Magistrate Court, the jurisdictional limits of Magistrate Court were not a problem. However, the dismissal of the case from Magistrate Court has resulted in the appellant having to make **additional expenses** in order to maintain and pursue this case; and the appellant has had to invest **a great deal of work in order to continue the pursuit of this case outside Magistrate Court**. Therefore, the **jurisdictional limits of Magistrate Court no longer seem appropriate**. In addition, these limits have been a barrier to the **appellant being able to engage legal counsel**; and these limits have also been a barrier to being able to **engage the appellee in reasonable settlement discussions**. Therefore, the **appellant requests that, since the original trial of the case will be in Circuit Court, the case be unbound from the Magistrate Court filing**.
4. The appellant also requests that the **Circuit Court Case be separated from the Magistrate Court Case so that the appellant can have a jury trial in Circuit Court**. At present, the appellant has been informed by the Circuit Court judge that a jury trial is not possible because the appellant did not request a jury for the original Magistrate

Court appearance. Once again, this case was dismissed from both Magistrate Court and Circuit Court without a hearing; and so any new trial would be the original trial. The appellant believes a jury trial is particularly important **given that whether the appellant should have known earlier of the misappropriation of the check is a matter of fact for a jury to decide.** See *Stemple v. Dobson*, W. Va. Supreme Court of Appeals, 184, W.Va. 317, 4C, S.E. 2d, 561, 564 (1990) and *Lillian Hill v. George R. Clarke et al.* #13796, Supreme Court of W. Va. 2-28-78 and *Newman*, 518, F. 2d at 100 and *Hill v. Clarke* 161, W. Va., 258, 241, S.E. 2d, 572, (1978).

5. **In summary, the appellant requests a separation of the Circuit Court Case from the Magistrate Court Case for the following reasons:**
 - a. **There has been no previous trial on the facts of this case,**
 - b. **The appellant received none of the Magistrate Court benefits normally available to the lay person,**
 - c. **The original trial on the facts of the case now has to be tried in Circuit Court,**

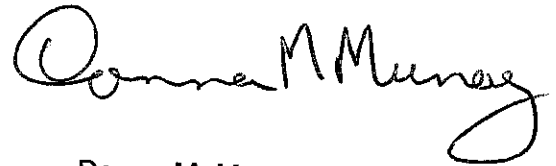
- d. The costs and work involved in pursuing this case can no longer be adequately compensated within the jurisdiction of the Magistrate Court,
- e. Separation would allow for a jury trial.

Response to Appellee's Prayer for Relief

Appellant requests that appellee's prayer for Relief be denied. The appellee is in possession of the appellant's money and, for over 2-1/2 years, has been using legal maneuvers and the courts to hold onto this illicitly obtained money. It is the appellant who is in need of relief.

Appellant's Prayer for Relief

The appellant requests the award of fees and costs and such other and further relief as is just and proper.

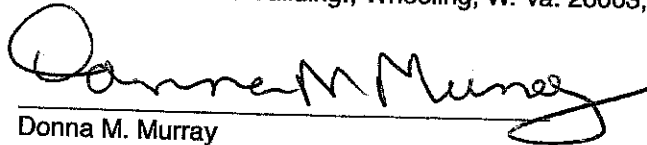


Donna M. Murray

October 25, 2006

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that on the 26th day of October, 2006, I served my 10-25-06 Response to Appellee's brief and accompanying cover letter to the W.Va. Supreme Clerk's Office 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, W. Va. 26003, his last known address.



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