STATE OF MICHIGAN

COURT OF APPEALS

JOHN PALAZZO, d/b/a NEUROMETRICS and d/b/a NEURO LABS,

Plaintiff-Appellant,

v

STANDARD FEDERAL BANK,

Defendant-Appellee,

and

FIRST FEDERAL OF MICHIGAN,

Defendant,

and

JILL KABANUK,

Not participating.

UNPUBLISHED
August 1, 1997

No. 185999
Oakland Circuit Court
LC No. 94-472231-CZ

Before: Young, P.J., and Taylor and R.C. Livo*, JJ.

PER CURIAM

Plaintiff appeals as of right the circuit court's orders granting defendant summary disposition and a protective order precluding discovery of defendant's records concerning losses from forged endorsements. Plaintiff has charged defendant Standard Federal Bank[1] with conversion for accepting checks from 1989 to 1993, which were payable to plaintiff's business, and depositing them into his employee's personal bank account. Plaintiff also alleged that defendant breached a warranty of good title by accepting the checks. The trial court dismissed plaintiff's claims and held that plaintiff's negligent supervision of his employee estopped him from maintaining a conversion claim against defendant and

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* Circuit judge, sitting on the Court of Appeals by assignment.

that defendant made no warranties, express or implied, to plaintiff. We reverse in part, affirm in part, and remand.

I. BACKGROUND AND PROCEEDINGS

A. Plaintiff's Business and Jill Kabanuk

Plaintiff is a physical therapist and sole proprietor doing business as Neurometrics and Neuro Labs. His work requires him to be at remote locations and travel extensively. In September 1993, the Internal Revenue Service notified plaintiff that there were disparities between the income declared on his business tax return and records which indicated that he received payments in excess of his declared income. After being notified, plaintiff discovered that the IRS possessed records of payments to his business which his office had no record of receiving. Plaintiff's employee Jill Kabanuk, now deceased, confessed in October 1993 that she had deposited payments to plaintiff's business into her personal checking account. Further investigation revealed that from May 1989 to from May 1989 to October 1993, Kabanuk deposited almost $360,000 in checks payable to plaintiff's business into her personal account at defendant's bank.

Plaintiff hired Kabanuk in 1987 as his office administrator and sole clerical support staff. In June 1987, Kabanuk was arraigned on federal charges of bank fraud unrelated to plaintiff's business.[2] In September 1987, Kabanuk pleaded guilty to the charges and was sentenced to three years of imprisonment on one count, and a concurrent sentence of five years of probation on the second count. It is unclear whether plaintiff knew the nature of the charges against Kabanuk. In his deposition, plaintiff testified that he had been informed by Kabanuk's husband that these matters concerned trouble with Kabanuk's personal credit cards and a loan involving her personal credit or applications for credit. Plaintiff also testified that he understood that these events had occurred sometime in the past and that Kabanuk had been sentenced or was waiting to be sentenced by a judge. During this time, plaintiff wrote a letter to the sentencing judge on behalf of Kabanuk, praising her skills as an employee and requesting that the court treat Kabanuk with leniency.

After serving her prison term, in 1989 plaintiff accepted Kabanuk's return to her former position whereupon she resumed managing the office and handling bookkeeping matters. In conjunction with these duties, plaintiff recorded payments received and prepared checks payable to plaintiffs' business for deposit. Kabanuk endorsed the checks with the business' endorsement stamp and left them in an envelope for plaintiff to deposit at his bank.

Because plaintiff's work required that he be out of the office, his direct supervision of Kabanuk's work was infrequent. However, plaintiff testified that he supervised Kabanuk when he was in the office and by reviewing her typewritten reports and his business records. Plaintiff made all the deposits for his business and was the only one authorized to write checks for the business. On a monthly basis, he reviewed his business records and reconciled his bank statements. Plaintiff also submitted the deposition testimony of his accountant and an affidavit from another accountant, attesting that plaintiff's practices in monitoring his finances were reasonable. Plaintiff contends that he was

completely unaware of Kabanuk's scheme to embezzle from him by depositing his business checks into her personal account.

To avoid plaintiff's detection of her scheme, Kabanuk did not record in plaintiff's business records some checks that were received, but instead endorsed them and deposited them into her personal account at defendant's various branches. Kabanuk held herself out to defendant as the owner of Neurometrics or Neuro Labs and on occasion discussed "her" business with defendant's employees. One of defendant's employees testified in her deposition that Kabanuk gave her brochures concerning the business. Kabanuk also produced to defendant's employees a forged copy of plaintiff's Certificate of Persons Conducting Business Under Assumed Name ("d/b/a" certificate) [3] which identified Kabanuk as the proprietor of the business.[4] The date when Kabanuk produced the certificate to defendant's employees is disputed by the parties.

B. Defendant's Policy for Accepting Checks Payable To A Business

According to its written policy, before defendant would accept checks made payable to a business for deposit into a personal account, the presenter of the check was required to provide the bank with a certified copy of a "d/b/a" certificate. Defendant required its customers to produce such a certificate as evidence that the customer had authority to conduct business under the assumed name and to negotiate checks payable to the business. Defendant maintained a copy of such certificates on file.

Some of defendant's employees testified in their depositions that it was their understanding that a d/b/a certificate allowing Kabanuk to deposit the checks was in the bank's files as early as 1990. However, none of them could testify that they had personally seen the certificate in 1990. There was also deposition testimony that in April 1993, defendant's employees at one branch could not locate a copy of any d/b/a certificate in their files, and that they requested a certificate from Kabanuk before they would accept her deposits. They testified that Kabanuk produced a photocopied d/b/a certificate several days later. That copy is in evidence and was Kabanuk's forgery of plaintiff's d/b/a certificate. Another of defendant's employees, who accepted deposits from Kabanuk at *another* branch, testified that when defendant's loss prevention department contacted her one year later in April 1994, she was unable to locate a copy of any d/b/a certificate in her branch's files.

C. Proceedings

Plaintiff filed this conversion action on March 11, 1994, alleging wrongful conversion and breach of implied warranty. In October 1994, the circuit court granted partial summary disposition to defendant and held that any checks cashed before March 11, 1991 were outside the statute of limitations for plaintiffs' conversion action. The court also dismissed plaintiff's breach of warranty claim against defendant and held that defendant made no warranties, express or implied, to plaintiff. The circuit court also granted defendant's motion for a protective order to preclude discovery of defendant's documentation concerning the bank's losses due to forged endorsements.

In February 1995, the circuit court dismissed plaintiff's conversion claim in its entirety. The court held that there were no disputed questions of fact that plaintiff was negligent in supervising his

employee, and consequently, plaintiff was estopped from pursuing his conversion action. This appeal ensued.

On appeal, plaintiff challenges the court's dismissal of his conversion claim on equitable estoppel grounds and also argues that checks paid three years prior to this action were not time barred. Plaintiff also challenges dismissal of his breach of warranty claim, and lastly, the order granting defendant's protective order and precluding discovery of documentation concerning defendant's losses due to forged endorsements.

II. EQUITABLE ESTOPPEL

Plaintiff first challenges the circuit court's dismissal of his conversion claim based on equitable estoppel. The court held that there were no questions of fact regarding plaintiff's negligent supervision of Kabanuk, and therefore, he was estopped from recovering against defendant. On appeal, plaintiff contends that there is a genuine factual dispute regarding whether his supervision of Kabanuk was negligent and whether defendant's conduct in accepting the forged endorsements in contravention of its policy defeats its equitable estoppel defense. We agree.

We review the circuit court's order granting summary disposition de novo to determine whether the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). In ruling on the motion, the trial court must consider the affidavits, pleadings, depositions, admissions, and other admissible documentary evidence submitted by the parties. MCR 2.116(G)(5); *SSC Associates Ltd Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 364, 366; 480 NW2d 275 (1991). Giving the benefit of all reasonable doubt to the opposing party, the trial court must determine whether a record might be developed that would leave open an issue of material fact upon which reasonable minds could differ. *SSC Associates, supra* at 364. Summary disposition is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Mitchell v Dahlberg*, 215 Mich App 718, 725; 547 NW2d 74 (1996).

The parties primarily dispute whose conduct should be evaluated under the doctrine of equitable estoppel. Defendant asserts that plaintiff's decision to allow a convicted criminal to handle these responsibilities constitutes "culpable negligence" which justifies dismissal of his conversion claim and argues that the propriety of its conduct in accepting the checks is inconsequential. Plaintiff responds that he should not be held accountable for Kabanuk's conduct because there were no indications from which he could infer that she was forging endorsements and depositing the checks into her personal account. Plaintiff contends that defendant's actions should be evaluated because if defendant had followed its written policy regarding the acceptance of checks payable to businesses, Kabanuk would not have succeeded in depositing the funds into her personal account. Both parties are in part correct.

Equitable estoppel arises where "a party, by representations, admissions, or silence, intentionally or negligently induces another party to believe facts, the other party justifiably relies and

acts on this belief, and will be prejudiced if the first party is permitted to deny the existence of those facts." *Hoye v Westfield Ins Co*, 194 Mich App 696, 705; 487 NW2d 838 (1992) (quoting

Southeastern Oakland Co Incinerator Auth v Dep't of Natural Resources, 176 Mich App 434, 442-443; 440 NW2d 649 (1989)). Thus, the doctrine of equitable estoppel bars plaintiff's conversion claim if defendant establishes:

(1) that by representations, conduct, or silence, plaintiff induced defendant to believe that Kabanuk was the proprietor of Neurometrics or Neuro Labs and authorized to endorse checks payable to plaintiffs' business;

(2) that plaintiff's conduct was intentional or negligent;

(3) that defendant justifiably relied upon its belief; and

(4) that defendant will be prejudiced if plaintiff were allowed to deny the fact that he culpably permitted Kabanuk to hold herself out to be the proprietor of Neurometrics or Neuro Labs.

After reviewing the evidence presented by both parties, we conclude that a factual dispute exists concerning whether plaintiff should be held accountable for Kabanuk's conduct in representing herself as the owner of his business *and* whether defendant was justified in relying upon Kabanuk's representations that she was the owner of the business when accepting the checks over a forged endorsement.

For estopple to bar plaintiffs' claim, defendant must show that plaintiff acted with knowledge, actual or constructive, of what was transpiring. *Langschwager v Penny*, 351 Mich 473, 482; 88 NW2d 276 (1958). Based on our review of the evidence, there exists a factual dispute as to whether plaintiff knew or should have known of Kabanuk's scheme.

Defendant contends that plaintiff acted negligently by not ascertaining the nature of Kabanuk's criminal charges before accepting her return to work. Defendant also stresses that plaintiff was negligent for giving Kabanuk authority to receive, record and endorse checks for the business. Defendant maintains that plaintiff's absence from the office and plaintiff's decision to keep his d/b/a certificate in an unlocked file cabinet gave Kabanuk the opportunity to forge the certificate and present herself as the business owner to defendant's employees. Plaintiff counters by stating that Kabanuk had been a reliable employee prior to her criminal action and that he understood that her criminal case related to past conduct involving her personal credit, which he believed that she had overcome. Plaintiff explains that the nature of his work, physical therapy, requires that he be out of the office most of the time. Plaintiff maintains that despite his absence, he supervised Kabanuk's work when he was in the office and on other occasions, by reviewing Kabanuk's typewritten reports and his business records. Plaintiff further explained that on a monthly basis, he reviewed his business records, signed all his checks, made all his deposits, and reconciled his bank statements. Plaintiff also submitted the deposition testimony of his accountant and an affidavit from another accountant, attesting that plaintiff's practices in monitoring his finances were reasonable.

Although defendant points to disparities in plaintiff's practices, plaintiff has set forth evidence which creates a material factual dispute as to whether his conduct was reasonable given the nature of his business. Therefore, we cannot conclude as a matter of law that plaintiff's actions were negligent such that he should be charged with constructive knowledge of her scheme. Accordingly, given the existence of this factual dispute, summary disposition was inappropriate. *Mitchell*, *supra* at 725.

Even if as defendant contends, plaintiff's actions or inactions allowed Kabanuk to forge his d/b/a certificate, there remains a factual dispute as to whether defendant acted reasonably in accepting the checks endorsed by Kabanuk, i.e., whether defendant justifiably relied on plaintiff's purported negligence in allowing Kabanuk to represent herself as the owner of the business. According to defendant's written policy, the only representation that it would accept for an individual's endorsement of checks payable to a business is a certified d/b/a certificate expressly authorizing the individual to endorse the checks. Defendant's policy also requires that a copy of the certificate be maintained in the bank's files.

The parties dispute if and when Kabanuk produced a d/b/a certificate. Defendant claims that Kabanuk provided such a certificate in the first half of 1990. Some of defendant's employees testified in their depositions that it was their understanding that Kabanuk had a d/b/a certificate in defendant's files as early as 1990.

Plaintiff contends that defendant has not established that Kabanuk supplied a d/b/a certificate. Plaintiff indicates that the employees who understood that a d/b/a certificate was on file also testified that they had not personally seen the certificate in 1990. There was also deposition testimony that in April 1993, defendant's employees at one branch could not locate a copy of the certificate in their files, and that Kabanuk produced a photocopy of the certificate several days later. That copy is in evidence and was Kabanuk's forgery of plaintiff's d/b/a certificate. Also, one of defendant's employees, who accepted deposits from Kabanuk at *another* branch, testified that when defendant's loss prevention department contacted her in April 1994, she was unable to locate a copy of any d/b/a certificate in her branch's files.

Plaintiff further contends that acceptance of the photocopy from Kabanuk was contrary to defendant's written policy that it would only accept a *certified* copy. In his deposition, James Neil, an employee of defendant, described that a certified copy of the d/b/a certificate would bear the stamp of the county's Register of Deeds. Plaintiff argues that the photocopy supplied by Kabanuk would have been detected as a forgery if defendant's employees had followed bank policy and asked Kabanuk to submit a *certified* copy.

The question raised by this evidence is whether any of defendant's employees saw a d/b/a certificate before Kabanuk began depositing checks from plaintiff's business. There is also a question whether defendant acted reasonably when accepting the photocopy of the forged d/b/a certificate as opposed to a certified copy in contravention of its written policy. Resolution of these factual questions is essential to determine whether defendant justifiably relied upon Kabanuk's representation that she was the owner of the business. *Westfield*, *supra* at 705. If defendant accepted the checks without reviewing a d/b/a certificate, its claim that it justifiably relied upon Kabanuk's representation is

questionable. Moreover, such conduct by defendant has a bearing on its ability to establish the last element of its estoppel defense: whether defendant would be prejudiced by plaintiff's denial that his conduct allowed Kabanuk to represent herself as the owner of the business. *Id*. Therefore, we conclude that there is a factual dispute regarding defendant's justifiable reliance. Specifically, questions of fact exist concerning when Kabanuk produced the forged certificate, who, within defendant's employ actually saw this certificate, and whether acceptance of the forged photocopy was reasonable. Because the resolution of these issues involve questions of credibility solely within the province of the trier of fact, the circuit court erred in granting defendant's motion for summary disposition. *Vanguard Ins Co v Bolt*, 204 Mich App 271, 276-277; 514 NW2d 525 (1994).

III. STATUTE OF LIMITATIONS

Plaintiff next challenges the circuit court's decision to grant defendant's partial motion for summary disposition. The circuit court held that plaintiff could not seek damages for checks that were accepted before March 11, 1991, three years prior to the date plaintiff filed his complaint. The court held that the statute ran from each forged endorsement and that plaintiff could not avail himself of any tolling principle. Plaintiff contends that he should be allowed to take advantage of at least one of the following tolling principles: the discovery rule, the continuing violation theory, or defendant's alleged fraudulent concealment of facts regarding his claim. We disagree.

When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(7), we accept the plaintiff's well-pleaded allegations as true and construe them in the plaintiff's favor. *Male v Mayotte, Crouse & D'Haene Architects, Inc*, 163 Mich App 165, 168; 413 NW2d 698 (1987). If there are no facts in dispute, the issue whether the claim is statutorily barred is one of law for the court. *Executone Business Sys Corp v IPC Communications, Inc*, 177 Mich App 660, 665; 442 NW2d 755 (1989).

Generally, a cause of action accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827; MSA 27A.5827. Plaintiff's conversion claim is based on the Uniform Commercial Code's ("UCC") recognition that a conversion occurs if a check is paid on a forged endorsement.[5] MCL 440.3419(1)(c); MSA 19.3419(1)(c). A conversion is committed when dominion is wrongfully asserted over the personal property of another. *Miller v Green*, 37 Mich App 132, 138; 194 NW2d 491 (1971). Consequently, a claim for conversion accrues on the date when dominion was asserted, when the check is paid on a forged endorsement, and as conversion results in injury to a person's property, the claim must be brought within three years from the date of the conversion. *Continental Casualty Co v Huron Valley Nat'l Bank*, 85 Mich App 319, 324; 271 NW2d 218 (1978); MCL 600.5805(8); MSA 27A.5805(8). Plaintiff does not dispute these general principles, but instead seeks to avail himself of an equitable tolling principle to delay the date that his cause of action accrued.

A. Discovery Rule

First, plaintiff argues that the discovery rule applies such that his claim did not accrue until plaintiff discovered or should have discovered the conversion. This Court has rejected the application

of the discovery rule in similar cases. *Continental Casualty*, *supra* at 325*; Insurance Co of North America v Manufacturer's Bank (hereinafter "INA")*, 127 Mich App 278, 283-284; 338 NW2d 214 (1983). As in this case, those plaintiffs urged this Court to recognize that their claims for conversion accrued from the date that they should have known of the conversion. *Continental Casualty*, *supra* at 325*; INA*, *supra at* 283. Both panels rejected this argument for sound policy reasons.

Plaintiff urges us to overrule these cases and adopt application of the discovery rule in this context. Plaintiff maintains that Michigan law has consistently recognized that a plaintiff should not be deprived of a cause of action before a plaintiff knows, or should know, of his claim. See *Moll v Abbott Laboratories*, 444 Mich 1, 13; 506 NW2d 816 (1993). Plaintiff contends that application of the discovery rule in this context would not offend the purposes underlying the statutes of limitation such as barring stale claims and loss of reliable evidence. See *Lemmerman v Fealk*, 449 Mich 56; 534 NW2d 695 (1995); *Stephens v Dixon*, 449 Mich 531; 536 NW2d 755 (1995). Plaintiff also points to specific language in a comparable provision of the UCC, which recognizes application of the discovery rule, as further support for his claim that the rule's application should be extended to his conversion claim. We disagree and hold that this Court's prior well-reasoned holdings should not be disturbed.

The primary purposes behind statutes of limitations are: (1) to encourage plaintiffs to pursue claims diligently; and (2) to protect defendants from having to defend against stale and fraudulent claims. *Lemmerman*, *supra* at 65. Nevertheless, Michigan courts have recognized in special cases, the importance of these goals conflict with the injustice of precluding some claims such that application of the discovery rule is required. *Id*. In limited contexts, Michigan courts have recognized policy reasons for application of the discovery rule, which cases generally have been negligence-type actions such as products liability or medical malpractice involving injuries to persons. See, e.g., cases discussed in *Lemmerman*, *supra* at 66-67. Plaintiff has not identified, nor have we discovered, a Michigan case which extends this principle beyond those contexts, and specifically in the area of intentional torts.[6] Moreover, plaintiff has not convinced this Court that strict enforcement of the three-year statute of limitations for conversion actions creates the kind of injustice that has prompted extension of the discovery rule in other contexts.

The Supreme Court has instructed that a decision to apply the discovery rule requires a balancing of competing policy considerations. *Goodridge v Ypsilanti Twp Bd*, 451 Mich 446, 454-455; 547 NW2d 668 (1996); *Stephens*, *supra* at 536. In *Goodridge*, the Supreme Court explained that in deciding whether to strictly enforce a period of limitation or to apply a discovery rule, a court must consider whether the party who has the burden of initiating litigation "'was given a fair opportunity to bring [the claim]'" and whether the responding party's "'equitable interests would be unfairly prejudiced by tolling the statute of limitations.'" *Goodridge*, *supra* at 454-455 (quoting *Stephens*, *supra* at 536). The *Goodridge* Court emphasized that this analysis was critical to ensure that the purposes of the legislation are respected. *Id*.

Applying this analysis to this case supports our affirmation of *Continental Casualty* and *INA*. We conclude first that plaintiff had a reasonable opportunity to bring his claim after discovering

Kabanuk's scheme in October 1993 and that defendant's interests would be unfairly prejudiced by extending the discovery rule to an action by a payee to recover for payment on a forged endorsement. This would frustrate the strong public policy of finality in commercial transactions. *INA*, *supra* at 283-284. Both *INA* and *Continental Casualty* adopted the well-reasoned holding in *Fuscellaro v Industrial National Corp*, 117 RI 558; 368 A2d 1227 (1977). The *Fuscellaro* court stated:

> In the instant case, analysis of the underlying policies leads us to conclude that a payee's action for conversion of a check must be governed by the general rule that in the absence of fraud by those invoking the statute of limitations, a cause of action in conversion accrues at the time the defendant wrongfully exercises dominion, regardless of the plaintiff's ignorance. The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends. Our law of commercial paper has codified a public policy strongly favoring such finality. That a discovery date would mitigate against finality and certainty of obligation is amply illustrated by the facts of the instant case. The plaintiff-payees apparently could not discover the forgery until after their father died and the estate was probated.
>
> In choosing the date of the wrongful exercise of dominion as the point from which the period of limitations runs, the law of conversion presumes that property owners know what and where their assets are, despite the fact that the presumption may work a hardship upon the property owner who fails to discover his or her ownership rights until after the period has run. . . . We fail to see why the limitation on an owner's action for conversion should be measured differently and with less predictability merely because the property involved is commercial paper, particularly when our commercial law places such great emphasis on certainty of liability. [*Id.* at 563-564.][Citations omitted.]

Based on these policy considerations, we conclude that the holdings of *Continental Casualty* and *INA* are sound and should not be disturbed.[7]

B. Continuing Violation Theory

Second, plaintiff argues that the acceptance of the checks with forged endorsements constituted a continuation violation such that plaintiff's cause of action encompassed transactions which occurred outside of the limitations period. Plaintiff contends that defendant's wrongful acts were part of defendant's continuing failure to verify Kabanuk's authority to endorse checks payable to plaintiff's business. We disagree. Plaintiff's argument fails for two reasons. First, plaintiff cannot establish that actions under the UCC warrant application of the "continuing violation" theory. Second, plaintiff cannot show that defendant's conduct constituted a continuing violation as opposed to series of separate violations, each of which were actionable.

In *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 510; 398 NW2d 368 (1986), the Michigan Supreme Court adopted the "continuing violation" theory. The theory had been applied by

federal courts in Title VII actions in order to avoid the harsh effects of a strict application of that act's ninety day limit for bringing claims. *Id*. at 525. The policy reasons behind this doctrine involve considering whether the purpose of a remedial statute would be frustrated if most claims were barred by the statute of limitations or given the nature of the wrong, a plaintiff would have difficulty identifying the precise date of its occurrence. See *Id*. at 525-526; *Phinney vPerlmutter, et al*, 222 Mich App 508, 545-548; ___ NW2d ___ (1997).

The UCC is not a remedial statue designed to redress the violation of rights. Instead, the major purpose of the Uniform Commercial Code is to "make uniform the law among the various jurisdictions." *Continental Casualty, supra* at 324; MCL 440.1102(2)(c); MSA 19.1102(2)(c). Moreover, the nature of conversion of a check by a forged endorsement is distinct enough for an aggrieved party to comprehend the date of its occurrence before the limitations period expired. Thus, there is no policy-based rationale to apply this doctrine in the area of commercial transactions. Further, Michigan courts have not recognized a cause of action for continued negligence. *Traver Lakes Community Maintenance Ass'n v The Douglas Co*, ___ Mich App ___ (Docket No. 182054, issued 6/27/97, slip op at 2.

Further, plaintiff cannot show that the *wrong* alleged in this case, was of a continuing nature. Plaintiff's contention that defendant's continuing failure to verify Kabanuk's authority to endorse the checks is without merit because defendant's failure to follow its own internal policy is not an actionable wrong, although such conduct is relevant to the question whether defendant may properly assert equitable estoppel to defeat plaintiff's lawsuit. Rather the touchstone of our analysis must be the statute itself. The statute expressly provides that a check is converted when it is *paid* on a forged endorsement. See MCL 440.3419(1)(c); MSA 19.3419(1)(c). Therefore, the statute makes clear that the wrong and the injury are complete upon payment such that a claim for conversion accrues with *each* payment. *Continental Casualty, supra* at 324. Because the express language of the statute provides that each payment is actionable, we will not engraft a contrary interpretation that revives an otherwise stale claim if a plaintiff establishes a series of payments as opposed to an individual transaction occurred. *International Union, United Auto Aerospace and Agr Implement Workers of America-UAW v Governor*, 50 Mich App 116, 119; 212 NW2d 814 (1973).

C. Fraudulent Concealment

Plaintiff lastly argues that the statute of limitations was tolled because defendant fraudulently concealed information from plaintiff that would have disclosed his cause of action. Specifically, plaintiff contends that he submitted Kabanuk's waiver for release of her account information in October 1993 and that defendant delayed its response for four months without justification. Plaintiff also emphasizes that certain key facts were not ascertained until after the complaint was filed. Plaintiff thus concludes that defendant's conduct constitutes affirmative acts of misrepresentation which deprived him of material facts pertinent to his right of action. We disagree.

A cause of action will not be barred if a plaintiff successfully proves that a defendant fraudulently concealed his cause of action. MCL 600.5855; MSA 27A.5855 provides:

> If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations.

To establish fraudulent concealment for the purposes of postponing the running of a limitations period, a plaintiff must prove that the fraud was manifested by an affirmative act or misrepresentation. The plaintiff must show that the defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery. *Witherspoon v Guilford*, 203 Mich App 240, 248; 511 NW2d 720 (1994). Plaintiff has not made this showing.

The only material fact which plaintiff could not ascertain before February 1994 was the existence of the forged d/b/a certificate that Kabanuk supplied to defendant. However, plaintiff's cause of action is based on defendant's acceptance of a check based upon payment on a forged endorsement not upon defendant's acceptance of a forged certificate. See MCL 440.3419(1)(c); MSA 19.3419(1)(c). To that end, plaintiff had all the pertinent facts necessary to establish a colorable claim for conversion in October 1993, i.e., before or simultaneously with the time he submitted Kabanuk's waiver for release of information to defendant. By that time, plaintiff had obtained Kabanuk's confession of her embezzlement scheme, copies of the stolen checks from the insurance companies that issued them, and learned that defendant accepted these checks over a forged endorsement. In fact, it was based on this information that plaintiff submitted Kabanuk's written release to defendant.

Thus, because plaintiff was fully aware that defendant had paid checks with a forged endorsement before or simultaneously with his submission of the release, we conclude that he had obtained sufficient facts to bring a conversion action pursuant to MCL 440.3419(1)(c); MSA 19.3419(1)(c) and that defendant's delay in responding to plaintiff was not an affirmative act of misrepresentation that justifies tolling the statute of limitations under MCL 600.5855; MSA 27A.5855.

IV. BREACH OF WARRANTY

Plaintiff next challenges the circuit court's dismissal of his breach of warranty claim that is based on the implied warranties provided in MCL 440.3417; MSA 19.3417 and MCL 440.4207; MSA 19.4207. The circuit court held that defendant made no warranties, express or implied, to plaintiff. We agree and affirm.

The express language of the UCC imposes certain implied warranties in connection with negotiable instruments. Plaintiff relies upon the implied warranties imposed by §§ 3417 and 4207. However, plaintiff's argument misconstrues the language of the statute. The warranties in §3417 generally provide that the *transferor* of the instrument warrants to the *transferee* that he or she has good title to the instrument and that all signatures are authorized.[8] MCL 440.3417(2); MSA 19.3417(2). Under these facts only Kabanuk is the *transferor* of the instruments. Similarly, the warranties in §4207 generally provide that a customer or *collecting* bank warrants to the payor bank or

payor that he or she has good title and presents an instrument with authorized signatures.[9] MCL 440.4207; MSA 19.4207. Again, under these facts only Kabanuk, as the customer, has made implied warranties to defendant, the payor bank. Plaintiff's business was the payee on the checks stolen by Kabanuk. Neither section creates an express warranty running from a transferee or payor bank to the payee. See *Matco Tools Corp v Pontiac State Bank*, 614 F Supp 1059, 1060-1061 (ED Mich, 1985); see also *National Surety Corp v Citizens State Bank*, 41 Colo App 580; 593 P2d 362 (1978), aff'd 199 Colo 497 (1980). Therefore, the circuit court properly dismissed plaintiff's breach of warranty claim.

Plaintiff nevertheless urges this Court to adopt Judge Kelly's reasoning in his dissenting opinion in *Continental Casualty*. *Continental Casualty*, *supra* at 326. In his dissent, Judge Kelly advocated for allowing a payee to pursue a claim under an "implied contract" theory in order to avail himself of the six-year statute of limitations authorized for contract actions. *Id*. at 327. However, Judge Kelly later recognized in his concurrence to *INA* that his dissent in *Continental Casualty* was incorrect such that an implied contract theory would still be subject to a three-year period of limitation. *INA*, *supra* at 285. More significant, Judge Kelly was interpreting the language in §3419 of the UCC which stated that a collecting bank "would not be liable in conversion *or otherwise*" if it acted in good faith and in accordance with reasonable commercial standards. *Continental Casualty*, *supra* at 327; MCL 440.3419(3); MSA 19.3419(3) (emphasis added). For purposes of this case, we need not address the propriety of this interpretation because plaintiff's warranty action is brought pursuant to §§3417 and 4207.

Instead, we adopt the reasoning of the majority in *Continental Casualty*, which stated as we do today, that: "The implied warranty of good title runs from a customer or collecting bank who obtains payment or acceptance of an item or transfers an item for value to each *subsequent payor bank or other payor* who, in good faith, pays or accepts the item. Since here plaintiff is a payee and not a payor of the item, plaintiff has no cause of action based on this theory." *Continental Casualty*, *supra* at 325.

IV. DISCOVERY

Plaintiff lastly challenges the circuit court's decision to grant defendant's motion for a protective order. The court held that plaintiff's request for all documentation related to defendant's losses due to forged endorsements was overbroad and unduly burdensome, and issued a protective order precluding their discovery. Plaintiff argues that the court abused its discretion because the information was relevant to ascertaining whether defendant had knowledge that its practices were inadequate and therefore consistent with reasonable banking standards. We disagree.

A trial court's decision regarding a discovery matter is reviewed for an abuse of discretion. *SCD Chemical Distributors, Inc v Medley*, 203 Mich App 374, 382; 512 NW2d 86 (1994). Plaintiff requested copies of files regarding any and all forged endorsement cases or claims that the bank may have experienced. Irrespective of any possible relevancy that these materials might have, plaintiff has not presented evidence that overrides defendant's evidence substantiating its claim that satisfying the request would have been unduly burdensome. Specifically, defendant presented evidence to the circuit

court that the information sought by plaintiff would require pulling and copying files from 169 branches. Accordingly, the court did not abuse its discretion in granting the protective order.

Our conclusion is further supported by the fact that the court allowed plaintiff to depose defendant's branch managers regarding compliance with the bank's policy to avoid acceptance of forged endorsements and also ordered defendant to produce a copy of its Corporate Security Manual and "criminal referrals for the period between 1989 and 1993" for in-camera review, along with a job description of defendant's vice-president of Corporate Security.

We reverse in part, affirm in part, and remand for proceedings consistent with this opinion. No costs may be taxed, neither party having prevailed in full.

/s/ Robert P. Young, Jr.
/s/ Clifford W. Taylor
/s/ Richard C. Livo

[1] Plaintiff originally brought suit against Jill Kabanuk, First Federal of Michigan, and Standard Federal Bank. Jill Kabanuk died shortly after the complaint was filed and was later dismissed from the action. Also, plaintiff's claims with First Federal of Michigan have been resolved and are not part of this appeal. "Defendant" hereinafter refers solely to Standard Federal Bank.

[2] The 1987 charges alleged that Kabanuk presented an altered check resulting in a $6,000.00 credit to her cash reserve account with a bank, and a fraudulent death certificate to a credit card company resulting in the company's forgoing a collection action against the allegedly deceased individual.

[3] Michigan law requires that any proprietor conducting under an assumed name must obtain such a certificate to identify the name of the business and to provide the general public with a record of the name and address of the person conducting the business. MCL 445.1(1); MSA 19.821(1).

[4] Plaintiff kept his d/b/a certificate in an unlocked file cabinet in the office.

[5] This section was amended by 1993 PA 130, § 1. Although the 1993 amendment rewrote this section, the statute prior to its amendment is applicable to this case. It provides:

(1) An instrument is converted when

(a) a drawee to whom it is delivered for acceptance refuses to return it on demand; or

(b) any person to whom it is delivered for payment refuses on demand either to pay or to return it; or

(c) it is paid on a forged indorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this act concerning restrictive indorsements a representative, including a depository or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depository bank is not liable in conversion solely by reason of the fact that proceeds of an item indorsed restrictively (sections 3205 and 3206) are not paid or applied consistently with the restrictive indorsement of an indorser other than its immediate transferor. [MCL 440.3419; MSA 440.3419.]

[6] Plaintiff's reliance on the holdings in *Lemmerman* and *Stephens* is misplaced. Those cases provide no analyses that support plaintiff's argument. In fact, both cases indicate the Supreme Court's reluctance to extend the scope of the rule's application. The *Lemmerman* Court rejected application of the discovery rule for intentional tort claims of assault and battery and intentional infliction of emotional distress based on sexual abuse that was discovered from repressed memories. *Lemmerman*, *supra* at 74-75. The Supreme Court also rejected application of the discovery rule in cases of ordinary negligence where a plaintiff later discovers the severity of a known injury. *Stephens*, *supra* at 537-538.

[7] In so holding we reject plaintiff's contention that the UCC recognizes the discovery rule based on the language in another part of the statute that an action for breach of warranty accrues when the person should have known of the breach. See MCL 440.3417(6); MCL 19.3417(6). This provision was added by a recent amendment that went into effect after the events in this case had already transpired. See 1993 PA 130, § 1. Furthermore, that provision does not appear in the statutory basis for plaintiff's conversion action, § 3419, as amended or before its amendment. The omission of a provision in one part of a statute that is included in another part is construed as an intentional omission. See *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993); *Gazette v City of Pontiac*, 212 Mich App 162, 169; 536 NW2d 854 (1995), remanded on other grounds, 453 Mich 973 (1996).

[8] This section was amended by 1993 PA 130, § 1. Although the 1993 amendment rewrote this section, the statute prior to its amendment is applicable to this case. It provides:

(1) Any person who obtains payment or acceptance and any prior transferor warrants to a person who in good faith pays or accepts that

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of a draft if the holder in due course took the draft after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the instrument has not been materially altered, except that this warranty is not given by a holder in due course acting in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of a draft with respect to an alteration made prior to the acceptance if the holder in due course took the draft after the acceptance, even though the acceptance provided 'payable as originally drawn' or equivalent terms; or

(iv) to the acceptor of a draft with respect to an alteration made after the acceptance.

(2) Any person who transfers an instrument and receives consideration warrants to his transferee and if the transfer is by indorsement to any subsequent holder who takes the instrument in good faith that

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the instrument has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted instrument.

(3) By transferring 'without recourse' the transferor limits the obligation stated in subsection (2)(d) to a warranty that he has no knowledge of such a defense.

(4) A selling agent or broker who does not disclose the fact that he is acting only as such gives the warranties provided in this section, but if he makes such disclosure warrants only his good faith and authority. [MCL 440.3417; MSA 19.3417].

[9] This section was amended by 1993 PA 130, § 1. Although the 1993 amendment rewrote this section, the statute prior to its amendment is applicable to this case. It provides:

(1) Each customer or collecting bank who obtains payment or acceptance of an item and each prior customer and collecting bank warrants to the payor bank or other payor who in good faith pays or accepts the item that

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not the drawer is also the drawee; or

(iii) to an acceptor of an item if the holder in due course took the item after the acceptance or obtained the acceptance without knowledge that the drawer's signature was unauthorized; and

(c) the item has not been materially altered, except that this warranty is not given by any customer or collecting bank that is a holder in due course and acts in good faith

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee; or

(iii) to the acceptor of an item with respect to an alteration made prior to the acceptance if the holder in due course took the item after the acceptance, even though the acceptance provided 'payable as originally drawn' or equivalent terms; or

(iv) to the acceptor of an item with respect to an alteration made after the acceptance.

(2) Each customer and collecting bank who transfers an item and receives a settlement or other consideration for it warrants to his transferee and to any subsequent collecting bank who takes the item in good faith that

(a) he has a good title to the item or is authorized to obtain payment or acceptance on behalf of one who has a good title and the transfer is otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the item has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with respect to the maker or acceptor or the drawer of an unaccepted item.

In addition each customer and collecting bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

(3) The warranties and the engagement to honor set forth in the 2 preceding subsections arise notwithstanding the absence of indorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.

(4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.