COPY

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

DOCKET NO. 30,829
SECOND JUDICIAL DIST. CT. NO. CV 2006-00832

ASSOCIATED HOME AND RV SALES, INC. a New Mexico corporation, d/b/a ENCHANTMENT RV and ENCHANTMENT RV SERVICE, a New Mexico corporation; TEAM EVENTS, INC., a New Mexico corporation; MOBILE HOME RECOVERY, INC.,a New Mexico corporation; and MDM COMPANY, INC., a New Mexico corporation,

Plaintiffs/Appellants,

vs.

BANK OF BELEN;

Defendant/Appellee.

APPELLANTS' BRIEF IN CHIEF
MAY 25, 2011

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The district court hearings are contained in the Transcript as prepared in booklet form by the district court. All citations to this hearing use the page and line format - e.g. [TR 12/5/07 p. 5 l.8 - p. 6 l. 20].

REFERENCES TO THE RECORD

References to the record will be to the record proper - e.g. [RP 1].

III. STATEMENT OF FACTS.

At all times material hereto, Appellants were in the business of RV sales under the trade name Enchantment RV [hereinafter "Enchantment"]. Enchantment's financing and sales of recreational vehicles involved several inter-related corporations which maintained several active checking accounts with Appellee Bank of Belen, now known as My Bank [hereinafter "Bank"]. Between the dates of February 3, 2003 and December 19, 2004, the Bank cashed a large number of forged checks made out by an embezzling employee. On November 4, 2004, Enchantment gave notice to the Bank as to the forgeries and losses. The Bank did not remunerate Enchantment for the losses based on UCC defenses.

Enchantment alleged that the Bank was liable to Enchantment because:

a. the Bank cashed forged checks written out to "Cash" without confirming the authenticity of the forged signature;

b. it cashed forged checks that were not signed before the teller;

c. it cashed forged checks when the check endorsements were never made in the teller's view and made out for "cash" in large amounts without supervisor approval and over teller limits;

d. the check cashing was obviously overly repetitious and well outside the business practices of Enchantment;

e. the Bank's agents and employees were familiar with the embezzling employee and had reason to know of her bookkeeping functions;

f. the check signatures did not match the account signature cards available to each teller; and

g. the majority of cashed checks were on corporate accounts. [RP 4-5]

Enchantment also alleged that the Bank misrepresented the security measures explicit in a) - c) above in order to induce Enchantment to deposit its funds there. Enchantment's claims sounded in: 1) tort for negligence (both codified by the UCC and common law), fraud, constructive fraud, and negligent misrepresentation; 2) breach of contract; and 3) violation of the Unfair Practices Act, NMSA 1978, Section 57-12-1 *et seq.* [RP6-8]

After two rounds of legal argument under Rule 1-012(b)(6) concerning the propriety of Enchantment's pleadings, the District Court dismissed the non-UCC claims with the exception of fraud on the basis that the UCC provided exclusive relief as against banks for forged checks. [TR 12/5/06 p. 20 l. 15 - p. 21, l. 8; RP 108]. After amendment of the complaint to limit the claim to fraud and the statutory remedy codified in NMSA 1978, § 55-4-406, the parties engaged in a third round of motion practice and the District Court dismissed the fraud claim based on Rules 1-009 and1-012 (b)(6) NMRA. [RP 142] The District Court based its decision not on preemption

but on the basis that there was an insufficient allegation of a nexus between the conduct of the Bank and the reliance of Enchantment on the Bank's representations concerning specific account security measures. [TR 7/31/07 p. 9 l. 15 - p.13 l. 9.]

Finally, the District Court dismissed the UCC claim on the basis of the Bank's Rule1-056 NMRA Motion [hereinafter "Motion"] which argued that the Bank had no liability under the UCC based on: 1) the signature of Enchantment's principals on a signature card which referenced a "Deposit Account Agreement and Disclosure"; 2) provision of monthly bank statements which created a short statute of limitations for forged checks; and 3) limitation on liability related to repeated forgeries by the same forger. [RP 192-193].

The Bank argued the account agreements were governed by the terms contained in a contract which shortened the statute of limitations. The Bank attached as Exhibit "30" to its Motion a document entitled "MYBANK - BUSINESS ACCOUNTS Deposit Account Agreement and Disclosure." [hereinafter "Disclosure"][1][RP 313-331] Michael Grier, the former CEO of Enchantment, had never seen the Disclosure. [RP 347] It is dated August 5, 2008. [RP 313] The forgeries were complete in November 2004. [RP 193] The only document anyone associated with the RV business saw were the signature cards which contain no references to time restrictions. [RP 347-348] The Disclosure is a MYBANK

[1] Enchantment also argued that the Bank's Exhibit "30" did not comply with Rule 1-056 and should have been stricken from the record. It is not certain whether the District Court considered this objection in its ruling.

document, not a Bank of Belen Document. [RP 313] MYBANK is the successor in interest to Bank of Belen. All of the forgeries occurred with Bank of Belen, not MYBANK. [RP 348] No one associated with Enchantment had never seen any of the terms that are allegedly contained in the Disclosure and the Bank never offered to show these terms to Enchantment. [RP 347-348]

The Bank also argued that it was immune from liability under NMSA 1978, §45-4-406 because it sent bank statements to Enchantment every 30 days. In fact, due to theft at the post office, the Bank retained the bank statements for pick-up by Enchantment. Most of the time, Jennifer Grano picked up the bank statements from the Bank since she was there at the bank almost every day. Jennifer Grano used the bank statements to commit her embezzlement. [RP 348]

Enchantment provided evidence that it was told that the Bank would not accept corporate checks made out to "cash" unless an officer of the corporation presented the check. *Id.* Ms. Grano present checks well over $1,000.00 made out to "cash" and it was well known that Ms. Grano was not a corporate officer. The checks were written out to cash and were repeatedly presented to the Bank by a bookkeeper who had no signature authority. The checks for cash were only presented by Jennifer Grano and she started the pattern of presenting the checks outside Enchantment's ordinary banking routine. The signatures were different between the signature cards and the checks and/or the endorsement. The checks were brought into the Bank

signed, even though they were made out to cash. The check amounts exceeded teller limits and were often cashed without supervisor approval. [RP 348-349]

Enchantment provided evidence that during the last year of the forgeries, Ms. Grano embezzled $202,075.00 from Enchantment. Beginning on the last date that a statement was provided to Plaintiffs (September and October 2004), the forged checks added up to $39,612.00. *Id.*

Also in support of their negligence argument, Enchantment presented evidence[2] that Kenneth J. Carson, Jr., the president of the Bank, admitted some fault for the unauthorized payments and he admitted there were improper banking procedures in the payment of some of the checks. [RP 345-346] Further, the Albuquerque Branch manager also admitted there was misuse of the check cashing procedures of the tellers of the Bank because quite a few of the checks were cashed over the tellers' limit without a required supervisor's signature. *Id.*

After oral argument, the District Court dismissed Enchantment's remaining claims with prejudice. [RP 364]. The District Court described the basis for its opinion in a letter ruling, wherein the Court stated that the 1 year statute of limitations contained in NMSA 1978, § 55-4-406(d)(2) for the same wrongdoer began to run after the first bank statement was issued and therefore Enchantment's claims were

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[2] These factual aversions were submitted by unverified Interrogatory Responses to which the Bank objected. [RP 353] It is unclear whether the District Court considered these matters in its decision; however, because the District Court may have considered the Disclosure which was unverified and to which Enchantment objected, Enchantment includes these allegations herein.

time-barred. [RP 361]. Because the Bank provided monthly statements, the District Court found no misconduct by the bank which might preclude the Bank's employment of NMSA 1978, 55-4-§406(d)(2) as a defense. [RP 361-362].

IV. ARGUMENT

A. Standard of Review

The preemption and fraud issues (Sections 1 and 2) were decided under Rule 1-012 NMRA. Dismissal under Rule 1-012(B)(6) NMRA is reviewed *de novo* as to whether a plaintiff can recover under any state of facts provable under the claim. *Castillo v. County of Santa Fe*, 107 N.M. 204, 205, 755 P.2d 48, 49 (1988); *Johnson Controls World Services, Inc. v. Barnes*, 115 N.M. 116, 118, 847 P.2d 761, 763 (Ct.App.), *cert. denied,* 115 N.M. 79, 847 P.2d 313 (1993).

The NMSA 1978, §§ 55-4-103 and 406 issues (Section 3) were decided under Rule 1-056 NMRA. Dismissal under Rule 1-056 NMRA is reviewed *de novo* as to whether a genuine issue of material fact exists which precludes judgment as a matter of law. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶16, 141 N.M. 21, 150 P.3d 971.

1. <u>The UCC does not Preempt other Common Law Theories</u>

The headwaters of most of the issues in this case is found in NMSA 1978, §55-4-406, the full text of which is as follows:

> 55-4-406. Customer's duty to discover and report unauthorized signatures or alteration.

(a) A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount and date of payment.

(b) If the items are not returned to the customer, the person retaining the items shall either retain the items or, if the items are destroyed, maintain the capacity to furnish legible copies of the items until the expiration of seven years after receipt of the items. A customer may request an item from the bank that paid the item, and that bank must provide in a reasonable time either the item or, if the item has been destroyed or is not otherwise obtainable, a legible copy of the item.

(c) If a bank sends or makes available a statement of account or items pursuant to Subsection (a), the customer must exercise reasonable promptness in examining the statement or the items to determine whether any payment was not authorized because of an alteration of an item or because a purported signature by or on behalf of the customer was not authorized. If, based on the statement or items provided, the customer should reasonably have discovered the unauthorized payment, the customer must promptly notify the bank of the relevant facts.

(d) If the bank proves that the customer failed, with respect to an item, to comply with the duties imposed on the customer by Subsection (c), the customer is precluded from asserting against the bank:

(1) the customer's unauthorized signature or any alteration on the item if the bank also proves that it suffered a loss by reason of the failure; and

(2) the customer's unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank if the payment was made before the bank received notice from the customer of the unauthorized signature or alteration and after the customer had been afforded a reasonable period of time, not exceeding thirty days, in which to examine the item or statement of account and notify the bank.

(e) If Subsection (d) applies and the customer proves that the bank failed to exercise ordinary care in paying the item and that the

failure substantially contributed to loss, the loss is allocated between the customer precluded and the bank asserting the preclusion according to the extent to which the failure of the customer to comply with Subsection (c) and the failure of the bank to exercise ordinary care contributed to the loss. If the customer proves that the bank did not pay the item in good faith, the preclusion under Subsection (d) does not apply.

(f) Without regard to care or lack of care of either the customer or the bank, a customer who does not within one year after the statement or items are made available to the customer (Subsection (a)) discover and report the customer's unauthorized signature on or any alteration on the item is precluded from asserting against the bank the unauthorized signature or alteration. If there is a preclusion under this subsection, the payor bank may not recover for breach of warranty under Section 55-4-208 NMSA 1978 with respect to the unauthorized signature or alteration to which the preclusion applies.

In granting the Bank's first motion to dismiss, the District Court agreed that the UCC preempts common law theories with the initial exception of fraud. On the other hand, Enchantment argued that causes of action which operate under different theories of liability are not displaced by the UCC and that in any event a negligence standard exists even if bank statements are provided on a monthly basis.

At the time of dismissal, Enchantment argued against dismissal of any of its claims based on the state of the law in New Mexico which contains no clear pronouncement of preemption under UCC Article 4. [RP 103-105; TR 12/5/06] In *Gallagher v. Santa Fe Federal Employees Federal Credit Union*, 2002 NMCA-088, 132 N.M. 453, 52 P.3d 412 (N.M. App. 2002), the Court of Appeals did not make a statement concerning the viability of common law claims such as fraud in the banking context. The Court of Appeals referenced NMSA 1978, §55-1-103 only to prescribe

the particular statute of limitation available to the plaintiff. In fact, the plaintiff in *Gallagher* did not plead common law claims in his action. *Id*, at ¶16-18. See also *Bank Polska Kasa Opieki, S.A. v. Pamrapo v. Sav. Bank S.L.A.*, 909 F.Supp. 948, 956 (D.N.J. 1995) ("[S]ome courts have been more innovative we believe they should have been in granting plaintiffs affirmative causes of action ***in negligence***. (emphasis added)); *White Sands Forest Products, Inc. v. First National Bank of Alamogordo*, 2002-NMCA-079, 132 N.M. 453, 50 P.3d 202 (2002)(case concerned negligence claim only); *Rutherford v. Darwin*, 95 N.M. 340, 622 P.2d 245 (Ct.App. 1980)(treatment restrictive endorsement issue with no common law claims of relief referenced); Compare *Clovis National Bank v. Thomas*, 77 N.M. 554, 425 P.2d 726 (1967)("under the code the secured party may consent to the sale of the collateral, and thereby wave his rights in same... There being no particular provision of the code which displaces the law of wavier, and particularly waiver by implied acquiescence or consent, the code provisions are supplemented thereby. Section 50A-1-103 N.M.S.A.1953." *Id*, at N.M. 563.)

The Bank argued that New Mexico UCC law displaced other statutory or common law principles. Although in *White Sands*, the New Mexico Court of Appeals decided a case somewhat factually similar to the instant case, the Court decided that Article 3 of the UCC pre-empted plaintiff's statutory negligence claim. However, Plaintiffs' claim is based on Article 4 (§55-4-406) and not Article 3. The

court merely said in *White Sands* that NMSA 1978, §55-3-406 does not create an affirmative cause of action but is to be used for defending a claim.

While some of the issues in *White Sands*, are similar to this case, they should not be considered precedential because in *White Sands* there were two banks involved. One was First National Bank of Alamogordo where the forged checks were negotiated and the other, Key Bank of Portland Oregon was where the plaintiff maintained their checking account. *White Sands* dealt with possible defenses a bank might have if they were in the position of First National Bank.

Another case relied on by the Bank, while it did not deal with a UCC issue is a case involving restrictive endorsements on a negotiable interest, was *Rutherford, supra*. While there is a discussion of NMSA 1978, §55-4-406 in *Rutherford*, it is by analogy only. The case itself is not a NMSA 1978, §55-4-406 case. To the extent that case has any value to that *sub justice*, the following is quoted from the opinion:

> It is certainly not the intention of §55-4-406 to allow the bank to be insulated from the effect of its own negligence; Subsection 3 expressly limits the action of this section to cases in which the bank has used ordinary care. Even if this court were to extend the operation of §55-4-406 by analogy to the case at hand, and even if we were willing to impose upon the customer the obligation to structure his relationship with a third party so as to discover the improper payment, the trial court would have had to believe FNBIA exercised ordinary care in its handling of the money order. The trial court did not so find.

If anything, the *Rutherford* case can be used for the proposition that a negligence claim is not precluded under the circumstances of the instant case. The other New Mexico case relied upon by the Bank was *Gallagher, supra*. While the

New Mexico Court of Appeals did discuss the issue of preemption of common law by the UCC relating to claims involved in forged check endorsements, the decision (at least at its narrowest) dealt with the applicable statute of limitations and is not dispositive on the issue of what common law theories are permitted. The court said that under circumstances similar to this case, liability of a drawee bank for negligence, breach of fiduciary duty, money had and received, or in implied contract is not directly mentioned in the UCC. The court specifically avoided the issue of the recognition of common law claims that might exist aside from conversion. See also *Rio Grande Jewelers Supply, Inc. v. Data General Corp.*, 101 N.M. 798, 799-800, 689 P.2d 1269, 1270 - 1271 (N.M. 1984) (finding that one reason the plaintiff did not have claims outside the UCC was that fraud was not pleaded).

Moving to extra-jurisdictional precedent, there are a number of jurisdictions that have held that the UCC does not entirely displace the common law with respect to claims of negligence. *See Sheiman v. Lafayette Bank and Trust Co.*, 4 Conn.App. 39, 44, 492 A.2d 219, 222 (Conn.App. 1985) (action by heirs against bank for making out check to the wrong person; affirming dismissal for failure to allege facts giving rise to duty):

> An action based on tort theory is separate and distinct from any claim based on the instrument. *Yahn & McDonnell v. Farmers Bank of State of Delaware,* 708 F.2d 104, 113 (3d Cir.1983). Therefore, the plaintiffs' lack of standing to sue on the check does not dispose of their counts alleging negligence and reckless and wanton misconduct. "[T]he UCC does not displace the common law of tort as its affects parties in their commercial dealings except insofar as reliance on the common law

would thwart the purposes of the Code." *New Jersey Bank, N.A. v. Bradford Securities Operations, Inc.*, 690 F.2d 339, 346 (3d Cir.1982).

Mount Vernon Properties, LLC v. Branch Banking and Trust Co., 170 Md.App. 457, 907 A.2d 373 (Md.App. 2006) held that genuine issue of material fact as to whether a check was properly payable under the UCC after person to whom drawer had entrusted check forged payee's signature and whether drawee bank exercised ordinary care to discover the forged endorsement precluded summary judgment on drawer's negligence claim against bank.

Williams v. Metropolitan Life Ins. Co., 367 F.Supp.2d 844 (M.D.N.C. 2005), held that under North Carolina law, the UCC did not displace a customer's common law negligence claims against a bank for changing her account information at a third party's request, accepting forged checks, and removing money for checks from her account where the bank did not show displacement of the common law. It said:

> Not only have the PNC defendants failed to fully develop their displacement argument as to negligence surrounding their acceptance of the forged checks, they have completely failed to address other portions of plaintiff's negligence claims. This is critically important because plaintiff's claims are based not only on the mere payment of the forged checks, but also on the PNC defendants' alleged negligence in changing the address on the account at Sneed's request and sending her a checkbook. Plaintiff further alleges that the PNC defendants do not have adequate internal procedures to protect persons such as plaintiff. Therefore, in order to be entitled to dismissal, the PNC defendants would need to show that particular UCC provisions displaced all these types of claims. They have not done so at this time. While the PNC defendants may well be correct in their displacement arguments and may prevail on the issue at summary judgment, their motion to dismiss plaintiff's negligence claims should be denied.

In *Cassello v. Allegiant Bank*, 288 F.3d 339 (C.A.8 (Mo.) 2002), a diversity case decided under Missouri law, the Court of Appeals stated that drawers and remitters of checks who were allegedly fraudulently induced to write checks or to transfer funds by cashier's checks in amounts that totaled more than $2.5 million could bring common-law negligence action against depositary banks for negligently handling the checks. The 8th Circuit said:

> We have discovered no "particular provision" of the UCC that would "displace" a common-law claim of negligence, so we conclude that the Missouri Supreme Court would hold that a drawer of a check could have a common-law cause of action against a depositary bank for negligently handling the drawer's check.
>
> . . .it is important to our reasoning that the UCC itself quite specifically reserves common-law claims unless they are particularly displaced by one of its provisions. The code, in other words, does not purport to occupy the field so completely as to preempt altogether any other law dealing with bank collections. In short, it is not the only place to look to determine whether an action lies in the present circumstances.

288 F.3d at 341.

In *Racso Diagnostic, Inc. v. Community Bank of Homestead*, 735 So.2d 519 (Fla.App. 3 Dist. 1999), the court held that fact questions precluded summary judgment on conversion claim, and injured parties may bring common law actions for negligence against banks that pay on forged endorsement:

> We note, as plaintiff contends, that the applicable section of Florida's version of the Uniform Commercial Code [UCC], current section 673.4201 (former section 673.419), Florida Statutes (1997), was substantially amended by the legislature in 1992. The former section, upon which the decision in *Isaac Industries* was based, contained the following relevant words: a depository or collection bank (as

> Community Bank is here) is "not liable in conversion *or otherwise* to the true owner beyond the amount of any proceeds remaining in his [the bank's] hands."(emphasis added). The current version, passed in 1992, omits the "or otherwise" language of the former statute and we agree that such omission evidences the legislative intent to alter the holding in *Florida Nat'l Bank v. Isaac Indus.* so as to permit injured parties to bring common law actions for negligence against banks which pay on forged endorsements, provided the plaintiff can actually prove that it was the holder of an instrument as to which the bank failed to exercise ordinary care and dealt with in a way which was not commercially reasonable.

735 So.2d at 520.

See also New Jersey Bank, N. A. v. Bradford Securities Operations, Inc., 690 F.2d 339, 345 (C.A.N.J. 1982) ("Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."); *Coastal Group, Inc. v. Dryvit Systems, Inc.*, 274 N.J.Super. 171, 177-178, 643 A.2d 649, 652 (N.J.Super.A.D. 1994):

> the court erred in precluding plaintiff from pursuing its claim for fraud and misrepresentation. *Spring Motors* only precludes claims brought under tort principles which are inconsistent with the remedies authorized under the UCC, *see id.* at 577-78, 489 *A.*2d 660; however, the UCC expressly preserves a buyer's right to maintain an action for fraud and misrepresentation. *N.J.S.A.* 12A:1-103 provides that "[u]nless displaced by the particular provisions of this Act, ... the law relative to ... fraud [and] misrepresentation ... shall supplement [the UCC's] provisions." In addition, *N.J.S.A.* 12A:2-721 provides that "[r]emedies for material misrepresentation or fraud include all remedies available under [the UCC] for non-fraudulent breach." "Thus, an action based on facts showing fraudulent conduct or material misrepresentation may be redressed by an action [in tort] for fraud or [a contract action for]

> nonfraudulent breach, and there is no need to elect." 3 William D. Hawkland, *Uniform Commercial *178 Code Servs.* § 2-721:01 at 461 (1993).[3]

In many jurisdictions, a bank's negligence is a defense to a bank's assertion of the protections of the UCC rather than a separate claim. *American Airlines Employees Federal Credit Union v. Martin,* 29 S.W.3d 86 (Tex.2000) (holding that the negligence of credit union in accepting a depositor's forged signature making his girlfriend the joint owner of his account prevented the credit union from relying on UCC provision requiring notice of first of unauthorized series of transactions by same wrongdoer within 14 days); *Canfield v. Bank One, Texas, N.A.*, 51 S.W.3d 828, 836 (Tex.App.–Texarkana 2001)(failure of bank to exercise ordinary care is necessary precludes bank from asserting depositor's negligence); *Tumlinson v. First Victoria Nat. Bank*, 865 S.W.2d 176, 178 (Tex.App.–Corpus Christi,1993); *McDowell v. Dallas Teachers Credit Union,* 772 S.W.2d 183, 192-193 (Tex.App.–Dallas,1989)(reversing judgment for the credit union and holding that because the credit union's conduct was not in accordance with reasonable commercial standards, it could not bar its customers from asserting wrongful payment if their

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[3] The New Mexico UCC expressly recognizes the preservation of an action for fraud, saying "Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy and other validating or invalidating cause, supplement its provisions." NMSA 1978, §55-1-103(b).

negligence substantially contributed to alteration or forgery of drafts). The court also held that:

> Section 4.406 places a duty upon a depositor to promptly examine his bank statement and report to the bank the discovery of any unauthorized signature or any alteration. . . . If the depositor fails to comply with this duty, the bank is protected from loss so long as it has exercised ordinary care and paid the item in good faith. . . . However, if the bank has not exercised ordinary care in paying the forged item or items, the bank is precluded from asserting a 4.406 defense.

772 S.W.2d at 188.

See also *City Dodge, Inc. v. Gardner,* 232 Ga. 766, 208 S.E.2d 794, 796-97 (1974):

> . . . neither the draftsmen nor the legislature intended to erase the tort remedy for fraud and deceit with the adoption of the Uniform Commercial Code in Georgia. In support of this conclusion, we find many Georgia cases subsequent to the adoption of the Uniform Commercial Code which recognize the tort remedy. (E.g., Wade Ford, Inc. v. Perrin et al., 111 Ga.App. 794, 143 S.E.2d 420; Rogers-Farmer Metro Chrysler-Plymouth, Inc. v. Barnett, 125 Ga.App. 494, 188 S.E.2d 122. No authority to the contrary has been cited to us, and we note that many of our sister states also provide a tort remedy. See, e.g., Clements Auto Co. v. Service Bureau Corp., 444 F.2d 169 (8th Cir. 1971); Sauerman v. Stan Moore Motors, Inc., 203 N.W.2d 191 (Iowa 1970); Chester v. McDaniel, 264 Or. 303, 504 P.2d 726 (1972). For additional supportive authority, see 3A Bender's U.C.C. Service, s 14.10, and White & Summers Handbook of the Law under the Uniform Commercial Code, s 8-1, p. 248. The latter treatise notes that, '(A)lthough their meaning is not crystal clear, it appears that the draftsmen contemplate a cause of action for fraud in which the buyer would have the right to return the goods purchased and get his money back. Presumably, this right to return the goods and get his money back is a right to 'rescission' which exists outside the Code.' White and Summers, supra, p. 248, Fn. 9.

In re Clear Advantage Title, Inc. 438 B.R. 58, 61 (Bkrtcy.D.N.J. 2010), the bankruptcy court stated:

> For the reasons set forth below, the Court finds Plaintiff's breach of contract, negligence, and recklessness claims implicate issues of good faith and fair dealing and are not displaced by the Uniform Commercial Code. However, these claims cannot be decided without resolving disputed material facts.
>
> . . . .preemption may not always apply: It is fair to say, however, that implicit in those expressions of the need for restraint is a recognition that a common law duty, in fact, may arise and that its breach may be actionable in spite of the existence of the [UCC]. *Girard Bank, supra,* 474 F.Supp. at 1239; *See also Penn. Nat'l Turf Club, supra,* 158 N.J.Super. at 203, 385 A.2d 932 (stating that "although a bank has complied with the [UCC] provisions, such compliance does not necessarily immunize it from ordinary tort liability.")"
>
> 166 N.J., at 58–59, 764 A.2d 411 (*emphasis added*). Specifically, a common law duty can arise when a special relationship exists between the parties. "Courts have recognized tort liability of a financial institution where a special relationship has been established such as fiduciary, confidential, *contractual,* or legal or where there was fraud or misrepresentation on part of defendant bank." *City Check Cashing,* 166 N.J. at 59–60, 764 A.2d 411 (*citing Cumis Ins. Soc'y, Inc. v. Windsor Bank & Trust Co.,* 736 F.Supp. 1226, 1233 (D.Conn.1990) (*emphasis added*)).
>
> Therefore, whether or not Clear Advantage's common law claims are preempted hinge on whether a "special relationship" exists between Clear Advantage and 1st Constitution. The Court finds that such a "special relationship" exists and therefore will allow Clear Advantage to maintain its common law claims of negligence and recklessness. The pleadings provide that, upon opening of the accounts, 1st Constitution required Clear Advantage to execute Depositary Agreements. As aforementioned, the Depositary Agreements contained a section entitled WITHDRAWALS which provided, *inter alia,* that:
>
> Unless otherwise clearly indicated on the account records, anyone of you who signs this form, including authorized signers, may withdraw or

> transfer all or part of the account balance at any time on forms approved by us."
>
> The only parties authorized to sign on either account were Edward Furfey, David G. Pierce, Christopher Lacroce and Joan C. Herrara. Jeff Gibb was never an authorized signature on either Trust Account. Nonetheless, 1st Constitution permitted Gibb to withdraw funds from the Accounts. This Court believes that this agreement reflects the very contractual undertaking the Courts had in mind when carving out this "special relationship" exception and that a duty arose requiring 1st Constitution to make further inquiry before permitting Gibb to withdraw funds from the Accounts.

438 B.R. at 65.

With regard to public policy, Enchantment submits that preemption is not a favored presumption in the law. In *San Juan Agr. Water Users Ass'n v. KNME-TV*, 2011 WL 1261374, 5 (N.M.) (N.M.2011), the New Mexico Supreme Court recently stated:

> When this Court interprets statutes, we do so against a background of common-law principles. In 1876, New Mexico's territorial Legislature determined that "the common law as recognized in the United States of America shall be the rule of practice and decision." 1875–1876 N.M. Laws, ch. 2, § 2; *see* NMSA 1978, § 38–1–3 (1876) (current version of the statute). "[T]he common law, upon its adoption, came in and filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment...." *Sims v. Sims*, 1996–NMSC–078, ¶ 23, 122 N.M. 618, 930 P.2d 153 (internal quotation marks and citation omitted). We presume that the Legislature enacts statutes that are consistent with the common law and that the common law applies unless it is clearly abrogated. *Id.* ¶ 24. "A statute will be interpreted as supplanting the common law only if there is an explicit indication that the legislature so intended." *Id.* ¶ 22.)

In finding preemption, the District Court did not address the merits of Enchantment's other common law claims of negligence, negligent misrepresentation

breach of contract and NMSA 1978, §57-12-1 et seq. Enchantment does not wish to waive its arguments concerning these causes of action, but it is Enchantment's understanding that because the District Court did not specifically rule on the merits of these causes of action, an argument as to the merits of these claims is premature. If indeed argument is necessary at the present time, Enchantment contends that its allegations concerning these Counts were properly pleaded.

Negligent misrepresentation is defined as follows:

> 'A negligent misrepresentation is one where the speaker has no reasonable ground for believing that the statement made was true.' SCRA 1986, 13-819. The degree of proof required of a party asserting negligent misrepresentation is a preponderance of the evidence. State ex rel. Nichols v. Safeco Ins. Co., 100 N.M. 440, 671 P.2d 1151 (Ct.App.), cert. denied 100 N.M. 327, 670 P.2d 581 (1983). Negligent misrepresentation is grounded in negligence rather than an intent to deceive. *Id.* The district court's findings that the principals of Golden Cone 'had no retail operating experience with shopping malls,' that the representations made by the Mall's agents concerning daily car traffic, national food chains, and the food court's function as an anchor store encompassed information only within its scope of knowledge, and that the Golden Cone principals were justified in their reliance thereon, all are supported by substantial evidence and support the court's conclusion of negligent misrepresentation. Golden Cone, supra at N.M. 13, P.2d 1327.

The same arguments concerning fraud in the next section would apply to negligent misrepresentation - i.e., the identity of the misrepresentations which create the basis of liability. The issues of duty and breach of duty appear to be self-evident. With regard to the common law claim of negligence, Enchantment would direct the Court's attention to the next subsection concerning negligence and bad faith as

arguments in favor of reviving Enchantment's common law negligence claim in the event of a finding of no preemption.

Finally, with regard to the breach of contract claim, Enchantment would point out that its allegations of breach of contract are sufficient to withstand a Rule 1-012 NMRA Motion since all the elements of a breach of contract are alleged, [RP 7] but Enchantment recognizes the more complicated issues implicit in this claim due to the fact that no contractual documents exist between the parties except a signature card (and possibly the Disclosure depending on the outcome of a factual conflict on this issue) and a course of conduct concerning the accounts. The role of the UCC as a gap-filler causes a breach of contract claim to edge more toward a NMSA 1978, §55-4-406 cause of action.

The UPA claim is treated in the next section due to its similarity to fraud.

2. <u>There is a Question of Fact as to the Fraud Claims</u>.[4]

"A successful fraud claim must prove a misrepresentation of fact, known by the maker to be untrue, made with the intent to deceive and to induce the other party to act upon it, and upon which the other party relies to his detriment." *Poorbaugh v. Mullen*, 96 N.M. 598, 601, 633 P.2d 706, 709 (Ct.App.1981)*(Poorbaugh I)*. A claim of fraud may be based on promises of future

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[4] This argument was preserved at RP 131-136 and TR 7/31/2007.

conduct where the promisor possesses knowledge of facts that render the promises deceitful:

Register v. Roberson Construction Co., 106 N.M. 243, 741 P.2d 1364 (1987), stated the following on promises concerning future events to support an action for fraud:

> While it is true that an action for fraud will ordinarily not lie as to a pattern of conduct based on promises that future events will take place, there are nonetheless the following well-established exceptions to this rule ... where the promises are based on contrary facts peculiarly within the promisor's knowledge, or where the promise is based on a concealment of known facts. Further, if the promise as to future events is part of an overall pattern designed to lead a party to act to his/her detriment, and in such a way as harmfully to alter a legal right possessed by the party, then promises as to future actions will support an action for fraud, especially in a situation where the defendant states an opinion or belief as to future occurrences which are shown to have had no support by the facts at the time the opinions or beliefs were given. *Id.* at 246, 741 P.2d at 1367 (citations omitted).

Golden Cone Concepts, Inc. v. Villa Linda Mall Ltd., 113 N.M. 9, 12, 820 P.2d 1323, 1326 (1991).

The *Citizens Bank* case also stands for the proposition that a fraudulent misrepresentation need not be made to the damaged victim so long as the representation was made to the class of persons that the fraudfeasor intended to influence. *Id*, at N.M. 365-366. In the latter case, a bank executive guaranteed indebtedness of the bank without knowledge of fraudulent misrepresentations made

by the defendant to the bank. See also *Ledbetter v. Webb*, 103 N.M. 597, 602, 711 P.2d 874, 879 (1985)(sale of defective machinery):

> The [sellers] argue, however, that the [buyers] had an opportunity to investigate the condition of the machine firsthand, thus implying that the [buyers] did not justifiably rely on their representations. That contention is without merit. The [buyers] had never before operated an ice cream business or worked with ice cream machines. They were entitled to rely on the [sellers'] representations regarding the condition of the machines.
>
> Constructive fraud is defined as follows:
>
> Breach of a legal or equitable duty is constructive fraud and it is not necessary to prove actual dishonesty of purpose nor intent to deceive. *Archuleta v. Kopp*, 90 N.M. 273, 276, 562 P.2d 834, 837 (Ct.App.) cert. denied 90 N.M. 636, 567 P.2d 485 (1977). A finding of constructive fraud need not be based upon a fiduciary relationship between the parties, as constructive fraud is defined as 'acts contrary to public policy, to sound morals, to the provisions of a statute, etc., however honest the intention with which they may have been performed.' *Wolf & Klar Cos. v. Garner*, 101 N.M. 116, 118, 679 P.2d 258, 260 (1984).

Golden Cone, supra, at N.M. 13, P.2d 1327-8.

Enchantment contends that their allegations of fraud and constructive fraud are sufficient to withstand Rule 1-009 NMRA and Rule 1–012 NMRA challenges. Enchantment alleged that:

> Over the course of Enchantment's relationship with the Bank, the Bank's agents and employees took actions and represented to Enchantment's owner and principal that the Bank followed certain procedures with regard to the safeguarding of Enchantment's funds, including but not limited to the teller limits on check cashing, supervisory approval of checks over a certain limit, use of signature cards to confirm signatures, and confirmation of unusual transactions.
>
> The actions and representations concerning the safeguards alleged to be employed by the Bank were false in that such safeguards were sporadically if

> ever employed. Upon information and belief, the representations were made by the Bank to Enchantments with knowledge that such representations were false and misleading, and the actions taken by the Bank which demonstrated that such safeguards would be taken were of the nature that required an affirmative communication on the part of the Bank to Enchantments that in fact such safeguards were sporadically if ever employed in order to properly inform Enchantments of the truth.
>
> Enchantments reasonably relied on these representations and omissions and banked with The Bank based on a false sense of security and paid consideration to The Bank in the form of fees associated with the various accounts maintained by Enchantment with the Bank. [RP 112-113]

The District Court's hesitation to find a nexus between the Bank's conduct and Enchantment's damage overlooks Enchantment's clear allegation of reliance by Enchantment on the Bank's representations as to the security measures it represented to employ. Implicit in the District Court's dismissal of this claim is the concept that the Bank's conduct can be explained by old-fashioned sloppiness as opposed to fraud. However, it could just as easily be seen that the benefit gained by the Bank in not employing security measures is to save money at its customer's expense. Indeed, the claim of fraud does not require an allegation that the fraudfeasor receiving a quantifiable gain from the act of fraud. The motivation of the Bank to make such representations is obvious in the sense that the Bank wants business customers in order to make money. If a customer alleges that its bank makes representations concerning security measures that it knows or should know to be false upon which a customer reasonably relies to its detriment, then the tort of fraud should be allowed to proceed past Rules 1-009 NMRA and Rule 1-012 NMRA, and the District Court's

presumptions concerning the a party's motivation to commit the fraud should not interfere with the normal adjudication of claims.[5]

3. Negligence and/or Bad Faith Precludes Use of Repeat Wrongdoer Defense.[6]

Throughout its motion practice, the Bank did does not seriously attempt to argue that it was not negligent in the handling of the checks at issue in this case. The Bank's arguments were essentially legal arguments flowing from the provision of bank statements on a monthly basis. However, according to the statute which the Bank relied upon for its defense, if the Bank "failed to exercise ordinary care in paying the item," the responsibility of the loss should be compared between the bank

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[5] The same logic should apply to the Unfair Practices Claim contained in the first two complaints. An "unfair and deceptive trade practice" is defined as "any false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale... of goods or services... in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person and includes but is not limited to... using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if doing so deceives or tends to deceive [or] failure to deliver the quality or quantity of goods or services contracted for..." NMSA 1978, § 57-12-2. "Trade" or "commerce" is defined as offering for sale, sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state." *Id.* "Person" is defined as a natural person or a corporation. *Id.*

Intent to deceive is not an element of the UPA. *Richardson Ford Sales, Inc. V. Johnson*, 100 N.M. 779, 676 P.2d 1344 (Ct.App. 1984). The "knowingly made" element is satisfied if the promisor was actually aware that the statement was false or misleading when made, or in the exercise of reasonable diligence should have been aware that the statement was false. *Diversey Corp. v. Chem-Source Corp.*, 125 N.M. 748, 965 P.2d 332 (Ct.App. 1998).

[6] This argument was preserved at RP 336-350; TR 7/20/2010.

and customer, and assessed according to their respective negligence. NMSA 1978, §55-4-406(e). Additionally, if the customer is able to demonstrate the lack of good faith, the bank is entirely responsible. *Id.*

NMSA 1978, §55-4-406(c) requires the Bank to make available a statement of account to allow a customer an opportunity to exercise reasonable promptness to examine the statement. However, The Bank knowingly provided the accounting statements directly to the unauthorized user which was taking advantage of its negligence. The unauthorized user was able to observe the Bank's pattern of negligence to deprive Enchantment the ability to reasonably examine the statements to identify the unauthorized signatures. Since there is a genuine issue of material fact as to whether the Bank actually made the statements of account available to Enchantment, it follows that there is a genuine issue of material fact as to whether Enchantment was able to promptly identify the unauthorized payments. Therefore, this presents a genuine issue of material fact to the application of §55-4-406(e).

Moreover, banks which act in bad faith are not entitled to reap the benefit of this defense. A bank may only charge a customer's account for an item that "is properly payable..." NMSA 1978, §55-4-401(a). In the present case, the forged instruments were not properly payable and, therefore, NMSA 1978, §55-4-406 does not apply. See *Lichtenstein v. Kidder, Peabody & Co.*, 727 F.Supp. 975 (D. Pa. 1989) further treatment 777 F.Supp. 423 (1991) rev'd on other grounds 840 F.Supp. 374 (1993):

Under New Jersey law, conspiracy and fraud claims are outside the protection of UCC section 4-406(4) (Pa.Cons.Stat. § 4406(d)). Brighton, Inc. v. Colonial First National Bank, 176 N.J.Super. 101, 422 A.2d 433, (1980), aff'd86 N.J. 259, 430 A.2d 902 (1981). Although the Brighton court failed to explain the basis for its *427 conclusion that section 4-406(4) does not bar fraud and conspiracy claims, in our opinion, such a conclusion is supported by UCC section 1-203 (13 Pa.Cons.Stat. § 1203) which states: "[e]very contract or duty within this title imposes an obligation of good faith in its performance or enforcement." See also, Creeger Brick & Bldg. Supply, Inc. v. Mid-State Bank & Trust Co., 385 Pa.Super. 30, 560 A.2d 151 (1989) (duty of good faith applies to all UCC sections); Brighton, Inc. v. Colonial First National Bank, 176 N.J.Super. 101, 422 A.2d 433 (1980) (party who acts in bad faith is not entitled to the protection of UCC). It is our opinion, therefore, that a bank which has engaged in fraudulent conduct has, as a matter of law, acted in bad faith and is not entitled to the protection of section 4406(d). In this case, however, the plaintiff is alleging *constructive* fraud.

[6] [7] Constructive fraud "has been used to designate a breach of duty which has a tendency to deceive others and operate to their injury, even though there is no vicious intent." Charleroi Lumber v. School District, 334 Pa. 424, 6 A.2d 88 (1939). Because intent is not an element of constructive fraud, a party whose actions constitute constructive fraud might still have acted in good faith. Good faith is defined by the Uniform Commercial Code as honesty in fact in the conduct or transaction concerned. 13 Pa.Cons.Stat. § 1201; Davis v. Pennsylvania Co. for Ins. etc., 337 Pa. 456, 12 A.2d 66 (1940); contra, Potoczny v. Dydek, 192 Pa.Super 550, 162 A.2d 70 (1960) (bad faith is dishonesty). Whether a party's conduct constitutes bad faith is normally a question for the jury. Grimes v. Prudential Ins. Co., 401 Pa.Super 245, 585 A.2d 29 (1991). Because of the plaintiff's allegations in this case, we cannot say as a matter of law whether or not the defendant acted in good faith. We will therefore permit the jury to make this determination. Unless the plaintiff proves that the defendant Kidder, Peabody's actions constituted bad faith, however, the protection afforded the defendant by section 4406(d) still applies. Id, 777 F.Supp. 426-427. See also Appley v. West, 832 F.2d 1021 (7th Cir. 1987)(bad faith coupled with negligence.)

In the present case, New Mexico's version of the UCC is identical to New Jersey's version of the UCC in the respects at issue here. See NMSA 1978, § 55-1-

203 (Obligation of good faith.) New Mexico also recognizes the tort of construction fraud. *Wirth v. Commercial Resources, Inc.*, 96 N.M. 340, 630 P.2d 292 (Ct.App 1981).

Plaintiffs have alleged facts which demonstrate, at the very least, bad faith. This evidence includes Bank allowed Ms. Grano to routinely violate banking procedure (referenced below) and also allowed her to pick up the bank statements.

Enchantment provided evidence a great deal of evidence of bad faith. The Bank represented that it would not accept corporate checks made out to "cash" unless an officer of the corporation presented the check, a representation which was false. Ms. Grano presented checks well over $1,000.00 made out to "cash" and it was well known that Ms. Grano was not a corporate officer. The checks were written out to cash and were repeatedly presented to the bank by a bookkeeper who had no signature authority. The checks for cash were only presented by Jennifer Grano and she started the pattern of presenting the checks outside Plaintiffs' ordinary banking routine. The signatures were different between the signature cards and the checks and/or the endorsement. The checks were brought into the bank signed, even though they were made out to cash. The check amounts exceeded teller limits and were often cashed without supervisor approval. Enchantment employee Idamay Romero's name is spelled out on the signature that is on the signature card, yet the signature on the forgery only shows a straight line for the name "Romero." Finally, it is very evident

that the signatures of Michael Grier's name did not match, since he was not a signer on one of the accounts. [RP 347-348]

Therefore, a genuine issue of material fact exists as to whether the Bank is entitled to the benefit of the one-year notice provision of NMSA 1978, §55-4-406(e). This evidence of bad faith does touch upon the defense contained in NMSA 1978, § 55-4-103(a); an alleged shortening of the one-year reach-back provision concerning the reporting of fraudulent checks. While it is not clear if the District Court relied on it, the document upon which the Bank based this argument was inadmissible on its face. It was a "MYBANK" document, not a Bank of Belen document, dated almost four years after the events occurring in this case. Second, even if the Bank could make some connection between the October 9, 2002, signature cards, Enchantment's principal testified in his affidavit that this document has never been provided to Enchantment (a *de facto* impossibility in light of the date of the document). [RP 347]

There is no doubt that Enchantment complied with the one-year reporting requirement and the three year statute of limitations. At the very most, the Bank's arguments stand for the proposition that Enchantment can only reach back as far as one year prior to the reporting of the forgeries to recover the embezzled funds. The funds embezzled during that year were over $200,000.00. The funds embezzled in the last two months of the fraud (and since the last statement provided to Enchantment) was almost $40,000.00. *Id.*

While there is little precedent in New Mexico concerning this issue, there is extra-jurisdictional precedent on point. In *American Airlines*, the Court stated:

> The UCC draws a careful distinction between disclaiming liability, which it does not permit the bank to do, and limiting the time period during which a bank can be charged with liability for paying unauthorized items, which it permits the bank to do. The Deposit Agreement is consistent with the UCC. The only question therefore becomes whether the agreed-upon time for giving notice is unreasonably short. If it is, then it in effect disclaims liability for a lack of ordinary care and can't be enforced consistent with the UCC regardless of whether the fair notice doctrine is satisfied. Martin does not argue, however, that sixty days is an unreasonable period of time. And we note that other jurisdictions have enforced shortened notice periods ranging from fourteen to sixty days.

Id, 29 S.W.3d at 97.

The *Martin* opinion cited the following cases as holding that shortened notice periods are only enforceable if there is no evidence that the bank has failed to exercise ordinary care: *Stowell v. Cloquet Co-op Credit Union,* 557 N.W.2d 567, 568 (Minn. 1997); (holding that "the Draft Withdrawal Agreement was not manifestly unreasonable and should be enforced in the absence of proof of a lack of ordinary care by the Credit Union in paying the forged items" and finding no evidence of lack of ordinary care); *Knight Publ'g Co. v. Chase Manhattan Bank, N.A.,* 125 N.C.App. 1, 479 S.E.2d 478, 488 (1997) (holding that "Chase may not utilize the shortened limitations period contained in its "Account Conditions" to deny Knight's claim, because Chase as a matter of law failed to exercise "ordinary care" in paying checks which lacked effective endorsements" where it honored a check with a missing

endorsement); *Herzog, Engstrom & Koplovitz P.C. v. Union Nat'l Bank,* 226 A.D.2d 1004, 640 N.Y.S.2d 703, 704 (N.Y.App.Div.1996), finding that the bank was not entitled to summary judgment where:

> even though plaintiff's conduct fell squarely within the rules, defendant will not be protected from liability if plaintiff establishes that it did not observe the standards of ordinary care. On this point, plaintiff's proof that defendant may not have inspected its checks for unauthorized signatures since they were for less than $10,000, coupled with defendant's failure to respond with evidentiary proof establishing that its processing of the checks comported with Federal Reserve regulations or operating letters or with general banking usage, creates a material issue of fact as to whether defendant exercised ordinary care.

226 A.D.2d at 1005, 640 N.Y.S.2d at 704 - 705, citing 6A Hawkland, Uniform Commercial Code Series § 4-103:03).

The *Martin* opinion also cited *New York Credit Men's Adjustment Bureau, Inc. v. Manufacturers Hanover Trust Co.,* 41 A.D.2d 912, 343 N.Y.S.2d 538 (N.Y.A.D. 1973) as another case holding that shortened notice periods are only enforceable if there is no evidence that the bank has failed to exercise ordinary care. That court ruled that §4-103(1) of the UCC:

> prohibits agreements by a bank to disclaim responsibility for its own lack of good faith or failure to exercise ordinary care. However, the agreement here does not absolve the bank for its negligence or lack of good faith or ordinary care[7]. It provides a condition precedent to liability in the nature of an abbreviated period of limitations. Had plaintiff, in opposition to the motion for summary judgment, come forth

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[7] Note that this court indicated that negligence remains viable under the UCC in addition to the UCC's standard of ordinary care.

> with evidence to indicate either lack of good faith or failure to exercise ordinary care by the bank, an issue would have been created and summary judgment would properly have been denied. No such showing appears in this record.

41 A.D.2d at 912, 343 N.Y.S.2d at 540.

Likewise a bank's failure to use ordinary care may preclude its use of the "repeat forger" rule:

> A customer cannot assert his or her unauthorized signature against a bank when one wrongdoer makes a series of unauthorized transactions, on the same account, if the customer fails to discover and report the first unauthorized transaction within fourteen days . . . . This defense is not available when the bank has failed to exercise ordinary care in paying the items. Since this case is an appeal of a summary judgment, this Court will view the evidence in favor of Canfield, and we will assume that the acceptance of purportedly forged documents rendered Bank One in violation of its duty to exercise ordinary care.

Canfield v. Bank One, Texas, N.A., 51 S.W.3d 828, 836.

Moreover, these time limits do not come into play until the bank delivers statements to the customer. As stated above, there are material fact issues as to whether the Bank's delivery of statements to the forger violated its duty of ordinary care given the red flags raised by her conduct. Accordingly, Enchantment contends that the Bank's delivery of the statements to the forger do not constitute delivery[8]:

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[8] NMSA 1978, § 55-4-406 provides that: A bank that sends or makes available to a customer a statement of account showing payment of items for the account shall either return or make available to the customer the items paid or provide information in the statement of account sufficient to allow the customer reasonably to identify the items paid. The statement of account provides sufficient information if the item is described by item number, amount and date of payment. See, *Airco Supply Co. v. Albuquerque Nat. Bank,* 68 N.M. 195, 360 P.2d 386 (N.M.1961) (account holder not estopped from recovering from bank on forged checks paid

> Section 4.406 acknowledges that the customer is in the best position to detect unauthorized transactions on his or her account, and it places the burden on the customer to exercise reasonable care to discover and report unauthorized transactions. The customer's duty to exercise this care is triggered when the bank satisfies its burden to provide sufficient information to the customer . . . . Regarding any items falling within ninety days before Canfield's notice, Bank One's negligence is relevant. *See Tumlinson,* 865 S.W.2d at 178. If a bank has not exercised ordinary care in paying a forged item, it is precluded from asserting the depositor's negligence in failing to examine the statement and notify the bank. *Id.* If Bank One fails to establish ordinary care in paying the items, then the bank's negligence, if any, presents a fact question with regard to any unauthorized signatures occurring within ninety days before the time Canfield notified Bank One.

Id; *cf. Stowell, supra* ("The modern UCC case law of other jurisdictions is virtually unanimous in holding that, once account statements are mailed to the account holder's proper address, the risk of nonreceipt falls on the account holder and interception of the statements by a wrongdoer does not relieve the account holder of the duty to examine the statements and report unauthorized items to the bank.") In this case, of course, the Bank was not mailing the statements to Enchantment, but delivered them instead to an agent who was engaging in a suspicious course of conduct, raising a question of fact as to whether the Bank acted in accord with industry standards.

In sum, as a general proposition, agreements shortening the time periods to examine statements and report unauthorized charges to a bank will be upheld where the agreements meet all elements of contract formation. However, in the present case,

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before the forged and cancelled checks were returned to him).

summary judgment should not have been granted because there is at least an issue of material fact as to: 1) whether the Bank exercised ordinary care in paying the forged item; and 2) whether Enchantment's duty to exercise reasonable care to discover and report the unauthorized transactions was not triggered until the Bank satisfied its burden to provide sufficient information to Enchantment to allow it to discover the charges.

V. RELIEF SOUGHT

Appellants seek reversal of the District Court's dismissal of all counts and remand to the district court for further proceedings consistent with this Court's ruling.

Respectfully submitted,

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