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' REPLY BRIEF
SEPTEMBER 12, 2011

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A. The UCC Does Not Preempt Other Common Law Theories

Defendants argue that the UCC displaces common law even where the statute does not expressly mention displacement. In their Brief in Chief, Plaintiffs argued that such displacement does not exist in New Mexico law and that other jurisdictions avoid displacement as well. In this Reply, Plaintiffs refer the Court to other areas of the UCC where displacement is avoided.

In *VIP Mortg. Corp. v. Bank of America, N.A.* 2011 WL 573601, 5 (D.Mass.) (D.Mass.,2011), the Court stated:

> In addition to fraudulent endorsements, VIP brings claims for general common law negligence against the Bank for allowing Rhodes to open the dba account without documentation and for failing to investigate Rhodes' accounts after it became aware of specific and actual fraud. Common law negligence is the breach of a duty of care that directly and proximately caused harm to the plaintiff. For plaintiff to show negligence under Connecticut law, however, it must first allege that the defendant owed a duty of care to the plaintiff. *Coburn v. Lenox Homes, Inc.,* 186 Conn. 370, 375, 441 A.2d 620 (1982). And here is where the plaintiff's common law claims for negligence fail.

In *Coldform, Inc. v. Faurecia Automotive Seating Canada, LTD* 2011 WL 383925, 4 (Conn.Super.) (Conn.Super.,2011) (unpublished), the Connecticut Court stated:

> . . .where a plaintiff claims commercial losses suffered as a result of defective performance of a contract for the sale of goods, such losses are governed by the UCC, which in turn preserves common law actions for

fraud and misrepresentation only as long as such actions are consistent with the particular provisions of the UCC . . .

(citing *Flagg Energy Development Corp. v. General Motors Corp.*, 244 Conn. 126, 709 A.2d 1075 (1998).

In *Roger Kaye, M.D., P.C. v. T.D. Banknorth* L 1532513, 1 -2 (Conn.Super.,2009) (not reported in A2d), the Court stated:

> While the law in Connecticut is unsettled as to the UCC's effect in relation to claims of negligence, a majority of the Superior Court decisions have held that the UCC does not displace common-law negligence claims. The court in *Cammarota v. Cammarota,* Superior Court, judicial district of Fairfield, Docket No. CV 06 05002935 (September 6, 2007, Hiller, J.) (44 Conn. L. Rptr. 135, 137), concluded that "[t]he Uniform Commercial Code does not dislodge common-law negligence claims, as [a]n action based on tort theory is separate and distinct from any claim based on the instrument." (Internal quotation marks omitted.) See also *Wachtel, Duklauer & Fein v. Sentinel Industrial, Inc.,* Superior Court, judicial district of Ansonia-Milford, Docket No. CV 94 0048307 (November 2, 1999, Arnold, J.) (UCC does not displace common-law negligence claims.); *Brookes v. New Haven Savings Bank,* Superior Court, judicial district of Hartford, Docket No. CV 94 0544390 (January 28, 1997, Hennessey, J.) (in instances involving cashing of forged checks the UCC does not expel common-law negligence actions); *Leaksealers v. Connecticut National Bank,* Superior Court, judicial district of Hartford, Docket No. CV 92 0517952 (June 20, 1995, Hennessey, J.) (UCC provisions for fraud allocation do not usurp the plaintiff's common-law claims for negligence).

The Connecticut courts reason that:

> 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).

It further noted:

It is clear from case law that, even where statutory and UCC remedies or standards overlap, **the UCC does not displace all negligence claims related to fraudulent checks or negotiable instruments.** *See Cassello v. Allegiant Bank,* 288 F.3d 339 (8th Cir.2002); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Devon Bank,* 702 F.Supp. 652 (N.D.Ill.1988). This is not to say that these cases are in any way controlling in the present case. Instead, they illustrate that it is not enough to simply say that Articles 3 and 4 of the UCC wipe out all negligence claims based on fraudulent checks. Because some types of claims are displaced and others are not, the PNC defendants must address all of the specific allegations of negligence in the amended complaint and explain which UCC provisions displace them and why.

367 F.Supp.2d at n. 5 (emphasis added).

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Devon Bank* 702 F.Supp. 652, 659 -660 (N.D.Ill.,1988), the Court stated:

Devon's negligence argument and its statutory claim are closely related, and it is difficult to determine where the one leaves off and the other begins. Indeed, Crocker treats the statutory and negligence claims, as well as the restitution claim, as mere variants of one another. Nonetheless, we are compelled to consider the negligence claim separately, since we have a duty "to examine the complaint to determine if the allegations provide for relief on any possible theory." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357 at 602 (1969); *see*

also Grove School v. Guardianship and Advocacy Commission, 596 F.Supp. 1361, 1366 (N.D.Ill.1984) (Shadur, J.).

> **Devon correctly asserts that the UCC does not generally displace common law negligence actions**[1]. UCC section 1–103 provides that "[u]nless displaced by the particular provisions of this code, the principles of law and equity ... shall supplement its provisions." Cal.Com.Code § 1103 (West 1964). It is clear that the duty of ordinary care in UCC section 4–202 does not displace negligence; if anything, section 4–202 is a restatement of the negligence standard. *Cf. Sun 'n Sand, Inc. v. United California Bank,* 21 Cal.3d 671, 696, 582 P.2d 920, 937, 148 Cal.Rptr. 329, 346 (1978) (UCC section 3–405, dealing with imposters and fictitious payees in commercial paper, does not preclude negligence action); *Joffe v. United California Bank,* 141 Cal.App.3d 541, 557, 190 Cal.Rptr. 443, 452 (2d Dist.1983) (UCC sections 3–116, dealing with commercial paper made payable to more than one person, and 3–117, dealing with commercial paper made payable to a person with words of description, do not preclude negligence action). Nonetheless, we conclude that even though section 4–202 does not preclude recovery for negligence, recovery for negligence is not available in this case.

702 F.Supp. at 661 (finding that because Crocker could not reasonably have foreseen that Devon would be harmed by Crocker's failure to inform Merrill Lynch, since Crocker could not reasonably have known that the check was finally paid. Since

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[1] NMSA 1978, §55-1-103 (b) provides that " 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."(emphasis added)

Crocker owed no duty to Devon, Devon could not recover in negligence.)

Johnson Development Co. v. First Nat. Bank of St. Louis, 999 S.W.2d 314, 318 -319 (Mo.App. E.D.1999)– common law action for negligence may survive . . . **BUT** subject to UCC's limitations period:

> In its second point, JDC argues that the trial court erred when it dismissed count II, which alleges, in the alternative, a common law negligence claim, because Missouri's enactment of the UCC statute preempts such a claim. JDC argues that the issue of whether section 400.4–406 preempts common law claims of negligence is one of first impression in Missouri. We agree. However, we have held that the UCC preempts the common law where the provisions of the UCC contradict the common law. *See, Consolidated Public Water Supply,* 686 S.W.2d at 853. "It is inconceivable that those who drafted the U.C.C. intended to forbid recovery under the Code, but to permit the same remedy for the same wrong outside the Code." *Id.* Section 400.1–103, which contemplates additional general principles of law, states: "[u]nless displaced by the particular provisions of this chapter, the principles of law and equity ... or other validating or invalidating cause shall supplement its provisions." Section 400.1–103.
>
> Section 400.4–406(f) mandates that a customer discover and report an unauthorized signature within one year after the statement or item is made available. Section 400.4–406(f). This limitation is imposed on a customer regardless of the fault of either party. *Id.* A greater period of limitation for a common law negligence action for the same wrong would contradict the limitation in UCC section 400.4–406 only for claims on checks issued outside the one-year limitation. It would not contradict the code limitation for checks issued within the period. **The court erred in dismissing the alternative pleading in count II, which alleged negligence in paying checks within one year of JDC's discovery and report of the forged checks.** (emphasis added)

In *Federal Ins. Co. v. NCNB Nat. Bank of North Carolina* 958 F.2d 1544, 1547 -1548 (C.A.11 1992), the Court stated:

> "The district court correctly held that NC Bank was negligent in paying the fraudulent checks for more than $10,000.00 that had one hand and one facsimile signature. The bank's duty not to pay those checks was created and defined by the contractual arrangements that the bank and Computer entered into when the accounts were opened." (applying Florida law)

Brookes v. New Haven Savings Bank , 1997 WL 48874, 2 (Conn.Super.) (Conn.Super.,1997):

> This court has explicitly held, under nearly identical factual circumstances involving the cashing of forged checks, that the UCC does not displace common law negligence actions. See *Leaksealers v. Connecticut National Bank,* Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 517952 (June 20, 1995) (Hennessey, J.) ("the UCC provisions for fraud do not displace the plaintiff's common law claims for negligence"); *Van Der Werff v. Shawmut Bank, N.A.,* Superior Court, judicial district of Hartford-New Britain at Hartford, Docket No. 554654, 18 Conn. L. Rptr. 245 (November 20, 1996) (Lavine, J.) (holding that the UCC does not displace negligence actions "in the absence of a clear indication from our Appellate or Supreme Court" to the contrary).

Similarly, Article 8 of the UCC does not displace the common law. In *Yahn & McDonnell, Inc. v. Farmers Bank of State of Del.,* 708 F.2d 104, 112 -113 (C.A.Del.1983), the Court vacated a summary judgment order for a bank in an action by creditor endorsee of a negotiable certificate of deposit acquired from the debtor's

surety against bank alleging bank's improper refusal to pay on the certificate. The Court stated:

> Defendant's final argument is that the Code displaces an action based on common law negligence. We turn to that issue first. In *New Jersey Bank v. Bradford Securities Operations, Inc.*, 690 F.2d 339 (3d Cir.1982), a case arising under Article 8, Judge Becker's opinion for the court addressed the status of parallel common law remedies for violations redressable under the Code. He concluded that where the Code provides a comprehensive remedy for parties to a transaction, a common law action is barred. 690 F.2d at 345-46. *See also* §§ 1-102(1)-(2), 1-103. **But a remedy in tort will be recognized where the Code's policy is furthered by "placing the risk of loss on the party most able to minimize that risk.**" 690 F.2d at 347.
>
> The circumstances of the case at hand fit within the latter category. The bank was in a position to prevent the loss by insisting upon surrender of the certificate. *See* § 3-505; 5B *Michie on Banks and Banking,* § 326a at 257-58 (1973) (generally held that bank cannot be compelled to pay a certificate of deposit without its production and surrender; otherwise bank acts at its peril). It was foreseeable that its unexplained conduct in permitting this negotiable instrument to remain at large could cause loss to innocent parties who subsequently acquired it. Moreover, since an action in negligence is separate and distinct from any claim based on the instrument or the underlying contract, we do not believe that the allocation of rights created by the holder in due course doctrine presents such a comprehensive remedial scheme as to supplant a negligence action. *New Jersey Bank,* 690 F.2d at 346-47. Accordingly, we find that the Code does not bar a claim based on a theory of negligence.

In *New Jersey Bank, N. A. v. Bradford Securities Operations, Inc.*, 690 F.2d 339, 345 -346 (C.A.N.J., 1982), the Court stated:

> BSOI does not embellish its "complete defense" contention with either case authority or analysis but rests on the submission that a "complete

defense" under the UCC perforce must immunize it from all liability, of any type, to NJB. Although the district court implicitly rejected BSOI's argument by finding for NJB on the negligence claim, it did not discuss this "preemption" contention, and we are not aware of any other decision that has addressed this precise issue. However, **after considering the scope of the UCC and the purposes of Article 8, we conclude that BSOI's argument is without merit and that the "complete defense" accorded to BSOI by section 8-202(3) does not bar its liability to NJB on a common-law theory of negligence.**

We begin with two basic propositions. First, the UCC is to be "liberally construed and applied to promote its underlying purposes and policies," which include simplifying and clarifying the law governing commercial transactions, fostering the expansion of commercial practices, and standardizing the laws of the various jurisdictions. Section 1-102(1)-(2). Second, the UCC does not purport to preempt the entire body of law affecting the rights and obligations of parties to a commercial transaction. Section 1-103 provides that general principles of law remain applicable unless otherwise preempted by the Code:

> 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.

As a general rule, courts have read these two principles of construction to mean that the UCC does not displace the common law of tort as it affects parties in their commercial dealings except insofar as reliance on the common law would thwart the purposes of the Code. 1 R. Anderson, Uniform Commercial Code s 1-103:65, at 105 (1981). Thus, in Morgan Guaranty Trust Company of New York v. Third National Bank of Hampden County, 400 F.Supp. 383 (D.Mass.1975), aff'd, 529 F.2d 1141 (1st Cir. 1976), the court allowed Morgan Guaranty to sue under Article 8 as well as tort law to recover the value of United States Government securities stolen from Morgan

> Guaranty and subsequently negotiated as loan collateral by the defendant bank. The court reasoned that suits for tortious conversion, although not provided for by Article 8, must have been envisioned by the authors of the UCC because Article 8 contains a provision insulating good-faith agents and bailees from liability for conversion, see section 8-318, and because the "gap" provision of section 1-103 contemplates supplementary causes of action. 400 F.Supp. at 388-89. [FN16] On the other hand, where Article 8 does provide a comprehensive remedy for parties to a transaction, a common-law action will be barred. See, e.g., Brannon v. First National Bank of Atlanta, 137 Ga.App. 275, 223 S.E.2d 473 (1976) (disallowing unjust-enrichment claim in suit for breach of Article 8's signature warranties because warranties would be rendered meaningless by allowance of common-law claim). We find these cases persuasive.

Plaintiffs disagree that they are simply relying on an absence of New Mexico law in support of their non-displacement argument. Plaintiffs rely heavily on the facts of this case. 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. The representations were made by the Bank to Enchantment 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 Enchantment that in fact such safeguards were sporadically if ever employed in order to properly inform Enchantment of the truth. [RP 112-113]

Moreover, the Bank knowingly provided the accounting statements directly to the unauthorized user and embezzler who was taking advantage of the Bank's negligence. The embezzler 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. [RP 348].

The facts of this case are quite different from the facts of any previously cited New Mexico case. Contrary to the Bank's argument on page 9 of its Answer Brief, the UCC does not provide a "particularized, detailed, and comprehensive statutory scheme to allocate liability between a bank and its customer for the payment of checks containing unauthorized signatures or alterations" with this factual backdrop.

Furthermore, Defendants disagree that "[p]ermitting additional causes of action or theories of liability in cases governed by NMSA (sic) 55-4-406 would defeat the objective of promoting certainty and predictability in commercial transactions and would thwart one of the primary objectives of the UCC." Answer Brief, p. 15.

Instead, Plaintiffs argue that the adoption of complete displacement would provide unfair and one-sided immunity to banks which completely fail to honor their promises to their customers or otherwise act in a tortious manner, thereby promoting bank conduct which is contrary to the UCC's mission of balancing factors of fairness between banks and customers. Stated another way, the "certainty" of an unlevel playing filed is not a public policy that New Mexico courts should endorse.

B. Plaintiffs Could Not Have Pled Fraud With More Particularity

It is difficult for Plaintiffs to understand how their allegations of fraud did not meet the standard of Rule 1-009(b) NMRA. Enchantment alleged 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. In fact, 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 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.

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." Secondly, 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 348-349]

This allegation of misrepresentation is neither complicated nor obtuse. It is a straightforward statement of fact made by the Bank which relied upon and which was false. Under New Mexico law, a speaker cannot make even a general representations of fact without a reasonable inquiry as to the accuracy of the statement. Moreover, this representation of fact is not "puffery". It was a statement concerning something far above the bar of materiality; the security measures of a valuable bank account. Merely because the individuals who made these representations is unidentified is irrelevant; it is undisputed that one or more of the employees of the Bank made these representations. Most importantly, Rule 1-009(b) clearly allows allegations concerning the condition of the mind of the speaker to be averred generally.

The argument that Plaintiffs waived their argument concerning fraud by failing to amend their complaint after dismissal without prejudice is incorrect. If Plaintiffs could not amend to plead with more particularity because their initial pleading "said it all," then it would be a useless act to replead the same allegations in order to obtain

a dismissal with prejudice. The dismissal of the case with prejudice at RP 364 perfected Plaintiffs' right to appeal all of the various dismissals in this case. Similarly, Plaintiffs did not waive their argument concerning the fraud in their Brief in Chief by failing to make an argument. Plaintiffs choice to not belabor a "know it when you see it" fact pattern, accompanied by a concise recitation of the law of New Mexico concerning the torts that sounded in deceit, is not waiver; it is a recognition that whether facts alleged meet a particular standard of pleading is plain from the four corners of the allegations. The time, place and content of the allegations are, in fact, described in the allegations. Bank employees made representations at the Bank while the Bank was purportedly employing false security measures. The idea that discovery could reveal the identity of a bank manager or employee who made such representations is unreasonable in light of the reality of employee turnover and multiplicity of bank personnel.

C. Recovery Is Not Barred By Section 55-4-406 and Plaintiffs Clearly Proved Bad Faith

The fallacy of Defendants' argument in this regard is highlighted by the reference to the pronouncement of *Rutherford v. Darwin*, 95 N.M. 340, 622 P.2d 245 (Ct.App. 1980):

> Section 55-4-406 was intended to mitigate the effect of the rather harsh rule that the bank is liable for paying drafts which contain **unobvious** forgery.

Rutherford, 95 N.M. at 344, 622 P.2d at 249 (emphasis added).

Plaintiffs alleged and provided evidence of the patent and almost sadly comical actions that the embezzler employed at the Bank to achieve her goal of siphoning the subject accounts. The embezzler's conduct at the Bank fairly screamed **FORGERY**: Checks written for "cash" time after time after time by an low level employee for hundreds of thousands of dollars endorsed in a manner that was in conflict of signature cards.

Therefore, the policy relied upon by the Bank in balancing the effect of obvious forgeries and unobvious forgeries is not furthered by immunizing the Bank from liability in this case. The checks in question were not properly payable and were obvious forgeries. Therefore, the Bank cannot rely on NMSA 1978, §55-4-406 immunity. Moreover, the fact that the Bank provided the statements to the individual who actually committed the obvious forgeries creates an issue of fact as to whether Plaintiffs were reasonable in their inability to report the forgeries.

Respectfully submitted:

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