STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

KEEPER OF THE WORD FOUNDATION and GREGORY J. REED & ASSOCIATES, PC.,

Plaintiffs,

-v-

FIRST INDEPENDENCE BANK,

Defendant.

Case No. 21-017337-CB

Hon. Annette J. Berry

OPINION AND ORDER

At a session of said Court held in the Coleman A. Young Municipal Center, Detroit, Wayne County, Michigan,
on this: 11/10/2023

PRESENT: Hon. Annette J. Berry
Circuit Judge

This civil matter is before the Court on motion for summary disposition filed by Defendant First Independence Bank. For the reasons stated below, the Court grants the motion.

I. BACKGROUND

Plaintiff Keeper of the Word Foundation ("KWF") and Plaintiff Gregory J. Reed & Associates, P.C. ("Reed & Associates") are both owned, operated, and represented by

the attorney of record, Gregory J. Reed. Plaintiff KWF allegedly operates as a charitable organization with a purpose of preserving African American culture and history.

In December 2019, Plaintiffs filed suit against Defendant First Independence Bank (the "Bank") in 36th District Court, alleging breach of contract and conversion for mismanaging KWF's $5,000.00 certificate of deposit (CD) and Plaintiff Gregory J. Reed & Associates, P.C.'S account. *Keeper of the Word Foundation, et al v First Independence Bank,* 36th District Court Case No. 19182983GC. In the district court complaint, Plaintiffs alleged that Reed & Associates deposited its funds with the Bank, and that Plaintiff KWF purchased a Certificate of Deposit ("CD") on November 25, 2005 from the Bank. at a face value of $5,000.00. The CD matured on November 25, 2006.

Plaintiffs also claimed that the Bank closed the Keeper of the Word's account after the CD matured, one year after the CD's purchase. They further alleged that the Bank "refused to pay and redeem the CD" in 2018. In addition, Plaintiffs alleged that Reed & Associates deposited $53,651.00 in an "interest on lawyers' trust account" ("IOLTA"), and that the Bank made false entries and material errors regarding the account. They claimed that the Bank "refused to account for all the money deposited." The district court dismissed the suit with prejudice after granting Defendant's motion for summary disposition pursuant to MCR 2.116(C)(2) (insufficient process) because Plaintiffs failed to serve Defendant and pursuant to MCR 2.116(C)(4) (lack of subject-matter jurisdiction) because the damages sought were greater than $25,000.00.

Plaintiffs then filed suit in this Court in December 2021. In their complaint, they allege breach of contract, negligence, that the Bank "recorded false bank entries in its

account," and conversion. They claim that the Bank mismanaged the CD and the IOLTA account. This Court's predecessor, Hon. David A. Groner,[1] granted summary disposition in favor of the Bank. Judge Groner determined that Plaintiffs' claims were barred as a matter of law because they were previously adjudicated to a final judgment by the district court. Plaintiffs appealed and the Court of Appeals reversed and remanded the case to this Court. *Keeper of the Word Foundation, et al v First Independence Bank,* unpublished per curiam opinion of the Court of Appeals decided on March 2, 2023 (Docket No. 361154). The Court of Appeals held:

> Because the district court's dismissal of plaintiffs' previous complaint under MCR 2.116(C)(4) for lack of subject matter jurisdiction did not constitute a prior decision on the merits, the trial court erred by granting defendant's motion for summary disposition on the basis of a prior adjudication.
>
> *Id* at 4.

Thus, the case was reversed and remanded for further proceedings in this Court. The case was reopened on May 25, 2023.

In January 2011, the Bank sought and received Reed's confirmation in writing that the IOLTA account would be managed in compliance with MRPC 1.15A. In July 2011, Reed completed and signed a new signature card for the IOLTA account, titled: "Michigan State Bar Assoc. — IOLTA, Gregory J. Reed & Associates, PC, Attorney at Law." Under MRPC 1.15A, "Trust Account Overdraft Notification," an IOLTA account can only be held or managed by a financial institution approved by the Bar. MRPC 1.15A(2)(b). In addition, MRPC 1.15(A)(2)(b) provides that the approved financial institution must agree to report to the Attorney Grievance Commission ("AGC") when

[1] This case was originally presided over by Hon. David A. Groner who is now retired. The case was then reassigned to this Court.

any IOLTA account is over-drafted or put the account into "Not Sufficient Funds" ("NSF") status.

Regarding further background, on September 23, 2013, a $166.00 check was presented to the Bank to be paid from the IOLTA account, which did not have sufficient funds. The Bank then put the IOLTA account in NSF status and reported the overdraft to the AGC as required by MRPC 1.15A. The AGC then began an investigation. After investigation, on August 6, 2018, the Grievance Administrator made the following findings and recommendations:

> 17. Following his receipt of the Grievance Administrator's Request for Investigation relating to the overdraft notification, Respondent caused the status of the account as an "IOLTA account" to be changed to a business account on or about October 25, 2013.
>
> 18. By reason of the conduct described above in this Formal Complaint, Respondent has committed the following misconduct and is subject to discipline under MCR 9.104 as follows:
>
> a) held funds other than client or third person funds in an IOLTA, in violation of MRPC 1.15(a)(3);
>
> b) failed to hold property of clients or third persons in connection with a representation separate from the lawyer's own property;
>
> c) deposited his own funds into an IOLTA in excess of the amount reasonably necessary to pay financial institution service charges or fees or to obtain a waiver of service charges or fees, in violation of MRPC 1.15(f);
>
> d) engaged in conduct involving dishonesty, fraud, deceit. misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer, in violation of MRPC 8.403);
>
> ...

> Wherefore, Respondent should be subjected to such discipline as may be warranted by the facts or circumstances of such misconduct.

[Defendant's Motion, Exhibit E].

A month after being notified of the Grievance Administrator's Request for Investigation, Reed converted the IOLTA account to a non-IOLTA business checking account and the IOLTA account was closed. On October 28, 2020, Reed received a letter regarding the decision of the AGC. Although Reed submits part of the letter, he does not submit the entire letter. It stated in part:

> At its regular monthly session on August 19, 2020, the Attorney Grievance Commission determined that the account was utilized as a business account.

[Plaintiff's Exhibit C].

Reed does not include in his submissions to this Court the AGC's final decision as to whether or not he was subject to discipline. However, he has submitted as evidence a letter signed by Elizabeth Mitchell, Branch Manager of the Bank, indicating the following:

> For clarity, we have updated our bank records for Gregory J. Reed & Associates, P.C. after we ascertained the account was not set up as directed.
>
> This letter is in regards to the business account listed and not an IOLTA account. On September 18, 2013, there was an item presented for payment in the amount of $166.00 made payable to Cardmember Service. Without verifying the authenticity for approval as to the business account of the item it was paid and the account was charged a fee of 35.00. First independence Bank recognizes the error and any fees; assessed to the Gregory J. Reed Associates, PC account was credited back m the customer's business account.
>
> The above account is independent of any IOLTA Account.

[Plaintiff's Exhibit G].

Thus, pursuant to this letter, the Bank was not required to notify the AGC of insufficient funds in an IOLTA account. This does not address the two issues before the Court, i.e. whether Reed is owed $5,000.00 for a CD and $53,651.48 from his business account. However, Mitchell does not recall having prepared, signed or delivered the letter. [Defendant's Motion, Exhibit G, p. 4]. The Bank has no record of the letter and the Bank believes that the letter is not authentic.

Notably, Reed filed for Chapter 7 Bankruptcy on August 28, 2014. *In re Gregory James Reed*, U.S. Bankruptcy Court - Eastern District of Michigan, Southern Division - Detroit, Case No. 14-5383-MBM. The bankruptcy court's findings included the following:

> The evidence supports the conclusion that KWF has always engaged in some activity consistent with its stated purpose. The evidence is even stronger, however, that Reed has used KWF primarily to protect his income and assets from the claims of creditors. Since at least 2012, Reed has had sole control over the financial affairs of KWF. (10/7/2015 Tr. at 118-120; KWF's Trial Ex. 1, Doc. 195-1 through Doc. 197-7). He used that control for his own benefit. He used the KWF bank account to pay all, or most of, his personal expenses, including the mortgage on the Burns Property, utilities, credit cards, and the Lexus car payment. His social security income was deposited into the KWF accounts. Reed used KWF to sell personal property and then retained the benefits of the transactions for himself.
>
> Reed also used KWF for purposes which have nothing to do with the charitable and educational mission of KWF. …
>
> [Defendant's Exhibit C, pp 27-28].

The bankruptcy was discharged on January 16, 2018. A formal decree was entered on August 22, 2020 closing the case. During this time, the AGC stayed its

investigation. The CD at issue in this lawsuit was not disclosed and identified as an asset of KWF in September 2015. Even after the Trustee investigated Reed's assets, there was no disclosure, discovery or identification of the CD as an asset of KWF in bankruptcy. "He filed his initial bankruptcy schedules in 2010. He amended them at least 4 times. He never disclosed that he had a claim of any kind against FIB with respect to the IOLTA." [Defendant's Motion, Exhibit G, FDIC Determination, p. 3].[2] In

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[2] Reed also made a complaint to the Federal Deposit Insurance Corporation ("FDIC") regarding these matters. The FDIC refers to the Bank as "FIB." In its response to Reed, the FDIC stated:

> With regards to the initial deposit of more than $53,000, the account was opened in April 2007, with no prior questions concerning the opening amount being unaccounted for. The Bank's records no longer include monthly statements that are more than seven years old. When the Bank converted the Reed IOLTA to a commercial business account at your request in October 2013, the new signature card generated populated based on information inputted into the computer system at the original account opening.
>
> Regulation E gives customers 60 days after they receive a periodic statement to complain of an error shown on the statement regarding electronic funds transfers (EFT'S). The Bank indicated it never received a complaint despite interest earned on funds in the Reed IOLTA was the subject of regular monthly EFT'S until October 2013. The Bank delivered more than 70 monthly statements showing EFT'S of interest being transferred from the Reed IOLTA to the Michigan Bar Foundation.
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> [Defendant's Motion, Exhibit K, p. 1] [Emphasis added].
> ...
>
> ... It is not within the purview of this office to resolve disputes over the interpretation of a contract. When an issue has been litigated or is currently in litigation, the U.S. courts system will render an opinion. You may consult with an attorney if you choose to pursue the issue.
>
> There are no federal laws enforced by the FDIC which require a bank to maintain deposit account records indefinitely. In general, the Bank Secrecy Act requires most records be maintained for at least five years. State laws also contain record retention provisions for account records, which is on average seven years.
>
> When a deposit account is inactive for a certain period of time, a bank is required to forward the funds from the account to the state for safekeeping. Each state has its own unclaimed property laws regarding when an account must be submitted. Most states maintain a website that allows you to check if it is keeping funds in your name, and how to claim

addition, Reed never disclosed that he had a claim of any kind against the Bank with respect to the IOLTA.

With respect to the dispute in this case regarding the CD, the Bank has presented an affidavit executed by Danielle Edwards who is Vice President and Branch Administrator for the Bank. Regarding the CD, Edwards stated in relevant part:

> 6. That I have made a diligent review of the Bank's records for the Keeper of the Word Foundation's ("KWF'S") Certificate of Deposit #1 05407 (the "'CD") purchased by Gregory J. Reed ("Mr. Reed") on November 25, 2005.
>
> 7. The CD matured on November 25, 2006 and would be due and payable at that time.
>
> 8. Pursuant to the Bank's policies and procedures, CD'S have an automatic 1-year; rollover period to allow the CD to be presented, honored, and paid within 1 year of the CD's maturity date.
>
> 9. In compliance with Michigan law and the Bank's policies and procedures, if a CD is not cashed out within 3 years of maturity, then the funds are escheated to the State of Michigan.
>
> 10. I have conducted a diligent search of the Bank's existing records and there is no record of the CD on deposit with the Bank.
>
> 11. The absence of any record of the CD in the Bank's system is consistent with the 7-year record retention policy of the bank and the fact that the CD was previously presented, honored, and cashed by KWF.

> it. The Bank already confirmed with the State of Michigan that the account was not escheated.
>
> Although we understand this may not be the response you are seeking, we appreciate you notifying us of your concerns. …
>
> [Id, p. 2] [Emphasis added].

> 12. Furthermore, we have no record of the CD funds being escheated with the State of Michigan, consistent with the conclusion that the CD was previously presented, honored, and cashed by KWF.
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> 13. For a second time, KWF presented the CD to be honored and paid in December 2018, which is 12 years after the CD matured and 4 years after the CD records were destroyed in accordance with the applicable law and Bank policies and procedures.
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> 14. At the time KWF presented the CD in 2018, the original records had already been destroyed.
>
> [Defendant Bank's Motion, Exhibit A, p. 2].

As to the IOLTA account and the $53,651.48 that Reed claims is owed to him, Edwards also stated in pertinent part:

> 30. In December 2018 (more than 4 years after the account was closed), Mr. Reed demanded return of a $53,651.48 deposit supposedly made into the IOLTA account in April 2007.
>
> 31. Mr. Reed produced an IOLTA account statement from April 2007, which was no longer in the Bank's records in December 2018 (11 years after the account was opened).
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> 32. According to Mr. Reed's copy of the April 2007 IOLTA account statement, there were no ($0.00) deposits made.
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> 33. It should further be noted that between April 2007 and December 2018, GJR would have received more than 70 account statements.
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> 34. Despite receiving more than 70 statements, Mr. Reed did not complain, object, or otherwise notify the Bank of the supposedly missing $53,651.48 deposit.
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> [Id, p. 4].

It should be noted that Reed does not submit any of the 70 bank statements sent to Reed to rebut any of the statements made by Edwards in her affidavit. The only

evidence he has submitted is what appears to be a deposit slip on the account ending in 0857. The deposit slip is dated April 27, 2007 and shows an amount deposited into the account of $53,651.48. It also indicates that the account is an IOLTA account. Reed has not submitted any of the 70 statements showing activity in the account, i.e., deposits or withdrawals. As indicated above, Plaintiffs allege that the Bank refused to pay and redeem the CD in 2018 and that Reed & Associates deposited $53,651 in an IOLTA account in which the Bank allegedly made "false entries and material errors" regarding the account. Plaintiffs also claim that the Bank "refused to account for all the money deposited."

As noted above, Plaintiffs filed their lawsuit in December 2021. Now before the Court is the Bank's second motion for summary disposition after the Court of Appeals reversed Judge Groner's decision granting summary disposition in favor of the Bank and remanded the case for further proceedings.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Defendant Bank bases its motion on MCR 2.116(C)(4), MCR 2.116(C)(7), and MCR 2.116(C)(8). "Summary disposition under MCR 2.116(C)(4) is appropriate when '[t]he court lacks jurisdiction of the subject matter.'" *Doe v Gen Motors, LLC*, ___Mich___; 992 NW2d 275, 276 (2023). "When considering a motion for summary disposition under MCR 2.116(C)(4), the trial court must determine whether the affidavits, together with the pleadings, depositions, admissions, and documentary evidence, demonstrate that the court lacks subject-matter jurisdiction. Though a plaintiff may plead sufficient facts supporting subject-matter jurisdiction, summary disposition

under MCR 2.116(C)(4) is proper if a defendant provides documentary evidence showing undisputed facts supporting the lack of jurisdiction." *Id.*

As to MCR 2.116(C)(7), under the rule governing summary disposition on grounds that claim is barred because of release, payment, prior judgment, immunity, or statute of limitations, all well-pleaded allegations must be accepted as true and construed in favor of the nonmoving party, unless contradicted by any affidavits, depositions, admissions, or other documentary evidence submitted by the parties. Such materials shall only be considered to the extent that they would be admissible as evidence. MCR 2.116(C)(7), (G)(6). *Willett v Charter Tp of Waterford*, 271 Mich App 38, 46; 718 NW2d 386 (2006)

"Thus, a party making a motion under MCR 2.116(C)(7) can present evidence, and there is no impropriety in the trial court considering evidence when ruling on a motion under MCR 2.116(C)(7)." *Id.*

MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may consider only the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130.

III. DISCUSSION

A. Standing and Collateral Estoppel

Defendant Bank first argues that Plaintiff KWF lacks standing to seek recovery of the CD funds. It claims that, based on collateral estoppel, the issues have already been presented and decided in bankruptcy court. The Bank incorrectly frames this argument under MCR 2.116(C)(7). To pursue summary disposition for lack of standing, Defendant should proceed under MCR 2.116(C)(5), in which "[t]he party asserting the claim lacks the legal capacity to sue."[3] On the other hand, the collateral estoppel argument is based on MCR 2.116(C)(7) where the claim is barred by "prior judgment."

The Court notes that Plaintiffs do not address Defendant's lack of standing argument. Instead, it claims that the AGC's determination is binding on the Court and that the Court of Appeals has ruled in Plaintiffs' favor. As to the AGC's findings, the findings are not dispositive in this case and the Court has no jurisdiction to involve itself in AGC decisions. See *Grievance Administrator, Attorney Grievance Comm v Oeming*, 151 Mich App. 575, 576-577; 391 NW2d 756 (1986) (holding that the circuit courts lacked subject-matter jurisdiction to review claims regarding disciplinary actions of the AGC). Thus, this Court need not address the Plaintiffs' contention that the AGC found that Reed did possess a CD and the monies in the IOLTA/business checking account

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[3] "A motion for summary disposition setting forth the defense that a party lacks the legal capacity to sue is filed under MCR 2.116(C)(5). Such defenses may include lack of standing…" § 63:32. Lack of legal capacity to sue - In general, 3 Mich. Ct Rules Prac, Forms § 63:32, citing in fn 0.10 *Sprenger v Bickle,* 302 Mich App 400; 839 NW2d 59 (2013) (circuit court correctly determined that plaintiff did not have standing and granted defendant's motion to dismiss under MCR 2.115(C)(5).); *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass'n,* 264 Mich App 523, 528; 695 NW2d 508 (2004) (challenge to the plaintiffs' standing was "an attempt to have this matter dismissed because plaintiffs lack the legal capacity to sue under the statute. MCR 2.116(C)(5).").

(ending 0857). Although the AGC's decision may not be dispositive in this case, the AGC's decision may be part of the evidence presented by Plaintiffs.

As to the Court of Appeals' decision, as indicated above, the Court of Appeals concluded that the case was improperly dismissed by this Court's predecessor because the district court did not dismiss the case based on the merits of the case. Thus, the case herein was reinstated in order to decide the case on its merits.

Assuming that Plaintiffs' claim that the AGC and the Court of Appeals decided in his favor as a way of asserting collateral estoppel offensively, the argument fails because neither the AGC's findings nor the Court of Appeals' holding concludes that he currently has a current right to the CD proceeds and the amounts claimed in the checking account. Also explained above, after the Trustee in bankruptcy investigated Reed's assets, there was no disclosure, discovery or identification of the CD as an asset of KWF in bankruptcy. In addition, Reed never disclosed that he had a claim or potential claim of any kind against the Bank with respect to the IOLTA.

Pursuant to *Spohn v Van Dyke Public Schools,* 296 Mich App 470; 822 NW2d 239 (2012), in bankruptcy proceedings, the debtor agrees to be bound by certain obligations, including a duty to disclose all of his or her assets to the bankruptcy court in return for a discharge of debts. *Id* at 481. This duty to disclose continues throughout the pendency of the bankruptcy action. *Id* at 482. "'[T]he duty of disclosure in a bankruptcy proceeding is a continuing one, and a debtor is required to disclose all potential causes of action.'" *Id* [Footnote omitted]. Because Reed never disclosed the CD, the bank account, or a potential cause of action in this Court, he is judicially

estopped from now claiming them as his assets.[4] Hence, rather than collateral estoppel, judicial estoppel is the more applicable doctrine. Therefore, Plaintiffs' claims are barred under MCR 2.116(C)(7).

B. Statute of Limitations

Next, Defendant Bank argues that Plaintiffs' claims are barred by the statute of limitations. Again, Plaintiffs do not address this argument. He merely argues that the Court should award Attorney fees and costs and to compel the Bank to redeem monies for the CD. In this argument, Reed goes into the legal analysis of the basis for awarding attorney fees and costs. This argument does not respond to the Bank's argument supporting its summary disposition motion. "This Court is not required to search for authority to sustain or reject a position raised by a party without citation of authority."

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[4] Whether the doctrine of judicial estoppel should to apply to bankruptcy proceedings, under *Spohn*, a trial court must find:

> [a reviewing court] must find that: (1) [the plaintiff] assumed a position that was contrary to the one that she asserted under oath in the bankruptcy proceedings; (2) the bankruptcy court adopted the contrary position either as a preliminary matter or as part of a final disposition; and (3) [the plaintiff's] omission did not result from mistake or inadvertence. In determining whether [the plaintiff's] conduct resulted from mistake or inadvertence, [the reviewing] court considers whether: (1) [the plaintiff] lacked knowledge of the factual basis of the undisclosed claims; (2) [the plaintiff] had a motive for concealment; and (3) the evidence indicates an absence of bad faith. In determining whether there was an absence of bad faith, [the reviewing court] will look, in particular, at [the plaintiff's] "attempts" to advise the bankruptcy court of [the plaintiff's] omitted claim.
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> *Spohn v Van Dyke Public Schools,* 296 Mich App 470, 480-481; 822 NW2d 239 (2012) [Footnote omitted].

There is no doubt that the assets now claimed by Reed were not included in his inventory in bankruptcy after at least 4 revisions. His position here is clearly "contrary" to the one he "asserted under oath in the bankruptcy proceedings." The omission was not the result of "mistake or inadvertence." As noted above, the bankruptcy court found that "[t]he evidence is even stronger, however, that Reed has used KWF primarily to protect his income and assets from the claims of creditors." [Defendant's Exhibit C, pp 27-28]. Nor did Reed ever attempt to advise the bankruptcy court of these assets.

Mettler Walloon, LLC v Melrose Tp, 281 Mich App 184, 220; 761 NW2d 293 (2008), citing *In re Reisman Estate,* 266 Mich App 522, 533; 702 NW2d 658 (2005); *Peterson Novelties, Inc. v City of Berkley,* 259 Mich App 1, 14; 672 NW2d 351 (2003). "A party abandons an issue by failing to address the merits of his or her assertions. Although we may deem this issue abandoned, we choose to exercise our discretion and consider it." *In re Conservatorship of Murray*, 336 Mich App 234, 260-261; 970 NW2d 372 (2021) [Citation omitted]. In this Court's exercise of discretion, it will address the Bank's statute of limitations argument. *Id.*

The statute of limitations for a breach of contract claim is six years. MCL 600.5807(9). The statute of limitations for a negligence claim is three years. MCL 600.5805(2). Conversion is an action for injury to property governed by the three-year statute of limitations. *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 49; 742 NW2d 622 (2007); MCL 600.5805(2). Claims for common law conversion and for statutory conversion[5] are both torts, which are claims for the recovery of damages for injury to property, and are subject to a three-year limitations period. *Tillman v Great Lakes Truck Ctr, Inc*, 277 Mich App 47, 49; 742 NW2d 622 (2007); *Brennan v Edward D Jones & Co*, 245 Mich App 156, 158; 626 NW2d 917 (2001).

Generally, a limitation period begins to accrue at the time the wrong upon which the claim is based was done regardless of the time when damage results. MCL

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[5] MCL 600.2919a provides in relevant part:

> (1) A person damaged as a result of either or both of the following may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney fees:
>
> (a) Another person's stealing or embezzling property or converting property to the other person's own use.

600.5827. Because Plaintiffs have provided no documentation to support their claims such as bank statements showing errors in the recording of account activity, there is no way to know if and when any error was committed by the Bank. Moreover, the only document submitted is the 2007 deposit slip, the statute of limitations based on breach of contract in connection with the IOLTA/business checking account is six years. Thus, the statute expired in 2013. As to the CD, purchased on November 25, 2005, and matured on November 25, 2006, according to Edwards from the Bank, KWF did not present the CD for payment until 2018. This was twelve years after the CD matured and four years after the Bank's records were destroyed in accordance with the law and Bank policies. There is also no evidence that Reed tried to redeem the CD before 2018, or that he complained of any errors in his bank statements for the IOLTA/business checking account before 2018. Again, because CDs have an automatic 1-year rollover period to allow the CD to be presented, honored, and paid within 1 year of the CD'S maturity date, the claim would have accrued in November 2007.

Hence, the statute of limitations for Plaintiffs' claim for breach of contract on the CD expired in 2013, and is time barred. Therefore, the Court grants summary disposition in favor of the Bank as to the breach of contract claim on the basis of expiration of the statute of limitations. MCR 2.116(C)(7).

With respect to Plaintiffs' negligence and conversions claims, "a claim accrues when the wrong upon which it is based occurs regardless of when damages result." *Schaendorf v Consumers Energy Co*, 275 Mich App 507, 512; 739 NW2d 402 (2007). As the Bank correctly states, the common law discovery rule does not apply to the accrual of personal injury claims. "[C]ourts may not employ an extrastatutory discovery

rule to toll accrual in avoidance of the plain language of the statute governing accrual of action." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 391-392; 738 NW2d 664 (2007).

Again, because there is no evidence that Reed asserted any claim to the CD or the bank account prior to 2018, or that he complained of any errors in his bank statements, the three-year statute of limitations applies to the negligence and conversion claims. Thus, the statute of limitations expired in 2010, and both claims are time-barred. The Court therefore, grants the Banks' motion for summary disposition as to both the negligence and conversion claims. MCR 2.116(C)(7).

C. Michigan Banking Code of 1999

The Bank's final argument is that the Michigan Banking Code of 1999 ("the Code"), MCL 487.11101, *et seq*, does not provide for civil remedies by an individual party. It further asserts that the Court has no jurisdiction over any claim brought under the Code.

Plaintiffs' complaint alleges that the Bank recorded false bank entries in its account causing the Plaintiffs unnecessary expenses and damages violating the banking Code act 276 of 1999, specifically MCL 487.13901. Under MCL 187.13901, "[d]eposits shall be repaid to the depositor, or the depositor's lawful representatives, according to the terms of the agreement between the depositor and the bank." As noted above, Plaintiffs failed to timely demand repayment of monies allegedly due on the CD and/or monies in the bank account. The breach "of the agreement between the depositor and the bank" accrued on 2013. Plaintiffs' claim under MCL 487.13901 also fails under MCR 2.116(C)(7) and MRC 2.116(C)(8).

Plaintiffs also allege that the Bank failed to exercise its fiduciary duties and management of Plaintiffs' accounts under MCL 487.12306. MCL 487.12306(1) provides:

> If in the opinion of the commissioner any director or officer of an institution has committed any violation of law or rule or of a cease and desist order or other order of the commissioner which has become final, or has engaged or participated in any unsafe or unsound practice in connection with the institution, or has committed or engaged in any act, omission, or practice which constitutes a breach of fiduciary duty as a director or officer and the commissioner determines that the institution has suffered or will probably suffer substantial financial loss or other damage or that the interests of its depositors could be seriously prejudiced by reason of the violation or practice or breach of fiduciary duty, the commissioner may serve upon the director or officer a written notice of intention to remove the person from office.
>
> [Emphasis added].

Plaintiffs incorrectly claim that MCL 487.12306 provides for a remedy for the Bank's alleged breach of fiduciary duty. The statute, however, is an enforcement mechanism for the commissioner of the office of financial and insurance services to regulate banks when there is or may be a loss or damage to a financial institution due to breaches of fiduciary duties. Therefore, any private claim under this provision fails as a matter of law. MCR 2.116(C)(8).

IV. CONCLUSION

Because Reed never disclosed the CD, the bank account, or any potential cause of action in the bankruptcy proceedings, he is judicially estopped from now claiming them as his assets. *Spohn, supra*. Therefore, Plaintiffs' claims are barred under MCR 2.116(C)(7). Thus, the Bank is entitled to summary disposition as to all Plaintiffs' claims.

The statute of limitations for Plaintiffs' claim for breach of contract on the CD expired in 2013, and is time barred. The three-year statute of limitations for Plaintiffs' negligence and conversion claims also expired in 2010 and both claims are also time-barred. Hence, summary disposition in favor of the Bank is warranted under MCR 2.116(C)(7).

Plaintiffs' claim under MCL 487.13901 also fails under MCR 2.116(C)(7) and MRC 2.116(C)(8). Because MCL 487.12306 is an enforcement mechanism for the commissioner of the office of financial and insurance services to regulate banks, any private claim under this provision fails as a matter of law. MCR 2.116(C)(8). Accordingly, the Court grants summary disposition as to Plaintiffs' claims under the Michigan Banking Code of 1999.

For the reasons stated in the foregoing Opinion,

IT IS ORDERED that the motion for summary disposition filed by Defendant First Independence Bank is hereby **GRANTED**;

IT IS FURTHER ORDERED that the complaint filed by Plaintiffs Keeper of the Word Foundation and Gregory J. Reed & Associates, P.C. is hereby **DISMISSED WITH PREJUDICE**;

IT IS FURTHER ORDERED that this **RESOLVES** the last pending claim and **CLOSES THE CASE.**

DATED: 11/10/2023

/s/ Annette J. Berry 11/10/2023
Circuit Judge