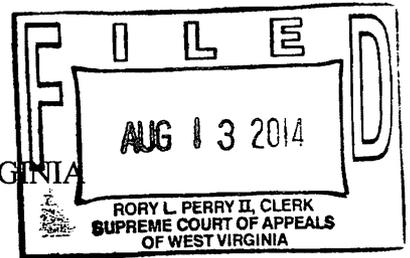


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

14-0291



Charles J. Evans and Cynthia B. Evans, et al.,
Petitioners,

v.

United Bank, Inc., a West Virginia corporation,
Stan McQuade, individually, Thelma McQuade
and d/b/a McQuade Appraisal Services,
Respondents.

BRIEF OF RESPONDENT UNITED BANK, INC.

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STATEMENT OF THE CASE

1. Statement of Relevant Facts

This action is before this Court on Petitioner's appeal of the dismissal of their Second Amended Complaint ("SAC") by the Circuit Court of Monroe County, West Virginia pursuant to W.Va. R. Civ. P. Rule 12(b)(6). The Circuit Court's rulings in dismissing the SAC are reflected in its Order-Granting Defendants' Motions to Dismiss. (A.R. 242-253).

This action stems from Petitioners' purchase of real estate in Monroe County, West Virginia, and their contention that they paid more than the fair market value for their respective properties because of the wrongful acts of the Respondents and others. Petitioners purchased real estate in Monroe County, West Virginia from Mountain America, LLC. The real estate is located in Walnut Springs Mountain Reserve, a "residential housing development with related amenities" being developed by Mountain America. *Mountain Am., LLC v. Huffman*, 224 W.Va. 669, 674, 687 S.E.2d 768, 773 (2009). United Bank loaned money to most of the Petitioners related to their purchase of the real estate.¹ The McQuades appraised the properties used to secure loans by United Bank. Petitioners purchased their properties between February 10, 2005 and June 29, 2006. Petitioners assert that they paid more than "real market value" for their property because the market value was fabricated by United Bank and others (Petitioners' Brief 17).

On February 7, 2007, the Petitioners or their co-owners protested the 2007 *ad valorem* tax assessments of their respective properties before the Monroe County Commission ("the Commission") meeting as a Board of Equalization and Review ("the Board"), asserting that those assessments were excessive and exceeded the true and actual value of their properties. (A.R. 243).

¹Petitioners' SAC and Brief contain numerous inflammatory comments about United Bank and its employees. Those comments are not relevant to this appeal and do not merit a response.

and Exhibit 1 to United Bank's Motion to Supplement Record). See also *Id.* at 676, 775. In order to demonstrate that the assessments exceeded the true and actual value of their properties, Petitioners needed to present evidence as to the true and actual value of their properties. Petitioners failed to present such evidence and the Board affirmed the assessments. (A.R. 244). Petitioners appealed their assessments to the Circuit Court of Monroe County, which found that they failed to properly perfect their appeal. (A.R. 244). The Petitioners then appealed to this Court, which affirmed the ruling of the Circuit Court. *Id.* Throughout the process, Petitioners were represented by counsel and had retained a certified general real estate appraiser to assist them when they appeared before the Board. (A.R. 248). The Circuit Court Judge who granted Respondents' Motions to Dismiss presided in Petitioners' appeal from the Board of their 2007 *ad valorem* tax assessment.

2. Procedural History

Petitioners Charles and Cynthia Evans initiated this action by filing suit against United Bank in the Circuit Court of Monroe County on November 30, 2009. (A.R. 4-19).

On July 6, 2010, Evans filed a "Motion for Leave to Amend" requesting permission to file an Amended Complaint adding various other plaintiff property owners, defendants, Stan McQuade, Thelma McQuade, McQuade Appraisal Services, Roy Leon Cooper (prior United employee) and Joyce Durham (present United employee) and a cause of action for "Constructive Fraud". (Exhibit 2 to Respondent United Bank's Motion to Supplement the Record on Appeal p. 18, ¶9). The motion was granted and the Amended Complaint was filed on August 16, 2010. (A.R. 20-66). Additional plaintiffs and related facts were added to form the SAC, which was filed on September 15, 2010. (A.R. 67-134). The plaintiffs in the SAC are all of the Petitioners.

The SAC contains ten counts alleging: (1) Fraud In The Inducement Or Aiding And Abetting Fraud In The Inducement (A.R. 118-122, ¶s 136-149); (2) Negligence (A.R. 122-124, ¶s 150-156);

(3) Civil Conspiracy (A.R. 124-126, ¶s 157-166); (4) Punitive Damages (A.R. 126, ¶s 167-168); (5) Intentional Or Negligent Infliction Of Emotional Distress/Tort Of Outrage (A.R. 126-127, ¶s 169-176); (6) *Respondeat Superior* (A.R. 127-128, ¶s 177-181); (there is no Count Seven)²; (8) Breach Of Implied Covenant Of Good Faith And Fair Dealing (A.R. 128-129, ¶s 182-186); (9) Breach Of Fiduciary Duty (A.R. 129-130, ¶s 187-192); (10) Constructive Fraud (A.R. 130-131, ¶s 193-197); and, (11) Detrimental Reliance (A.R. 131-132, ¶s 198-203). All Counts of the SAC are applicable to United Bank and all but Count Eight are applicable to the McQuades.

All defendants named in the SAC filed motions to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. (A.R. 137-157 and 158-171). (Pages 15 through 18 of United Bank's Motion to Dismiss were omitted from the Appendix and are Exhibit 3 to United Bank's Motion to Supplement the Record on Appeal). Petitioners voluntarily dismissed their claims against Cooper and Durham, with prejudice. The Circuit Court granted the remaining defendants' Motions by Order of February 27, 2014. (A.R. 242-253). In response to that Order, Petitioners filed, in the Circuit Court, a Motion to Alter or Amend Judgment, or in the Alternative Motion for Relief from Judgment on March 7, 2014 and a Notice of Appeal, with this Court, on March 17, 2014. The Circuit Court denied all of Petitioners' motions by Order of May 29, 2014. (A.R. 276 and 277). This appeal is from the February 27, 2014 Order granting the remaining Defendants' Motions to Dismiss. (A.R. 242-253).

The Circuit Court granted the Motions to Dismiss finding that: (a) the Petitioners' claims for fraud in the inducement and aiding and abetting fraud in the inducement, negligence, intentional or negligent infliction of emotional distress/tort of outrage, breach of fiduciary duty and constructive

² None of the Complaints contain a Count Seven.

fraud were not timely filed (A.R. 249); (b) the Petitioners' claims for civil conspiracy, *respondeat superior* and punitive damages were dependent on the independent causes of action which were untimely and, therefore, were also untimely (A.R. 246); (c) Petitioners' claim for breach of the implied covenant of good faith and fair dealing arises only in connection with a claim for breach of contract and Petitioners did not assert a claim for breach of contract (A.R. 250); and, (d) Petitioners' claim for detrimental reliance arises in equity and Petitioners are seeking to recover damages, not equitable relief, therefore, the Petitioners have an adequate remedy at law and the Circuit Court is without jurisdiction to grant equitable relief – or in the alternative these claims are a restatement of Petitioners' untimely fraud in the inducement claims. (A.R. 252).

Petitioners' Concessions

Petitioners raise four issues on appeal. They claim the Circuit Court improperly: (1) dismissed their claim because they plead that they were unaware that they were victims of fraud until after the inception of the present action; (2) took judicial notice of a prior civil action regarding Petitioners' tax assessments; (3) dismissed their claim for breach of the implied covenant of good faith and fair dealing; and, (4) dismissed their claims for detrimental reliance as a restatement of the fraudulent inducement claim.

Petitioners' Brief only substantively addresses the dismissal of the fraud and breach of the implied covenant of good faith and fair dealing claims. Petitioners present no independent argument pertaining to the dismissal of their claims for negligence, intentional or negligent infliction of emotional distress/tort of outrage, breach of fiduciary duty, civil conspiracy and *respondeat superior* or their claim for punitive damages. Therefore, any error in regard to the Circuit Court's ruling as to these claims should be deemed waived for purposes of this appeal. See *Noland v. Virginia Insurance Reciprocal*, 224 W.Va. 372, 378, 686 S.E.2d 23, 29 (2009) citing *Tiernan v. Charleston*

Area Med. Ct., Inc., 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998). Similarly, as to the dismissal of the detrimental reliance claim, Petitioners only reference the argument in connection with their fraud claim. They do not challenge the dismissal of that claim based on the fact that this is an equitable claim for which they have an adequate remedy at law, nor do they dispute that their detrimental reliance claim is a restatement of their fraud in the inducement claim. Accordingly, any error regarding those issues should be deemed waived. *Id.*

Facts relied on by the Circuit Court that the Petitioners do not contest include: the findings that (1) any wrongful act by the Respondents occurred no later than the date of the last sale to Petitioners, June 30, 2006; and that (2) in February 2007, Petitioners knew or had the means to know (a) what they paid for their properties; (b) what information they relied on in purchasing their properties; and, (c) the identity of the persons who supplied that information.

Summary Of Argument

Preliminary Statement

In its Order dismissing the SAC, the Circuit Court first addressed the applicable standard for a Rule 12(b)(6) motion. It next addressed the propriety of taking judicial notice of facts under that standard. Finally, it addressed the merits of the motions. Petitioners' assignment of error reverses, in part, the Circuit Court's second and third steps. The Circuit Court's approach is more logical and will be followed in this Brief.

1. Judicial Notice of Facts

The Circuit Court properly took judicial notice of adjudicative facts in *MBMA, LLC, et al.*, Monroe County Civil Action 07-C-30, and *Mountain Am., LLC v. Huffman*, supra., relying on Rule 201 of the *West Virginia Rules of Evidence*, this Court's decision in *Forshey v. Jackson*, 222 W.Va.

743, 747, 671 S.E.2d 748, 752 (2008), and Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, § 201.03[3][e] (5th ed. 2012). (A.R. 244). The facts of which the Circuit Court took judicial notice are relevant to the dismissal based on timeliness. The judicially noticed facts were properly used in Step 3 of the five step test set out in Syllabus Point 5 of *Dunn v. Rockwell*, 225 W.Va. 43, 46, 689 S.E.2d 255, 258 (2009) to determine when the statutes of limitations applicable to Petitioners' various causes of action began to run.

2. Claims Dismissed as Untimely

Although the Petitioners only challenge the dismissal of the fraud claims based on the statute of limitations, the Circuit Court properly dismissed all of the claims (except the breach of the covenant of good faith and detrimental reliance claims) because they were not timely filed.³ Petitioners' appeal as to this issue rests solely on the assertion that they were unaware until the initiation of this litigation that the fraud had occurred and only United Bank and the developer could have known before the institution of this litigation that the Petitioners had been defrauded. (Petitioners Brief 9). The Circuit Court found that Petitioners should have known of those claims and their other claims no later than February 7, 2007. (A.R. 249).⁴

In evaluating motions to dismiss based on running of a statute of limitations, this Court, in Syllabus Point 5 of *Dunn v. Rockwell*, 225 W. Va, at 46, 689 S.E.2d at 258, articulated a five step

³Petitioners do not challenge the Circuit Court's rulings regarding their claims for negligence, intentional or negligent infliction of emotional distress/tort of outrage, breach of fiduciary duty, civil conspiracy, *respondeat superior* and detrimental reliance and for punitive damages related to those claims. In fact, Petitioners' Brief does not mention any of these claims. Therefore, any error as to those rulings should be deemed waived on appeal. See *Noland v. Virginia Insurance Reciprocal*, supra., and Syllabus Point 6 in *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

⁴Fraud is one of the causes of action alleged in the Complaint filed on November 30, 2009. (A.R. 12). However, Petitioners fail to allege any basis for tolling the applicable statutes of limitation between February 7, 2007 (the date the Circuit Court ruled that the statute of limitations began to run) and November 30, 2009 (the date of filing of the Complaint alleging that United Bank committed fraud).

test to be applied.

First, the court should identify the applicable statute of limitation for each cause of action. **Second**, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. **Third**, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). **Fourth**, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And **Fifth**, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. *Id.* (emphases added)

Petitioners assert that the Circuit Court should have only addressed Step 1, claiming that the remaining steps are questions of fact to be determined by the trier of fact. (Petitioners' Brief 10). Petitioners are wrong. See *Rufus v. Greenbrier Sporting Club Development Company, Inc.*, No. 13-0216, 2013 WL 5966996 (W. Va. Sup. Ct. November 8, 2013) (memorandum decision) (affirming dismissal under Rule 12(b)(6) based on running of statute of limitations) Despite its position that the Circuit Court should have limited its review to Step 1, Petitioners' Brief focuses on Step 3 regarding the discovery rule, claiming that "... the Court arbitrarily initiated the statute for a date which is factually different from the allegations made by the Petitioners in the Second Amended Complaint." (Petitioners Brief 12). Their assertion that they could not have known of the alleged fraud until their attorney reviewed the McQuade appraisals is a conclusion, not a factual allegation and is contradicted by factual allegations in their Complaint, the Motion to Amend and by facts of which the Circuit Court took judicial notice.

3. Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

The Circuit Court correctly ruled that West Virginia law does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing in the absence of a breach of contract claim, relying on federal court decisions in *Powell v. Bank of Am., N.A.*, 842 F. Supp 2d 966, 981 (S.D. W.Va. 2012) and *Wittenburg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d 731 (N.D. W.Va. 2012) and this Court's decision in *Highmark W. Virginia, Inc. v. Jamie*, 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007) referencing *Stand Energy Corp. v. Columbia Gas Transmission*, 373 F. Supp. 2d 631, 644 (S.D. W.Va. 2005) (A.R. 250). Petitioners incorrectly assert: "The Circuit Court concluded that the federal courts in West Virginia have opined that an implied covenant of good faith and fair dealing does not exist in West Virginia." (Petitioners Brief21). The Circuit Court said no such thing, and there is no dispute that there is an implied covenant of good faith and fair dealing in every contract. The Circuit Court recognized the existence of the implied covenant of good faith and fair dealing, but correctly held that no independent tort cause of action exists for a breach of such a covenant. (A.R. 250). This ruling is based on decisions by federal courts in West Virginia and this Court's failure to indicate otherwise subsequent to the decision eight years ago in *Highmark W. Virginia, Inc. v. Jamie*, 221 W.Va. at 492, 655 S.E.2d at 514, where this Court recognized that "it has been held that an implied covenant of good faith and fair dealing does not provide a private cause of action apart from a breach of contract claim."

4. Claims for Detrimental Reliance

The Circuit Court properly dismissed Petitioners' detrimental reliance claim as it was based on equity, no equitable remedy was requested and it was nothing more than a restatement of Petitioners' fraud claims which were untimely. Petitioners do not contest the Circuit Court's finding that their detrimental reliance claim is an equitable claim for which no equitable relief is requested. Likewise, Petitioners do not contest the Circuit Court's finding that the detrimental reliance claim

is a restatement of the fraud in the inducement claims. Petitioners' only argument regarding the dismissal of their detrimental reliance claim is that it is not barred by the statute of limitation applicable to a fraud in the inducement claim. As Petitioners present no argument in response to the Circuit Court's ruling based on equitable principles, these arguments should be deemed waived for purposes of this appeal. See *Noland v Virginia Insurance Reciprocal*, 224 W. Va. at 378, 686 S.E.2d at 29.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary pursuant to the criteria set forth in Rule 18(a) of the Rules of Appellate Procedures because the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

ARGUMENT

1. Standard of Review

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. Syllabus Point 2, *State ex rel. McGraw v. Scott Runyon Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

2. Standard for Granting Motion to Dismiss Pursuant to W.Va. R. Civ. P. 12(b)(6)

A complaint must set forth facts which demonstrate that the plaintiff is entitled to the relief requested. W.Va. R. Civ. P. 8(a)(1). A motion under Rule 12(b)(6) properly tests the sufficiency of a complaint. *Collia v. McJunkin*, 178 W.Va. 158, 159, 358 S.E.2d 242, 243 (1987). A motion under Rule 12(b)(6) is a proper method for asserting that an action is untimely filed because of the running of the applicable statute of limitations. *Rufus v. Greenbrier Sporting Club Development Co.*,

Inc., No. 13-0218, 2013 WL 5966996 (W.Va. Sup. Ct. November 8, 2013) (memorandum decision) citing Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 12(b)(6)(2), at 388 (4th ed. 2012).

3. The Circuit Court Properly Took Judicial Notice of Certain Facts

Petitioners argue that the Circuit Court improperly took judicial notice of certain facts to determine that the majority of Petitioners' claims are barred by applicable statutes of limitations. Although a court is usually limited to considering only the factual allegations in a complaint when ruling on a motion to dismiss pursuant to Rule 12 (b)(6), a court may also consider relevant facts of which the court may take judicial notice. Rule 201 deals with "**Judicial notice of adjudicative facts.**" Rule 201(d) provides: "(d) *When mandatory.* – A court shall take judicial notice if requested by a party and supplied with the necessary information." The Respondents requested the Circuit Court to take judicial notice of its own records regarding Petitioners' appeal from the Board. There can be no dispute that these records were available to the Circuit Court.

Rule 201(b) addresses the kind of facts subject to judicial notice and provides:

(b) *Kinds of facts.* – A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Certainly the accuracy of records of the Circuit Court cannot be reasonably questioned.

Rule 201(f) provides:

(f) *Time of taking notice.* – Judicial notice may be taken at any stage of the proceeding.

This Court acknowledged in *Forshey v. Jackson*, 222 W.Va. at 747, 671 S.E.2d at 752 "Further, Rule 12(b)(6) permits courts to consider matters that are susceptible to judicial notice",

citing D. Cleckley, Robin J. Davis & Louis J. Palmer, Jr. *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2] at 348 (3rd ed. 2008).

Petitioners do not dispute the propriety of the Circuit Court taking judicial notice of pertinent facts. (Petitioners' Brief 14). The Petitioners claim, however, that the Circuit Court erred in relying on those facts because they were not relevant and the Circuit Court overly emphasized the relevance of those facts. (Petitioners' Brief 14).

The Circuit Court took judicial notice of facts developed in the Petitioners' challenge of the 2007 *ad valorem* tax assessments of their property before the Board, the appeal of the decision of the Board to the Circuit Court of Monroe County and the appeal of the Circuit Court decision to this Court. The Circuit Court took judicial notice of the following:

First, the Plaintiffs claimed before the Board that their tax assessments exceeded the true and actual value of their property. Second, the fair market value of Plaintiffs' property is the basis of Plaintiffs' claims against Defendants in this civil action. Third, the Plaintiffs' were represented by counsel and retained a certified general real estate appraiser in connection with their challenges. Fourth, although the Plaintiffs did not present evidence of the fair market value of their respective properties at the hearing, the Plaintiffs had the means to determine the fair market value at that time and should have known that the land they purchased was overvalued. (A.R. 248 and 249).

Rule 201(f) made it permissible for the Circuit Court to take judicial notice of the those facts when ruling on Respondents' 12(b)(6) motion. It was not only proper for the Circuit Court to take judicial notice of the adjudicative facts in Petitioners' tax appeal, it was mandatory under Rule 201(d).

4. The Circuit Court Properly Held Petitioners' Tort Causes of Action Were Untimely

The parties agree that the proper analysis as to the timeliness of Petitioners' actions for fraud in the inducement and aiding and abetting fraud in the inducement, negligence, intentional or

negligent infliction of emotional distress/tort of outrage, breach of fiduciary duty and constructive fraud and claim for punitive damages is set forth in Syllabus Point 5, *Dunn v. Rockwell*, 225 W.Va. at 46, 689 S.E.2d at 258 (2009). As noted above, the five step test is as follows:

First, the court should identify the applicable statute of limitation for each cause of action. **Second**, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. **Third**, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). **Fourth**, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And **Fifth**, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. *Id.* (emphases added)

Application of this test requires a finding that the Circuit Court properly concluded that the above referenced claims were time barred and should be dismissed. In reaching this determination, the Circuit Court properly relied on the various facts of which it was able to take judicial notice as well as the facts alleged in the Complaint.

Petitioners assert that the Circuit Court should have only addressed Step 1—that it was error to address Steps 2-5, claiming that these are questions of fact to be determined by the trier of fact. (Petitioners' Brief 10). Petitioners are wrong. This is a misstatement of the applicable part of the decision in *Dunn*. Courts properly apply this test in granting Motions to Dismiss based on statute of limitations. See *Rufus v. Greenbrier Sporting Club Development Company, Inc.* No. 13-0218, 2013 WL 5966996 (W. Va. Sup. Ct. November 8, 2013) (memorandum decision). The applicable part of Syllabus Point 5 of *Dunn v. Rockwell*, 225 W. Va. at 46, 689 S.E.2d at 258 provides: "Only

the first step is purely a question of law, the resolution of steps two through five will **generally** involve questions of material fact that will need to be resolved by the trier of fact.” (emphasis added) Use of the term “generally” clearly indicates that there are occasions where there is no material fact to be addressed at trial, and addressing these steps is wholly appropriate in ruling on a motion to dismiss. Here based on the allegations of fact in their Motion to Amend, SAC and facts of which the Circuit Court took judicial notice, there are no questions of material fact which need to be resolved in connection with the Motions to Dismiss.

Step One

Petitioners do not dispute that the Circuit Court properly perform the first step, determination of the applicable statutes of limitation.

Step Two

The second step of the analysis requires “... the court (or if questions of material fact exist, the jury) [to] identify when the requisite elements of the cause of action occurred.” *Id.* As to this step, the Circuit Court properly noted:

2. Based on the allegations in the Plaintiffs’ Second Amended Complaint, the Court finds that Plaintiffs seek to recover damages from the Defendants on the theory that the Plaintiffs paid more than fair market value for the property because of the alleged wrongful acts of the Defendants. Plaintiffs’ Second Amended Complaint alleges those purchases occurred on or before June 30, 2006. (A.R. 247)

Petitioners agree with the Circuit Courts’ determination of the basis for their causes of action. “The central component of the case *sub judice* is that the Petitioners never paid real market value for their properties because the market was fabricated ...” (Petitioners’ Brief 17). Petitioners present no argument as to why the Circuit Courts’ determination that their causes of action arose on or before June 30, 2006 (the last date any of the properties were purchased) is incorrect (other than their

unsupported self-serving contention that they could not have learned of the fraud until their attorney reviewed the McQuade appraisals) and a review of the SAC confirms this is correct. (For the date of the last purchases, see A.R. 115, ¶ 130. Dates of other purchases are set out in ¶s 59, 63, 68, 73, 77, 85, 90, 94, 99, 104, 106, 111, 113, 114, 118, 121, 124 and 126 of the SAC.)

Step Three

The third step is to apply the discovery rule “... to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action...” *Id.* Citing Syllabus Point 4 of *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). The Circuit Court determined that the applicable statutes of limitation began to run no later than February 7, 2007, the date of Petitioners’ hearings before the Board. (A.R. 249). The Circuit Court relied on facts of which it took judicial notice as well as facts alleged in the Complaint in reaching this determination.

A. Judicially Noticed Facts

The first fact of which the Circuit Court took judicial notice is that “... the Plaintiffs claimed before the Board that their tax assessments exceeded the true and actual value of their property.” (A.R. 248). Petitioners counter this reliance by incorrectly claiming that: “Mountain America, LLC was about challenging tax assessments and methodology.” (Petitioners’ Brief 17). This is not a fair description of *Mountain America*, which also addressed the substance of the tax assessments. In sustaining the decision of the Board and the Circuit Court, this Court stated: “Mountain America had the burden of proving the Assessor’s valuation was excessive, but it did not offer any evidence of the true and actual value of the residential property.” *Mountain America, LLC v. Huffman*, 224 W.Va. at 687, 687 S.E.2d at 786.

The Circuit Court next relied on the fact that “... the fair market value of Plaintiffs’ property

is the basis of Plaintiffs' claims against Defendants in this civil action." (A.R. 248). Petitioners concede this fact. (Petitioners' Brief 17).

The next set of facts of which the Circuit Court took judicial notice of are that "... the Plaintiffs' (sic) were represented by counsel and retained a certified general real estate appraiser in connection with their challenges." (A.R. 248). Petitioners do not dispute these facts, but question the effectiveness of their representation because their attorneys represented United Bank in a prior unrelated matter and a subsequent related matter. (Petitioners' Brief 14). Petitioners do not explain why this is relevant to the judicial notice of the fact that they were represented by an attorney.

Despite how Petitioners choose to characterize their role in the tax assessment litigation, they were parties to the hearing before the Board, the appeal of the Board's findings and in the appeal of the ruling of the Circuit Court to this Court. The Circuit Court correctly took judicial notice of the facts that the Petitioners were parties to the hearings, were represented by attorneys and as of the time of the hearing had retained a certified general real estate appraiser.

The fourth set of facts on which the Circuit Court took judicial notice is that "... the Plaintiffs had the means to determine the fair market value at the time and should have known that the land they purchased was overvalued." (A.R. 248 and 249). Petitioners counter by claiming that "There would be no way for an independent appraiser to discover the fraud." (Petitioners' Brief 19). Petitioners fail to acknowledge that their appraiser could have appraised their properties and compared his appraised values to what Petitioners paid for their properties (no more than two (2) years earlier) to determine if they paid "real market value".

B. Allegations in the Complaint and SAC

The Circuit also relied on factual allegations in the Complaint in concluding that the applicable statutes of limitations began to run on February 7, 2007. Although the factual allegations

in the SAC are more detailed than the Complaint, the essence of the factual allegations in the SAC are the same as in the Complaint. The following is a summary of the allegations in the Complaint and the SAC:

	Complaint	SAC
Count 1	Fraud in the inducement and aiding and abetting fraud in the inducement - Misrepresentation of value, investment potential, retirement potential and overall characteristics and amenities.	Fraud in the inducement and aiding and abetting fraud in the inducement - Misrepresentation of value, investment potential, retirement potential and overall characteristics and amenities.
Count 2	Negligence - Breach of duty of reasonable care by failing to prevent fraud of third parties and inducing or allowing Petitioners to purchase property.	Negligence - Breach of duty of reasonable care by making loans for fraudulently inflated prices and for financing purchases.
Count 3	Civil Conspiracy - Conspired with third parties to entice Petitioners to buy property for an amount in excess of its fair market value.	Civil Conspiracy - Conspired with third parties to entice Petitioners to buy property for an amount in excess of its fair market value.
Count 4	Punitive Damages - United's actions were grossly negligent, reckless and intentional.	Punitive Damages - Respondents' actions were grossly negligent, reckless and intentional.
Count 5	Intentional or negligent infliction of emotional distress/tort of outrage. Outrageous or negligent conduct.	Intentional or negligent infliction of emotional distress/tort of outrage. Intentional conduct in participating in third party fraud was outrageous and negligent.

Count 6	<i>Respondeat Superior</i> - Liability for actions of officers and employees of United Bank based on other allegations.	<i>Respondeat Superior</i> - Liability for actions of officers and employees of United Bank based on other allegations.
Count 7	No Count Seven.	No Count Seven.
Count 8	Breach of Implied Covenant of Good Faith and Fair Dealing. Covenant based on relationship with United Bank which was breached by United Bank.	Breach of Implied Covenant of Good Faith and Fair Dealing. Covenant based on contractual and fiduciary relationship arising from loans and covenant breached by United Bank.
Count 9	Breach of Fiduciary Duty. Fiduciary relationship because of loans and representations by United Bank.	Breach of Fiduciary Duty. Fiduciary relationship because of loans and representations by United Bank.
Count 10	Detrimental Reliance - United Bank made representations to Evans which they relied on causing them to pay more than the fair market value for property.	Constructive Fraud - Misrepresentations of property values through financing purchases by others, allowing rebates, allowing submission of false records to others, misrepresentation of amenities, quality and characteristics of property.
Count 11	No Count Eleven	Detrimental Reliance - Misrepresentations to Petitioners which they relied on causing them to pay more than the fair market value for property.

The Court also properly considered the above facts alleged in the SAC. Based on the

allegations in the SAC, the Court determined: (1) Petitioners seek to recover damages based on their claim that they paid more than fair market value due to the Respondents' alleged wrongful acts (A.R. 247); (2) the purchases occurred on or before June 30, 2006 (A.R. 247); and, (3) Petitioners allege that they could not have known of their claims against Respondents until commencement of this action because of the acts of the Respondents. (A.R. 248).

Based on the facts of which the Court took judicial notice regarding the Petitioners' challenge of the 2007 *ad valorem* tax assessments of their property before the Board, the allegations in Petitioners' SAC and the record in the Circuit Court, the Circuit Court properly found that the applicable statutes of limitations for all of the claims, except claims for breach of implied covenant of good faith and fair dealing and detrimental reliance, began to run no later than February 7, 2007, more than two years before the Complaint was filed on November 30, 2009 (A.R. 247); and the SAC was filed on September 15, 2010 (A.R. 248).

The Circuit Court properly concluded that "... a reasonable person would have inquired as to the identity and conduct of the parties involved in the sales of their property, i.e. the Defendants." (A.R. 249). Respondents' purported conduct which forms the basis of Petitioners' causes of action occurred no later than June 30, 2006. If Petitioners allegedly relied on United Bank in deciding to purchase their properties, they knew of that reliance on or before June 30, 2006. If Petitioners were injured because they paid more than fair market value for their properties they had the means to, and should have discovered, that fact on or before February 7, 2007. If Petitioners were injured because of their reliance on United Bank, they had the knowledge and means to know that on or before February 7, 2007. Accordingly, the Circuit Court properly determined that the statute of limitations began to run, at the latest on February 7, 2007.

Petitioners seek to avoid this undeniable conclusion by alleging that they could not have

known of their causes of action until commencement of the present action because Respondents camouflaged information contained in appraisals requested by United and prepared by McQuades. (Petitioners' Brief 9). This contention is directly contradicted by the facts alleged in the Complaint and the court properly rejected this conclusion as contrary to the factual allegations.

Step Four

The fourth step is only applicable if the Plaintiff is not entitled to rely on the discovery rule. As that is not an issue here, there is no need to address this requirement. The Petitioners were given the benefit of the discovery rule by the Circuit Court. Petitioners do not dispute the Circuit Court's Step 4 analysis.

Step Five

The fifth step requires the court "... to determine if the statute of limitation period was arrested by some other tolling doctrine." *Dunn v. Rockwell*, 225 W. Va. at 46, 689 S.E.2d at 258. The Circuit Court found: "Plaintiffs have asserted no other tolling doctrine which arrests the applicable statutes of limitation." Petitioners do not dispute this finding.

The Circuit Court correctly applied the five-step test in concluding that the claims for fraud in the inducement and aiding and abetting fraud in the inducement, negligence, intentional or negligent infliction of emotional distress/tort of outrage, breach of fiduciary duty, constructive fraud, civil conspiracy, *respondeat superior*, and punitive damages were not filed within the applicable statutes of limitations. (two years from February 7, 2007).

5. The Circuit Court Properly Ruled that West Virginia Does Not Recognize an Independent Tort Cause of Action For Breach of the Implied Covenant of Good Faith and Fair Dealing in a Contract

Petitioners' sole basis for United Bank's alleged breach of its implied covenant of good faith and fair dealing is:

183. Defendant United Bank, due to its contractual and fiduciary relationship with the Plaintiffs, owed the Plaintiffs an implied covenant of

good faith and fair dealing. Specifically, this duty arose when Defendant United Bank accepted the Plaintiffs as customers/clients and entered into agreements to loan them money secured by the subject lots in WSMR. (A.R. 128).

Petitioners' claim is based on their loan agreements (contracts) with United Bank. However, Petitioners do not assert that United Bank breached any of those contracts.

In dismissing Petitioners' claims for breach of the implied covenant of good faith and fair dealing, the Circuit Court properly concluded that "... Plaintiffs failure to allege a breach of contract is fatal to their claim for breach of the implied covenant of good faith and fair dealing." (A.R. 250).

It is undisputed that a covenant of good faith and fair dealing is implied in every contract entered into in West Virginia. In reliance on decisions by the United States District Courts in West Virginia (*Powell v. Bank of America, N.A.*, 842 F.Supp. 2d 966 (2012) and *Wittenberg v. Wells Fargo, N.A.*, 852 F. Supp. 2d 731 (2012)) and an analysis of the decisions of the West Virginia Supreme Court of Appeals, the Circuit Court properly dismissed the claim for breach of the covenant of good faith and fair dealing, holding that West Virginia does not recognize an independent or tort cause of action for breach of an implied covenant of good faith and fair dealing in a contract. (A.R. 250).

Petitioners rely on three decisions of this Court to support the proposition that West Virginia would recognize an independent or tort cause of action for breach of an implied covenant of good faith and fair dealing in a contract, *McGinnis v. Cayton*, 173 W.Va. 102, 312 S.E.2d 765 (1984), *Caperton v. A.T. Massey Coal Co., Inc.*, 223 W.Va. 624, 679 S.E.2d 223 (2008) and *Elmore v. State Farm Mutual Ins. Co.*, 202 W.Va. 430, 435, 504 S.E.2d 893, 898 (1998). (Petitioners' Brief 20-23). None of these cases supports Petitioners' position.

The existence of an implied covenant of good faith in a contract is mentioned in footnote 20

of Justice Harshbarger's concurring opinion in *McGinnis v. Cayton*, 173 W.Va. at 114, 312 S.E.2d at 778, which references W.Va. Code § 46-1-203. The relevant part of which provides that: "Every contract or duty within this **chapter** imposes an obligation of good faith in its performance or enforcement." (emphasis added) First, this discussion was limited to claims under Chapter 46 (the Uniform Commercial Code). The present claim does not fall within Chapter 46. Additionally, again, there is no dispute that there is a duty of good faith implicit in every contract. Accordingly, a reiteration of the fact that there is a duty of good faith, does nothing to further Petitioners' argument that such a claim can be brought in the absence of a breach of contract claim.

Caperton is also inapplicable. *Caperton* mentions the fact that the plaintiffs in a Virginia case asserted a tort cause of action for breach of a covenant of good faith and fair dealing which was withdrawn prior to trial. *Caperton v. A. T. Massey Coal Co., Inc.*, 223 W.Va. at 634, 679 S.E.2d at 233. Justice Albright mentions the existence of an implied covenant of good faith and fair dealing in every contract in his dissent but says nothing to suggest that an independent or tort cause of action for breach of an implied covenant of good faith and fair dealing in a contract is recognized in West Virginia. In fact Justice Albright criticized the majority for characterizing the claim which was dismissed in the Virginia action as a tort. *Id.* at 281, 681., n. 9.

In *Elmore v. State Farm Mutual Automobile Ins. Co.*, 202 W.Va. 430, 504 S.E.2d 893 (1998), this Court discussed the development of first party common law tort claims for an insurer's breach of its duty of good faith and fair dealing. Even in the insurance context, this Court was careful to limit the situations in which breach of the duty of good faith could be brought, concluding that such claims could only be brought in the first party insurance context (i.e. by an insured against his own insurer). The logic underlying application of such claims in this limited context, has no bearing on the matter before this Court.

The tort action set forth in *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986), and expanded upon in subsequent cases only pertains to claims by an insured against his or her insurer. Petitioners provide no authority for or any explanation why this rule should be expanded to all contracts.

The Circuit Court's ruling is consistent with the federal court decisions relied on by the Circuit Court and this Court's acknowledgement of that principal without adverse comment in *Highmark W. Virginia v. Jamie*, 221 W.Va. 487, 492, 655 S.E.2d 509, 514 (2007) and more recently in *Gaddy Engineering Company v. Bowles Rice McDavid Graff & Love*, 231 W.Va. 577, 587, 746 S.E.2d 568, 578 (2013) citing *Corder v. Countryside Home Loans, Inc.*, No. 2:10-0738, 2011 WL 289343 at *3 (S.D.W.Va 2011), and should be affirmed by this Court.

In *Powell v. Bank of Am., N.A.*, 842 F. Supp.2d 966 (S.D. W.Va. 2012), the United States District Court for the Southern District of West Virginia, relied on this Court's decision in *Highmark* to conclude that "West Virginia recognizes no such claim [for breach of the implied covenant of good faith], and claims for breach of the implied covenant must be predicated on a breach of contract." *Id.* at 982. Later that same year, the United States District Court for the Northern District of West Virginia in *Wittenberg* followed suit, in succinctly holding that "West Virginia does not recognize a stand-alone cause of action for failure to exercise contractual discretion in good faith." *Wittenberg v. Wells Fargo Bank, N.A.*, 852 F. Supp. 2d at 750. Relying on *Corder v. Countrywide Home Loans, Inc.*, 2011 WL 289344, *4 (S.D. W.Va. January 26, 2011) and *Clendenin v. Wells Fargo Bank, N.A.*, 2009 WL 4263506, *5 (S.D. W.Va. November 24, 2009) the court further stated that a claim for the breach of the implied covenant of good faith can only survive if the plaintiff pleads an express breach of contract claim. As the court had dismissed the breach of contract claim, it also dismissed the claim alleging breach of the covenant of good faith and fair dealing.

Recent case law from this Court lends further support to the Circuit Court's holding that there is no independent claim for the breach of the covenant of good faith and fair dealing. In 2002, this court in *Lockhart v. Airco Heating, Inc.*, 211 W.Va. 609, 611, 567 S.E.2d 619, 621 (2002) concluded that tort liability of the parties to a contract arises from the breach of some positive legal duty imposed by law because of the relationship of the parties, rather than from a mere omission to perform a contract obligation. An action in tort will not arise for breach of contract unless the action in tort would arise independent of the existence of the contract. Similarly, in *Highmark*, this court in 2007 expressly acknowledged that it has been held (by the West Virginia Federal courts and this court) that "an implied covenant of good faith and fair dealing does not provide a cause of action apart from a breach of contract claim." *Highmark W. Virginia, Inc. V. Jamie*, 221 W. Va. at 492, 655 S.E.2d at 514.'

This Court in *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love*, 231 W.Va. 577, 586, 746 S.E.2d 568, 577 (2013) recently rejected a plaintiff's attempt to create a tort claim from a breach of contract claim based on the "gist of the action" doctrine. The court held that a breach of contract claim cannot be recast as a tort claim when any of the following factors is demonstrated: (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; or (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim. The court continued to note that whether a tort claim can co-exist with a contract claim is determined by examining whether the parties' obligations are defined by the terms of the contract. In dismissing the claim for fraud, the court stated that "it is obvious that the petitioner's fraud claims were clearly contract claims disguised as tort claims as the source of the alleged breach of duties was the alleged

fee-sharing agreement and not ‘the larger social policies embodied by the law of torts.’” *Id.*, at 586, 577 (internal citations omitted). Similarly, in dismissing the negligence claims, the court concluded that they were “nothing more than Gaddy’s breach of contract claim couched in tort terminology.” *Id.* In challenging the dismissal, the plaintiff argued that the claims should not have been dismissed because there was an implied covenant of good faith implied in every contract. This court flatly rejected this argument because of “...the clear contractual nature of the claim and the circuit court’s proper grant of summary judgment to the contract-based claims...”. *Id.* at 587, 578.

The implied covenants of good faith and fair dealing alleged by Petitioners stem solely from the loan agreements/contracts and do not arise independently. (A.R. 128). But for the existence of the loan agreements, there would be no covenant of good faith and fair dealing. Clearly the purported tort claim for breach of the covenant of good faith and fair dealing cannot stand. Liability arises solely from the contractual relationship between the parties. The alleged duties breached were grounded in the contract and any liability stems solely from the contract.

If Petitioners do have a tort cause of action (which, as demonstrated above, they do not) for breach of a covenant of good faith and fair dealing, then that claim is barred by W.Va. Code § 55-2-12(c). This issue was not addressed by the Circuit Court because it was unnecessary based on its finding that no tort cause of action exists. However, if a common law tort cause of action exists, the applicable statute of limitations is one year. See Syllabus Point 4, *Noland v. Virginia Insurance Reciprocal*, 224 W. Va. at 373, 686 S.E. 2d at 25. There can be no dispute that such a claim was not timely filed.

The Circuit Court correctly ruled that in West Virginia there is no independent cause of action in tort for the breach of an implied covenant of good faith and fair dealing in a contract. However, if this court finds to the contrary, the Circuit Court’s dismissal of that cause of action is

proper because it is untimely.

6. The Circuit Court Properly Dismissed the Detrimental Reliance Claim

In dismissing Petitioners' claim for detrimental reliance, the Circuit Court found that it lacked jurisdiction because the Detrimental Reliance claim sounded in equity and Petitioners were not seeking equitable relief, but to recover monetary damages. (A.R. 251). In the alternative, the Circuit Court found that:

Plaintiffs' detrimental reliance claim are essentially a restatement of their fraud in the inducement claims under Count One. Accordingly, the Court finds that the Plaintiffs had an adequate remedy at law, albeit untimely filed, pursuant to their fraud in the inducement claims and are precluded from bringing an equitable claim for detrimental reliance. (A.R. 252).

Petitioners' entire argument as to the dismissal of their detrimental reliance claim is as follows:

The Circuit Court erred in dismissing the Petitioners' claims for detrimental reliance pursuant to Rule 12(b)(6) for the same reasons that the Court erred in dismissed (sic) the fraud claim.

To the extent that the detrimental reliance claim is a restatement of the fraud claim, or another count for fraud, the Petitioners reassert their arguments against the dismissal of the fraud claim as were argued *supra*. (Petitioners' Brief 23).

This argument fails to meet the requirements of Rule 10(c)(7) of the West Virginia Rules of Appellate Procedure because it fails to address the Circuit Court's first basis for dismissal of the detrimental reliance claim for lack of a proper claim for equitable relief. Therefore, any error regarding that ruling by the Circuit Court should be deemed waived for the purposes of this appeal. *Noland v. Virginia Insurance Reciprocal*, 224 W.Va. at 382, 686 S.E.2d at 33.

Petitioners' fraud claims were properly dismissed because they are untimely. As to the Circuit Court's alternate basis for dismissing the detrimental reliance claim, Petitioners do not

contest the Circuit Court's finding that their detrimental reliance claim is "... essentially a restatement of their fraud in the inducement claims under Count One." (A.R. 252). Therefore, Petitioners should be deemed to have waived any error in regard to that finding. *Id.*

If Petitioners are deemed to have waived any error in regard an equitable claim for detrimental reliance, they have no independent claim for detrimental reliance and the Circuit Court's dismissal of Count Eleven of the SAC should be affirmed by this Court.

CONCLUSION

The Circuit Court properly granted Respondent United Bank, Inc.'s Motion to Dismiss because (1) all causes of action asserted by Petitioners are barred by the applicable statutes of limitation; (2) West Virginia does not recognize an independent or tort cause of action for breach of an implied covenant of good faith and fair dealing except in the context of insurance contracts; and, (3) the Circuit Court lacked jurisdiction of Petitioners' equitable claim based on detrimental reliance because Petitioners had an adequate remedy at law. For these reasons, the dismissal of Petitioners' Second Amended Complaint should be affirmed.



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CERTIFICATE OF SERVICE

I, C. William Davis, attorney for defendant United Bank, Inc., hereby certify that on the 13th day of August, 2014, I served the foregoing BRIEF OF RESPONDENT UNITED BANK, INC. upon the following by depositing true copies thereof in envelopes, postage prepaid, in the United States mail, addressed to each of them as follows:

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