No. 23589 -- Jerry A. Vorholt v. One Valley Bank, (formerly the Kanawha Valley Bank, N.A.), One Valley Bank, a National Banking Association, (formerly the Kanawha Valley Bank), trustee of the Ansel F. Vorholt Trust, Leo J. Vorholt, Jr., Edward Vorholt, Archie Vorholt, Ruth V. Childress, Catherine V. Melton, and the Most Reverend Bernard W. Schmitt, D.D., Bishop of the Roman Catholic Diocese of Wheeling-Charleston, and his successor in office, and all other known and unknown heirs at law of beneficiaries or other beneficiaries, known or unknown of the Ansel F. Vorholt Trust

Starcher, Justice, concurring, in part, and dissenting, in part:

I concur in the result of this case. However, I would have reached the same result through the application of *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), which analyzed the discovery rule and its effect on statutes of limitation.

I must say that while I support the result of this case, I am concerned that the evidence might well support a jury finding that the appellee bank negligently distributed the 1955 Ansel Vorholt trust, thereby creating a question of fact that would survive summary judgment. One could find that the appellee bank's trust department failed to keep abreast of the law; I agree with Justice Workman, and hope that the Court's opinion is not read to excuse financial institutions from knowing the current state of the law. As a doctor should be knowledgeable of trends in his or her field of medicine, or an insurance company should understand new insurance statutes and regulations, a bank should be aware of changes in the law of estates and trusts. Banks and trust departments deal with trust and estate law on a daily basis; bank customers do not.

Leo Vorholt died in 1970, and the appellee bank began paying the trust income created under Ansel Vorholt's 1955 will only to the appellant's stepbrother and stepsister, and none to the appellant, Leo Vorholt's adopted son. *W.Va. Code*, 48-4-5 was amended in 1959 to provide adopted children the same rights of inheritance as natural born children. The bank relied on our opinion in *Security National Bank & Trust v. Willim*, 151 W.Va. 429, 153 S.E.2d 114 (1967) where we stated that the statutes in effect at the time a will was written should be applied.

But in 1977, we overruled *Willim* and held that trusts executed before 1959 must be construed under *W.Va. Code*, 48-4-5 [1959]. *See Wheeling Dollar Savings & Trust Co. v. Hanes*, 160 W.Va. 711, 237 S.E.2d 499 (1977). After we issued the *Hanes* decision, the bank should have begun to pay the appellant his share of the trust income, but it did not. Then, in 1980, the Ansel Vorholt trust terminated and the bank transferred ownership of the estate property only to the trust beneficiaries, including the appellant's stepbrother and stepsister, again not recognizing the *Hanes* decision. The appellant did not receive the share to which he was legally entitled.

Contrary to the majority's opinion, see *supra* ___ W.Va. at ___, ___ S.E.2d at ___, slip op. at 10, I see absolutely nothing in the record to suggest that the appellant had any reason to know in 1970, 1977 or 1980 that the bank had breached any duty towards him. The record simply does not support the notion that the appellant should have "offer[ed] evidence to explain his failure to take reasonable measures to ascertain his legal rights under his *father's* estate in the nineteen year period beginning in 1970 and ending in 1989." ___ W.Va. at ___, ___ S.E.2d at ___, slip op. at 11 (emphasis added). This comment by the majority misses the whole point: this case revolves around the bank's mishandling of the appellant's *grandfather's* estate, not his father's estate.

I can think of no reason why a 17-year-old living in Florida (like the appellant was when his father died in 1970) should have been concerned about how a bank in West Virginia was handling a trust account for a deceased, adoptive grandfather he never knew. The appellant's affidavit in the record indicates that he did not even know of the existence of his grandfather's trust until 1989 when he was contacted by the bank. Further, I find nothing in the record to suggest that the appellant knew his adopted siblings were receiving proceeds from his grandfather's trust account after the death of his father. Hence, he had absolutely no reason to try and make an inquiry about his legal rights.

My reading of the record shows that it was not until 1989 that the appellant was first advised of the results of a title search on the disputed property, and "discovered" that he might have a cause of action against the bank. The unfortunate problem is that the appellant's counsel waited two years and nine months to file this action.

The majority's application of the statutes of limitation and the discovery rule to these simple facts, to me, seems to be backwards. The majority begins by saying the limitation period started to run in 1980, then tries to figure out which statute of limitation applies, then says the plaintiff has failed to prove the cause of action was concealed from him by the defendants, and lastly that he is not entitled to the benefits of the discovery rule.

The evaluation of whether a case is barred by a statute of limitation is a four-step process. *See, Keesecker v. Bird*, 200 W.Va. 667, 682-684, 490 S.E.2d 754, 769-771 (1997). In the first step of the process, the court must determine what limitation period applies. I agree with the majority that the 10-year statute of limitation found in *W.Va. Code*, 55-2-7 [1972] does not apply. I accept, but do not fully agree with, the majority's conclusion that the one-year "catch-all" statute of limitation found in *W.Va. Code*, 55-2-12 [1959] is instead applicable.[1]

The second step in the process recognizes that a statute of limitation is an affirmative defense. The defendant or party relying on the limitation period bears the burden of proving entitlement to the defense. Hence, the defendant must prove (1) when the cause of action "accrued," that is, when all of the elements existed such that the

[1]I cannot say that I am in any way comfortable with this conclusion. However, because the appellant failed to brief whether any other statute of limitation could apply, the Court declined to go any further in its research. Practitioners and judges facing a similar situation should investigate the possibility of applying the contract statute of limitation, *W.Va. Code*, 55-2-6 [1923], and consider whether or not an individual such as the appellant could be considered a third-party beneficiary to the contract between the bank and the settlor. Questions should also be asked whether a statute of limitation even applies when the remedy sought is specific performance, rather than damages. Most of all, I am unclear whether a breach of a fiduciary duty sounds in equity, whether it is a tort (with a two-year statute of limitation under *W.Va. Code*, 55-2-12 [1959]), or whether it is a breach of contract (with a ten-year statute of limitation under *W.Va. Code*, 55-2-6 [1923]). Whatever argument is advanced, it should be advanced at the circuit court level first.

plaintiff *could* have filed an action, and (2) that the plaintiff filed his claim outside the limitation period. Here, the appellee bank showed that its last potential negligent act was in 1980, when it distributed the trust assets in a manner contrary to law. Hence, the one-year statute of limitation was triggered in 1980.

The third step involves determining whether the discovery rule tolls the applicable statute of limitation. Normally a statute of limitation begins to run when the negligent act occurs. However, under the "discovery rule" the statute of limitation is tolled until a plaintiff knows or by reasonable diligence should know of his claim. In *Gaither v. City Hospital, Inc.*, *supra*, the Court analyzed 77 years of case law interpreting the discovery rule, and stated the general guide for the discovery rule's application in this manner:

> [U]nder the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

Syllabus Point 4, in part. This rule is the culmination of seven decades of application of the discovery rule to cases involving defective products, negligent lawyers and doctors, trespassing miners, and privacy-invading public officials. *Gaither* is not a factual aberration applicable only to medical malpractice claims as the majority opinion might suggest.

In this case, the appellant claims he is entitled to the benefit of the discovery rule. However, in applying *Gaither* to the facts, it is still clear that the appellant's cause of action against the bank is time barred. Even though the appellant's cause of action accrued in 1980, he was apparently unaware of the action's existence until 1989; hence, under the discovery rule as announced in *Gaither*, the statute of limitation was tolled until 1989. After 1989, the appellant was not entitled to the discovery rule's protection, and the one-year statute of limitation was triggered.

The fourth and last step in the analysis is whether, once the plaintiff knows or should know he has got a lawsuit, the defendants did anything to conceal their actions from the plaintiff or otherwise deter him from acting. This is essentially a "last chance" defense by a plaintiff to a statute of limitation. As we stated in *Gaither*, "often an injury or wrong occurs of such a character that a plaintiff cannot reasonably claim ignorance of the existence of a cause of action." 199 W.Va. at 712, 487 S.E.2d at 907. In those cases, the burden shifts to the plaintiff to make a strong showing "that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury." 199 W.Va. at 712, 487 S.E.2d at 907, *quoting* Syllabus Point 3, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992). As *Gaither* makes clear, this rule from *Cart* is not the starting point, but is the last line of defense for a plaintiff; it only applies in those instances where "causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance." *Id*.

I see nothing in the record of the instant case which suggests any concealment by the appellee bank, nor any action designed to deter the appellant from prosecuting his lawsuit. The appellant knew in 1989 that he had a loss caused by the bank, and he failed to show the bank did anything prevent him from filing an action. Hence, I do not feel that the concealment defense espoused in *Cart* applies.

The plain conclusion is that the appellant knew in 1989 that the bank distributed the trust assets to his siblings and other beneficiaries and excluded him entirely. He should have filed a lawsuit by 1990, and not waited until 1992. Under the one-year statute of limitation, his claim would obviously be barred.

Accordingly, I concur with the majority's result; I dissent to the means used to reach that result.