

No. 33046

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

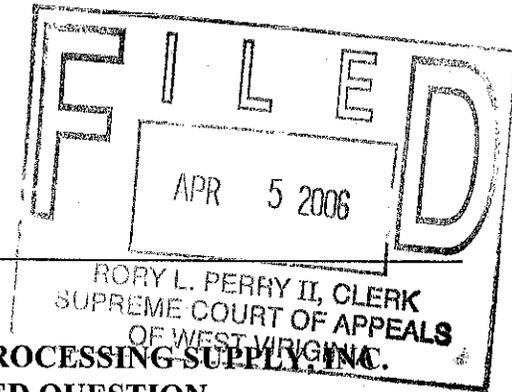
COPIER WORD PROCESSING SUPPLY, INC.,

Appellant/Plaintiff,

vs.

WESBANCO BANK, INC., *et. al.*

Appellee/Defendant.



BRIEF OF COPIER WORD PROCESSING SUPPLY, INC.
UPON CERTIFIED QUESTION

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INTRODUCTION

Comes now, Copier Word Processing Supply, Inc. ("CWS"), by counsel, James R. Leach, Esq., Victoria J. Sopranik, Esq. and Jim Leach, L.C., and respectfully files this Brief regarding the legal questions that this Court certified pursuant to the West Virginia Rules of Appellate Procedure. In support, CWS states the following:

I. KIND OF PROCEEDING AND NATURE OF RULING

This brief is upon a certified question from the Circuit Court of Wood County, the Honorable Jeffrey Reed presiding. This certified question presents a novel and important issue of law that has yet to be decided by this Court. The issues raised relate to the statute of limitations provision of W.Va. Code § 46-3-118(g) and if West Virginia law allows equitable tolling of that provision. This Court is asked whether the statute of limitations period can be equitably tolled on a claim for conversion against a commercial bank where that bank allows an employee of the Appellant/Plaintiff to deposit corporate checks made payable to the corporation into her personal account at the defendant bank on a regular basis over a period of several years. Although this issue has been addressed by courts in other jurisdictions, it has not yet been addressed by this Court.

CWS filed its Complaint for conversion against the defendant Doris Hendrickson and conversion and negligence against the Appellee/Defendant WesBanco Bank, Inc. ("WesBanco") on October 6, 2003.¹ WesBanco filed its Answer and Cross-Claim against Doris Hendrickson on November 20, 2003. Defendant Doris Hendrickson did not file an Answer and Default Judgment

¹The complaint was initially filed against Ms. Hendrickson, WesBanco, Inc. and Does 1-50. The complaint was amended as of right, prior to a responsive pleading having been served on October 30, 2003 for the purpose of correcting the name of the Defendant WesBanco Bank, Inc. from WesBanco, Inc.

Default Judgment was entered against her on February 4, 2005. CWS filed a Second Amended Complaint on July 19, 2003, joining Steven Hendrickson as a defendant for claims of conversion. Mr. Hendrickson served his Answer on November 3, 2003. WesBanco answered the Second Amended Complaint and filed a cross-claim against Steven Hendrickson, which he answered on December 2, 2004. Mr. Hendrickson subsequently filed for bankruptcy protection in the United States Bankruptcy Court for the Southern District of West Virginia, and is not currently a party to this action due to the automatic stay provision of the Bankruptcy Code.

On November 11, 2004, CWS filed a Motion for Summary Judgment and WesBanco filed a timely response.² CWS filed its Reply and WesBanco filed a Supplemental and Amended Response. On January 6, 2005, WesBanco filed its Motion for Judgment on the Pleadings, CWS filed a timely response and WesBanco filed its Reply.³ A hearing was held on February 4, 2005 on all Motions. The trial court denied CWS' Motion for Summary Judgment and granted WesBanco's Motion on the Pleadings, holding that neither the discovery rule nor the continuing tort theory are applicable to causes of action governed by the limitation period provided for by W.Va. Code § 46-3-118(g) due to policy considerations of finality and certainty in commercial transactions and the negotiability of instruments. Therefore, the Court held that the three-year limitations period bars CWS's cause of action on any of the negotiable instruments converted prior to the filing of the original complaint on October 6, 2003 and the Court granted

²In its Motion for Summary Judgment, CWS requested judgment on all issues in the case, both its claims for negligence and conversion against WesBanco and that CWS's claims are not barred by the statute of limitations. The Certified Question only addresses the statute of limitations issue. However, the Circuit Court denied summary judgment to CWS on all issues.

³WesBanco's Motion for Judgment on the Pleadings requested judgment on the issue of the statute of limitations, which motion the Circuit Court granted.

WesBanco's motion for judgment on the pleadings and awarded judgment dismissing with prejudice CWS's cause of action on the negotiable instruments alleged to have been negotiated more than three years prior to the filing of the original complaint on October 6, 2003.

On May 9, 2005, CWS moved the Circuit Court of Wood County, pursuant to W.Va. Code § 58-5-2, to certify a question to the West Virginia Supreme Court of Appeals on the question of whether the tort of conversion as alleged in the Complaint and Amended Complaint was a continuing tort and the statute of limitations began to run from the date of the last injury or when the tortious overt acts or omissions cease. The Court granted the Motion and entered the Order of Certification on August 10, 2005 and this Court recently granted CWS's Petition to Certify the Question.

II. STATEMENT OF FACTS

CWS employed Doris Hendrickson in 1985, initially as a temporary employee for three months, then hired full-time and eventually promoted to the position of an office manager in 1994. Ms. Hendrickson began embezzling funds from the CWS at least since 1994 by depositing checks from vendors of CWS for accounts receivables, made payable to CWS or some form of the corporate name, into her personal accounts at Wesbanco.⁴ Her scheme required her to intercept a check received in the mail from a vendor, locate the invoice for which the check represented payment, "zero out" the invoice with a credit memo and then sign the back of the check with an endorsement purported to be "CWS" and "John Alkire: Pres., Doris Hendrickson,

⁴This date is based upon discovery that had been conducted prior to the filing of the motions for Summary Judgment and Judgment on the Pleadings. Additional discovery, produced subsequent to the filing of the Motions revealed that Ms. Hendrickson began her embezzlement scheme as early as 1991.

Treas.” and deposit the check into her personal checking account at WesBanco.⁵ All checks deposited into her personal account at WesBanco were made payable to either “CWS” or “Copier Word Processing Supply, Inc.” or some variation of the corporate name.⁶ WesBanco accepted such deposits on a continuing, regular basis for years, without questioning any transaction, despite contrary instructions in its policies and procedures, which provided that corporate checks *must* be deposited into the business account.

Ms. Hendrickson had two personal accounts with WesBanco in which she deposited checks. She shared one of the accounts with her son Steven Hendrickson and the other was held in her own name. The fraudulently indorsed checks were deposited into both of these accounts. Ms. Hendrickson deposited checks made out to CWS either directly into the shared account or into her own personal account. In either instance, she would routinely also deposit a portion of the check into her personal account, receive cash back and either keep the cash or deposit that cash into the shared account. When depositing or cashing the checks, Ms. Hendrickson did not deal with simply one teller at Wesbanco, but instead made the deposits over the years to many different tellers. Ms. Hendrickson simply waited in line for the next available teller, never attempting to use any one teller more than another, and she did not personally know any of the tellers. Indeed, not one time in all of the *at least 721* times she deposited a check made payable to CWS, a corporation, into her own personal accounts, did any teller make any inquiry at all concerning the transaction, nor, to her knowledge, did a teller question a supervisor concerning

⁵Ms. Hendrickson was the office manager for CWS, not the Treasurer. There is also some dispute as to whether Ms. Hendrickson endorsed the checks with “CWS” although it is agreed that she forged Mr. Alkire’s name and signed her own.

⁶CWS never had an account with Wesbanco and it obviously follows that Wesbanco had no documentation authorizing deposit of CWS’s checks into Ms. Hendrickson’s personal accounts.

the transaction, as Ms. Hendrickson was never detained or questioned by anyone. Indeed, her transactions were always "very routine."

Ms. Hendrickson was eventually caught by CWS and her services were terminated in May of 2003. Over the course of the previous six (6) years, since 1997, Ms. Hendrickson deposited 721 checks made payable to CWS, totaling approximately \$472,000.00, into her accounts at WesBanco.⁷ She was indicted for the offense of embezzlement, and, pursuant to a plea agreement, pled guilty and was sentenced accordingly on July 14, 2004.

III. CERTIFIED QUESTION

Question: In a case governed by the three year limitations period provided for in West Virginia Code 46-3-118(g):

- (a) Does the continuing tort theory apply to the alleged conversion of multiple, separate negotiable instruments made payable to the plaintiff's business by an employee of plaintiff to her personal checking account at defendant bank over a period of several years, such that the cause of action accrues at, and the statute of limitations does not begin to run until, the date of the alleged conversion of the last negotiable instrument, permitting damage claims for instruments allegedly converted more than three years prior to the filing of the complaint, or
- (b) Does the cause of action accrue and the limitations period run from the date of the negotiation of each separate instrument permitting damage claims only for such instruments allegedly converted within such three year period prior to the filing of the complaint?

The Circuit Court of Wood County, West Virginia answered the question as follows:

Answer: (a) No
 (b) Yes

⁷As noted previously, this number and amount is based upon the records of Ms. Hendrickson's two accounts at WesBanco that had been produced as of the date of filing of the Summary Judgment motion. Subsequent discovery revealed that WesBanco retained records from 1991. The additional records, from 1991 forward, revealed that Ms. Hendrickson deposited approximately 1,000 checks into her personal account over the 13 years, totaling over \$600,000.00.

IV. TABLE OF AUTHORITIES

Cases

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V. DISCUSSION OF LAW

a. Standard of Review

The standard of review upon certified question from a circuit court to the Supreme Court is *de novo*. *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996), *Lucas v. Fairbanks Capital Corp.*, 217 W.Va. 479, 618 S.E.2d 488 (2005). "A *de novo* standard is applied by this court in addressing the legal issues presented by a certified question from a federal district or appellate court." Syl. Pt. 1, *Light v. Allstate Ins. Co.*, 203 W.Va. 27, 506 S.E.2d 64 (1998). Furthermore, this Court has flexibility to address a certified question and, thus, may reformulate a certified question in order to encompass the law which is involved in the question. Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993).

b. Although the Certified Question does not include the discovery rule, given the nature of the issues and law involved, this Court should reformulate the Certified Question to address the issue of the applicability of the discovery rule to this matter.

It is well settled that this Court has the power to reformulate a Certified Question to fully and fairly address the law.

When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to

reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W.Va. Code, 51-1A-1, et. seq. and W.Va. code, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.

Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993). See also *Charter Communications, VI, PLLC v. Community Antenna Service, Inc.* 211 W.Va. 71, 561 S.E.2d 793 (2002); *Ferrell v. Nationwide Mut. Ins. Co.*, 217 W.Va. 243, 617 S.E.2d 790 (2005); *Aikens v. Debow*, 208 W.Va. 486, 541 S.E.2d 576 (2000) (“Recognizing that this Court, in addressing certified questions, has ‘retained the right to address them with some flexibility[,]’ we reframe the question presented in the case sub judice to more thoroughly encompass the full breadth of the question to be answered.” citing *Miller v. Lambert*, 195 W.Va. 63, 69, 464 S.E.2d 582, 588 (1995)).

This Court has further recognized that “[t]here have also been cases where this Court deemed it necessary to reformulate certified questions, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993), and to notice and discuss questions which fairly arise upon the record in a certified case, *Charleston Transit Co. v. Condry*, 140 W.Va. 651, 86 S.E.2d 391 (1955).” FN 3, *State ex rel. Mountaineer Park, Inc. v. Polan*, 190 W.Va. 276, 438 S.E.2d 308 (1993).

Therefore, clearly, if the certified question does not encompass the question to be resolved, this Court may reformulate the question.

In the instant matter, the certified question only addresses the applicability of the continuing tort rule. However, the discovery rule must be addressed as well in order for the Court to fully address the law which is involved in this matter. Indeed, the Circuit Court not only addressed the issue of the discovery rule as it applies to this case, but ruled that neither the

discovery rule nor the continuing tort theory are applicable to causes of action governed by the limitation period provided for by W.Va. Code § 46-3-118(g). Therefore, as the Circuit Court did rule on the issue, it is an integral part of the law involved and necessary to the decision of the case, the Supreme Court has the power to reformulate the question to answer whether the discovery rule or the continuing tort theory would apply, and should do so, especially in light of Judge Goodwin's recent decision in *C&L Construction Company, Inc. v. BB&T Corporation*, 2005 WL 2792401 (S.D.W.Va.).

c. The discovery rule is applicable and would operate to toll the statute of limitations.

In West Virginia, the claims of conversion and negligence both sound in tort. W.Va. Code §46-3-420 expressly states that the law applicable to conversion of personal property applies to instruments, and thus, the conversion of negotiable instruments is a tort. *See also e.g. Arnold v. Kelly*, Syl. Pt. 1, 4 W.Va. 642 (1871) ("The tortious or unlawful taking of personal property, and the exercise of ownership and dominion over it, against the consent of the owner is, in law, a conversion of the property . . .") (emphasis added). The discovery rule as applied in tort actions is well settled in West Virginia jurisprudence:

In tort actions, unless there is a clear statutory prohibition to its application, under 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.

Syl. Pt. 4, *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). *See also*, Syl. Pt. 4, *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 624 S.E.2d 562 (2005); Syl. Pt. 5, *Bennett v. Asco Services, Inc.*, 218 W.Va. 41, 621 S.E.2d 710 (2005); Syl. Pt. 2, *McCoy v. Miller*, 213 W.Va. 161, 578 S.E.2d 355 (2003).

In fact, Judge Goodwin, in *C&L Construction Company, Inc. v. BB&T Corporation*, 2005

WL 2792401 (S.D.W.Va.), held that the discovery rule is applicable to the issue of the statute of limitations in conversion cases, based upon *Public Citizen v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). *C&L Construction* presented facts similar to those in this matter. The owner of the company, Frank Moffitt, hired his sons into the small family construction business in the 1970s. *Id.* at 1. One son, Jeff Moffitt, took over the financial duties for the company, and, in 1994, began embezzling large sums of money from the company, by endorsing checks made payable to the company, stamping “For Deposit Only” and depositing them into his personal account rather than into the company account at BB&T. *Id.* Both Jeff and C&L had accounts with BB&T. *Id.*

The embezzlement was discovered in 2002 and C&L instituted suit against BB&T on March 18, 2004, alleging negligence, breach of contract, and conversion against BB&T for depositing the funds into Jeff’s account instead of C&L’s. *Id.* BB&T moved for summary judgment against C&L for all claims, which was denied by the Court.⁸ *Id.* BB&T argued that W.Va. Code § 46-3-118(g) barred recovery by C&L for conversion of the checks more than three years prior to the filing of the complaint. *Id.* at 3. The Court cited W.Va. Code 46-3-118(g), which provides that a conversion action “must be commenced within three years after the cause of action accrues.” *Id.* To determine when a cause of action accrues, the Court then looked a West Virginia common law.

In West Virginia, “[g]enerally the statute of limitations begins to run when a tort occurs; however, under the ‘discovery rule,’ the statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim.” *Gaither v. City Hospital*, 199 W.Va. 706, 487 S.E.2d 901, 906 (W.Va. 1997). West Virginia has ruled that “[t]he tolling of the statute of limitations under ‘the discovery rule’ is generally applicable to all torts, unless there is a clear statutory prohibition of its application,” *Harris v. Jones*, 209 W.Va. 557, 550 S.E.2d 93, 98 (W.Va. 2001). A clear statutory prohibition of the application of the “discovery rule” to U.C.C. conversion cases does not exist.

Id. The Court went on to recognize that “a majority of jurisdictions have refused to apply the

⁸BB&T moved for summary judgment on all claims based on various theories, this Brief will only discuss the issue relevant to the statute of limitations.

'discovery rule' to U.C.C. conversion cases; nevertheless I find that the West Virginia Supreme Court would adopt the minority approach." *Id.* at 4.

The Court supported the decision based upon *Public Citizen v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996), although acknowledging that the court in *Public Citizen* did not "explicitly hold[] that 'the discovery rule' applied to U.C.C. conversion cases." *Id.* The Court reasoned:

In *Public Citizen*, Public Citizen, Inc. brought a conversion action against First National Bank in Fairmont for converting checks. *Id.* at 542. The last alleged conversion that occurred was on September 5, 1989. *Id.* Public Citizen did not file suit against First National Bank in Fairmont until October 3, 1992. *Id.* This was more than three years after the alleged last conversion had occurred. The issue of timeliness was resolved in the defendant's favor in the circuit court. *Id.* at 547. The West Virginia Supreme Court reversed the finding of the circuit court and held that the claim was filed timely. *Id.* at 548. The court did not discuss the applicable statute of limitations or "the discovery rule" but did state that the plaintiff "did not file a claim until twenty-three months after learning of the deposit." *Id.* Thereafter, the court ruled that the claim was filed timely. *Id.* The language used by the court indicates that the court in this case looked at "the learning of the deposit" as the applicable time when the statute of limitations should begin to run. In fact, if the court used the time of the conversion as the start of the statute of limitations, the court would have had to rule that the claim was filed untimely. Accordingly, the court in *Public Citizen* implicitly applied "the discovery rule" to a U.C.C. conversion case. As a result, the Supreme Court of West Virginia would apply "the discovery rule" in the case at hand.

C&L, at 4.

Although a minority, other jurisdictions have also applied the discovery rule to conversion cases. For instance, in *UNR-Rohn, Inc. v. Summit Bank of Clinton County*, 687 N.E.2d 235, 36 UCC Rep.Serv.2d 792 (Ind.App., 1997), the court applied the discovery rule to a claim of conversion of negotiable instruments, citing Indiana Supreme Court precedent. Although the court acknowledged that the majority of courts that had addressed the issue of the applicability of the discovery rule to conversion cases, it held that, under Indiana precedent, "our courts since 1992 have consistently applied the discovery rule." *Id.* at 240 (citations omitted). Indeed, similar to West Virginia, the Indiana Supreme Court had "expanded its application of the discovery rule to all tort cases." *Id.* citing *Wehling v. Citizens Nat. Bank*, 586 N.E.2d 840 (Ind.

1992). The court applied the discovery rule in this case, in spite of the argument by the defendant that no other Indiana case had applied the discovery rule on a conversion case and other jurisdictions declined to do so. As the court noted:

Although it is true that none of the Indiana cases cited above involved the accrual date of a claim of conversion, the holding of *Wehling* and the reasoning inherent in it logically applies to all tort actions. To carve out an exception to the discovery rule in injuries to personal property involving conversion of negotiable instruments would be wholly incongruous and inconsistent with Indiana's system of jurisprudence.

Id.

In the instant case, the same reasoning applies in West Virginia as in Indiana. West Virginia precedent has consistently ruled that the discovery rule applies to *all* tort cases, absent clear statutory prohibition. To carve out an exception in this instance, given that there is no statutory prohibition against application of the discovery rule to U.C.C. conversion cases, and conversion and negligence both sound in tort, would "be wholly incongruous and inconsistent with [West Virginia's] system of jurisprudence. Consequently, the discovery rule tolls the statute of limitations in this matter until CWS knew, or by the exercise of reasonable diligence, should have known of the conversion.

d. Even if the discovery rule is not applicable, the conversion is a continuing, repeated injury and the cause of action accrued at and the statute of limitations began to run from the date of the last transaction.

A cause of action predicated on conversion and negligence regarding a negotiable instrument is governed by a three year statute of limitations. W.VA. CODE § 46-3-118(g).

Pertinently, subsection (g) of the W.VA. CODE § 46-3-118 states:

Unless governed by other law regarding claims for indemnity or contribution, an action (i) for conversion of an instrument, for money had and received, or like action based on conversion, (ii) for breach of warranty or (iii) to enforce an obligation, duty, or right arising under this article and not governed by this section must be commenced within three years after the cause of action accrues.

W.Va. Code § 46-3-118(g) (emphasis added). As noted above, the claims of conversion and negligence both sound in tort. W.Va. Code §46-3-420 ; *Arnold v. Kelly*, Syl. Pt. 1, 4

W.Va. 642 (1871).

In the event of a continuous tort, the cause of action accrues only after the last check was fraudulently cashed by the embezzler. In *Graham v. Beverage*, where property owners sued developers of adjacent property for their alleged negligent, defective, and improper construction of housing development storm water management system, the West Virginia Supreme Court held that “where a tort involves a continuing or repeated injury, the cause of action accrues at and the statute of limitations begins to run from the date of the last injury or when the tortious overt acts or omissions cease.” 211 W.Va. 466, 566 S.E.2d 603, 614 (2002) (emphasis added), *relying on, Handley v. Town of Shinnston*, 169 W.Va. 617, 289 S.E.2d 201, 202 (1982) (holding that where the damage did not occur all at once but increased as time progressed; each injury being a new wrong, the tortious act did not cease until the leaking waterline was removed from the appellants’ property). The concept of “continuing tort” for limitation purposes requires showing of repetitious, wrongful, conduct. *Ricottilli v. Summersville Memorial Hosp.*, 188 W.Va. 674, 425 S.E.2d 629, 632 (1992).

This Court again addressed the issue of the effect of a continuing tort on the statute of limitations in *Taylor v. Culloden Public Service District, et. al.*, 214 W.Va. 639, 591 S.E.2d 197 (2003). In *Taylor* the defendant was granted summary judgment on the basis of the two year statute of limitations for nuisance. *Id.* at 642. The case involved landowners who lived adjacent to and downstream from a wastewater treatment facility.⁹ For years, the treatment facility had continuously dumped untreated sewage into the stream that ran through the landowners property. The landowners intervened in a suit already filed against the wastewater treatment facility, alleging nuisance, trespass and violations of state and federal statutes. The wastewater facility filed a motion for

⁹There were several claims and parties involved in *Taylor*. This brief only discusses the relevant portions of the case.

summary judgment alleging that the two year statute of limitations barred in part the landowner's nuisance claims, the lower court granted the motion and the landowners appealed. *Id.* at 643.

The Supreme Court found that there was no disagreement that the facility had been periodically dumping untreated sewage for years, the basis for the nuisance claim of the landowners, and was still ongoing at the time of the case. The landowners argued that, based upon the continuing nature of the nuisance, the rationale of Syllabus Point 11 of *Graham v. Beverage*, applied and the statute had not yet begun to run, given that the nuisance was ongoing. *Id.* at 647.

The wastewater facility, in its brief, proposed the same argument that WesBanco does in the instant matter, that because the case does not involve the same type of tort, *Graham* would be inapplicable. *Id.* The Court rejected that argument out of hand.

"There is no language in syllabus point eleven of *Graham* that limits its application to specific types of torts. As a result, that point of law was clearly intended to apply to torts of all types – not merely to the negligence type of action involved in *Graham*." (emphasis added). Thus, the Court found that the landowners' nuisance claims were not barred by the statute of limitations, as their claim was brought while the acts were ongoing. *Id.*

Though the theory of continuous injury as applied to conversion of negotiable instruments has yet to be addressed by a West Virginia court, courts in other jurisdictions have followed the continuous injury theory with respect to conversion of negotiable checks. In *Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322 (Ill. App. 1997), where a joint owner of checks allegedly paid by financial institution over forged indorsements brought suit against the financial institution for its alleged conversion, the court noted the following regarding application of statute of limitations:

When a series of checks is cashed as part of an ongoing scheme or plan, the plan constitutes a single transaction for purposes of the commencement of the statute of limitations. Thus, if plaintiff alleged facts sufficient to show a plan for

[embezzler's] conversion of checks payable to [parent company of Plaintiff], the date on which the last check was deposited would govern as the date for all the checks for purposes of the statute of limitations.

Id. at 324 (emphasis added); *see also, Field v. First Nat. Bank of Harrisburg*, 619 N.E.2d 1296, 1299 (Ill. App. 1993) (holding that the defendant's alleged conversion of payee's retirement checks by placing them in an account on which his name did not appear over his restrictive indorsement was one continuous course of conduct, and, thus, banking transactions that occurred more than five years prior to filing of suit were not barred by five-year statute of limitations because the limitations period did not commence running until last of pension checks was cashed).¹⁰

In the instant case, the actions of defendants Doris Hendrickson and WesBanco involved a continuing or repeated injury that did not cease until May 2003. These actions sound in tort, and the Supreme Court of West Virginia has adopted a general applicability of the continuing tort theory to all types of torts, not just specific types. *Graham*, 566 S.E.2d at 614; *Handley*, 289 S.E.2d at 202; *Taylor*, 591 S.E.2d at 647. The conversion and negligence causes of action against WesBanco should, therefore, pursuant to the continuing tort theory, accrue from the day the last check, as part of the fraudulent scheme, was negotiated and the tortious acts of conversion and negligence ceased, which, in the instant case, is May 2003. CWS brought its cause of action against the defendant WesBanco on October 6, 2003, well within three years

¹⁰The United States Court of Appeals for the Seventh Circuit, the federal appellate court that includes Illinois, revisited this issue in *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 57 UCC Rep.Serv.2d 392 (7th Cir. 2005). In *Rodrigue*, the lower court held that the Illinois Supreme Court would apply the "continuing violation rule" in a cause of action for conversion. *Id.* at 439. The 7th Circuit reversed, determining that, in spite of the rulings in *Haddad* and *Fields*, the Illinois Supreme Court would not apply the "continuing violation rule" in a cause of action for conversion. *Id.* at 442. However, the Court based its reasoning on the fact that "[t]he Illinois Supreme Court has not adopted 'a continuing violation rule of general applicability in all tort cases . . .'" *Id.* The West Virginia Supreme Court, in contrast, has done so, as it pointed out in *Taylor*: "There is no language in syllabus point eleven of *Graham* that limits its application to specific types of torts. As a result, that point of law was clearly intended to apply to torts of all types – not merely to the negligence type of action involved in *Graham*." *Taylor*, 591 S.E.2d at 647 (emphasis added). Therefore, the reasoning of the court in *Rodrigue* is not applicable in West Virginia. In addition, as this case was decided not by the Illinois Supreme Court but by a federal court whose role is to only predict what it believes the Supreme Court of that state would do. *Rodrigue*, 406 F.3d 441. It is therefore not decided how the Illinois Supreme Court would rule, but it is clear that two appellate courts from that state did apply the continuing violation rule.

from the date "of the last injury or when the tortious overt acts or omissions cease." *Graham*, 566 S.E.2d at 614. Thus, the none of the claims of CWS should be barred by the statute of limitations.

VI. RELIEF PRAYED FOR

Based upon the foregoing, CWS respectfully requests this Court answer the Certified Question (a) such that the continuing tort theory and/or the discovery rule does apply to the alleged conversion of multiple, separate negotiable instruments made payable to the plaintiff's business by an employee of plaintiff to her personal checking account at defendant bank over a period of several years, such that the cause of action accrues at, and the statute of limitations does not begin to run until, the date of the alleged conversion of the last negotiable instrument, permitting damage claims for instruments allegedly converted more than three years prior to the filing of the complaint, and answer Certified Question (b) that the cause of action does not accrue and the limitations period run from the date of the negotiation of each separate instrument permitting damage claims only for such instruments allegedly converted within such three year period prior to the filing of the complaint, and reverse the Circuit Court's ruling denying the Appellant's Motion for Summary Judgment on the issue of the statute of limitations.

Copier Word Processing Supply, Inc.
By Counsel,



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No.33046

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

COPIER WORD PROCESSING SUPPLY, INC.,

Appellant/Plaintiff,

vs.

WESBANCO BANK, INC., *et. al.*

Appellees/Defendants.

CERTIFICATE OF SERVICE

I, James R. Leach, hereby certify that I served the foregoing *Brief of Copier Word Processing Supply, Inc. upon Certified Question* upon all counsel of record on the 4th day of April, 2006, via United States Mail, postage pre-paid, addressed as follows:

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