

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33046

COPIER WORD PROCESSING SUPPLY, INC.
Plaintiff below/Appellant,

vs.

WESBANCO BANK, INC., et. al.
Defendant below/Appellee.

Honorable Jeffrey B. Reed
Circuit Court of Wood County
Civil Action No. 03-C-472

**APPELLEE'S BRIEF
IN RESPONSE TO BRIEF OF
APPELLANT UPON CERTIFIED QUESTION
FROM THE CIRCUIT COURT OF WOOD COUNTY
GRANTED ON MARCH 2, 2006**

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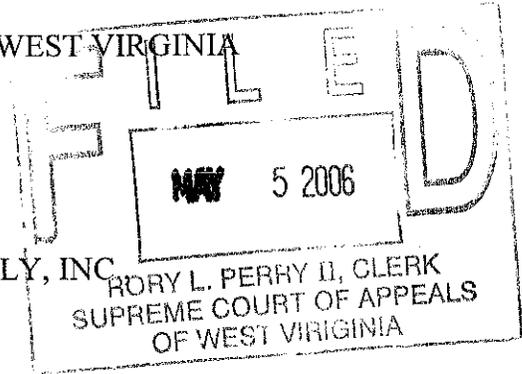


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I.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

The kind of proceeding and nature of the ruling below are adequately described in Appellant's Brief for purposes of the review before the Court, and, accordingly, is not further repeated herein.

II.

STATEMENT OF FACTS

Although substantial factual disputes remain to be tried below, particularly as to the comparative fault of the parties, including that of Appellant in its hiring of Doris Hendrickson as its employee without apparently ascertaining that she was at the time on

probation in federal court upon a conviction arising out of similar activity for a prior employer, entrustment of responsibility to her, and lack of supervision of her in those responsibilities, the facts to the effect that Ms. Hendrickson, in the course of her employment, allegedly converted multiple, separate negotiable instruments payable to Appellant over a period beginning more than three years prior to Appellant's filing of its complaint, is inherent in the Circuit Court's certified questions and sufficiently stated in Appellant's Brief for purposes of the review before the Court, and, accordingly, is not further repeated herein.

III.

CERTIFIED QUESTION AND ISSUES PRESENTED

The Circuit Court's certified questions and answers thereto are as follows:

Question: In a case governed by the three year limitation 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 limitation 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?

Answer: (a) No
(b) Yes

While the above questions certified by the Circuit Court in and of themselves succinctly state the issues to be decided, Appellant's presentation raises the following additional issues for consideration, discussion and determination:

1. Has Appellant waived its ability to argue the applicability of the discovery rule in support of its position in this case?
2. Is the discovery rule applicable to a case such as the one at bar as described in the aforesaid certified questions involving a claim for the alleged conversion of negotiable instruments under the Uniform Commercial Code permitting damage claims for instruments allegedly converted more than three years prior to the filing of the complaint?

IV.

POINTS AND AUTHORITIES RELIED UPON

West Virginia Supreme Court of Appeals

Basham v. General Shale, 180 W.Va. 526, 377 S.E.2d 830 (1988).

Bell v. West, 168 W. Va. 391, 397, 284 S.E.2d 885, 881 (1981).

De Rocchis v. Matlock, Inc., 194 W.Va. 417, 460 S.E.2d 663 (1995).

Fullmer v. Swift Energy Co., Inc., 185 W.Va. 45, 404 S.E.2d 534 (1991).

Gallapoo v. Wal-Mart Stores, Inc., 197 W.Va. 172, 475 S.E.2d 172 (1996).

Graham v. Beverage, 211 W. Va. 466, 566 S.E.2d 603 (2002).

Public Citizen, Inc. v. First Nat'l Bank of Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996).

Shrewsbury v. Humphrey, 183 W. Va. 291, 395 S.E.2d 535 (1990).

State ex rel. Cutlip v. Sawyers, 147 W.Va. 687, 130 S.E.2d 345 (1963.)

Taylor v. Culloden Public Service Dist., 214 W.Va. 639, 591 S.E.2d 197 (2003).

West Virginia Statutes

W. Va. Code § 46-1-102(2) (2006).

W. Va. Code § 46-2-725 (2006).

W. Va. Code § 46-3-118 (2006).

W. Va. Code § 46-3-406 (2006).

W. Va. Code § 46-3-420 (2006).

W. Va. Code § 55-2-12 (2006).

Other Cases

Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc., 770 N.E.2d 177 (2002).

Bradley v. National City Bank, 55 U.C.C. Rep.2d 613 (Ky. Ct. App. 2004).

C & L Construction Company, Inc. v. BB&T Corporation, 2005 WL 2792401 (S.D. W.Va.).

Continental Casualty Company v. Huron Valley Nat'l Bank, 271 N.W.2d 218 (Mich. 1978).

Estate of Hollywood v. First Nat'l Bank of Palmerton, 859 A.2d 472 (Pa. Super. Ct. 2004).

Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union, 678 N.E.2d 322 (Ill. App. 1997).

Field v. First Nat. Bank of Harrisburg, 619 N.E.2d 1296 (Ill. App. 1993).

First Investment Corp. v. Citizens Bank, Inc., 757 F. Supp. 687 (W.D. N.C. 1991), aff'd without published opinion at 956 F.2d 263 (4th Cir. 1992).

Fuscellaro v. Industrial Nat'l Corp., 368 A.2d 1227 (R.I. 1977).

Husker News Co. v. Mahaska State Bank, 460 N.W.2d 476 (Iowa 1990).

Insurance Co. of North Am. v. Manufacturers Bank of Southfield, 338 N.W. 2d 214 (Mich. Ct. App. 1983).

Kuwait Airways Corp. v. American Security Bank, 890 F.2d 456 (D.C. Cir. 1989).

Menichini v. Grant, 995 F.2d 1224 (3rd Cir. 1993).

Metz v. Unizan Bank, 416 F.Supp.2d 568 (N.D. Ohio 2006).

Palmer Mfg. and Supply, Inc. v. Bank Ohio Nat'l Bank, 637 N.E.2d 386 (Ohio Ct. App. 1994).

Pero's Steak And Spaghetti House v. Lee, 90 S. W.3d 614 (Tenn. 2002).

Rodrigue v. Olin Employees Credit Union, 406 F.3d 434 (7th Cir. 2005).

Smith v. Franklin Custodian Funds, Inc., 726 So. 2d 144 (Miss. 1998).

Stefano v. First Union Nat'l Bank of Virginia, 981 F.Supp. 417 (E.D. Va. 1997).

Wang v. Farmers State Bank of Winner, 447 N.W.2d 516 (S.D. 1989).

Yabro, Ltd. v. Missoula Federal Credit Union, 50 P.3d 158 (Mont. 2002).

Other Authority

HENRY J. BAILEY & RICHARD B. HAGEDORN, *BRADY ON BANK CHECKS, THE LAW OF BANK CHECKS* (Rev. Ed. 2006).

LARY LAWRENCE, *AN INTRODUCTION TO PAYMENT SYSTEMS* (1997).

V.

STANDARD OF REVIEW

Because this case presents a question of statutory application upon a certified question, namely the application of W. Va. Code § 46-3-118(g), the standard of review is *de novo*. As this Court recognized in Syllabus point 1 of *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996), “[t]he appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.”

VI.

DISCUSSION OF LAW

A.

Introduction

Appellant rightly notes the applicability of the three-year statute of limitations of West Virginia Code § 46-3-118(g), which provides as follows:

§ 46-3-118. Statute of limitations.

...

(g) 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. (1993, c.166.)

However, Appellant erroneously seeks to extend such statute by application of either the discovery rule or the continuing tort doctrine to delay the accrual of a cause of action for any of the checks allegedly converted until the date of deposit of the most recent check in issue. In doing so,

Appellant cites several West Virginia cases pertaining to both doctrines, none of which have application in a context remotely similar to a case such as the one at bar involving negotiable instruments and the rights of parties under Article 3 of the Uniform Commercial Code ("UCC"). In fact, none of the West Virginia cases cited by Appellant even relate to a statutorily-created tort as in the conversion of a negotiable instrument.

In its discussion regarding the discovery rule, Appellant largely ignores the super majority of cases in this country rejecting the application of the discovery rule in a case such as the one at bar, briefly discussing the distinct and acknowledged minority which have applied the rule, but primarily relying upon a memorandum opinion of the United States District Court for the Southern District of West Virginia, which, for the reasons discussed below, misapplies a prior opinion of this Court which is completely inapplicable to the statute of limitations issue presented herein. Appellant also cites cases from two intermediate appellate courts in one jurisdiction, Illinois, which apply the continuing tort doctrine in such context, a position subsequently rejected by the United State Court of Appeals for the Seventh Circuit in a case applying Illinois law. In fact, the vast majority of cases in jurisdictions throughout the country indicate a strict application of either the above referenced statute of limitations, if part of such jurisdiction's Uniform Commercial Code, or other applicable statute of limitations, without benefit of any doctrine extending the statutory period in any manner.

B.

**The Overwhelming Majority of Authority Rejects
the Application of The Discovery Rule Because
the Rationale for Its Application Is Contrary to
the Underlying Law Governing Conversion of Negotiable
Instruments under the Uniform Commercial Code and Is Contrary
to the Policy Behind the Adoption of the Uniform Commercial Code**

The super majority of cases reject application of the discovery rule to cases of conversion of negotiable instruments such as are involved in the allegations in this case because application of this equitable doctrine is simply not compatible with the stated policy and rationale behind the adoption of the UCC. While Appellant acknowledges that the proposition it is advocating represents a minority view, it chooses to simply not mention the dearth of decisions that have rejected application of the discovery rule. *See, e.g., Pero's Steak And Spaghetti House v. Lee, supra.; Menichini v. Grant*, 995 F.2d 1224 (3rd Cir. 1993); *Kuwait Airways Corp. v. American Security Bank*, 890 F.2d 456 (D.C. Cir. 1989); *Stefano v. First Union Nat'l Bank of Virginia*, 981 F. Supp. 417 (E.D. Va. 1997); *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144 (Miss. 1998); *Palmer Mfg. and Supply, Inc. v. Bank Ohio Nat'l Bank*, 637 N.E.2d 386 (Ohio Ct. App. 1994); *Insurance Co. of North Am. v. Manufacturers Bank of Southfield*, 338 N.W. 2d 214 (Mich. Ct. App. 1983); *Wang v. Farmers State Bank of Winner*, 447 N.W.2d 516 (S.D. 1989); *Continental Casualty Company v. Huron Valley Nat'l Bank*, 271 N.W.2d 218 (Mich. 1978); *Fuscellaro v. Industrial Nat'l Corp.*, 368 A.2d 1227 (R.I. 1977); *Yabro, Ltd. v. Missoula Federal Credit Union*, 50 P.3d 158 (Mont. 2002); *First Investment Corp. v. Citizens Bank, Inc.*, 757 F. Supp. 687 (W.D. N.C. 1991), *aff'd* without published opinion at 956 F.2d 263 (4th Cir. 1992); *Husker News Co. v. Mahaska State Bank*, 460 N.W.2d 476 (Iowa 1990); *Estate of Hollywood v. First Nat'l Bank of Palmerton*, 859 A.2d 472 (Pa. Super. Ct. 2004); *Metz v. Unizan Bank*, 416 F.Supp.2d 568 (N.D. Ohio 2006);

Bradley v. National City Bank, 55 U.C.C. Rep.2d 613 (Ky. Ct. App. 2004). Further, Courts in every state neighboring the State of West Virginia that have confronted this issue have all followed the sound reasoning of this overwhelming majority. See *Estate of Hollywood v. First Nat'l Bank of Palmerton*, 859 A.2d 472 (Pa. Super. Ct. 2004); *Palmer Mfg. and Supply, Inc. v. Bank Ohio Nat'l Bank*, 637 N.E.2d 386 (Ohio Ct. App. 1994); *Metz v. Unizan Bank*, 416 F.Supp.2d 568 (N.D. Ohio 2006); *Stefano v. First Union Nat'l Bank of Virginia*, 981 F.Supp. 417 (E.D. Va. 1997); *Bradley v. National City Bank*, 55 U.C.C. Rep.2d 613 (Ky. Ct. App. 2004). The only instances where Courts have applied the discovery rule are the few cases cited by Appellant in its brief, which clearly represents a distinct minority of Courts around the nation that have passed judgment on this issue. In fact, the Appellant can not even point to a single state supreme court or other court of highest jurisdiction from any state that has issued a decision supporting the proposition it advocates. This fact alone should highlight the errant reasoning that the Appellant's argument is based upon.

The rationale for rejecting such rule as contrary to the very policy behind the adoption of UCC Article 3 is based upon two primary principles, as articulated by the Supreme Court of Tennessee in the case of *Pero's Steak and Spaghetti House v. Lee*:

The majority view is primarily grounded upon two principles. First is the commercial policies underlying the Uniform Commercial Code that militate strongly against open-ended liability on negotiable instruments. As the Third Circuit explained:

The utility of negotiable instruments lies in their ability to be readily accepted by creditors as payment for indebtedness. Checks must be transferable. Consequently, "In structuring the law of checks, we ... seek to enhance the negotiability of commercial paper so that it may play its role as a money substitute." Robert Hillman, et al., *Common Law and Equity Under the Uniform Commercial Code*, P 14.01[1] (1985). Negotiability requires predictable and rapid collection through payment channels.

Closely related to negotiability are commercial finality and certainty. "The finality of transactions promoted by an ascertainable definite period of liability is essential to the free negotiability of instruments on which commercial welfare so heavily depends." *Fuscellaro v. Industrial Nat'l Corp.*, 117 R.E. 558, 368 A.2d 1227, 1231 (1977); [statutory citation omitted].

...

The Code drafters sought quick and inexpensive resolution of commercial disputes. This overarching goal is particularly important with negotiable instruments where the exigencies of commerce require inexpensive, quick, and reliable transfer of funds. When the only legally significant temporal events are the time of injury and the time of filing, the issue whether the statute of limitations bars an action becomes a relatively simple determination capable of resolution on the basis of judicial pleadings.

Menichini, 995 F.2d at 1230-31; see also *Haddad's of Illinois, Inc.*, 678 N.E.2d at 326 ("the use of negotiable instruments was intended to facilitate the rapid flow of commerce. This policy is best served by finding the accrual of a cause of action for conversion of negotiable instruments occurs when the instrument is negotiated."); *Husker News Co.*, 460 N.W.2d at 479 ("Strict application of the limitation period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies and 'certainty of liability' advanced by the [Code].").

The second reason often cited by courts adopting the majority view is that a claim for conversion of negotiable instruments is unlike other claims to which the discovery rule has been applied. For example, the discovery rule generally has been applied where the actual injury does not manifest itself until years after the tortious conduct occurred and long after the statute of limitations expired. *Qualify Auto Parts Co. Inc.*, 876 S.W.2d at 822. In contrast, the tort of conversion is complete and the injury occurs at the moment the tortfeasor appropriates the plaintiff's property to his or her own use or benefit by exercising dominion over it in violation of the true owner's right. See *Barger v. Webb*, 216 Tenn. 275, 391 W.2d 664, 665 (Tenn. 1965); *General Electric Credit Corp. of Tennessee v. Kelly & Dearing Aviation*, 765 S.W.2d 750, 753 (Tenn. Ct. App. 1988). When the property converted is a negotiable instrument, the damage is done, and the tort is complete when the instrument is negotiated, regardless of the plaintiff's ignorance of the conversion. See, e.g., *Menichini*, 995 F.2d at 1230-31; *Kuwait Airways Corp.*, 890 F.2d at 462; *Haddad's of Illinois, Inc.*, 678 N.E.2d at 326; *Yarbro, Ltd.*, 50 P.3d at 163. Moreover, the law of conversion presumes that property owners know what their assets are and where they are located. See, e.g., *Fuscellaro*, 368 A.2d at 1231. The law therefore presumes that the plaintiff is not ignorant of the conversion. Unlike other

situations in which the discovery rule has been applied, persons alleging conversion, and particularly conversion of a negotiable instrument, generally should be able to easily and quickly detect the loss and take appropriate action. Having considered the authority, we agree with the Iowa Supreme Court's assessment:

As tempting a choice as that may be in an individual case [applying the discovery rule], we think the public would be poorly served by a rule that effectively shifts the responsibility for careful bookkeeping away from those in the best position to monitor accounts and employees. Strict application of the limitations period, while predictably harsh in some cases, best serves the twin goals of swift resolution of controversies and "certainty of liability" advanced by the [Uniform Commercial Code].

Husker News Co., 460 N.W.2d at 479; see also *Menichini*, 995 F.2d at 1230-31; *Kuwait Airways Corp.*, 890 F.2d at 462; *Haddads's of Illinois, Inc.*, 678 N.E.2d at 326; *Habro, Ltd.*, 50 P.3d at 164; *Palmer Mfg. & Supply, Inc.*, 637 N.E.2d at 390-91; *Fuscellaro*, 368 A.2d at 1231.

Pero's Steak And Spaghetti House v. Lee, 90 S.W.3d 614, 622-24 (Tenn. 2002).

The foregoing summary points out the destructive effect of the use of a tolling period in conversion cases under the UCC. The basic fabric of the UCC is that each negotiable instrument is a separate and distinct item which creates statutory rights and responsibilities among the parties who handle it. Similarly, unlike other instances of tortuous conduct where application of the discovery rule is considered, each separate check converted is a much more transparent, separately-discernable injury. Each party involved in each instrument has independent rights and responsibilities which necessarily relate to how they are structured under the UCC. A series of converted instruments involving a single wrongdoer could have widely differing ramifications even among similarly-situated parties depending on how each instrument is negotiated or transferred. Thus, rights and responsibilities must be measured in finite periods to ensure predictability and finality in commercial transactions. Altering an essential underpinning of the UCC would disrupt the primary purpose of the UCC in ordering instruments in interstate commerce.

While this Court has not ruled on the applicability of the discovery rule to a case involving conversion of negotiable instruments, it has refused to apply the discovery rule to the limitation provisions of W. Va. Code § 46-2-725(2), which is a limitations provision contained in a separate Article of the UCC. *See generally* *Basham v. General Shale*, 180 W. Va. 526, 377 S.E.2d 830 (1988). This case follows the majority rule in strictly applying UCC limitation periods consistent with the above discussion. Such a decision would be consistent with courts in other jurisdictions that have declined to apply the discovery rule generally to tortious conduct involving statutorily-created causes of action involving transaction in commerce, such as the one here. *See e.g. Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 770 N.E.2d 177 (2002). Such a decision would also be consistent with another essential underpinning of the UCC generally, namely “to make uniform the law among various jurisdictions.” W. Va. Code § 46-1-102(2)(c) (2006).

Accordingly, given the overwhelming majority of cases which strictly apply applicable statutes of limitation to cases involving conversion of negotiable instruments and the desire for certainty and uniformity in commercial transactions, which forms the basis of such decisions, Appellant’s claims pertaining to deposit transactions more than three years prior to the filing of its complaint on October 6, 2003, should be barred by West Virginia Code § 46-3-118(g), and the Court should reject application of the discovery rule to extend this period.

C.

The District Court in *C & L Construction Company, Inc., v. BB&T Corporation*, 2005 WL 2792401(S.D. W.Va.) Misconstrued This Court's Opinion in *Public Citizen v. First National Bank of Fairmont*, 198 W. Va. 329, 480 S.E. 2d 538(1996) and Appellant's Reliance Thereon Is Likewise Misplaced

The Southern District Court's opinion in *C & L Construction Company, Inc., supra*, is in error, particularly in regard to its reliance upon certain language from *Public Citizen, supra*. In *Public Citizen* the issue of the statute of limitations and its application governing a conversion case, or any other case for that matter, was not before the Court. The issue simply had not been raised. The Court's only discussion of timeliness in *Public Citizen* related to the requirement under former West Virginia Code § 46-4-207 that claims for breach of warranties under that section were required to be "made within a reasonable time after the person claiming learns of the breach." *See Public Citizen, Inc. v. First Nat'l Bank of Fairmont*, 198 W.Va. 329, 338-39, 480 S.E.2d 538, 547-48 (1996). The *Public Citizen* Court didn't even reach a discussion of that issue since it was determined that Plaintiff had no claim pursuant to § 46-4-207 in any event. *See id.* at 339, 480 S.E.2d at 548. The Court in *Public Citizen*, in fact, did not rule that the claim was timely filed as the District Court's opinion asserts. *See id.* Moreover, the element of "the learning of the deposit" was a particular statutory provision of § 46-4-207 and a required element of the determination to be made under that section regarding whether a claim had been "made within a reasonable time". *See id.* Accordingly, even if such discussion had been reached, such discussion represents dicta at best and is clearly distinguishable from any discussion of the application of the common law discovery rule for the tolling of a specific statutory limitation period, and provides neither authority nor rationale for the District Court's opinion or Appellant's position.

Public Citizen was decided on the basis of statutory provisions which have been substantially amended by a subsequent adoption to Article 3 of the Uniform Commercial Code in West Virginia, and it construed an earlier version of the UCC no longer applicable. Importantly, the standard which *Public Citizen* construed was not a limitations provision at all, but a contributory negligence standard that has since been replaced in the Code as a result of this amendment by a comparative fault standard. *See id.* at 337-38, 480 S.E.2d at 546-47 (discussing applicability of preclusion defense based on commercial reasonableness by banks in certain check transactions involving forged signatures); *see also* W. Va. Code § 46-3-406(b) (1993) (outlining new comparative fault doctrine to analyze negligence contributing to forged signature). Thus, the essential elements of the actual claim and defense construed by the *Public Citizen* Court have even been statutorily altered. This is further evidence that the reasoning of the District Court in *C&L Construction Company, Inc.* was flawed.

D.

**Appellant Should Be Prevented from
Arguing the Applicability of the Discovery Rule Because
It Waived Application of Such Theory by
Expressly Stating Below That It Was Not Relying
Upon the Discovery Rule to Expand the Applicable Limitations Period**

Even if the Court were to find the discovery rule to be applicable in the instant case, Appellant should not be entitled to rely upon that doctrine in this case because they have waived application of the same at the trial court level. It is most interesting that Appellant's request for relief to the Court in its brief is first and foremost that it should reformulate the Certified Question and apply the discovery rule to this case and generally in West Virginia. This is the first instance that the Appellant has argued for the adoption of the discovery rule to this case or generally to the law governing the statute of limitations for conversion. In fact, in its pleadings below, Appellant

stated that it was expressly not relying upon the discovery rule and only the continuing tort theory in advocating for the expansion of the applicable statute of limitations in this case. See Plaintiff's Reply Brief, served January 10, 2005, footnote 2, page 4. It is well settled that a party is not entitled to raise arguments on appeal that have not been advanced or expressly waived at the trial court level. See *Shrewsbury v. Humphrey*, 183 W. Va. 291, 395 S.E.2d 535 n.3 (1990); see also *Bell v. West*, 168 W. Va. 391, 397, 284 S.E.2d 885, 881 (1981). Accordingly, because the Appellant expressly waived application of the discovery rule to the instant case at the trial court level, they should not be entitled to rely on it even if the Court decides to adopt the discovery rule in this jurisdiction.

E.

**West Virginia Cases Applying
the Continuing Tort Doctrine Are Clearly
Distinguishable From the Case At Bar and Do Not
Involve Transactions Governed by the Uniform Commercial Code**

Appellant's attempt to expand the purview of the statute of limitations in this case beyond its stated three-year period on a continuing tort theory is flawed in several respects because the cases cited by the Appellant involve factual backgrounds and substantive areas of the law not even remotely similar to the one at bar. Generally, the cases cited by Appellant from this jurisdiction involve repeated, recurring cumulative injury to one item of property, often a tract of real estate, or a person, and not distinct, separate events which cause distinct damages identifiable separately to each such event. For instance, the case of *Graham v. Beverage* relied upon by Appellant to assert that the continuing tort theory should be adopted in the instant case, involved a suit over a negligently constructed storm water management system in a housing development, which altered the flow of surface water onto the Plaintiff's lot. See *Graham v.*

Beverage, 211 W. Va. 466, 470, 566 S.E.2d 603, 607 (2002). The damage caused by this flow of water did not manifest itself for some time until a particularly severe storm happened, which caused flooding and severe water damage to the Plaintiffs' home. *See id.* Cases such as this support the adoption of the continuing tort theory because damage from such conduct occurs over time and damages are not always quantifiable until all of the tortious conduct has ceased. Such circumstances are completely distinguishable from the circumstances in this case involving separate checks, being separate and distinct items of property for which the individual act of conversion was complete when the individual check was negotiated by Defendant Doris Hendrickson. This rationale, that each check represents a separate and distinct act of conversion under the UCC and separate and distinct actionable appropriation of personal property, that have corresponding readily-measurable damages along the way, is a primary reason for most courts to find that equitable tolling doctrines should not apply to these cases. Additionally, Appellant ignores the fact that its action is brought pursuant to the Uniform Commercial Code, as opposed to the common law of this state, and deference to the uniform application of such statutes among the several states should be afforded as discussed in the authorities cited and discussed herein. *See W. Va. Code § 46-1-102(2)* (2006).

In particular, Appellant's reliance upon the case of *Taylor v. Culloden Public Service Dist.*, 214 W. Va. 639, 591 S.E.2d 197 (2003), in furtherance of its argument that the continuing tort theory expands the statutory period of limitations to permit Appellant to seek recovery for conversion of checks which allegedly occurred more than three years prior to the filing of the complaint herein, is completely misplaced. A careful reading of *Taylor, supra*, reveals that it is a reiteration of longstanding authority in this jurisdiction that causes of action for distinct tortious events resulting in separate identifiable damages occurring within the

statutory period of limitations are not barred simply because other similar events, including the first of such series of events, occurred outside the statutory period of limitations and, accordingly, for which claims are barred. *See id.* at 647, 591 S.E.2d at 205; *see also Fullmer v. Swift Energy Co., Inc.*, 185 W. Va. 45, 404 S.E.2d 534 (1991); *De Rocchis v. Matlock, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Indeed, footnote 21 of *Taylor, supra*, is particularly instructive in such regard in stating as follows:

21. While the issue of recoverable damages is not properly before us, we note that the damages that the Balls can recover in connection with a temporary nuisance are limited to the two-year period in time prior to the filing of their cause of action. *See generally State ex rel. Cutlip v. Sawyers*, 147 W. Va. 687, 691, 130 S.E.2d 345, 348 (1963). We further observe that successive actions can be filed to recover additional damages for temporary nuisances that occur subsequent to the filing of the initial nuisance suit.

Id., 591 S.E.2d 197, 205. The two-year period referenced is that of the general tort statute of limitations for property damages, W. Va. Code § 55-2-12, discussed in such case. Such authority is entirely consistent with Appellee's position on the issue of application of the statute of limitations in this case and the nature of conversion of negotiable instruments and damages therefrom as being distinct and complete upon the negotiation of each instrument as discussed in the authorities cited and discussed below. Appellee does not seek to bar Appellant's cause of action in its entirety because some transactions occurred prior to three years before the filing of the complaint as was the position espoused by the defendant in at least some of the authority cited by Appellant. In this action, Appellee seeks to bar only those transactions occurring prior to such three-year period ending when Appellant filed its complaint. Such a position is supported by the general tort law of this State as noted above.

F.

**The Only Authority Cited by Appellants
for Adoption of The Continuing Tort Doctrine Is
From A Jurisdiction which has not Fully Accepted
The Doctrine and Does Not Yet Uniformly Follow the Doctrine**

Appellant's authority to support its argument that the continuing tort doctrine should be applied to the context of check transactions governed by Article 3 of the Uniform Commercial Code is from two intermediate appellate courts in the State of Illinois. *See generally Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union*, 678 N.E.2d 322 (Ill. App. 1997); *Field v. First Nat. Bank of Harrisburg*, 619 N.E.2d 1296 (Ill. App. 1993). It is important to note that the Illinois Supreme Court has declined to adopt "a continuing violation rule of general applicability in all tort cases, or ...cases involving a statutory cause of action." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 264, 770 N.E.2d 177, 191 (2002). There is no other state supreme court that has adopted this doctrine in the present context that Appellant requests. In fact, courts within the State of Illinois have not even uniformly adopted the continuing tort theory.

In the case of *Rodrigue v. Olin Employees Credit Union*, the United States Court of Appeals for the Seventh Circuit, which is the federal judicial circuit that includes the State of Illinois, was faced with a situation remarkably analogous to the present situation. In that case, an employee of a physician from Illinois stole some 269 insurance reimbursement checks payable to her employer and fraudulently endorsed the checks over to herself prior to presenting them to her credit union for deposit. *See Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434 (7th Cir. 2005). In that case, the Seventh Circuit rejected the *Haddad's of Illinois, Inc.* and *Field* cases and predicted that the Illinois Supreme Court would not adopt the continuing violation rule or

continuing tort theory. *See id.* at 447. In making this prediction, the Court reasoned that the cases where the Supreme Court of Illinois had previously deemed application of the continuing tort theory appropriate in the past all involved situations arising “not from individually identifiable wrongs but rather from a series of acts considered collectively,” such as situations involving repeated intentional infliction of emotion distress and continuing unbroken treatment situations involving medical malpractice. *See id.* at 442-43. By contrast, the Seventh Circuit observed that the Supreme Court of Illinois expressly declined to adopt the continuing violation rule in the *Belleville Toyota, supra*, case, which involved a continuing series of violations of the Illinois Motor Vehicle Franchise Act, each violation of which was separately actionable under the Act. *See id.* (further citations omitted). Given that each violation of this Act was a separately identifiable wrong and separately identifiable cause of action under this Act, the Supreme Court of Illinois declined to adopt the continuing violation rule to expand the statute of limitations period provided by this Act. *See id.*

The *Rodrigue* Court reasoned that, like the violations of the Illinois Act in *Belleville Toyota*, conversion of a check is a statutorily-provided cause of action under the UCC and each separate conversion constitutes an independent violation of the UCC and an independent cause of action by reasoning as follows:

Whether [Plaintiff's Employee] managed to negotiate hundreds of checks over an 85-month period is irrelevant insofar as [Plaintiff's] right or ability to sue for conversion. Whether [Plaintiff's Employee] had negotiated one check or 1000, [Plaintiff] had a valid cause of action for conversion; nothing about the repeated or ongoing nature of [Plaintiff's Employee's] conduct affected the nature or validity of [Plaintiff's] suit, beyond increasing [Plaintiff's] damages. Moreover, in contrast to a claim that arises from a cumulation of wrongful acts, a claim for conversion does not pose undue difficulty for the victim in identifying the nature, origin, and extent of her injury.

Rodrigue, 406 F.3d at 443.

The same reasoning holds true in the instant case. Each conversion of each check by Defendant Hendrickson constituted an independent and separate cause of action for conversion under the statute. Similar to the authority from the State of Illinois cited in *Rodrigue*, the West Virginia authority relied upon by the Appellant involves claims that arise as a result of a cumulation of conduct not able to be measured individually in the abstract, not a series of separately-identifiable transgressions. Each conversion of each check by Hendrickson constituted a separately identifiable cause of action under the UCC and should be regarded as such for determination of the appropriate statute of limitations period.

G.

**The Rationale for Adoption Of The Continuing
Tort Theory Is also Contrary to the Underlying Law
Governing Conversion of Negotiable Instruments Under the
UCC and Contrary to the Policy Behind the Adoption of the UCC**

The rationale used by the Court in the *Haddad's of Illinois, Inc.* case that Appellant cites in asking this Court to adopt the continuing tort theory fails when placed under scrutiny. The passage cited by the Appellant provides, in part, as follows: “[w]hen a series of checks is cashed as part of an ongoing scheme or plan, the plan constitutes a single transaction....” *Haddad's of Illinois, Inc.*, 678 N.E.2d at 324. This line of reasoning, that a series of checks converted by a singular wrongdoer constitutes a single transaction, runs completely contrary to the law governing conversion of negotiable instruments. W. Va. Code § 46-3-420 provides that “an instrument is also converted if it is taken by the transfer...from a person not entitled to enforce the instrument....” W. Va. Code § 46-3-420 (2005) (emphasis

added). The plain text of this statute confirms why the overwhelming majority of jurisdictions have held that “[e]ach instance of conversion is a discrete and actionable wrong.” *Rodrigue*, 406 F.3d at 447. This notion is further reinforced by examining the plain text of the applicable limitations statute, W. Va. Code § 46-3-118(g): “...an action...for conversion of **an instrument**...must be commenced within three years after the cause of action accrues.” W. Va. Code § 46-3-118(g) (2006) (emphasis added). The plain language of each of these statutes further reinforces that conversion of a series of individual checks is just that: a series of individual checks and individual transactions rather than “one transaction” as the minority contrary authority has held. Permitting application of the continuing tort theory to toll the statute of limitations by reasoning that a series of converted checks by the same wrongdoer “constitutes a single transaction” runs contrary to the plain text of the conversion statute itself, along with the holdings of an overwhelming majority of other jurisdictions.

Applying the continuing tort doctrine to toll the statute of limitations for negotiable instruments also runs contrary to the very policy behind the adoption of Article 3 of the UCC, and the basis for the rationale discussed above in Section VI.B. hereof, citing *Pero's Steak And Spaghetti House, supra*. These well-reasoned and well-placed policies behind the adoption of the UCC are completely ignored by application of either the continuing tort theory or discovery rule. It is for this reason that an overwhelming majority of jurisdictions have refused to adopt either the continuing tort theory or the discovery rule to allow for the tolling of the statute of limitations in a negotiable instrument conversion action. It is yet another reason why the Court should refuse to allow the adoption of the continuing tort doctrine to the instant case.

Moreover, while such cases directly hold the discovery rule inapplicable to cases such as the one at bar, the facts of several of these cases involved longstanding schemes, claims for which were held to be barred in part by the applicable statute, whereas application of the continuing tort doctrine would have permitted a cause of action to be pursued for all transactions involved in such cases regardless of application of the discovery rule. *See Pero's Steak And Spaghetti House v. Lee, supra.; Menichini v. Grant, supra; Kuwait Airways Corp. v. American Security Bank, supra; Stefano v. First Union Nat'l Bank of Virginia, supra.* Additionally, in *Smith v. Franklin Custodian Funds, Inc., supra*, although only one transaction was involved, the Court expressly refused to apply the continuing tort doctrine to the continuing concealment of such transgression and thereby extend the statute. *Id.* at 148-49. The fact that the continuing tort theory was apparently not even discussed in the above-cited cases where it could have been argued to expand, at least in part, the plaintiff's claims is itself instructive.

H.

Major Scholarly Treatises and Additional Policy Concerns Also Support Appellee's Position

Appellant's advocacy of adoption of either the discovery rule or the continuing tort theory also run contrary to other major and well-respected treatises on payment systems. "The statute of limitations on an action for conversion of an instrument expires three years after the cause of action accrues. The cause of action accrues when the act of conversion occurred. In the case of a payor, the cause of action accrues on the date of payment...The statute is not tolled because the owner is ignorant of the conversion." LARY LAWRENCE, AN INTRODUCTION TO PAYMENT SYSTEMS p. 242 (1997). For a similar discussion and survey of the multitude of jurisdictions following this majority view, *see* HENRY J. BAILEY & RICHARD B. HAGEDORN, BRADY ON BANK CHECKS, THE LAW OF BANK CHECKS ¶ 30.12[2] (Rev. Ed. 2006).

One additional issue not addressed in the Appellant's brief is the restructuring or reordering of the UCC in West Virginia that would result from such a decision if an equitable tolling doctrine is inserted by the Court. As noted previously, each instrument, once negotiated, flows separately and distinctly through the collection and payment process. Rights and obligations on the instrument are attached, or arise, on an instrument based on its method of transfer and collection. These rights are inter-dependent and in some cases, based on a cause and effect structure. Transfer of instruments creates new rights and, in some cases, transfers new responsibilities. Altering this essential interdependence of a fairly complex and structured code which works reasonably-well in millions of check transactions each day would affect the whole structure of the UCC in West Virginia and raise uncertainty as to the liability on instruments which flow through West Virginia, thereby creating an anomaly for our State and other jurisdictions through which our instruments pass. The Appellant offers no insight into this havoc which its requested relief would raise. Ordering of rights, predictability of liability and speed of transfer are essential underpinnings of the UCC in everyday commerce. These underpinnings are substantially vitiated by the adoption of either equitable tolling doctrine advocated by the Appellant and, accordingly, should be rejected by the Court.

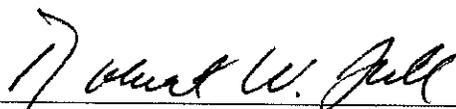
VI.

RELIEF REQUESTED

Because Appellant's position 1) is contrary to the overwhelming authority rejecting application of the doctrines it seeks to invoke, 2) is contrary to the common law of the State of West Virginia regarding the nature of the cases and injuries to property to which the continuing tort theory has been applied, 3) is contrary to the common law of the State of West

Virginia regarding the applicability of statutes of limitation to cases involving distinct, tortious events resulting in damages separately identifiable to each such event, 4) is contrary to the very nature and definition of the act of conversion of a negotiable instrument, and 5) is contrary to the policy objectives of finality and uniformity of the UCC regarding commercial transactions in general and negotiable instruments in particular which supports the overwhelming authorities which hold that statutes of limitation applicable to actions for conversion of negotiable instruments are strictly applied, Appellant's argument is not supportable and fails. Accordingly, Appellee respectfully requests that this Court answer the questions certified in the same manner as the Circuit Court of Wood County.

Respectfully submitted this 4th day of May 2006.


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33046

COPIER WORD PROCESSING SUPPLY, INC.,
Plaintiff below/Appellant,

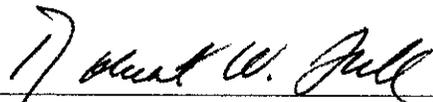
vs.

WESBANCO BANK, INC., et. al.
Defendant below/Appellee.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee's Brief in Response to Brief of Appellant Upon Certified Question From the Circuit Court of Wood County Granted March 2, 2006, was served upon all counsel of record via First Class Mail, Postage Prepaid, this 4th Day of May, 2006, addressed as follows:

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