

No. 33046

IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

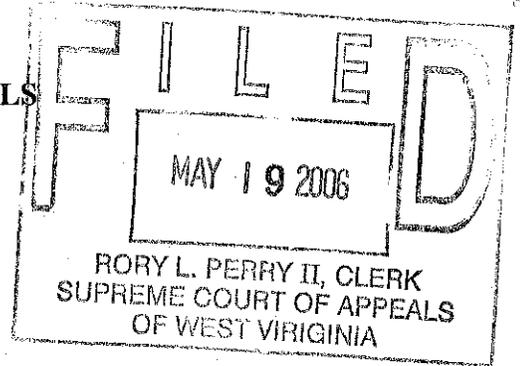
COPIER WORD PROCESSING SUPPLY, INC.,

Appellant/Plaintiff,

vs.

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

Appellee/Defendant.



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

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

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**TABLE OF CONTENTS**

I. TABLE OF AUTHORITIES ..... 3

II. DISCUSSION OF LAW ..... 7

    a. Introduction ..... 7

    b. The discovery rule is applicable pursuant to West Virginia precedent, regardless of decisions of other jurisdictions, and would operate to toll the statute of limitations ..... 7

    c. *C&L Construction Company, Inc. v. BB&T Corporation* was correctly decided by the District Court based upon West Virginia law. .... 13

    d. The question of whether Appellant effectively waived application of the Discovery Rule is not properly before this Court on this Certified Question. .... 14

    e. 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 ..... 15

    f. Conclusion ..... 20

III. RELIEF PRAYED FOR ..... 20

## I. TABLE OF AUTHORITIES

### Cases

#### West Virginia Cases

<i>Gaither v. City Hospital, Inc.</i> 199 W.Va. 706, 487 S.E.2d 901 (1997) .....	7, 8, 11
<i>Goodwin v. Bayer Corp.</i> 218 W.Va. 215, 624 S.E.2d 562 (2005) .....	7, 8
<i>Bennett v. Asco Services, Inc.</i> 218 W.Va. 41, 621 S.E.2d 710 (2005) .....	7, 8
<i>McCoy v. Miller</i> 213 W.Va. 161, 578 S.E.2d 355 (2003) .....	7, 8
<i>Harris v. Jones</i> 209 W.Va. 557, 550 S.E.2d 93, 98 (2001) .....	7, 11
<i>Graham v. Beverage</i> 211 W.Va. 466, 566 S.E.2d 603 (2002) .....	7, 16, 17
<i>Taylor v. Culloden Public Service District, et. al.</i> 214 W.Va. 639, 591 S.E.2d 197 (2003) .....	7, 16, 18
<i>Arnold v. Kelly,</i> 4 W.Va. 642 (1871) .....	7, 15
<i>C&amp;L Construction Company, Inc. v. BB&amp;T Corporation</i> 2005 WL 2792401 (S.D.W.Va.) .....	8, 13
<i>Petrelli v. West Virginia-Pittsburgh Coal Co.</i> 86 W.Va. 604, 104 S.E. 103 (1920) .....	11
<i>Basham v. General Shale</i> 180 W.Va. 526, 377 S.E.2d 830 (1988) .....	12
<i>Public Citizen v. First National Bank in Fairmont</i> 198 W.Va. 329, 480 S.E.2d 538 (1996) .....	13

<i>Kincaid v. Mangum</i>	
189 W.Va. 404, 432 S.E.2d 74 (1993) .....	14
<i>Weatherford v. Arter</i>	
135 W.Va. 391, 63 S.E.2d 572 (1951) .....	14
<i>Harris v. Allstate Ins. Co.</i>	
208 W.Va. 359, 540 S.E.2d 576 (2000) .....	14
<i>State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.</i>	
203 W.Va. 690, 699, 510 S.E.2d 764, 773 (1998) .....	14
<i>Trent v. Cook</i>	
198 W.Va. 601, 482 S.E.2d 218 (1996) .....	14
<i>Voelker v. Frederick Bus. Properties Co.</i>	
195 W.Va. 246, 465 S.E.2d 246 (1995) .....	14
<i>State v. Stout</i>	
95 S.E.2d 639, 142 W.Va. 182 (1956) .....	14
<i>State ex rel. Medical Assurance of West Virginia, Inc. v. Recht</i>	
213 W.Va. 457, 583 S.E.2d 80 (2003) .....	16, 17
<i>Walker v. Doe</i>	
210 W.Va. 490, 558 S.E.2d 290 (2001) .....	17
<b>Other Cases</b>	
<i>Menichini v. Grant</i>	
995 F.2d 1224 (3 <sup>rd</sup> Cir. 1993) .....	9
<i>Pocono International Raceway, Inc. v. Pocono Products, Inc.</i>	
503 Pa. 80, 468 A.2d 468 (1983) .....	9
<i>Smith v. Franklin Custodian Funds, Inc.</i>	
726 So.2d 144 (Miss. 1998) .....	9, 19
<i>Palmer Manufacturing and Supply, Inc. v. BancOhio National Bank</i>	
637 N.E.2d 386 (Ohio Ct. App. 1994) .....	9
<i>Geraldo v. First Dominion Mutual Life Ins. Co.</i>	
2002 WL 31002770 (Ohio Ct. App. 2002) .....	9

<i>REIT One v. Jacobs</i> 46 Ohio St.3d 176 (1989) .....	10
<i>Pero's Steak and Spaghetti House, et. al. v. Lee et. al.</i> 90 S.W.3d 614 (Tenn. 2002) .....	10
<i>UNR-Rohn, Inc. v. Summit Bank of Clinton County</i> 687 N.E.2d 235, 36 UCC Rep.Serv.2d 792 (Ind.App., 1997) .....	12
<i>DeHart v. First Fidelity Bank, N.A.S.,</i> 67 Bankr. 740 (D.N.J. 1986) .....	12
<i>Stjernholm v. Life Ins. Co. of N.Am.,</i> 782 P.2d 810 (Colo. App. 1989) .....	12
<i>Branford State Bank v. Hackney Tractor Co., Inc.,</i> 455 So.2d 541 (Fla. Dist. Ct. App. 1984) .....	12
<i>Rodrigue v. Olin Employees Credit Union</i> 406 F.3d 434, 57 UCC Rep.Serv.2d 392 (7 <sup>th</sup> Cir. 2005) .....	17, 18
<i>Haddad's of Illinois, Inc. v. Credit Union 1 Credit Union</i> 678 N.E.2d 322 (Ill. App. 1997) .....	18
<i>Field v. First Nat. Bank of Harrisburg</i> 619 N.E.2d 1296 (Ill. App. 1993) .....	18
<i>Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.</i> 199 Ill.2d 325, 770 N.E.2d 177 (2002) .....	18
<i>Yarbro Ltd. v. Missoula Fed. Credit Union</i> 50 P.3d 158 (Mont. 2002) .....	19
<b>West Virginia Statutes</b>	
W.VA. CODE § 46-3-118(g) .....	7, 14
W.VA. CODE § 46-3-420 .....	7, 15
W.VA. CODE § 46-2-725(2) .....	12
W.VA. CODE § 58-5-2 .....	14

**Other Authority**

James R. Leach, *Cart v. Marcum: The Discovery Rule as an Exception to the Statute of Limitations in West Virginia*  
96 W.Va. L. Rev. 1197 (1994) ..... 7

*Black's Law Dictionary*  
1100 (7th ed.1999) ..... 16

## II. DISCUSSION OF LAW

### a. Introduction

In the entire twenty-six (26) pages of Appellee's Brief, the Appellee was unable to cite to a single West Virginia case that carved out an exception to the long-standing precedent that the discovery rule and the continuing tort theory apply to *all* torts in West Virginia. Instead, the Appellee cited authority from other jurisdictions and advanced policy arguments in an attempt to arbitrarily create an exception, where one does not exist. In West Virginia, pursuant to *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), *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), *Harris v. Jones*, 209 W.Va. 557, 550 S.E.2d 93, 98 (2001), *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603 (2002), and *Taylor v. Culloden Public Service District, et. al.*, 214 W.Va. 639, 591 S.E.2d 197 (2003), the three year statute of limitations of West Virginia Code § 46-3-118(g) is subject to extension by the discovery rule and/or the continuing tort theory. *See also* James R. Leach, *Cart v. Marcum: The Discovery Rule as an Exception to the Statute of Limitations in West Virginia*, 96 W.Va. L. Rev. 1197 (1994).<sup>1</sup> Authority from other jurisdictions does not alter the long standing precedent of the Supreme Court of Appeals of West Virginia.

### b. The Discovery Rule is applicable pursuant to West Virginia precedent, regardless of decisions of other jurisdictions, and would operate to toll the statute of limitations.

Conversion is a tort. W.Va. Code §46-3-420; *Arnold v. Kelly*, Syl. Pt. 1, 4 W.Va. 642

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<sup>1</sup>This, of course, is not an exhaustive list of cases citing the discovery rule or the continuing tort theory in West Virginia, as the cases are too numerous to address in one Brief. The cited law review article has an in depth look at the discovery rule as it developed and is applied in West Virginia.

(1871). Appellee has not, indeed cannot, argue that conversion and negligence alleged in the Complaint are not torts. Under West Virginia law, the discovery rule applies to tort actions unless there is a clear statutory prohibition to its application. 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). As there is no statutory prohibition against application of the discovery rule in this matter, the rule operates under West Virginia precedent to toll the statute of limitations. The Appellees have cited no West Virginia authority that would contradict or change this basic rule of tort law. In fact, this issue has been decided pursuant to West Virginia law in *C & L Construction Company, Inc. v. BB&T Corporation*, 205 WL 2792401 (S.D. W.Va.), in which the District Court for the Southern District of West Virginia determined that the discovery rule would apply.

The Appellee asserts that a “super majority” of jurisdictions have rejected the discovery rule in this context. Appellee’s “super majority” is, in reality, only a small minority of courts in this country that have even addressed this issue. Of the cases cited by Appellee in support of that assertion, out of the hundreds of courts in this country, only seven (7) of the cited cases were decided by the Supreme Court of that state. Five (5) more were decided by federal courts predicting how the supreme court of that particular state may rule<sup>2</sup> and the remainder of the cases cited are from lower courts, decided without guidance from the supreme court of that state. Additionally, many of the cases are based upon forms of the discovery rule that are distinct and more narrow than the rule in West Virginia or were statutorily created and defined within the

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<sup>2</sup>And out of those five (5) cases, only one was an Appellate Court, the other four (4) were district courts.

statute.<sup>3</sup>

For instance, in *Smith v. Franklin Custodian Funds, Inc.* 726 So.2d 144 (Miss. 1998), the plaintiffs brought suit in 1993 against Franklin Custodial Funds for a conversion of plaintiffs' securities that occurred once in 1987. 726 So.2d at 146. The discovery rule in Mississippi had been codified at Miss Code Ann. § 15-1-49(2) (1995) and stated:

In an action for which no other period of limitation is prescribed and which involve latent injury or disease, the cause of action does not accrue until the plaintiff has discovered, or by reasonable diligence should have discovered the injury.

*Id.* at 148. Based upon this statutory language, the Court held that the discovery rule was not applicable to toll the statute of limitations. However, clearly, this statutory language is more narrow than the discovery rule in West Virginia.<sup>4</sup>

Appellee also relies on *Palmer Manufacturing and Supply, Inc. v Bancohio National Bank*, 637 N.E.2d 386 (Ohio Ct. App. 1994) for its "super majority." However, the Court in *Geraldo v. First Dominion Mutual Life Ins. Co.*, 2002 WL 31002770 (Ohio App. Ct. 2002) refused to follow the reasoning of *Palmer*, stating that *Palmer* relied "entirely on authority outside the state of Ohio," and failed to follow Ohio Supreme Court precedent. *Id.* at ¶31. In *Geraldo*, plaintiff brought suit against several financial institutions for conversion of checks with

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<sup>3</sup>It is unclear whether many of the jurisdictions apply the discovery rule to all torts, as does West Virginia. For instance, in *Menichini v. Grant*, 995 F.2d 1224 (3<sup>rd</sup> Cir. 1993) the trial court applied the discovery rule to a claim of conversion of negotiable instruments based upon *Pocono International Raceway, Inc. v. Pocono Produce, Inc.*, 503 Pa. 80, 468 A.2d 468 (1983). The Appellate Court reversed, holding that the facts in *Pocono* were much different from the facts in *Menichini*. And the Pennsylvania Supreme Court in *Pocono*, discussed the discovery rule in Pennsylvania, but applied it on a case-by-case basis, as opposed to all torts, such as the position in West Virginia. *Pocono International Raceway*, 503 Pa. at 85. Thus, the rule in West Virginia has a broader application than in Pennsylvania, and Appellee's reliance on *Menichini* is misplaced.

<sup>4</sup>The Court also discussed the continuing tort doctrine, which will be discussed *infra*.

forged and/or missing indorsements.<sup>5</sup> *Id.* at ¶3. At issue was whether the claim was barred by the statute of limitations. *Id.* ¶23. The *Geraldo* Court held that:

Specifically, with respect to conversion, the Ohio Supreme Court stated, “\*\*\*by the express terms of R.C. 2305.09(D), the four-year limitations period does not commence to run on claims presented in fraud or conversion until the complainants have discovered, or should have discovered, the claimed matters. *REIT One v. Jacobs*, (1989), 46 Ohio St.3d 176, paragraph 2b of the syllabus.

Despite this syllabus law in *REIT One*, *Palmer Mfg. And Supply, Inc. v. BancOhio Nat'l Bank* (1994), 93 Ohio App.3d 17, held that the discovery rule, set forth in R.C. 2305.09(D), for purposes of determining the commencement of the running of a statute of limitations, does not apply in conversion cases of negotiable instruments. The court in *Palmer* relied entirely on authority outside the state of Ohio and did not mention *REIT One* in its analysis. Insofar as syllabus law of the Ohio Supreme Court is controlling over the law of an appellate court, we decline to follow the reasoning in *Palmer*.

*Id.* at ¶31. Thus, based upon controlling Ohio Supreme Court precedent, the *Geraldo* Court held that the discovery rule tolled the statute of limitations such that it did not begin to run until the conversion was discovered. *Id.* at ¶32.

Given the decision of the Appellate Court in *Geraldo* and the *REIT One* decision, the Ohio Supreme Court would apply the discovery rule in a cause of action for conversion of negotiable instruments. With this decision, Appellee's “super majority” continues to shrink, further eroding its argument that this Court should ignore its own precedent to follow some alleged “super majority” of jurisdictions that have rejected the application of the discovery rule.

And, in *Pero's Steak and Spaghetti House, et. al. v. Lee et. al.* 90 S.W.3d 614, 620 (Tenn. 2002), quoted extensively by the Appellee, the Court relied on a balancing test to determine

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<sup>5</sup>The events in *Geraldo* occurred prior to the amendment of Ohio's Uniform Commercial Code, specifically the amendment of the three year statute of limitations. The Court therefore applied the general statute of limitations for the taking of personal property, the same statute of limitations at issue in *Palmer*. *Id.* at ¶31.

wether the discovery rule was applicable to toll the statute of limitations on a claim of conversion of negotiable instruments:

When determining whether to apply the discovery rule, this Court considers the specific statutory language at issue and balances the policies furthered by application of the discovery rule against the legitimate policies upon which statutes of limitations are based.

90 S.W.3d at 620. There is no such balancing test in applying the discovery rule in West Virginia. Indeed, the application of the discovery rule is quite clear and broader than either of the discovery rules above:

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) (emphasis added). In *Harris v. Jones*, 209 W.Va. 557, 550 S.E.2d 93, 98 (2001), the West Virginia Supreme Court held 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.” (emphasis added). Thus, absent a statutory prohibition, which is not present in this matter, the discovery rule applies to all torts, without the necessity of the balancing test applied in *Pero*’s.

The discovery rule was recognized in West Virginia in 1920, in *Petrelli v. West Virginia-Pittsburgh Coal Co.*, 86 W.Va. 607, 104 S.E. 103 (1920). Thus, when the legislature amended Article 3 of the Uniform Commercial Code in West Virginia, it was aware of the application of the discovery rule. Had the legislature not wanted the discovery rule to apply to conversion of negotiable instruments, it could have inserted a specific prohibition against its application. It did

not. Therefore, the discovery rule would apply in this context, regardless all of the Appellee's arguments to the contrary.

As noted in Appellant's Brief Upon Certified Question, other jurisdictions have applied the discovery rule in cases involving conversion of negotiable instruments, where the application of the discovery rule had been expanded to all tort cases. See e.g. *UNR-Rohn, Inc. v. Summit Bank of Clinton County*, 687 N.E.2d 235, 36 UCC Rep.Serv.2d 792 (Ind.App., 1997). The discovery rule has also been applied in this context in New Jersey, *DeHart v. First Fidelity Bank, N.A.S.*, 67 Bankr. 740 (D.N.J. 1986); Colorado, *Stjernholm v. Life Ins. Co. of N.Am.*, 782 P.2d 810 (Colo. App. 1989); and Florida, *Branford State Bank v. Hackney Tractor Co., Inc.*, 455 So.2d 541 (Fla. Dist. Ct. App. 1984). Appellee acknowledges that some jurisdictions have applied the discovery rule in this context. Yet, in spite of all the dire predictions of chaos should this Court apply the discovery rule and/or the continuing tort theory to cases involving conversion of negotiable instruments, Appellee failed to mention *any* consequences in those jurisdictions. In addition, to forestall the "havoc" the Appellee predicts if the Court applied the discovery rule to conversion cases, the legislature need only add one sentence to the statute, prohibiting such application.

Appellee's citation to *Basham v. General Shale*, 180 W.Va. 526, 377 S.E.2d 830 (1988) in support of its position that the discovery rule does not apply to the statute of limitations in the instant matter is unavailing. The *Basham* court dealt with a contract claim under W.Va. Code §46-2-725(2), Statute of limitations in contracts for sale, not tort, and, therefore, the case is not relevant to this matter. Thus, pursuant to precedent of the West Virginia Supreme Court, the discovery rule would apply in the context of conversion of negotiable instruments, such that the

statute of limitations begins to run when the plaintiffs discovered or should have discovered the conversion.

- c. ***C&L Construction Company, Inc. v. BB&T Corporation* was correctly decided by the District Court based upon West Virginia law.**

Contrary to Appellee's argument that the District Court's opinion in *C&L Construction Company, Inc. v. BB&T Corporation*, 2005 WL 2792401 (S.D.W.Va.) was in error, in fact, the District Court laid out a well reasoned opinion, supported by extensive factual issues as well as citations to West Virginia case law including, but not limited to, *Public Citizen v. First National Bank in Fairmont*, 198 W.Va. 329, 480 S.E.2d 538 (1996). The Court expressly recognized that other "jurisdictions have refused to apply the 'discovery rule' to U.C.C. conversion cases; nevertheless I find that the West Virginia Supreme Court would adopt the minority approach." *C&L*, at p. 4.

The Court first reviewed the discovery rule applicable in West Virginia, determined that a clear statutory prohibition of the application of the "discovery rule" to U.C.C. conversion cases does not exist and held that the discovery rule would apply to conversion cases. It was only *after* the Court determined that the discovery rule would apply to conversion cases that it supported its decision with *Public Citizen. Id.* Thus, contrary to Appellee's argument, the Court in *C&L* did not base its decision on *Public Citizen* but on the application of the discovery rule as it applies in West Virginia. The decision was not in error, but a soundly supported by the precedents of the West Virginia Supreme Court.<sup>6</sup>

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<sup>6</sup>Appellee also argues that, because *Public Citizen* was decided prior to the adoption of the current Article 3 of the Uniform Commercial Code in West Virginia, and, thus, was construed under an earlier version that is no longer applicable, it is not controlling. However, it should be noted that many of cases relied upon by the Appellee to support its position were also decided prior to the adoption of the current Uniform Commercial Code.

**d. The question of whether Appellant effectively waived application of the Discovery Rule is not properly before this Court on this Certified Question.**

The Appellee's argument that Appellant should be prevented from arguing the discovery rule because it waived the application of the discovery rule is not properly before this Court upon this Certified Question, but an issue to be brought before the trial court if this Court finds that the discovery rule applies to conversion of negotiable instruments. Although this Court has the power to reformulate a Certified Question to fully and fairly address the law, Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 432 S.E.2d 74 (1993), it is also well settled that the Court will address only questions that have been decided by the trial court. *Weatherford v. Arter*, 135 W.Va. 391, 63 S.E.2d 572 (1951). "Typically, we have steadfastly held to the rule that we will not address a nonjurisdictional issue that has not been determined by the lower court." *Harris v. Allstate Ins. Co.*, 208 W.Va. 359, 540 S.E.2d 576 (2000) citing *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W.Va. 690, 699, 510 S.E.2d 764, 773 (1998). Accord Syl. pt. 2, *Trent v. Cook*, 198 W.Va. 601, 482 S.E.2d 218 (1996); Syl. pt. 3, *Voelker v. Frederick Bus. Properties Co.*, 195 W.Va. 246, 465 S.E.2d 246 (1995). Furthermore, this Court has no jurisdiction to determine a question of fact on certificate. W.Va. Code § 58-5-2; *State v. Stout*, 95 S.E.2d 639, 142 W.Va. 182 (1956).

The reformulated Certified Question in the instant matter should address the law which is involved in the question, which is whether the discovery rule and/or 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). This issue was extensively argued by the Appellee in its Response to Plaintiff's Motion for Summary Judgment and Appellee's Motion for Judgment on the Pleadings, and was

ruled upon by the trial court, in its Order dated February 4, 2005. However, whether Appellant waived its right to argue the applicability of the discovery rule is a question of fact for the trial court, and was never ruled on by the trial court. Furthermore, the trial court specifically ruled on the applicability of the discovery rule to the Appellant's case, indicating that the trial court did not consider the application of the discovery rule to be waived. In fact, the Appellant did not expressly waive its right to argue whether the discovery rule applies.

- e. **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.**

While Appellee claims that the cases cited by Appellant to support the application of the continuing tort theory to the case at bar are not applicable because the backgrounds and substantive areas of law are not similar to a case involving negotiable instruments, the Supreme Court of West Virginia has made it very clear that such an argument is unavailing. Appellee cannot dispute that the claims of conversion and negligence both sound in tort. Indeed, 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).

Appellee admitted that the acts of Defendant Doris Hendrickson in depositing checks made payable to Appellant into her personal account was a “longstanding scheme.” (*See* Response of Defendant WesBanco Bank, Inc. to Plaintiff's Motion for Summary Judgment at pg. 8). And, there is no dispute that Ms. Hendrickson began depositing those checks on a

continuing, regular basis into her personal account at least since 1994, depositing more than 721 checks made payable to CWS.<sup>7</sup> In such circumstances, the West Virginia Supreme Court has expressly and unequivocally stated, “*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.*” *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603, 614 (2002) (emphasis added). There are no exceptions cited in that passage, regardless of Appellee’s attempt to arbitrarily insert one for negotiable instruments. Thus, the continuing tort theory also applies to *all* tort actions, regardless of the nature of the tort.

Notwithstanding Appellee’s reliance on cases from foreign jurisdictions to alter the law of torts in West Virginia, the West Virginia Supreme Court in *Taylor v. Culloden Public Service District, et. al.*, 214 W.Va. 639, 591 S.E.2d 197 (2003) specifically rejected the Appellee’s argument that the continuing tort doctrine does not apply to a tort action simply because it was not the same type of tort alleged in *Beverage*, holding that the doctrine “clearly intended to apply to torts of all types.” 214 W.Va. at 647.

Appellee further argues that *Taylor* is inapplicable to the case at bar, citing footnote 21 in support of its argument. However, reliance on a footnote is misplaced as “language in a footnote generally should be considered obiter dicta which, by definition, is language ‘unnecessary to the decision in the case and therefore not precedential.’” *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W.Va. 457, 471, 583 S.E.2d 80 (2003) citing *Black’s Law Dictionary*

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<sup>7</sup>This date and amount are 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 and deposited more than 1,000 checks.

1100 (7th ed.1999). Regardless of the footnote language, which is irrelevant to the case at bar as it does not address the issue of the application of the continuing tort doctrine, the *Taylor* Court explicitly held, in Syllabus Pt. 4: "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." Syl. Pt. 11, *Graham v. Beverage*, 211 W.Va. 466, 566 S.E.2d 603 (2002)." *Id.* And it is axiomatic that "... [n]ew points of law ... will be articulated through syllabus points as required by our state constitution." *Medical Assurance*, 213 W.Va. at 471 citing Syllabus Pt. 2, in part, *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001). Thus, regardless of a footnote that has no bearing on this issue, West Virginia law would require the application of the continuous tort doctrine.

Appellee's assertion that the only authority cited by Appellant in support of its position for application of the continuing tort doctrine is from another jurisdiction that has not fully adopted the doctrine is erroneous on several counts. First, Appellant relies strictly on West Virginia law in support of its position that the continuing tort doctrine applies to all torts, including the tort alleged in the case at bar, as noted above. Authority from other jurisdictions is simply additional information for the Court to consider.

Second, Appellee wrongly asserted that the courts in Illinois have not uniformly adopted the continuing tort theory. Appellee points to *Rodrigue v. Olin Employees Credit Union*, 406 F.3d 434, 57 UCC Rep.Serv.2d 392 (7<sup>th</sup> Cir. 2005) in support of its position. *Rodrigue* was decided by the United States Court of Appeals for the Seventh Circuit, the federal appellate court that includes Illinois, predicting what the Illinois Supreme Court would do. However, the state courts in Illinois that have addressed this issue have determined that the Illinois Supreme Court

would adopt the continuing tort doctrine. See *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, 1299 (Ill. App. 1993).

In *Rodrigue*, the 7<sup>th</sup> Circuit held 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. The Court cited to *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill.2d 325, 770 N.E.2d 177 (2002), in support of its decision, holding that “[t]he Illinois Supreme Court has not adopted ‘a continuing violation rule of general applicability in all tort cases . . .’” *Rodrigue*, 460 F.3d at 439. However, the plaintiffs in *Bellville Toyota* alleged a cause of action for breach of dealer agreements and a violation of Motor Vehicle Franchise Act, both actions sounding in contract, as opposed to tort. *Bellville Toyota*, 770 N.E.2d at 177. As a contract action, by definition the continuing tort theory would not apply. In addition, the *Bellville Toyota* Court did not base its decision on the continuing violation doctrine as it applied to torts but held that it “did not adopt a continuing violation rule of general applicability in all tort cases or, as here, cases involving a statutory cause of action.” *Id.* at 192 (emphasis added). Thus, the 7<sup>th</sup> Circuit erroneously applied *Bellville Toyota* to the facts in *Rodrigue*.

More importantly, the West Virginia Supreme Court, in contrast to the 7<sup>th</sup> Circuit in *Rodrigue*, applies the continuing tort doctrine to all torts, 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, for several reasons, the rationale of the court in *Rodrigue* is not applicable in

West Virginia. In addition, 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.

Other jurisdictions that have refused to apply the discovery rule in conversion cases have implicitly applied the continuing tort doctrine. For instance, in *Yarbro Ltd. v. Missoula Fed. Credit Union*, 50 P.3d 158 (Mont. 2002), the Montana Supreme Court declined to apply the discovery rule to a claim for conversion of negotiable instruments. However, it implicitly applied the continuing tort doctrine when it stated:

In this case, Yarbro's cause of action against MFCU for conversion accrued for each check at the time the check was deposited by McLean in her MFCU account and MFCU credited McLean's account therefor. It is not disputed that the last deposit to McLean's MFCU account was made on June 7, 1996. Because *the elements of conversion for all transactions existed or occurred by then*, the 3 year statute of limitations for all claims began to run, at the latest, on June 8, 1996. Yarbro's complaint was not filed until June 9, 1999.

50 P.3d at 161 (emphasis added).

And, in *Smith v. Franklin Custodian Funds, Inc.*, 726 So.2d 144 (Miss. 1999), again a claim for conversion of negotiable instruments, the Court discussed whether the continuing tort doctrine would toll the statute of limitations in a conversion case. In *Smith*, the plaintiff filed suit based upon one incident of conversion that occurred in 1987, which the plaintiff discovered in 1993. The applicable statute of limitations had expired prior to the suit being filed, and the trial court found that the claims were barred. The plaintiff contended that the discovery rule and/or the continuing tort doctrine tolled the statute of limitations. The Mississippi Supreme Court

addressed both issues, and rejected the application of the discovery rule. However, the Court discussed the continuing tort doctrine, defining it as:

one inflicted over a period of time, it involves a wrongful conduct that is repeated until desisted, and each day creates a separate cause of action. A continuing tort sufficient to toll a statute of limitations is occasioned by a continual unlawful action, not by continual ill effects from an original violation.

*Id.* at 148. “We have held that we will not apply the continuing tort doctrine when harm reverberates from one wrongful act or omission.” *Id.* at 149. The Court ultimately held that, because there was only one wrongful act of conversion, injuring the plaintiff only once, the continuing tort doctrine would not toll the statute of limitations. *Id.* The Court did not, as Appellee’s contend, refuse to apply the doctrine to all conversion cases, just this one based upon the particular facts of this case.

**f. Conclusion**

Based upon the overwhelming law in West Virginia, the discovery rule and/or the continuing tort theory apply in this matter to toll the statute of limitations. It is up to the legislature to specifically prohibit the application of these legal rules to W.Va. Code § 46-3-118(g), if the legislature agrees with other jurisdictions that these rules should not apply. Until the legislature so amends the statute, West Virginia precedent dictates application of the discovery rule and/or the continuing tort theory to *all* torts, including the tort of conversion of negotiable instruments.

**III. RELIEF PRAYED FOR**

Appellant 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, or when the plaintiff knows, or by the exercise of reasonable diligence, should know, it has been injured, 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 and granting the Appellee's Motion for Judgment on the Pleadings 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.*

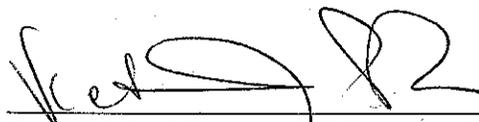
Appellees/Defendants.

CERTIFICATE OF SERVICE

I, Victoria J. Sopranik, hereby certify that I served the foregoing *Reply Brief of Copier Word Processing Supply, Inc. upon Certified Question* upon all counsel of record on the 18<sup>th</sup> day of May, 2006, via United States Mail, postage pre-paid, addressed as follows:

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