No. 33046 - *Copier Word Processing Supply, Inc. v. Wesbanco Bank, Inc., et al.*

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OF WEST VIRGINIA

Starcher, J., dissenting:

The majority opinion makes law that will let wrongdoers get off scot-free. Accordingly, I dissent.

For purposes of this case, we are required to assume that Wesbanco ("the bank") was sloppy and careless or worse, and "looked the other way" while Doris Hickerson defrauded her employer. We are also required to assume that the bank engaged in this misconduct for seven years and never corrected its continuing conduct.[1]

The statute of limitations can sometimes help a person who stops doing bad things. But it's another matter when a wrongdoer repeats those bad acts over and over, and then, when caught, tries to plead the statute of limitations to escape accountability for the earlier actions that have continued unabated.

The majority opinion presents the reader with exactly *one* case that supports its counter-sensical holding – and *two* that do not. This is not exactly "persuasive authority."

Moreover, the majority opinion confuses apples and oranges. The opinion

[1]Let me be clear that I do not accept as a *fact* that Wesbanco is a wrongdoer in the instant case. For all I know, Wesbanco did everything a bank should do with respect to their customer Copier Word Processing, and a jury might well so find. But in the posture of a motion to dismiss based on the statute of limitations, we must treat all of the allegations against Wesbanco as true.

recognizes that the continuing tort theory establishes that the statute of limitations begins to run on the date of the most recent injury or instance of misconduct. Then, the opinion leaves the continuing tort theory hanging, and then discusses "equitable tolling," which *suspends the running* of the statute of limitations, an entirely different issue. The majority opinion doesn't seem to appreciate this simple distinction, leading to a confusing holding at best.

In the instant case, one can apply the continuing tort theory to claim that the most recent "conversion" by the bank was when the statute of limitations began to run. But one may also view the case as one where fraudulent concealment or similar conduct by the bank "equitably tolled" the statute of limitations which had begun running at each of the earlier episodes. It's unclear what the majority opinion means on these two different issues; but either way, the bank should not be able to get away with alleged misconduct when they never stopped engaging in it.

As to the "statutory construction" discussion in the majority opinion, it strains to produce a gnat. The drafters of the UCC did not clearly demonstrate the intent to allow a bank to sleep on its customers' rights for years and then escape accountability on a technicality.

Finally, the plaintiff Copier Word Processing may have been just as negligent as Copier says the bank was – which is probably the unspoken reason behind the result arrived at by the majority opinion. But from a legal point of view, that comparison is to be made at a trial, before a jury – not by a court that goes out of its way to express its

appreciation of the role played by the West Virginia Association of Community Bankers and the West Virginia Bankers Association "in determining the outcome of this case," *see* note 5.

Accordingly, I dissent.