IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0913

Wesbanco Bank, Inc.

Defendant Below, Petitioner,

v.

(Circuit Court of Monongalia County
Civil Action No. 19-c-87)

Crystal Gayle Ellifritz,

Plaintiff Below, Respondent.

PETITIONER'S REPLY BRIEF

Wesbanco Bank, Inc.

James A. Walls (WVSB # 5175)
SPILMAN THOMAS & BATTLE, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
Phone: 304.291.7947; Fax: 304.291.7979
jwalls@spilmanlaw.com

Joseph A. Ford (WVSB # 12984)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Blvd., East
Charleston, WV 25301
Phone: 304.340.3832; Fax: 304.340.3801
jford@spilmanlaw.com

James C. Gardill, Esq. (WVSB # 1335)
Robert D. Plumby, Esq. (WVSB # 10430)
PHILLIPS GARDILL KAISER & ALTMEYER PLLC
61 Fourteenth Street
Wheeling, WV 26003
Phone: 304.232.6810; Fax: 304.232.4918
robertplumby@pgka.com

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STATEMENT OF THE CASE

The Respondent argues that this is a simple breach of contract case and yet the only competent evidence of any such contract presented by the Respondent below was a six-month certificate of deposit registered in the names of Dewey Ellifritz or Crystal Gayle Ellifritz dated December 31, 1980 issued by a Wesbanco Bank, Inc. ("Wesbanco") predecessor. In addition, Dewey Ellifritz, who was deceased at the time of the filing of the case, had sole possession of the certificate of deposit from the date of its issuance in 1980 until his death in 2017, a period of 37 years. A.R. 500 (Trial Tr. 44:12-13); A.R. 648 (Trial Tr. 192:3-10); A.R. 658 (Trial Tr. 202:14-15). The Respondent then asserts that her simple possession of the stale certificate is sufficient evidence upon which to substantiate a contract based solely on a presentment clause contained in the certificate.

The Respondent also commits the same error committed by the Circuit Court of Monongalia County in asserting that Wesbanco presented no proof of payment or, as the Circuit Court noted to Wesbanco's counsel: "You haven't presented any evidence of where that money is. You've presented no evidence of where that money is". A.R. 725 (Trial Tr. 269:19-21). Thus, notwithstanding the failure to present any evidence of any account relationship between Wesbanco and Respondent for over 38[1] years, the Circuit Court failed to grant Wesbanco's Motion for Summary Judgment. Instead, the court improperly shifted the burden of proof to Wesbanco to prove where the money was.

Additionally, the Respondent asserts that this Court's holding in *Peters v. Peters*, 191 W.Va. 56, 443 S.E. 2d 213 (1994) is distinguishable and that the failure of the trial court to give

[1] The certificate was presented for payment in 2018.

the two proposed jury instructions, including Instruction No. 2 and Instruction No. 3, which were based on this Court's holding in *Peters,* did not create reversible error. Resps.' Br. Pg. 5.

Finally, the Respondent fails to appreciate the interplay of the dormancy laws in West Virginia, along with the record retention requirements as they affect the applicable statute of limitations and/or the doctrine of laches to the extent that they create a presumption of redemption of the certificate in question many years prior to the time of the filing of the Complaint in this case.

For ease of review, this Reply Brief will follow the outline contained in Respondent's Brief.

ARGUMENT

A. The Trial Court Did Commit Error in Denying Wesbanco's Motion for Summary Judgment and Motion for Judgment As A Matter of Law.

1. Standard of Review.

The parties generally agree on the standard of review for an order granting or denying a renewed motion for judgement as a matter of law after trial pursuant to Rule 50(b) of the W.Va. Rules of Civil Procedure and that it is *de novo. Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E. 2d 16 (2009). The parties also generally agree that the *de novo* standard of review applies for denial of a Rule 50 motion before the jury verdict as cited in the case *Stanley v. Chevatahanarat*, 222 W.Va. 261, 263-64, 664 S.E. 2d 146, 148-149 (2008) (Citing *Cleckley, et al., Litigation Handbook* §50(a)(1), at 73 (Cum. Supp. 2007)).

2. *Peters v. Peters* Is Not Distinguishable From The Instant Matter.

The Respondent argues that this Court's decision in *Peters* is materially distinguishable from this case for several reasons.

First, the Respondent argues that in *Peters* the bank in question had evidence that the funds had been withdrawn. Resps.' Br. Pg. 8. In distinguishing *Peters*, the Respondent asserts that

Wesbanco presented no definitive proof that the funds were withdrawn 38 years after they were deposited. *Id.* In addition, in a footnote, Respondent again suggests that the Circuit Court's determination that the *Peters* case was distinguishable since the bank in that case had proof that it had paid the funds. *Id.* The Circuit Court noted specifically that "we don't have any proof that it was paid". A.R. 732 (Trial Tr. 276:19). As the Respondent asserts, and as the Circuit Court concluded, the absence of a record of any current account on its books only provides "an assumption" and not a "presumption" that the funds were previously paid. Resps.' Br. Pg. 9; A.R. 627 (Trial Tr. 171:17-22). As explained below, the effect of this determination was to shift the burden of proof to Wesbanco to prove where the funds were, as opposed to requiring the Respondent to prove the existence of a current contract. The essential holding in *Peters* was not tied to this Court's determination that the money had in fact been paid out.

The Respondent next asserts that *Peters* is distinguishable because a certificate of deposit created a contract. Resps.' Br. Pg. 9. There is no question that the certificate of deposit created a contract. A.R. 549; 552 & 560 (Trial Tr. 93:4-6; 96:7-9 & 104:21-23). However, the essential elements of the contract were the return of the funds with interest as provided for at the rate set forth in the contract based on the term of the contract. In her response, the Respondent notes the back of the certificate and even highlights the language on the reverse of the certificate noting that if the contract contains the conjunctive term "or" then the certificate may be payable to any or the survivor or survivors of the names appearing on the certificate and "payment **MAY** be made upon surrender of the certificate to any of them". Resps.' Br. Pg. 10; A.R. 10; (Compl. Ex. 1) (emphasis added). In citing this language, the Respondent failed to note the permissive term "may" which will be addressed later in this reply as it is relevant to certain authority cited by the Respondent in her Brief. Even though Respondent's father had been in possession of the certificate for 37 years,

the court permitted the Respondent to testify, as the Respondent notes, that neither she nor her father received the funds. Resps.' Br. Pgs. 2, 10; A.R. 651 (Trial Tr. 195:3-7). Obviously that was pure speculation as she was not in possession of the certificate during that entire period, and she did not file this case until well after her father died.

The third distinguishing characteristic made by the Respondent is that in *Peters* there was some element of waiver and Wesbanco presented no evidence at trial that the presentment provisions of the certificate of deposit were, in fact, waived by Wesbanco. Resps.' Br. Pgs. 10-11. First of all, this statement is inaccurate as there were a number of references to the fact that certificates were redeemed without presentation. A.R. 536, 544, 551-552, 562 & 704 (Trial Tr. 80:5-15; 88:7-10; 95:17-96:6; 106:15-16; 248:16-21). The Respondent even acknowledges such testimony in her Response Brief. Resps.' Br. Pg. 11. The Respondent, however, argues that since there was no written documentation of such waiver, therefore this case is distinguishable from *Peters*. *Id.* at 10-11. This conclusion ignores the five-year record retention requirements for financial institutions. If any such waiver, receipt or acknowledgement had been received, it would have long since been disposed of in accordance with the retention period provided by that statute. See W.Va. Code §31A-4-35.

Finally, the Respondent attempts to distinguish *Peters* holding that the presentation clause was not an essential element of the "contract" by suggesting that Wesbanco had admitted that all terms and conditions within the money market certificate were contractual terms. Resps.' Br. Pg. 13. This is simply an incorrect statement of fact and law. The statements posed to the Wesbanco witnesses assumed an active account. An active account would continue so long as the deposited funds were held by the financial institution and neither reclaimed by the depositor nor escheated to the State under the West Virginia Uniform Unclaimed Property Act. Additionally, the terms of

the certificates in question in this case and in *Peters* were strikingly similar and essentially verbatim as noted in Wesbanco's Brief. Pet'r's Br. Pg. 8. The Ellifritz certificate of deposit provided that it was payable "on the return of this certificate properly endorsed" and the *Peters* certificate of deposit provided that it was payable "on its return properly endorsed". A.R. 9 (Compl. Ex. 1); *Peters*, 191 W.Va. at 62, 443 S.E. 2d at 219. As this Court noted in *Peters* these words are "mere boilerplate recitals" of the depositor's obligation to present the certificate at the time of withdrawal; they constitute nothing more than general statements of bank policy; they create no substantive rights in the depositors; they were positioned or articulated in such a way as to make it evident that the bank did not intend for the terms to be binding; and therefore, no contract exists as to those terms. *Peters*, 191 W.Va. at 62, 443 S.E. 2d at 219.

The presentation clause in the Ellifritz certificate of deposit is positioned in exactly the same manner as the presentation clause in the *Peters'* certificate of deposit – both were positioned on the face of the certificate. *Peters*, 191 W.Va. at 59, 443 S.E. 2d at 216; A.R. 9 (Compl. Ex. 1). Therefore, based on this Court's holdings in *Peters*, the presentation clause in the Ellifritz certificate of deposit is merely a boilerplate recital of the Ellifritz' obligation to present the certificate of deposit at the time of withdrawal; it constitutes nothing more than a general statement of Bank policy and creates no substantive rights and no enforceable contract claim exists as to those terms.

Notably, *Peters* was decided in 1994. It has been the law in West Virginia for nearly 30 years. Financial institutions in the State of West Virginia have come to rely upon this Court's decision in *Peters* as the applicable law with respect to presentation clauses. This is especially important given the record retention requirements that apply to West Virginia banks since based on this Court's holding in *Peters*, as noted in the Amicus Brief filed by the respective Bankers'

Associations, certificates of deposit are routinely redeemed without presentation of the original certificate in reliance upon this Court's holding in *Peters* that presentation clauses in stale certificates create no substantive rights and no enforceable contract claim exists as to those terms. Amicus Br. Pgs. 8-10.

As set forth in Wesbanco's Appellate Brief, the result in *Peters* is supported by persuasive authority found in other jurisdictions. *Krawitt v. Keybank,* 871 N.Y.S. 2d 842, 23 Misc. 3d 297 (Sup. Ct. 2008), *Schnack v. Valley Bank of Nevada*, 291 Fed. App. 168 (10th Cir. 2008), *Spiller v. Sky Bank-Ohio Bank Region*, 122 Ohio St. 3d 279, 910 N.E. 2d 1021 (2009) and *Abraham v. National City Bank Corp.*, 50 Ohio St. 3d 175, 553 N.E. 2d 619 (1990). Pet'r's Pg. 14. These cases generally endorse the concept that a stale certificate or receipt alone is insufficient to sustain a claim for payment though they each address the issues somewhat differently. In an effort to overcome this authority, in her Response Brief, Respondent attempts to distinguish *Schnack*, on its facts, using *Brentlinger v. Bank One of Columbus, N.A.*, 150 Ohio App. 3d 589, 782 N.E. 2d 648 (Ohio Ct. of App., 10th Dist., 2002) to distinguish *Spiller*, and using *Katzman v. Citibank*, 298 Fed. Appx. 81 (2nd Cir, 2008) (*Katzman II)* to distinguish *Krawitt.* As shown below, Respondent's attempt is not persuasive.

The *Krawitt* case dealt with a 182 day renewable certificate of deposit issued in 1987 to the plaintiff's mother, who died in 1994. The plaintiff discovered a receipt for the certificate in 2006 and presented it for payment. The court did deny summary judgment to the bank on the basis of the expiration of a six-year statute of limitations, holding that the statute of limitations would run from the date of demand for payment. The court did, however, grant summary judgment for the bank holding that New York state recognizes a legal presumption of payment after the lapse of 20 years between the right to enforce an obligation and an attempt to do so. Citing several state

cases, and *Katzman v. Citibank*, No. 5:03-CV-1031 (LEK/GJD), 2007 WL 2325857 (N.D.N.Y. Aug. 9, 2007) (*Katzman I*), the court noted the reliance by the bank on its record retention practices, the absence of any intervening evidence of the deposit, the plaintiff's failure to overcome the presumption of payment and held that the defense of laches barred the action, and granted summary judgment in the bank's favor.

Katzman I was cited in the *Krawitt* decision. It was a Federal District Court case decided in 2007. In *Katzman I*, a widow attempted to redeem a savings certificate issued in 1981 to her late husband, who had died in 1999, two years after his death in 2001. The court acknowledged the 20 year presumption of payment rule recognized in New York, but determined that the 20-year rule had not been met under the facts of the case because interest had been paid, based on the bank's own records, in at least one of the intervening years. Thus, the court applied an inference of payment standard under all the facts and circumstances, in lieu of a presumption of payment. Based on the 19-year lapse, the absence of any records of the deposit, and evidence of payment by the bank without presentment of similar certificates, the court held that mere retention of the original certificate was insufficient to overcome the inference of payment and granted summary judgment for the bank.

Katzman II was the resulting appeal to the Second Circuit Court of Appeals. In a decision issued 11 days before the *Krawitt* decision was issued, the Court of Appeals reversed the District Court, holding simply that a genuine issue of material fact existed, precluding summary judgment. The court did not address the presumption of payment rule since the District Court had already held that it did not apply. The court noted the ambiguity in record keeping by the bank on the interest payment noted above, but more importantly relied on the language of the certificate itself which recited as follows:

> "To withdraw your entire balance you **MUST** surrender your certificate to Citibank on or before maturity date."

Katzman, 298 Fed. Appx. at 83 (emphasis added) (*Katzman II*).

Katzman II is clearly distinguishable based on the express language of the certificate. No such language was contained in the Ellifritz certificate. In point of fact, it was issued in the names "Dewey Ellifritz, or Crystal Gale Ellifritz" and contained terms and conditions stating:

> "When two or more persons are named as depositors on this Certificate with the conjunction 'or' separating the names, then such Certificate shall be payable to any or the survivor or survivors of them and payment **MAY** be made upon the surrender of this Certificate ..."

A.R. 9-10 (Compl. Ex. 1) (emphasis added).

The Respondent attempts to distinguish *Schnack* on the basis that there was no evidence that the subject certificate had an automatic renewal provision. Resps.' Br. Pg. 19. Though the Respondent acknowledges that the plaintiff in that case believed his 90-day certificate would renew, the key issue in the case was that he waited 15 years before attempting to redeem the certificate. The court held that laches precluded recovery since the customer had offered no evidence indicating that the certificate remained outstanding, had not received any taxable interest income reporting and the bank was prejudiced by justifiably destroying account records under its seven-year retention policy.

Wesbanco cited *Spiller* in its initial Brief. Pet'r's Br. Pg. 14. In that case, a bank refused to honor a decades old automatically renewing certificate of deposit for which the bank had no records and the bearer could produce only the original certificate. *Spiller* cities *Abraham* with approval in its opinion as follows:

> "'The problem is that the passbook proves only that the account existed; it does not explain how the funds were removed from the account. Only the internal bank records could explain it.' We concluded that the action depended upon records that

the bank was permitted by statute to destroy, and therefore we held that the suit was time-barred by the statute."

Spiller, 122 Ohio St. 3d at 281, 910 N.E. 2d at 1024 (citing *Abraham*, 50 Ohio St. 3d at 177, 553 N.E. 2d at 619).

Of importance, noting its decision in *Abraham* dealt with a savings passbook, the Supreme Court held that such a rule also applied to automatically renewing certificates of deposit.

The Respondent cited *Brentlinger*, an intermediate appellate court decision in Ohio seeking to distinguish *Spiller* and limit *Abraham* since *Brentlinger* dealt with an automatically renewing certificate of deposit. However, that case does not represent the law in Ohio as the *Spiller* case was decided by the Ohio Supreme Court seven years after *Brentlinger* and reaffirmed the holding in *Abraham*, and specifically applied its holding to automatically renewing certificates of deposit.

3. Respondent's Claims Are Barred By The Statute of Limitations and/or Laches And Wesbanco Is Entitled To A Presumption That The Certificate Was Closed Long Ago.

In these two sections, the Respondent, and the trial court below, missed the true significance of the statutory scheme cited by Wesbanco with respect to this stale certificate of deposit case. Essentially, the Respondent cannot have it both ways. The only competent evidence of a contractual relationship between Respondent and Wesbanco was the now 40 year old certificate of deposit. As Wesbanco notes below, and in Petitioner's Brief, the Uniform Unclaimed Property Act in West Virginia contains specific guidance as to automatically renewable certificates of deposit. A.R. 191-193 (Wesbanco MSJ/MOL Pgs. 12-14); Pet'r's Br. Pgs. 19-20. An interest bearing time deposit "including a deposit that is automatically renewable" is presumed to be abandoned if it is unclaimed by the apparent owner for "seven years after the earlier of maturity or the date of the last indication by the **owner** of interest in the property". W.Va. Code §36-8-2(a)(5) (emphasis added). "A deposit that is automatically renewable is deemed matured for

purposes of this section upon its initial date of maturity, unless the owner has consented to a renewal at or about the time of the renewal and the consent is in writing or is evidenced by a memorandum or other record on file with the holder". W.Va. Code §36-8-2(a)(5).

The Respondent presented no evidence at trial of any such consent or renewal of the certificate in question and Wesbanco had no evidence of any such record or renewal. A.R. 660 (Trial Tr. 204:7-9). Additionally, the Respondent presented no evidence of either her or her father receiving a 1099 for interest earned on such deposit, any notice of interest rate change, or any account statement, acknowledgement, or other written consent in the intervening 38 years. A.R. 651-652 & 660 (Trial Tr. 195:8-196:5; 204:4-13). Thus, as noted in Petitioner's Brief, such a deposit is presumed abandoned and would be required to be remitted to the West Virginia State Treasurer. Pet'r's Br. Pgs. 6, 19-20. If the deposit had not been redeemed, Wesbanco could not have held the deposit for 40 years. Any report of the property escheated to the State must be maintained by Wesbanco for a period of 10 years, and Wesbanco had no such record.

From the statutory scheme, it is evident that Wesbanco could not have held the deposit unless there was some evidence of renewal or continuation provided by the depositor and no such evidence was presented at trial. Thus, we turn to the applicable statute of limitations. There is under West Virginia law a statute of limitations with respect to certificates of deposit contained in W.Va. Code §46-3-118(b). The Respondent asserts that this statute does not apply since the certificate in question was not a "negotiable instrument". Resps.' Br. Pg. 21. We are not aware of any determination by this Court as to whether the provisions of the Uniform Commercial Code applicable to certificates of deposit would be applied to non-negotiable certificates.

The Respondent correctly recites subsection (e) of W.Va. Code §46-3-118 which provides that an action to enforce the obligation of a party to a certificate of deposit must be commenced

within 6 years after demand for payment is made, but if the instrument states a due date, and the maker is not required to pay before that date, the 6-year period begins when a demand for payment is in effect, and the due date has passed. Resps.' Br. Pgs. 21-22. Notwithstanding the ambiguity of the limitations period applicable to certificates, the Respondent asserts that this section does not apply since it is not a negotiable instrument. *Id.* Wesbanco relies on this statute of limitations because this Court has not yet determined whether the limitations period noted would apply to a non-negotiable certificate of deposit. However, the discussion concerning the statute of limitations presupposes that an account relationship exists.

Alternatively, Wesbanco asserts the applicable contract limitation period of W.Va. Code §55-2-6. As noted in Petitioner's Brief, assuming that the Court determines that the limitations period of the Uniform Commercial Code do not apply to such a non-negotiable certificate of deposit, the applicable 10-year statute of limitations would apply to such a contract. Pet'r's Br. Pg. 16. The Respondent distinguishes this limitations period from applying to the facts in this case on the basis that it would not apply until the time for performance commenced. Resps.' Br. Pg. 23. The Respondent further asserts that the automatically renewing language of the certificate extends the contract indefinitely, thus apparently for eternity. Resps.' Br. Pgs. 13-14, 22-23, 28. Wesbanco is not aware of any decisions of this Court confirming eternal contracts. The contract would end when the deposit is returned.

The important issue arising from the limitations period and the presumption of abandonment provisions, is that the comprehensive scheme created by the legislature creates a presumption of payment when viewed in conjunction with the record retention requirement of 5 years. Since banks are only required to keep records for a period of five years after any contractual relationship has terminated, and there are express escheatment provisions applicable to stale

automatically renewing certificates, and there is an applicable statute of limitations at some period in time, if there are no records of a deposit relationship, and there is no evidence of any such existing deposit relationship within the time periods covered under these various statutes, it is clear that the legislature has evidenced the intent to create a presumption that the funds were paid long ago since no such records of its existence continue. Since no such records existed, Wesbanco was prejudiced by the Circuit Court's admonition that it needed to provide proof of payment of the deposit in question. How would a bank ever be able to dispose of any records?

This presumption of payment is reinforced by the recent amendment to the records retention statutes noted in Petitioner's Brief. Pet'r's Pgs. 17-18. W.Va. Code §31A-4-35 was amended, effective June 5, 2020, by HB 4406 to address this very issue. The amendment added subsection (c), which provides:

> Notwithstanding any other provision of this code establishing a statute of limitations for any period greater than five years, **any action by or against a bank for any balance, amount, or proceeds from any time, savings or demand deposit account based on the contents of records for which a period of retention or preservation is set forth in section (a) of this section shall be brought within the time for which the record must be retained or preserved**.

W.Va. Code §31A-4-35(c), effective 6/5/2020 (emphasis added). The West Virginia Legislature noted in the Introduced Version of HB 4406 that "[t]he purpose of this bill [HB 4406] is to **provide a repose from risk for a bank having lawfully destroyed records in accordance with the existing record retention law**." *See Introduced HB 4406* (emphasis added). The amendment to the Records Retention Statute constitutes a statute of repose and precludes claims not brought within the five-year records retention timeframe.

This amendment clarifies existing law and bolsters Wesbanco's position that the lack of records creates a presumption that the certificate of deposit was closed long ago. The introduction to Enrolled HB 4406 states, in pertinent part, with emphasis added:

> An Act to amend and reenact §31A-4-35 of the Code of West Virginia, 1931, as amended relating to ... the period for which banks shall retain or preserve records; **providing clarification that an action against a bank for any balance, amount, or proceeds from an account must be brought during the retention or preservation period** ...

See Enrolled HB 4406 (emphasis added). The West Virginia Legislature clearly intended this amendment to provide clarity to existing law and therefore, it is pertinent to the pending matter. All financial institutions in West Virginia, including Wesbanco, have the right to destroy records five years after an account is closed. The amendment to W.Va. Code §31A-4-35 provides clarification by codifying the long-standing rule implied in subsection (a). In this case, no records exist for the last twenty years to show that the account remained in existence after it was opened on December 31, 1980. A.R. 660 (Trial Tr. 204:4-13). Therefore, it is presumed that the funds were redeemed, and the account closed long ago.

At a minimum, the above factual and legal history relied upon by Wesbanco, and banks in general, requires the application of the doctrine of laches to the facts of this case.[2] The application of laches to the facts of this matter shows that Respondent's 38-year delay in presenting the certificate of deposit for payment, or otherwise create any activity in that regard, plus Wesbanco's reliance on *Peters*, *supra*, the record retention and escheatment statutes, created the very problem that the trial court relied upon (that Wesbanco could not prove that the certificate of deposit was paid to Respondent's father), to rule in favor of the Respondent on Wesbanco's Summary Judgment and Rule 50 Motions.

An analysis of the laches doctrine proves that it should be applied to this case resulting in the dismissal of Respondent's Complaint.

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[2] In its Motion for Summary Judgment, Wesbanco briefed the application of the doctrine of laches and Plaintiff briefed her opposition thereto in her response to Wesbanco's Motion for Summary Judgment. A.R. 194-196; 227-228 & 331-332. It is also incorporated into its Assignment of Error No. 5 in its Petition for Appeal. See: W.Va. R. App. P. 10(c)(3).

"...[L]aches is an equitable doctrine based on the maxim that equity aids the vigilant, not those who slumber on their rights." *Puleio v. Vose,* 830 F. 2d 1197 (1st Cir.1987). *See* Syllabus Pt. 2, *Phillips v. Piney Coal & Coke Co.,* 53 W.Va. 543, 44 S.E. 774 (1903) ("A court of equity will not assist one who has slept upon his [her] rights and shows no excuse for his *laches* in asserting them")." *Banker v. Banker,* 196 W.Va. 535, 474 S.E. 2d 465 (1996). *See also Whitney v. Fox,* 166 U.S. 637, 17 S.Ct. 713, 41 L.Ed. 1145 (1897) (sustaining the defense of laches in a suit to establish the existence of a trust in plaintiff's favor). A Court may dismiss a claim on the ground of laches even when a statute of limitations is not a bar. That question will require resolution by the trial court. *Province v. Province*, 196 W. Va. 473, 484, 473 S.E. 2d 894, 905 (1996).

The elements of laches consist of (1) unreasonable delay and (2) prejudice. *See State, Dept. of Health and Human Resources, Child Advocate Office on Behalf of Robert Michael B. v. Robert Morris N.,* 195 W.Va. 759, 466 S.E. 2d 827 (1995). "Mere delay will not bar relief in equity on the ground of laches. Laches is a delay in the assertion of a known right which works to the disadvantage of another, or such delay as will warrant the presumption that the party has waived his right." *Province*, 196 W. Va. at 483, 473 S.E. 2d at 904 (Citing Syllabus Point 2, *Bank of Marlinton v. McLaughlin,* 123 W.Va. 608, 17 S.E. 2d 213 (1941)). The burden of proving unreasonable delay and prejudice is upon the litigant seeking relief. *Province*, 196 W. Va. at 484, 473 S.E. 2d at 905. The element of unreasonable delay is evident by Respondent's 38-year delay in presenting the certificate of deposit for payment.

Prejudice to Wesbanco is determined on a case by case basis, and the facts herein support prejudice to Wesbanco. "No rigid rule can be laid down as to what delay will constitute prejudice; every claim must depend upon its own circumstances. To be clear, the plea of laches cannot be

sustained unless facts are alleged to show prejudice to the opposing party, or that the ascertainment of the truth is made more difficult by the delay in seeking immediate relief." *Id.*

"Modern decisions have somewhat changed the original theory of laches, and time alone is not now considered a controlling factor in the application of the doctrine. It has been defined as such neglect as leads to a presumption that the party has abandoned his claim and declines to assert his right." *Hoffman v. Wheeling Savings & Loan Association, et al*, 133 W.Va. 694, 707, 57 S.E. 2d 725, 732-33 (1950).

"It is delay in the enforcement of one's rights as works a disadvantage to another; or, such delay without regard to the effect it may have upon another as will warrant the presumption that the party has waived his right." *Laurie v. Thomas*, 170 W.Va. 276, 279, 294 S.E. 2d 78, 82 (1982).

> Where a party knows his rights or is cognizant of his interest in a particular subject-matter, but takes no steps to enforce the same until the condition of the other party has, in good faith, become so changed, that he cannot be restored to his former state if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right. This disadvantage may come from death of parties, loss of evidence, change of title or condition of the subject-matter, intervention of equities, or other causes. When a court of equity sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief.

Id., 170 W. Va. at 280, 294 S.E. 2d at 82 (Citing Syl. Pt. 3, *Carter v. Price*, 85 W.Va. 744, 102 S.E. 685 (1920)).

The record of this case is replete with examples prejudicial to Wesbanco due to the Respondent's 38-year delay in presenting the certificate of deposit. The trial court stressed repeatedly that Wesbanco had the burden, A.R. 725 (Trial Tr. 269:19-21), which it failed to meet, to produce documentation that Respondent's father had already presented the certificate of deposit for payment. The lack of documentation was due to the passage of 38 years without activity, plus

the application of record retention policies and escheatment.[3] Respondent's delay created the very problem that the trial court relied upon to rule in favor of Plaintiff on summary judgment and Rule 50 motions.

B. As Noted In Petitioner's Brief, Contrary To The Assertion Of The Respondent, The Trial Court Did Err In Failing To Give Proposed Jury Instruction Nos. 2 and 3.

1. Standard of Review.

Wesbanco and the Respondent agree that the standard of review for the denial of jury instructions is an abuse of discretion standard. *State v. Guthrie*, 194 W. Va. 657, 671, 461 S.E. 2d 163, 177 (1993).

2. Wesbanco's Proposed Jury Instruction Nos. 2 and 3 Were Inappropriately Rejected By The Trial Court.

As noted in the discussion concerning *Peters* above, these instructions were critical to overcome the trial court's admonition that Wesbanco needed to account for where the money went. In addition, they were critical to clarify for the jury that presentation clauses, such as those which were enforced in this case, were waivable by a bank and do not provide an enforceable contract claim on behalf of the depositor.

The fact that the certificate was a contract is not disputed. A.R. 549, 718-719, 730, 732, 746 (Trial Tr. 93:4-6; 226:24-227:1; 274:4; 276:8; 290:19-22). However, as noted earlier, the contract in question is the return of the deposit and the payment of interest for the period held, not a presentment clause of the nature identified in this case which was waivable by the party to be benefitted.

As noted in Petitioner's Brief, throughout the trial, the Respondent erroneously suggested to the jury that the words "on the return of this certificate properly endorsed" meant that the funds

[3] The prejudice to Wesbanco is significant as described in more detail on pages 10-11 herein and for the sake of brevity will not be repeated.

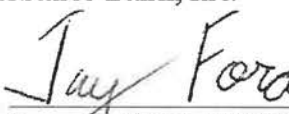
were only payable upon the presentation of the certificate of deposit. Pet'r's Br. Pg. 23, *see e.g.* A.R. 768. It was, therefore, absolutely necessary for the jury to understand that under West Virginia law, these words are nothing more than general statements of bank policy and they create no substantive rights in depositors like Respondent. It was absolutely necessary for the jury to understand that under West Virginia law, no breach of contract exists as to those terms. That is exactly what Wesbanco's proposed Instructions No. 2 and 3 say, and it was reversible error for the trial court to refuse to give such instructions. This is especially true since the Respondent presented no competent evidence of a contractual relationship for a period of 38 years. Notwithstanding the lack of any evidence of any existing account, the trial court continued to express during the course of the trial that Wesbanco had the obligation to prove where the money went.

CONCLUSION

For the reasons set forth herein, and as set forth in the Petitioner's initial Brief, the Circuit Court's Order denying Wesbanco's Motion for Judgment as a matter of law should be reversed and the judgment entered in favor of Wesbanco on Respondent's breach of contract claim.

Dated: April 20, 2022

Wesbanco Bank, Inc.



James A. Walls (WVSB # 5175)
SPILMAN THOMAS & BATTLE, PLLC
48 Donley Street, Suite 800
Morgantown, WV 26501
Phone: 304.291.7947; Fax: 304.291.7979
jwalls@spilmanlaw.com

Joseph A. Ford (WVSB # 12984)
SPILMAN THOMAS & BATTLE, PLLC
300 Kanawha Blvd., East
Charleston, WV 25301
Phone: 304.340.3800; Fax: 304.340.3801
jford@spilmanlaw.com

James C. Gardill, Esq. (WVSB # 1335)
Robert D. Plumby, Esq. (WVSB # 10430)
PHILLIPS GARDILL KAISER & ALTMEYER, PLLC
61 Fourteenth Street
Wheeling, WV 26003
Phone: 304.232.6810; Fax: 304.232.4918
robertplumby@pgka.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0913

Wesbanco Bank, Inc.

Defendant Below, Petitioner,

v.

(Circuit Court of Monongalia County Civil Action No. 19-c-87)

Crystal Gayle Ellifritz,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

I, Joseph A. Ford, hereby certify that on this 20th day of April, 2022, I served the foregoing **Petitioner's Reply Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

Frank E. Simmerman, Jr.
Chad L. Taylor
Frank E. Simmerman, III
254 East Main Street
Clarksburg, WV 26301
fcs@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com
Fax: 304-623-4906
Counsel for Respondent

Joseph A. Ford (WVSB # 12984)