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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0913

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Wesbanco Bank, Inc.

Defendant Below, Petitioner,

v.

Crystal Gayle Ellifritz,

Plaintiff Below, Respondent.

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

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

This case involves the attempted enforcement of a stale Certificate of Deposit that was issued by Wesbanco Bank, Inc.'s (hereinafter "Wesbanco" or "Bank") predecessor, Central National Bank, on December 31, 1980. The sole evidence presented at trial of the existence of a deposit relationship was the certificate itself, which was issued in joint names with the Respondent and her father. The demand for payment was made by the Respondent, subsequent to her father's death, some 38 years after it was issued. Wesbanco had no record of an existing deposit relationship and refused her demand for payment.

Wesbanco asserts six Assignments of Error in its Notice of Appeal. The first two Assignments of Error are based on this Court's holdings in *Peters v. Peters*, 191 W.Va. 56, 443 S.E. 2d, 213 (1994). They address the error of the Court in refusing to enter judgment as a matter of law on Respondent's breach of contract claim based on this Court's holdings in the *Peters*' case that presentation clauses are not meant to protect a depositor against withdrawals by a co-depositor, are clearly waivable by a bank, and create no substantive contract rights in depositors. The second Assignment of Error with respect to the *Peters*' case is the failure of the Court to give two proposed jury instructions, including Instruction No. 2 and Instruction No. 3 which were based on this Court's holding in *Peters*. Jury Instruction No. 2 simply recited this Court's holding in *Peters* that surrender clauses are nothing more than general statements of bank policy and as such they create no substantive rights in depositors. Jury Instruction No. 3 simply confirms this Court's holding in *Peters* that a surrender clause does not constitute a contractual duty on the part of the Bank.

The remaining four Assignments of Error deal with the statutes of limitations applicable to the certificate and the Respondent's breach of contract claim, the failure of the Court to recognize the significance of West Virginia laws on record retention requirements for financial institutions

and the clear impact of West Virginia's Uniform Unclaimed Property Act, all of which clearly prejudiced Wesbanco. This was compounded by the Court's own declaration that it was Wesbanco's burden to disprove the parties' contractual relationship. See, e.g. A.R. at 725 (Trial Tr. 269:19-21) ("the Court" "you [Wesbanco's counsel] haven't presented any evidence where that money is. You presented no evidence of where that money is"). Thus, the Court erroneously shifted the burden of proof from the Respondent to the Bank to prove where the deposit, made 38 years prior to the demand, had gone. Clearly, that shifting of the burden of proof was contrary to the statutory scheme in West Virginia providing for a meaningful limitations period, clear dormancy provisions and clear record retention requirements. No bank in West Virginia would be able to meet such a burden.

STATEMENT OF THE CASE

On December 31, 1980, Dewey Ellifritz deposited $10,000 into Time Deposit Account Number T5249 (the "Account") at Central National Bank in Morgantown in the names of "Dewey Ellifritz or Crystal Gayle Ellifritz." A.R. 9-10 (Compl. Ex. 1). As evidence of this deposit, Central National Bank provided Dewey Ellifritz with the Certificate of Deposit (the "CD") at issue herein. *Id.* The CD is non-negotiable, non-transferable, and has no independent value. *Id.* The CD simply states the amount deposited into the Account as of December 31, 1980, and sets out the general terms of the Account. *Id.*

The CD provides that the Account would accrue interest at a rate of 14.282% until it matured on July 1, 1981. *Id.* If the Account was not redeemed at maturity on July 1, 1981, a new 26-week term would automatically begin at an interest rate equal to the then-prevailing average U.S. Treasury Department T-bill rate. *Id.* The Account would continue to mature every 26 weeks until the funds in the Account were withdrawn. *Id.* The CD also provides that the funds were

payable to either Dewey Ellifritz or Respondent "on the return of this certificate properly endorsed." *Id.* In the banking industry, this is known as a "presentation" or "surrender" clause. Wesbanco's corporate representative testified that it was common for banks, including Wesbanco, to permit a certificate of deposit to be redeemed without presenting the original endorsed certificate. A.R. 536, 544, 551-552, 562, & 704. (Trial Tr. 80:1-15; 88:7-10; 95:17-96:6; 106:15-16; 248:16-21).

In October 1994, almost 14 years after the funds were deposited into the Account, Central National Bank merged into Wesbanco Bank Fairmont, Inc. ("Wesbanco Fairmont") A.R. 182 (MOL/MSJ p. 3). In January 2000, Wesbanco Fairmont merged into Wesbanco Bank Wheeling, Inc., and Wesbanco Bank Wheeling, Inc. immediately changed its name to Wesbanco. *Id.* In the mergers, the surviving entity acquired all of the merging entity's open accounts, including all funded time deposit accounts. *Id.* Wesbanco's Vice President and Manager of Bank Operations testified that the Bank had never lost a deposit account during any of the mergers in his nineteen-year career, and in fact, he also testified that the Bank had not lost a deposit account outside of a merger. A.R. 608 & 616. (Trial Tr. 152:13-18; 160:19-23). With respect to Central National Bank certificates, Wesbanco's corporate representative testified that she personally had redeemed Central National Bank certificates which had followed through the mergers to Wesbanco's electronic record keeping system. A.R. 581-582. (Trial Tr. 125:20-126:7)

Wesbanco has two electronic record keeping systems, its core system, Bankway, and its document management system, IS-View. A.R. 700-701 (Trial Tr. 244:7-245:22). When Bankway and IS-View are searched using a person's name and/or social security number, the results show every active account at Wesbanco associated with that name and social security number. *Id.* It also shows every account associated with that name and social security number that have been closed

at Wesbanco since Wesbanco combined in 2000. *Id.* In short, if an account existed at any time at Wesbanco since 2000, it would be in Bankway and/or IS-View. *Id.*

In December 2018, 38 years after her father deposited the funds into the Account at Central National Bank, Respondent presented the CD to Wesbanco and demanded payment. A.R. 658-659 (Trial Tr. 202:16-203:19). Wesbanco subsequently conducted numerous searches, including electronic searches in Bankway and IS-View, and found no evidence of any accounts associated with Dewey Ellifritz, Crystal Gayle Ellifritz, or their respective social security numbers. A.R. 702-703 (Trial Tr. 246:6-247:21). Based on those searches, Wesbanco concluded that the Account had been closed sometime before 2000. *Id.* There being no record of any such Account for at least twenty (20) years, Wesbanco advised Respondent that the Account was no longer in existence and there was nothing to redeem. *Id.*

On April 19, 2019, Respondent sued Wesbanco for breach of contract, unjust enrichment, constructive fraud, and punitive damages. A.R. 5-6 (Compl. ¶¶ 12-32). In her breach of contract claim, Respondent contends that the CD is an enforceable contract, and Wesbanco breached the presentation clause in the CD by failing "to remit payment to" her when she attempted to redeem the CD in December 2018. A.R. 5 (Compl. ¶ 14).

On September 16, 2020, Wesbanco filed a motion for summary judgment and supporting memorandum of law (collectively, the "MSJ"). A.R. 176-200. In its MSJ, Wesbanco argued, *inter alia*, that Respondent's breach of contract claim should be dismissed because (1) Respondent was unable to demonstrate the existence of an enforceable contract *between her and Wesbanco*; (2) the absence of records relating to the account create a presumption that Dewey Ellifritz closed the Account long before Respondent presented the CD to Wesbanco in December of 2018; and (3) Respondent's claims are barred by the statute of limitations. *Id.* By Order entered January 4,

2021, the trial court denied Wesbanco's motion for summary judgment. A.R. 361-362.

Trial began on March 2, 2021, and the overwhelming and uncontroverted evidence established that there had been no record of the existence of the Account since at least 2000 and that it had been closed for quite some time. For instance:

- Wesbanco witnesses testified that they searched Bankway and IS-View using the names Dewey Ellifritz and Crystal Gayle Ellifritz and their respective social security numbers and found no accounts associated with those names or social security numbers. A.R. 683-688 (Trial Tr. 227:21-232:17); A.R. 699-701 (Trial Tr. 243:7-245:22); A.R. 702 (Trial Tr. 246:6-22). Thus, the Account had to have been closed prior to 2000.
- Banks are required to send Form 1099-INT to customers who receive at least $10 in bank deposit interest, and customers must pay taxes on that interest.[1] Respondent testified that her father kept meticulous records, and she reviewed decades of Mr. Ellifritz' detailed financial records and tax returns. A.R. 651-652 (Trial Tr. 195:8-196:5). However, she found no evidence that her father received any 1099s and she received no 1099s. *Id.* Moreover, Respondent found no evidence that her father had paid taxes on any income associated with the Account. A.R. 660-661 (Trial Tr. 204:17-205:4). The total lack of 1099s and tax payments are conclusive evidence that the Account was closed prior to Respondent's attempt to redeem the CD in December 2018.
- Respondent testified that she had not received any renewal notices for the Account. A.R. 660 (Trial Tr. 204:4-13). If the Account had not been closed prior to her attempt

[1] *See* https://www.irs.gov/pub/irs-pdf/i1099int.pdf.

to withdraw the funds in December 2018, Respondent or her father would have received more than 40 renewal notices between 2000 and trial. A.R. 591 (Trial Tr. 135:3-15). Additionally, there would have been a total of 78 such notices since inception of the deposit, but Respondent produced not a single one.

- Under West Virginia's Uniform Unclaimed Property Act (the "Act"), a bank is required to pay the funds in any abandoned accounts to the West Virginia State Treasurer. W.Va. Code §§ 36-8-7(a) and (d). Under the Act, an automatically renewable time deposit account, like the one Dewey Ellifritz opened at Central National Bank, is presumed to be abandoned if it is unclaimed 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). And, "[a] deposit that is automatically renewable is deemed matured for purposes of this section upon its initial date of maturity (July 1, 1981), 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). Wesbanco investigated and determined that the Account had not escheated to the State pursuant to the Act, which provided further evidence that the Account had been closed at least 18 years before December 2018. A.R. 538-539 (Trial Tr. 82:4-83:3); A.R. 713-714 (Trial Tr. 257:10-258:19).
- While the presentation clause in the CD states that the funds were payable "on the return of this certificate properly endorsed," Wesbanco presented evidence that it is a common practice for a bank to permit a depositor to redeem a CD without returning the original certificate. A.R. 536; 544; 551-552 (Trial Tr. 80:5-15; 88:7-10; 95:23-96:2). *See also*, *Peters v. Peters*, 191 W.Va. 56, 60, 443 S.E.2d 213, 217 (1994)

(depositors often lose or misplace certificates of deposit, and presentation clauses may be waived by the bank). Thus, without basic account information, possession of the original CD alone is not sufficient to establish the Account remains in existence or that Wesbanco owes Respondent any duty to pay her the funds she demands. This is certainly true in this case since the certificate was in joint names with her father, either party could have redeemed it, and Respondent waited until after her father's death to assert such a claim.

At the close of Respondent's case-in-chief, the trial court granted Wesbanco's Rule 50 motion for judgment as a matter of law as to Respondent's unjust enrichment and constructive fraud claims, but denied Wesbanco's motion as to Respondent's breach of contract and punitive damages claims. A.R. 671-673 (Trial Tr. 215:21-217:21). At the conclusion of all the evidence, the trial court granted Wesbanco's renewed Rule 50 motion for judgment as a matter of law with respect to Respondent's claim for punitive damages, but once again denied Wesbanco's motion with respect to Respondent's breach of contract claim. A.R. 732-735 (Trial Tr. 276:64-279:19). As a result, the case went to the jury on a single claim, breach of contract. The jury was left to determine if Wesbanco breached the presentation clause in the CD when it denied Respondent's demand to withdraw funds from an account which did not exist.

In accordance with the trial court's pre-trial order, Wesbanco submitted 5 proposed jury instructions. A.R. 397-401. Wesbanco's proposed jury instruction number 2 provided as follows:

> Plaintiff contends that the Certificate of Deposit indicates that neither she nor her father could withdraw the funds from the account without first endorsing and surrendering the Certificate of Deposit to the bank. Under West Virginia law, these types of surrender provisions are nothing more than general statements of bank policy. As such, they create no substantive rights in depositors like the plaintiff and her father.

Id. Wesbanco's proposed jury instruction number 3 provided as follows:

> Furthermore, the provision in the Certificate of Deposit that indicates that neither the plaintiff nor her father could withdraw the funds from the account without first endorsing and surrendering the Certificate of Deposit to the bank does not constitute or create a contractual duty on the part of the bank.

Id. Both instructions were based on this Court's holdings in *Peters*.

The trial court instructed the jury that "[i]n determining the meaning of a written contract, you must consider the contract as a whole, including all of its parts and attachments." A.R. 759 (Trial Tr. 303:12-14). The trial court also instructed the jury that "[a] party breaches a contract when it fails to do something that it is obligated by the contract to do or does something which it has contracted not to do. A breach of contract is material if it deprives the other party of a substantial benefit that she reasonably expected to receive under the terms of a contract." A.R. 759-760 (Trial Tr. 303:23-304:4). However, over Wesbanco's objection, the trial court refused to give Wesbanco's proposed jury instructions numbers 2 and 3. A.R. 747 (Trial Tr. 291:4-24).

On March 3, 2021, the jury returned its verdict and found in favor of Respondent on her breach of contract claim. A.R. 413. On March 18, 2021, the trial court entered its amended judgment order on jury trial. A.R. 418-421. In that order, the trial court expressly preserved all of the parties' objections and exceptions. *Id.*

SUMMARY OF THE ARGUMENT

Many passbooks and certificates of deposit contain presentation or surrender clauses. Here, the CD states that the funds were payable to Dewey Ellifritz or Crystal Gayle Ellifritz "on the return of this certificate properly endorsed." In *Peters v. Peters*, the certificate of deposit provided virtually identical language; that the funds were payable to John Peters or Patricia Peters "on its return properly endorsed." *Peters*, 191 W.Va. 56, 59, 443 S.E.2d 213, 216 (1994). In *Peters* this Court held that presentation and surrender clauses are for the protection of the bank, not the depositor. *Peters*, 191 W.Va. at 60, 443 S.E.2d at 217. Moreover, "mere boilerplate recitals of the

obligation to present passbooks or surrender certificates at the time of withdrawal constitute nothing more than general statements of bank policy ***and as such create no substantive rights in depositors***." *Peters*, 191 W.Va. at 61-62, 443 S.E.2d at 218-219 (emphasis added) (citations omitted). Thus, in West Virginia, a depositor cannot assert a breach of contract claim against a bank for the failure to comply with a presentation or surrender clause in a certificate of deposit. In this case, Respondent's breach of contract claim is predicated on her allegation that Wesbanco failed to comply with the presentation clause in the CD. Based on this Court's holdings in *Peters*, that claim fails as a matter of law and the trial court erred in denying Wesbanco's renewed Rule 50 motion for judgment as a matter of law.

In addition, the evidence at trial established that no principal or interest were paid on the CD during the 10-year period before Respondent filed her complaint. The complete lack of evidence relating to the Account for 38 years and the absence of any Account activity for 38 years demonstrate that the funds in the Account were withdrawn, and the Account closed long ago. The trial court committed reversible error by denying Wesbanco's motion for judgment as a matter of law and shifting the burden of proof.

Furthermore, Respondent's breach of contract claim (which is an action to enforce the CD) is barred under any applicable West Virginia statute of limitations, and the trial court erred in denying Wesbanco's motion for judgment as a matter of law.

Ignoring the applicable statute of limitations, record retention requirements and dormancy laws, the Court improperly imposed on Wesbanco the burden to prove that no deposit account relationship existed and even demanded that it prove where the money went.

Finally, the trial court erred in refusing to give two jury instructions proposed by Wesbanco that were based on *Peters*.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Wesbanco requests oral argument and a signed decision pursuant to W.Va. R. App. P. 19(a)(1) or (a)(3). Under Rule 19(a)(1), oral argument is appropriate because the issues in this case are of significant impact to Wesbanco and the entire banking industry in West Virginia. There are thousands of stale certificates of deposit and passbooks in desk drawers, closets, storage lockers, safe deposit boxes, safes, and cabinets in homes and businesses in West Virginia. To say such stale documents create enforceable contracts and impose a burden on a bank to prove where the deposit is, as suggested by the trial court, would jeopardize all banks and completely abrogate clearly defined statutory limitation provisions on enforceable claims and the statutory presumption created by the dormancy laws in West Virginia.

ARGUMENT

I. The trial court erred in denying Wesbanco's motion for judgment as a matter of law based on *Peters v. Peters* and by shifting the burden of proof to Wesbanco when it ignored the presumption established by the statutory framework of dormancy, retention and limitations periods in the West Virginia Code.

A. Standard of appellate review.

The appellate standard of review of an order granting or denying a W.Va. R. Civ. P. 50 motion for judgment as a matter of law, either during or post-trial, is *de novo*. *See Princeton Ins. Agency, Inc. v. Erie Ins. Co.*, 225 W.Va. 178, 183, 690 S.E.2d 587, 592 (2009), citing *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009), *Gillingham v. Stephenson*, 209 W.Va. 741, 745, 551 S.E.2d 663, 667 (2001), and Syl. Pt. 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996). In reviewing a trial court's order on a Rule 50 motion, the appellate court must use the same standards as those employed by the lower court. *See Stanley v. Chevathanarat*, 222 W.Va. 261, 263, 664 S.E.2d 146, 148 (2008) (citation omitted). Stated more pointedly,

> in reviewing a motion for judgment as a matter of law, a court should (1) resolve direct factual conflicts in favor of the nonmovant, (2) assume as true all facts supporting the nonmovant which the evidence tended to prove, (3) give the nonmovant the benefit of all reasonable inferences, and (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

Id., citing *Cleckley*, et al., *Litigation Handbook* § 50(a)(1), at 73 (Cum. Supp. 2007) (footnote omitted).

B. *Peters v. Peters.*

Respondent's breach of contract claim is governed by this Court's holdings in *Peters v. Peters*. In 1978, Patricia Peters and her husband John Peters opened joint checking and passbook savings accounts at Whitesville State Bank in Boone County. *Peters*, 191 W.Va. at 58-59, 443 S.E.2d at 215-216. Whitesville issued the Peters a passbook in the names of "John L. or Patricia Peters" to be used in making withdrawals from their account. *Id.* The passbook contained printed rules and regulations. *Peters*, 191 W.Va. at 59, 443 S.E.2d at 216. Immediately above the rules and regulations, the passbook stated that "NO PAYMENTS WILL BE MADE EXCEPT UPON PRESENTMENT OF THIS BOOK." *Id.* In addition, one of the rules and regulations expressly provided that "[d]eposits and the interest thereon may be withdrawn by the depositor in person or by written order; ***but in either case, the passbook must be presented*** ....." *Id.* (emphasis added).

Several years later, the Peters purchased two certificates of deposit from Whitesville. *Id.* The certificates of deposit were made payable to John L. or Patricia Peters, and each expressly provided that it was payable "on its return properly endorsed." *Id.*

In June 1984, John Peters withdrew the funds from the joint accounts and redeemed the two certificates of deposit. *Id.* He did not, however, present the passbook or certificates of deposit: "[n]otwithstanding the aforesaid rules printed in the passbook and on the certificates, the Bank permitted [Mr. Peters] to withdraw the funds on deposit in both accounts without presentation of

either the passbook or certificate." *Id.*

In September 1984, Patricia Peters presented the certificates of deposit to Whitesville and asked that they be renewed. *Id.* Whitesville refused, explaining that her husband previously redeemed the certificates of deposit. *Id.* Patricia Peters subsequently sued Whitesville for, among other things, breach of contract.[2] *Id.* In her breach of contract claim, Mrs. Peters alleged that Whitesville had entered into a contractual relationship with her, and by allowing her husband to redeem the certificates of deposit without presenting the certificates, Mrs. Peters argued that Whitesville breached its contract. *Peters*, 191 W.Va. at 61, 443 S.E.2d at 218.

In May 1992, the trial court granted Whitesville's motion for summary judgment, and Mrs. Peters appealed. *Peters*, 191 W.Va. at 59, 443 S.E.2d at 216. In affirming, this Court opined that "[t]he rules of a bank voluntarily adopted by it become a valid agreement or contract between the bank and its depositors when an account is opened, and the passbook is issued or a CD purchased pursuant to the printed rules set forth in the passbook or the certificates." *Peters*, 191 W.Va. at 61-62, 443 S.E.2d at 218-219. However, "mere boilerplate recitals of the obligation to present passbooks or surrender certificates at the time of withdrawal constitutes nothing more than general statements of bank policy ***and as such create no substantive rights in depositors***." *Peters*, 191 W.Va. at 61-62, 443 S.E.2d at 218-219 (emphasis added) (citations omitted). And, "when the terms relating to the requirement of presentation of a passbook or certificate are positioned or articulated in such a way as to make it evident that a Bank does not intend the terms to be binding, no contract exists as to those terms." *Id.*

Here, the CD, like the certificate of deposit in *Peters*, contains boilerplate language that encourages Respondent or her father to present the CD to withdraw funds from the Account. The

[2] Mrs. Peters also sued the children of John Peters from another marriage. Apparently, Mr. Peters gave the money he withdrew from the accounts to his children.

CD states that, when a certificate naming two or more depositors is separated by the conjunction "or," "payment **may** be made upon surrender of this certificate" to any of the joint depositors. A.R. 9-10 (Compl. Ex. 1, emphasis added). Conversely, if the certificate used the conjunction "and" to separate the names of joint depositors, "the certificate **shall** be payable only upon the signatures of all depositors named." *Id.* (emphasis added). The CD used the conjunction "or" to separate the names of Respondent and her father. *Id.* Therefore, the CD was redeemable by either Respondent or her father, with or without the presentation of the CD.

The presentation clause in the *Peters*' certificate of deposit provided that it was payable "on its return properly endorsed." *Peters*, 191 W.Va. at 59, 443 S.E.2d at 216. This Court found that these words are "mere boilerplate recitals" of the depositor's obligation to present the certificate of deposit 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 CD 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. Moreover, the presentation clause in the Ellifritz' CD is nearly identical to the presentation clause in the Peters' certificate: the Ellifritz' CD provides that it is 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." Therefore, based on this Court's holdings in *Peters*, the presentation clause in the Ellifritz' CD is merely a boilerplate recital of the Ellifritz' obligation to present the CD at the time of withdrawal; it constitutes nothing more than general statements of bank policy; it creates no substantive rights in the Ellifritz; and no enforceable contract claim exists

as to those terms.

In its Rule 50 motion, Wesbanco argued that it was entitled to judgment as a matter of law because, based on *Peters*, Respondent's breach of contract cannot be maintained. The trial court erred when it rejected this Court's holdings in *Peters* and denied Wesbanco's motion.

Similar decisions in other jurisdictions support the decision of this Court in the *Peters* case. See *Krawitt v. Keybank*, 871 N.Y.S.2d 842, 23 Misc. 3d 297 (2008) (Plaintiff could not overcome presumption of payment of certificate of deposit issued to plaintiff's mother prior to her death where plaintiff had only the original certificate and bank had no record of forwarding funds to state under the 5 year dormancy statute applicable); *Schnack v. Valley Bank of Nevada*, 291 Fed. App. 168 (10th Cir. 2008) (Stale certificate not enforceable against bank where records of bank did not show any trace of certificate and bank had been materially prejudiced by customer waiting 15 years before attempting to redeem 90 day certificate); *Spiller v. Sky Bank-Ohio Bank Region*, 122 Ohio St. 3d 279, 910 N.E. 2d 1021 (2009) (Bearer of four decades old automatically renewing certificate cannot maintain an action for enforcement of the certificate after the expiration of the time provided for retention of those records.) *See also*, *Abraham v. National City Bank Corp*, 50 Ohio St. 3d 175, 553 N.E. 2d 619 (1990).

C. Respondent's claims are barred by the applicable statute of limitations.

Plaintiff's claims are barred by the statute of limitations. "A certificate of deposit is a **note** of the bank." W.Va. Code § 46-3-104(j) (emphasis added). "Certificates of deposit are treated in former Article 3 as a separate type of instrument. In revised Article 3, Section 3-104(j) treats them as **notes**." W.Va. Code § 46-3-104 (UCC Comment 4) (emphasis added).

1. W.Va. Code § 46-3-118(b).

A certificate of deposit is "an instrument containing an acknowledgment by a bank that a

sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a **note** of the bank." W.Va. Code § 46-3-104(j) (emphasis added). If a demand for payment is made to the maker of a note, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand." W.Va. Code § 46-3-118(b). If, however, no demand for payment is made, "an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of 10 years." *Id.* In this case, Respondent sued Wesbanco on April 19, 2019. Her breach of contract claim (which is an action to enforce the certificate of deposit) is barred under W.Va. Code § 46-3-118(b) if no principal or interest were paid on the CD during the 10-year period from April 18, 2009 to April 18, 2019.

The evidence at trial established that no principal or interest were paid on the CD during that 10-year period. Banks are required to send Form 1099-INT to customers who receive at least $10 in bank deposit interest, and customers must pay taxes on that interest.[3] Respondent testified that her father kept meticulous records, and she reviewed decades of Mr. Ellifritz' detailed financial records and tax returns in advance of trial. A.R. 651-652 (Trial Tr. 195:8-196:5). However, Respondent found no evidence that her father received any Form 1099-INTs; she received no Form 1099-INTs; and no taxes were paid on the account since before 2000. *Id.*; A.R. 660-661 (Trial Tr. 204:17-205:4). Moreover, the account did not exist at Wesbanco since at least 2000, so it is simply impossible for principal or interest to have been paid and Wesbanco has no record of the account during the 10-year period from April 18, 2009 to April 18, 2019. A.R. 683-688 (Trial Tr. 227:21-232:17); A.R. 699-701 (Trial Tr. 243:7-245:22); A.R. 702 (Trial Tr. 246:6-22).

[3] *See* https://www.irs.gov/pub/irs-pdf/i1099int.pdf.

2. W.Va. Code § 55-2-6.

Notwithstanding the clear language of the UCC limitations period, as to certificates of deposit, the Respondent argued that the UCC does not apply as the instrument is non-negotiable. This position does not enhance the Respondent's case.

Furthermore, if the Court were to apply a written contract limitation period, such a breach of contract claim in West Virginia is subject to the 10-year statute of limitations contained in W.Va. Code § 55–2–6, which provides, *inter alia,* that an action to recover on the breach of a written and signed contract must be brought within 10 years "after the right to bring the same shall have accrued." W.Va. Code § 55-2-6. S*ee, Steeley v. Funkhouser*, 153 W.Va. 423, 169 S.E.2d 701 (1969) (In an action to enforce a demand note, this Court held that W.Va. Code § 55-2-6 provides that the action shall be brought within ten years next after the right to bring the same shall have accrued.) Citing *Sansom v. Sansom*, 148 W.Va. 603, 137 S.E.2d 1 (1964); *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 466 S.E.2d 810 (1995) (W.Va. Code § 55–2–6 provides a ten-year period in which to bring an action based on a contract.); *Thomas v. Branch Banking & Tr. Co.*, 443 F. Supp. 2d 806 (N.D.W.Va. 2006) (In general, breach of contract claims in West Virginia are subject to the time limitations contained in W.Va. Code § 55–2–6, which provides, inter alia, that an action to recover on the breach of a written and signed contract must be brought within ten years "after the right to bring the same shall have accrued.").

Wesbanco argued that Respondent's breach of contract claim is barred by W.Va. Code § 46-3-118(b), and it made the same argument in its motion for judgment as a matter of law. A.R. 193-194 (MOL/MSJ pp. 14-15); A.R. 667 (Trial Tr. 211:3-13). The trial court erred in denying both motions.

D. The lack of any records of the Account creates the presumption that the account was closed long ago and does not shift the burden of proof.

1. W.Va. Code § 31A-4-35.

Possession of the CD alone does not prove that funds remain on deposit in the Account. A "[c]ertificate of deposit means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A certificate of deposit is a note of the bank." W.Va. Code § 46-3-104(j). The CD merely establishes Central National Bank's receipt of the $10,000 deposited into the Account and its promise to repay Respondent **or** her father the funds deposited. By its very terms, the CD is non-negotiable, non-transferable, and therefore has no intrinsic value. The physical CD does not, in and of itself, convey a right to withdraw funds from the Account. A current deposit relationship must be established to prove Respondent has a right to the funds she demands. Respondent produced no evidence to establish a current deposit relationship and the lack of records demonstrates that the Account was closed well before Respondent's demand for payment.

Pursuant to W.Va. Code § 31A-4-35(a), banks are statutorily permitted to destroy records 5 years after the "final entry" in the Account. The final entry of an automatically renewing time deposit account is the final withdrawal of funds from the account. Accordingly, the absence of any records in the Bank's systems for twenty years demonstrates that the funds were withdrawn more than 5 year ago. Respondent relied heavily on this lack of records in her case, and the trial court committed reversible error by shifting the burden of proof from Respondent/ Plaintiff to WesBanco, the defendant below.

W.Va. Code § 31A-4-35 was amended, effective June 5, 2020, by HB 4406, which added subjection (c), and provides, in pertinent part, with emphasis added:

> Notwithstanding any other provision of this code establishing a statute of limitations for any period greater than 5 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.**

See W.Va. Code § 31A-4-35(e), effective 06/5/2020. A note at the end of the Introduced Version of HB 4406 specifically states: "The purpose of this bill 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).* This note establishes that the amendment constitutes a statute of repose and precludes claims not brought within the 5-year record retention timeframe. In addition, 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. Thus, Subsection (c) to § 31A-4-35 added by the West Virginia Legislature simply clarifies existing law and confirms the position taken in this case by Wesbanco. The outcome at trial is contrary to the very purpose of the record retention statute, to address situations exactly like the facts in this case. The trial court's rulings leave financial institutions that have relied on W.Va. Code § 34A-4-35 defenseless to claims by customers demanding payment on accounts closed long ago.

At the very least, the lack of records creates a presumption under W.Va. Code § 31A-4-35 that the Account was closed more than 5 years ago. Respondent could have easily overcome or rebutted this presumption by presenting any evidence that the Account contained funds at any point after it matured in July of 1981. Respondent was not able to produce a single piece of

evidence to prove the Account remained at any point after December 31, 1980, the date of the CD, let alone in the past 5 years. Respondent produced NO evidence other than the original CD. The trial court committed reversible error by ignoring the presumption created by W.Va. Code § 31A-4-35 and shifting the burden of proof to Wesbanco to not only disprove an existing account relationship, but also to present evidence of where the money is. See, e.g. A.R. at 725. (Trial Tr. 269:19-21).

2. W.Va. Code § 36-8-1, et seq.

The record retention statute applicable to banks aligns with the West Virginia Uniform Unclaimed Property Act which requires the holder of property presumed to be abandoned to make a report concerning the property to the West Virginia State Treasurer for the property presumed abandoned. W.Va. Code § 36-8-7(a) and (d). Upon the filing of this report, the holder of the property presumed abandoned must pay, deliver, or cause to be paid or delivered to the West Virginia State Treasurer the property described in the report as unclaimed. W.Va. Code § 36-8-8(a). The Act contains its own rule for record retention: "a holder required to file a report under section seven of this article shall maintain the records containing the information required to be included in the report for 10 years after the holder files the report." W.Va. Code § 36-8-21(a).

Wesbanco is a "holder" under the Act since it is obligated to hold for the account of another, or deliver or pay to the owner of, or person who has a legal or equitable interest in, property subject to the Act. W.Va. Code § 36-8-1(6 & 11). Thus, as a holder, Wesbanco is, and/or its predecessors were, obligated to report and pay over to the Administrator property presumed abandoned under the Act and maintain those records for 10 years.

Property is presumed abandoned if it is "unclaimed" for the applicable period set forth in W.Va. Code § 36-8-2(a). "Unclaimed" means that "the apparent owner has not communicated in

writing ... with the holder concerning the property or the account in which the property is held, and has not otherwise indicated an interest in the property" during the applicable statutory period. W.Va. Code § 36-8-2(c). An apparent owner may indicate an interest in the property or account by: 1) the presentment of an instrument of payment with respect to the account; 2) owner-directed activity in the account in which the property is held; or 3) making a deposit or withdrawal from the account. W.Va. Code § 36-8-2(d)(1-3).

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). "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).

There are no records of unclaimed property in the name of Respondent or her father. In addition, Wesbanco confirmed with the West Virginia State Treasurer's Office, Unclaimed Property Division, that there is no record of property reported by Wesbanco or its predecessors in Respondent's name or her father's name, their tax identification numbers, or the number associated with the Account. Since there is no record of the funds in the Account being escheated to the West Virginia State Treasurer's Office, and there is no record of the Account in Wesbanco's record keeping systems, there can only be one logical conclusion; that the funds were redeemed years ago, and the Account closed. The trial court committed reversible error by denying Wesbanco's motion for judgment as a matter of law and shifting the burden to Wesbanco to prove the funds were paid to Respondent or her father.

3. Application of the record retention requirements.

Applying the record retention requirements of W.Va. Code § 31A-4-35 and W.Va. Code § 36-8-21(a) to the CD relied upon by the Respondent at trial, the following timelines apply:

- The record retention requirement for the Bank for the deposit in question represented by the CD would have expired in 1986, 36 years ago.
- Under the dormancy laws, the Account would have been required to be remitted to the State of West Virginia 7 years after its maturity date of July 1, 1981; thus on or about July 1, 1988, a period of approximately 33 years ago.
- Under the record retention period for records of escheatment, the Bank would have only been required to keep those records for 10 years. Applying the 6-month term of the CD, plus the 7 years, plus the 10 years, Wesbanco, or its predecessor, would have disposed of those records on or about July 1, 1998, a period of 23 years ago.

The CD at issue in this case, and relied upon by the Respondent, does not constitute competent evidence of an existing deposit relationship. Respondent could offer no evidence of an existing deposit relationship other than the forty-year-old CD. Therefore, the trial court committed reversable error by denying Wesbanco's motion for judgment as a matter of law and shifting the burden to Wesbanco to prove the funds were paid to Respondent or her father.

II. The trial court erred in refusing to give two of Wesbanco's proposed jury instructions based on this Court's holdings in *Peters v. Peters*.

A. Standard of appellate review.

As a general rule, where, as here, an error complained of involves the trial court's refusal to give a jury instruction, this Court applies an abuse of discretion standard. *Kessel v. Leavitt*, 204 W.Va. 95, 144, 511 S.E.2d 720, 769 (1998). In so doing, the Court " 'will ... presume[ ] that [the] trial court acted correctly ... unless it appears from the record in the case ... that the

instructions refused were correct and should have been given.' " *Id.*, citing *Coleman v. Sopher*, 201 W.Va. 588, 602, 499 S.E.2d 592, 606 (1997) (internal quotations and citations omitted).

B. The *Peters* instructions were correct and should have been given.

Wesbanco's proposed jury instruction number 2 provided as follows:

> *Peters v. Peters*—General Statement of Bank Policy
>
> Plaintiff contends that the Certificate of Deposit indicates that neither she nor her father could withdraw the funds from the account without first endorsing and surrendering the Certificate of Deposit to the bank. Under West Virginia law, these types of surrender provisions are nothing more than general statements of bank policy. As such, they create no substantive rights in depositors like the plaintiff and her father.

A.R. 398. Wesbanco's proposed instruction number 3 provided as follows:

> *Peters v. Peters*—Surrender Clause Does Not Create a Contractual Duty
>
> Furthermore, the provision in the Certificate of Deposit that indicates that neither the plaintiff nor her father could withdraw the funds from the account without first endorsing and surrendering the Certificate of Deposit to the bank does not constitute or create a contractual duty on the part of the bank.

A.R. 399.

Notably, the trial court acknowledged that the proposed instructions were correct recitals of this Court's holdings in *Peters*. A.R. 747 (Trial Tr. 291:4-16). However, the trial court refused to give the instructions on the grounds that "the circumstances in *Peters* were considerably different." A.R. 747 (Trial Tr. 291:4-16).

The instructions should have been given. In *State v. Guthrie*, this Court wrote:

> The purpose of instructing the jury is to focus its attention on the essential issues of the case and inform it of the permissible ways in which these issues may be resolved. If instructions are properly delivered, they succinctly and clearly will inform the jury of the vital role it plays and the decisions it must make.

State v. Guthrie, 194 W.Va. 657, 672, 461 S.E.2d 163, 178 (1995). "Without [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the

appropriate legal conclusions based on the facts." *Id.*, citing *State v. Miller*, 194 W.Va. 3, 16 n. 20, 459 S.E.2d 114, 127 n. 20 (1995).

Like Patricia Peters in the *Peters* case, in this case, Respondent contends that the bank breached its contract when it failed to comply with the presentation clause in the CD. Throughout the trial, Respondent erroneously suggested to the jury that the words "on the return of this certificate properly endorsed" meant that the funds were only payable upon the presentation of the CD. *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 the Ellifritz. It was also 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 numbers 2 and 3 say, and it was reversible error for the trial court to refuse to give them.

CONCLUSION

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

Dated: February 14, 2022

Wesbanco Bank, Inc.

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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 14th day of February, 2022, I served the foregoing **Petitioner's Brief** via electronic mail and U.S. Mail, postage pre-paid, addressed as follows:

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