IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0913

WESBANCO BANK, INC.,

Defendant below, Petitioner,

vs.

Appeal from an order of the
Circuit Court of Monongalia County
(Civil Action No. 19-C-87)

CRYSTAL GAYLE ELLIFRITZ,

Plaintiff Below, Respondent.

RESPONDENT'S BRIEF OF CRYSTAL GAYLE ELLIFRITZ

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com
Counsel for Respondent Crystal Gayle Ellifritz

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I. STATEMENT OF THE CASE

This is a breach of contract case, and a simple one at that. More specifically, this case concerns a money market certificate issued by Central National Bank to Plaintiff's father, Dewey Ellifritz, on December 31, 1980. Most basically, in 1980, Mr. Ellifritz deposited $10,000 with Wesbanco's predecessor Central National Bank and was issued a money market certificate. A.R. 9-10. This certificate created a contract whereby, at maturity, Wesbanco's predecessor-in-interest Central National Bank would repay the $10,000 deposit, plus interest, to Dewey Ellifritz or his daughter Crystal Gayle Ellifritz, Plaintiff herein. *Id.* This matter arises out of Wesbanco's failure to honor the subject money market certificate – in breach of its contract with Plaintiff - when Plaintiff presented the certificate to Wesbanco in 2018 following her father's death.

The subject money market certificate is found numerous places throughout the Appendix Record, and the original was admitted as exhibit no. 2 and published to the jury at the trial of this matter. A.R. 499. For purposes of clarification: the front of the certificate is found at the top of A.R. 9 (this copy has had Mr. Ellifritz's social security number redacted); the provisions printed on the back of the certificate are found at A.R. 10; though not produced in the Appendix Record, the original money market certificate was housed in a green cover (akin to the cover on a checkbook) which, as described in trial testimony, had the phrase "Place This In Your Safe Deposit Box" on it (A.R. 587:7-14; 590:5-14); also in the aforementioned green cover with the certificate was a card, whose contents are found at the lower half of A.R. 9. Notably, there is no dispute as to the authenticity of the money market certificate at issue in this matter.

As referenced in Petitioner's brief, in October 1994, Central National Bank merged into Wesbanco Bank Fairmont, Inc. ("Wesbanco Fairmont")(A.R. 182); in January 2000, Wesbanco Fairmont merged into Wesbanco Bank Wheeling, Inc., and immediately thereafter, the Wesbanco Bank Wheeling, Inc., changed its name to Wesbanco Bank, Inc. (Defendant below, Petitioner

herein). (*Id.*; see also Pet. Brief at p. 3). Wesbanco presented no evidence or argument below, nor does it contend on appeal, that it has no obligation to honor the terms of the active accounts of its predecessor Central National Bank. In fact, Wesbanco's corporate representative testified that she had personally redeemed certificates issued by Central National Bank during her tenure at Wesbanco. A.R. 581-82.

At trial, the undisputed evidence presented reflected that the subject money market certificate was kept by Mr. Ellifritz in a home safe (depicted by a photograph introduced as Exhibit 1 at trial). In the final years of his life, Mr. Ellifritz, and his safe, moved in with Plaintiff. A.R. 494. Only Plaintiff and her father had access to the safe. A.R. 648. Plaintiff did not access the safe until after her father's death in 2017. *Id.* Upon accessing the safe, Plaintiff found the subject money market certificate (of which she had prior knowledge – A.R. 646:2-5) inside with other important papers. A.R. 650:18, 496:15-16. In December 2018, Plaintiff attempted to redeem the money market certificate by presenting the same to a Wesbanco branch. A.R. 650, 652:11. Such demand for payment on the money market certificate was denied by Wesbanco. A.R. 650. It is undisputed that Plaintiff tendered the original, un-negotiated money market certificate for payment to Wesbanco in 2018, and Wesbanco refused to satisfy the same.

Plaintiff testified that she had never redeemed the money market certificate prior to 2018, and that she knew her father had never "cashed it in" either. A.R. 651:3-7. Plaintiff testified about: assisting her father in getting his affairs in order prior to his passing (A.R. 655), her familiarity with her father's record keeping and business practices based upon her personal observations (A.R. 656-57), the fact that if her father had previously redeemed the subject money market certificate "he would have wrote on there redeemed and whatever date it was[;] [h]e would have wrote down whatever amount he would have got out of it[;] and he wouldn't have left it in the safe;" and her

review of her father's meticulous financial records after his death. A.R. 651:10-18. It is undisputed that Wesbanco has no conclusive proof that the subject money market account funds were withdrawn prior to 2018 when Plaintiff demanded payment. A.R. 544:13-16, 548:10-13, 548:14-17, 575:1-6, 626:5-7.

Further, through its Rule 30(b)(7) corporate witness, Wesbanco admitted that the subject money market certificate is a contract, with its terms and conditions on its face and on the back of the certificate (A.R. 549:4-12), and those terms and conditions include that the certificate is payable on the return of the certificate properly endorsed (A.R. 552:7-16). Contrary to Wesbanco's *Statement of the Case* representation, the subject money market certificate does not set out merely "general" terms of the account, but rather contractual terms.

The subject money market certificate specifically states on its face that the funds are only payable "IN CURRENT FUNDS 26 WEEKS AFTER DUE DATE, **ON THE RETURN OF THIS CERTIFICATE PROPERLY ENDORSED.**" *Emphasis added,* A.R. 9. The face of the money market certificate also clarifies that it shall have multiple maturity periods of 26 weeks, and that succeeding interest rates shall accrue at the "THEN PREVAILING U.S. TREASURY BILL RATE."

As evidenced by the face of the money market certificate, it had "multiple" succeeding maturity periods. A.R. 9, 550-51. This means that the money market certificate is auto-renewing, without any action required by the Ellifritzes to continue to renew and roll over continuously. A.R. 592:2-5.

On the back of the money market certificate is a release, to be completed by the account owner when the account's funds are redeemed/withdrawn - confirming that all funds and attendant interest due the account owner for this money market account had been paid, and absolving

Wesbanco "from any further liability in connection herewith.". A.R. 10, 595:3-24. Wesbanco produced no evidence at trial that such release had been executed by Mr. Ellifritz or Plaintiff.

Though Wesbanco could produce no documentation conclusively demonstrating that the subject money market certificate had been redeemed prior to Plaintiff's demand for payment in 2018, Wesbanco's defense in this action is that the subject money market account was not effective in 2018 because Wesbanco had no record of such account. A.R. 702-03. Contrary to Wesbanco's Brief's *Statement of the Case*, no conclusive evidence demonstrating that the subject money market account had been closed was produced at trial. Rather, Wesbanco's defense is based upon *assumptions* which it asked the jury to utilize to conclude that Wesbanco had not breached its contract with Plaintiff.

Plaintiff's breach of contract claim was tried before a jury on two days in March 2021. On March 3, 2021, the jury returned a verdict finding that Wesbanco breached its contract with Plaintiff. A.R. 413. Insofar as Wesbanco did not challenge Plaintiff's expert's calculation of the applicable interest on Plaintiff's initial $10,000 money market deposit, the parties essentially stipulated to the amount of Plaintiff's damages as $51,209.75 (original $10k deposit with attendant interest, as calculated by Plaintiff's expert witness), which appeared on the verdict form. A.R. 413, 765, 772-73.

Because the Trial Court did not error in denying Wesbanco's motion for summary judgment or its motion for judgment as a matter of law, and did not commit error in rejecting Wesbanco's proposed jury instructions 2 and 3, Wesbanco's arguments presented to this Court fail. Thus, the jury's verdict should be affirmed.

II. SUMMARY OF ARGUMENT

Through this action, Plaintiff is not on a crusade to turn the banking industry on its head, and Wesbanco's suggestion that enforcement of the subject money market certificate contract

would "jeopardize all banks" is clearly hyperbole. Rather, throughout this now three-year litigation, Plaintiff has simply sought to compel Wesbanco to fulfill its contractual obligations and issue payment for the money market certificate Plaintiff's father entered into with Wesbanco's predecessor over forty years ago. The trier of fact duly found that Wesbanco is obligated to make such payment, and that verdict should not be disturbed by this appeal.

The *Peters v. Peters* case at the heart of Wesbanco's appeal is materially different from the circumstances present in the instant case. The Trial Court appreciated the distinguishing characteristics between this case and *Peters* throughout this matter. Accordingly, the holdings in *Peters* are not applicable to this matter and *Peters'* syllabus points do not defeat Plaintiff's breach of contract claim.

Moreover, no applicable statute of limitations period bars Plaintiff's claim. Wesbanco attempts to utilize inapplicable and/or incomplete versions of W.Va. Code to buttress its statute of limitations argument. Wesbanco is not entitled to any presumptions that the subject money market account was closed prior to 2018. As set forth below, the jury was permitted to fully and fairly consider Wesbanco's evidence and assumptions which Wesbanco feels demonstrate that the money market funds were withdrawn prior to 2018. Having done so, the jury clearly concluded that there was, in fact, more than "one logical conclusion" which could be drawn from Wesbanco's inability to produce conclusive documentation of prior payment of the subject money market funds.

Finally, because *Peters* is distinguishable from the instant matter, the Trial Court correctly rejected Wesbanco's proposed jury instructions 2 and 3. No reversible error was committed by the Trial Court, and Wesbanco's instant appeal should be denied and the jury's verdict undisturbed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rule of Appellate Procedure 18(a)(4), oral argument is not necessary in this case. Indeed, the facts and arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT ERROR IN DENYING WESBANCO'S MOTION FOR SUMMARY JUDGMENT NOR MOTION FOR JUDGMENT AS A MATTER OF LAW.

1. Standard of Review.

"The appellate standard of review for an order granting or denying a renewed motion for judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998] is *de novo*." Syl. pt. 1, *Herbert J. Thomas Mem. Hosp. Ass'n v. Nutter*, 238 W.Va. 375, 795 S.E.2d 530 (2016), quoting Syl. pt. 1, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). Further,

> [w]hen this Court reviews a trial court's order granting or denying a renewed motion for judgment as a matter of law after trial under Rule 50(b) of the *West Virginia Rules of Civil Procedure* [1998], it is not the task of this Court to review the facts to determine how it would have ruled on the evidence presented. Instead, its task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, when considering a ruling on a renewed motion for judgment as a matter of law after trial, the evidence must be viewed in the light most favorable to the nonmoving party.

Id. at Syl. pt. 2, quoting Syl. pt. 2, *Fredeking v. Tyler*, 224 W.Va. 1, 680 S.E.2d 16 (2009). This Court "uses the following guideline to weigh whether there is sufficient evidence to support the jury's verdict:

> [i]n determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4)

> give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved."

Id. at 384, citing Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983). Similarly,

> 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.

Stanley v. Chevathanarat, 222 W.Va. 261, 263-64, 664 S.E.2d 146 (2008), citing Cleckley, et al., *Litigation Handbook* § 50(a)(1), at 73 (Cum. Supp. 2007)(footnote omitted).

2. *Peters v. Peters* is distinguishable from the instant matter.

Wesbanco relies heavily on this Court's decision in *Peters v. Peters*, 191 W.Va. 56, 443 S.E.2d 213 (1994), to support its argument that it is entitled to judgment as a matter of law. *Peters* concerned a widow's claim that a bank improperly paid out proceeds of certain bank accounts which she jointly held with her late husband (held in the form of joint tenancy with right of survivorship). *Id.* at 58. Additionally, Mr. and Mrs. Peters purchased two certificates of deposit ("CDs") which were held jointly, were negotiable, and each certificate stated that it was "payable on its return properly endorsed." *Id.* at 59.

Most basically, in June 1984, without telling his wife, Mr. Peters withdrew the funds in the subject joint checking and savings accounts, and redeemed the two CDs jointly held with his wife. *Id.* In September 1984, Mrs. Peters presented the CDs to the bank seeking to renew them, but was told that unbeknownst to her, Mr. Peters had already redeemed the CDs. *Id.* Thereafter, on April 3, 1989, Mrs. Peters filed suit against the bank, among others, seeking reimbursement for the value

of the CDs, plus interest. *Id.* The factual circumstances in *Peters* are materially distinguishable from the case at bar for several reasons.[1]

First, in *Peters,* the bank had evidence that the funds in the subject joint accounts and CDs had been withdrawn.[2] Based upon the timeline referenced above, insofar as Mrs. Peters went in to renew the subject CDs just three (3) months after her husband's withdrawal of the same and filed suit within five (5) years thereof, the bank clearly had documentation that the funds in the joint accounts and joint CDs were paid out. Conversely, in the instant case, it is undisputed that Wesbanco has no definitive proof that the subject money market account funds were withdrawn prior to 2018 when Plaintiff demanded payment. Wesbanco's designated Rule 30(b)(7) corporate representative Joan Miller admitted that:

- Wesbanco had no "formal record of the money market certificate being redeemed by anyone or any entity," (A.R. 544:13-16);
- Wesbanco had "no physical factual evidence that this [money market] certificate was ever returned to Wesbanco or any predecessor" (A.R. 548:10-13);
- "Wesbanco has no evidence that this [money market] certificate was ever properly endorsed by Dewey Ellifritz or Crystal Gayle Ellifritz" (A.R. 548:14-17); and,
- "Wesbanco has no document, instrument, copy indicating that anyone ever received funds under the money market certificate, or released Wesbanco as the successor from any further liability in connection with the money market certificate" (A.R. 575:1-6).

Wesbanco Vice President William Buchanan further confirmed that Wesbanco has no evidence or records to demonstrate that the subject money market funds were withdrawn. A.R. 626:5-7.

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[1] The Trial Court considered *Peters* at numerous stages of this litigation, and explicitly found *Peters* distinguishable from the instant matter. A.R. 732:15-23("[*Peters*] is distinguishable from the case that's before me now. This case [*Peters*], the bank had proof that it paid. It made the payment to a co-depositor. We don't have that in this case. We don't have any proof that it was paid. Now, you're arguing that – you're saying it's a contract. And then you're in the same – almost same sentence saying it's not a contract because Peters says it isn't a contract. You can't have it both ways.").

[2] Wesbanco has acknowledged as much during this action. See A.R. 365("The only difference is that Whitesville State Bank, the bank at issue in *Peters*, had deposit records reflecting that the funds were withdrawn. . .").

Rather, Wesbanco's defense in this matter is simply: because there is no record of the subject money market account on its books, then the funds must have been paid out to someone prior to the year 2018 when Plaintiff sought to redeem the same. As recognized by the Trial Court, this defense is based merely on an *assumption* that the money market funds were paid previously. A.R. 627:17-22. The Trial Court "didn't buy that" (A.R. 627:19), and as evidenced by the verdict returned, neither did the jury. A.R. 413.

Second, in the instant case, Wesbanco conceded that the money market certificate was a contract, with its terms printed on the same. More specifically, Wesbanco's designated corporate witness pursuant to W.Va. Rule of Civil Procedure 30(b)(7) – Joan Miller[3] – admitted that the subject money market certificate is a contract, with its terms and conditions on its face and on the back of the certificate (A.R. 549:4-12), and those terms and conditions include that the certificate is payable on the return of the certificate properly endorsed (A.R. 552:7-16). Wesbanco's counsel similarly acknowledged that the money market certificate was a contract numerous times throughout the trial. *See e.g.* A.R. 718:24-719:1("What we have right now is a pure breach of contract case."); 730:4("it is a contract."); 732:8("there's a contract."); 746:19("We do admit that there is a contract here."). The subject money market certificate specifically states on its face that the funds are only payable "IN CURRENT FUNDS 26 WEEKS AFTER DUE DATE, **ON THE RETURN OF THIS CERTIFICATE PROPERLY ENDORSED.**" *Emphasis added,* A.R. 9.

[3] Ms. Miller's Rule 30(b)(7) deposition testimony was read into the record before the jury at the trial of this matter. During her deposition, Ms. Miller expressed understanding that was speaking on behalf of Wesbanco and that her testimony bound Wesbanco (A.R. 515); and that she was testifying as to all maters known or reasonably available to Wesbanco, and was prepared to give knowledgeable, complete, and binding answers on behalf of Wesbanco (A.R. 524). Notably, among the various deposition topics for which Ms. Miller was designated to testify on behalf of Wesbanco was topic no. 13: "Wesbanco's interpretation and understanding of the terms set forth on the face of the Money Market Certificate and the back of the Money Market Certificate." A.R. 134, 516:8-9.

Additionally, within the 'Terms and Conditions' on the back of the money market certificate, under the heading 'Joint Certificates', the contract states that "[w]hen two or more persons are named as depositors on this Certificate with the conjunction 'or' appearing between names, then such Certificate shall be payable to any or the survivor or survivors of them and **payment may be made upon *surrender of this Certificate*** to any of them during the lifetime of all, or to the survivor or survivors after the death of one or more of them." *Emphasis added*, A.R. 10. In the instant matter, the subject money market certificate is payable to "Dewey Ellifritz **or** Crystal Gayle Ellifritz" (Plaintiff). A.R. 9. Plaintiff testified at trial that neither she nor her father received the money market funds. A.R. 651:10-15; 657:9-12.

Also on the back of the money market certificate is a release, to be completed by the account owner when the account's funds are redeemed/withdrawn. A.R. 10. Per its terms, when executed, such release would confirm that all funds and attendant interest due the account owner for this money market account had been paid, and absolve Wesbanco "from any further liability in connection herewith." A.R. 10, 595:3-24. Wesbanco presented no evidence that this release, or a replacement release (if, as Wesbanco argues, the subject account's funds were withdrawn without presentment of the money market certificate) was ever executed by Mr. Ellifritz or Plaintiff. Wesbanco's corporate representative witness Joan Miller testified that even when Wesbanco redeems a CD and the account holder does not present the original certificate, the bank nonetheless requires the customer to sign a CD withdrawal form. A.R. 580. Wesbanco produced no such executed CD withdrawal form executed by Plaintiff or her father in this matter.

Third, in *Peters,* the bank permitted Mr. Peters to withdraw the funds held in the joint accounts and redeem the two joint CDs without having to present the passbook or CDs – essentially waiving the presentation provisions. In the instant case, however, Wesbanco presented no

evidence at trial that the presentation provisions of the subject money market contract were in fact waived by Wesbanco. As this Court has recognized, "[a] waiver is a voluntary act, and implies an election by the party to give up something of value, or to forego some advantage which he might, at his option, have insisted on and demanded." *Bd. of Educ. v. Airhart*, 212 W.Va. 175, 182, 569 S.E.2d 422 (2002), quoting Smith *v. Bell*, 129 W.Va. 749, 760, 41 S.E.2d 695, 700 (1947). Further, there must be clear and convincing evidence of a party's intent to relinquish a known right. *Hoffman v. Wheeling Sav. & Loan Ass'n,* 133 W.Va. 694, 713, 57 S.E.2d 725, 735 (1950)("A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights."). Importantly, "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Id.* (citing *Hamilton v. Republic Cas. Co.,* 102 W.Va. 32, 135 S.E. 259 (1926); see also *Mundy v. Arcuri*, 165 W.Va. 128, 131, 267 S.E.2d 454, 457 (1980)("One who asserts waiver. . . has the burden of proving it.")(citations omitted). Accordingly, to the extent Wesbanco equates itself to the bank in *Peters*, it has failed to present any evidence that it waived its right, and the contractual provision of the money market certificate, to require presentation of the endorsed certificate before issuing payment.

Again, in this action, Wesbanco presented no evidence that the subject money market funds were paid prior to 2018 without presentation of a properly endorsed money market certificate. Wesbanco corporate designee Joan Miller testified that in her career at Wesbanco, she is aware of instances in which money market certificates were redeemed by the bank without the original certificates being signed and produced to Wesbanco. A.R. 536:5-15. However, Ms. Miller acknowledged that in those instances, Wesbanco nonetheless creates "a record of the transaction that the proceeds have gone out either fully or partially." A.R. 536:16-19. Importantly, Wesbanco

produced no evidence that the subject money market certificate was redeemed – not by endorsement of the money market certificate, nor by any alternative documentation.

Further, within the Terms and Conditions on the back of the subject certificate, is the following provision: "AMENDMENTS: The Depository [i.e. Wesbanco] may amend or repeal these Terms and Conditions, in whole or in part, which amendment or repeal shall be binding upon the depositor ten (10) days after notice of said amendment or repeal has been given." A.R. 10. Wesbanco presented no evidence that it ever amended or repealed the presentation provision (requiring return of the money market certificate properly endorsed to secure payment) of this contract by issuing notice of the same to Dewey Ellifritz or Plaintiff. Very simply, while syllabus point two of *Peters* suggests that presentation clauses "may be waived by the bank", no evidence of express nor implied waiver of the presentation requirement in the subject money market certificate was presented by Wesbanco at trial.

Fourth, to the extent Wesbanco attempts to rely upon syllabus point 4 of *Peters*, which states:

> The 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 certificate of deposit purchased pursuant to the printed rules set forth in the passbook or the certificates. However, mere boilerplate recitals of the obligation to present passbooks or surrender endorsed certificates at the time of withdrawal constitute nothing more than general statements of bank policy and as such create no substantive rights in depositors. Thus, 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[,]

Wesbanco failed at trial to present a defense consistent with this syllabus point. 191 W.Va. 56.

Wesbanco's appellate brief claims that the presentation clause found in Plaintiff's money market certificate is merely a boilerplate, general statement of bank policy, which fails to give rise to an enforceable contract claim by Plaintiff. Wesbanco Brief at p. 13. However, the

aforementioned syllabus point provides that "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." *Emphasis added, Id.* Wesbanco fundamentally made no factual presentation at trial related to this defense. For example, Wesbanco failed to distinguish admitted contractual terms, from terms positioned or articulated in non-binding ways, nor did Wesbanco distinguish which terms Wesbanco voluntarily adopted as contract terms juxtaposed to mere boilerplate recitals. Rather Wesbanco admitted that all terms and conditions within the money market certificate were contractual terms, in binding testimony presented at trial. *See e.g.* A.R. 549:4-12, 552:7-16. Plainly stated, if Wesbanco's logic is accurate, how are account holders ever to know which contract terms are binding and which are not? How are customers to know which "Terms and Conditions" – which Wesbanco's corporate representative conceded were contractual provisions – they have to abide by and which are unenforceable? And most importantly, how are bank customers to know which contractual provisions they can rely upon the bank fulfilling and which can be unilaterally withdrawn by the bank when convenient to avoid honoring a valid money market certificate? At trial, Wesbanco provided no solution to these questions.

Rather, the evidence presented at trial demonstrated that Plaintiff's father did precisely what Wesbanco's predecessor suggested - after making the initial $10,000 money market deposit, he placed the money market certificate is a safe location, allowing the funds to gain value as the certificate automatically renewed. As Wesbanco Vice President and Manager of Bank Operations William Buchanan testified, the cover of the subject money market account instructed the Ellifritzes to put the certificate in a safe place, like a safe deposit box. A.R. 590. Dewey Ellifritz did that in securing the certificate in his home safe for over thirty-seven (37) years. As evidenced

by the face of the money market certificate, it had "multiple" succeeding maturity periods. A.R. 9, see also testimony of Joan Miller, confirming the same, A.R. 550-51. Mr. Buchanan admitted that the money market certificate is auto-renewing, without any action required by the Ellifritzes. A.R. 591. Mr. Buchanan agreed that if the Ellifritzes put the subject money market certificate in a safe or safe deposit box and let it sit there, it would continually and automatically renew. A.R. 591-92, see also testimony of Joan Miller at A.R. 582 (acknowledging that if the money market's funds are not withdrawn, "it would be able to roll over continuously"). Mr. Buchanan agreed that the subject money market certificate would not expire after 10, 20, 30, or even 40 years because it automatically renewed. A.R. 592:2-5. Despite the auto-renewal aspect of the subject money market certificate, Wesbanco now seeks to penalize Plaintiff for relying on the same – yet another contractual term of the money market certificate which Wesbanco asks this Court to disregard.

The principal issue in *Peters* was whether the bank could permit an account owner to withdraw funds from joint accounts without presentation of the savings account passbook, or CD – thus, without notification of the joint owner. In reliance upon W.Va. Code § 31A-4-33 (providing that payment to one joint account owner of account's funds releases/discharges the bank from further obligation to pay such funds to another joint owner), this Court affirmed the circuit court's grant of summary judgment to the bank. 191 W.Va. 56, 59. In the case at bar, however, the Trial Court found that the subject money market certificate was recognized by Wesbanco as a contract, and found that "this is a contract case." A.R. 672:1; see also A.R. 717(Trial Court stated that "you have a contract because [Wesbanco] admitted it's a contract. And because it's a contract, the provisions in the contract prevail. Any other evidence is parol evidence. We learned that the first year of law school."); A.R. 722 ("You have a contract. The contract says you have to present this CD to get payment and then sign a release.").

Wesbanco concludes its argument section regarding the *Peters* decision with a string cite to foreign caselaw which it claims support the *Peters* decision. These foreign cases are inapposite to the instant matter and will be addressed in turn.

Krawitt v. Keybank, 871 N.Y.S.2d 842, 23 Misc. 3d 297 (2008): *Krawitt* is factually dissimilar to the instant matter. It involved a CD issued in the name of "Mollie Krawitt ITF Donald Krawitt" in 1987. *Id.* at 298. Mollie Krawitt died in 1994, and her son Donald subsequently discovered and presented CD for payment twelve years later in 2006. *Id.* The bank denied payment to Mr. Krawitt for the CD funds, stating that it had no record of the CD. *Id.* Mr. Krawitt filed suit and the bank moved for summary judgment asserting that Krawitt's claim was barred by the statute of limitations, laches, and the presumption of payment. *Id.* at 298-99.

Notably, the New York Court held that Krawitt's claims were not barred by the statute of limitations (six years) "because the relevant date for statute of limitations purposes is the date of plaintiff's demand [for payment] in 2006." *Id.* at 299. The New York Court nonetheless granted the bank summary judgment based upon a legal presumption of payment recognized in New York State "after the lapse of 20 years between the right to enforce an obligation and an attempt to do so" (*Id.* at 299), and laches, relying heavily upon the United States District Court case of *Katzman v. Citibank*, 2007 U.S. Dist. LEXIS 59115, 2007 WL 2325857 (NDNY 2007), finding that "the facts of [*Krawitt*] are strikingly similar to those in *Katzman*. . .". 23 Misc. 3d 297, 300.

In the instant matter, this Court's decision in *Peters* does not address a presumption of payment doctrine. Moreover, Wesbanco has not asserted that West Virginia recognizes such a legal presumption after a period of 20 years, nor has Wesbanco asserted in this appeal that Plaintiff's claims are barred by laches.[4] Further, the *Katzman* decision relied upon by the *Krawitt*

[4] In distinguishing *Krawitt,* the Court of Appeals of Mississippi noted that its state had no long-standing legal presumption of payment under these circumstances. *English v. Regions Bank (In re Estate of*

Court was subsequently overruled by the U.S. Court of Appeals for the Second Circuit in *Katzman v. Citibank*, 298 Fed. Appx. 81 (2nd Cir. 2008). *Katzman* involved a CD issued in 1981 payable to "Abel Katzman and/or Eva Katzman" twenty-six weeks after the date of the CD. *Id.* at 82. The Katzman CD stated on its face that "Payment will be made when this Certificate is turned in at the Branch or Office named above." *Id.* Mr. Katzman did not inform Mrs. Katzman that he opened the CD and Mrs. Katzman had no other documents pertaining to the CD other than the CD itself which she found following her husband's death in 2001. *Id.* Citibank denied payment to Mrs. Katzman and she filed suit. The District Court granted summary judgment in favor of Citibank. *Id.* at 81.

The Second Circuit reversed the summary judgment ruling, finding:

- "that Katzman did not file tax returns after 1982 does not indicate that Katzman 'and her husband did not have reportable income,' and, absent other evidence relevant to Katzman' tax returns or their income, any conclusion about reasons the Katzmans failed to pay income tax is speculative." *Id.* at 83.
- "that the relevant account was not treated as abandoned property by Citibank or New York State does not, without more, warrant an inference that the account was closed, and drawing any inference in Citibank's favor from such evidence was improper." *Id.*

English), 184 So. 3d 983, 986 (Ct. of App. of Miss. 2015). Further, the defendant bank's failure to provide any direct proof that the CD proceeds were paid to any of the owners of the CD, combined with the evidence that the account holder had never surrendered the original CD, created a genuine issue of material fact which prevented judgment as a matter of law in favor of the defendant. *Id.* at 987. As the *English* Court recognized, the bank's assertions that other account owners *could have* previously redeemed the CD was not "so indisputable, or so deficient, that the necessity of a trial of fact [was] obviated." *Id.* quoting *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). Accordingly, as in the case at bar, the *English* Court found that the defendant bank was not entitled to judgment as a matter of law.

- "no inference should be drawn in favor of Citibank that the account was paid based on the lapse of time in light of the terms and conditions of the CD, which state *inter alia:* 'To withdraw your entire balance you must surrender your certificate to Citibank on or before maturity date,' and 'Your account balance will be automatically renewed unless you notify us in person or in writing.' *Id.*
- "drawing inferences from the terms of the CD in favor of Katzman, especially in light of the requirement that the CD be surrendered at the time of payment, it is reasonable to infer that, if the CD was not surrendered to Citibank, it would have been renewed automatically rather than closed." *Id.*
- Evidence from Citibank's operations manager that "[i]f a Citibank customer who is identified by an officer or employee of a branch came to the branch without a Savings Certificate, the Savings Certificate would have been paid to the customer and the appropriate notation made on the account," was "**inconclusive because it was directly contradicted by the express language of Citibank's CD stating that, in order to withdraw the entire balance, the CD must be surrendered to Citibank.**" *Emphasis added, Id.*
- "Absent explicit evidence that Katzman's CD was paid to her husband or her in the way described by the operations manager, this conflicting evidence of Citibank's own making concerning the way Citibank pays its CDs creates a genuine issue of material fact. Weighing that evidence is not the function of the court as it considers the summary judgment motion." *Id.*
- "Although Katzman's only record evidence was, in essence, the CD itself, it was Citibank's burden to demonstrate that no genuine issues of material fact existed

with respect to that CD, the authenticity of which does not appear to be disputed by Citibank." *Id.* at 84.

- **"In light of the CD's express language that the CD had to be surrendered to Citibank in order to withdraw the entire balance, Citibank's statement that '[s]uch was not necessarily the case' does not establish conclusively that the relevant account had been paid out; rather, it creates a genuine issue of material fact entitling Katzman to have a jury decide how much weight, if any, to give to that evidence and what inferences, if any, to draw from that evidence at trial."** *Emphasis added, Id.*

Similar to *Katzman*, the Trial Court in the case at bar found that genuine issues of material fact existed which warranted trial by jury. The jury in this case was presented with the evidence of the parties, including the testimony of four Wesbanco employees, and was afforded the opportunity to determine what weight to give to the evidence, and what inferences to draw from the same.[5] Ultimately, the jury found Wesbanco breached the terms of its contract with Plaintiff. Such finding should not be disturbed on appeal.

Schnack v. Valley Bank of Nevada, 291 Fed. App. 168 (10th Cir. 2008): *Schnack* involved a $500,000 CD purchased in 1986, which matured in ninety days. *Id.* at 170. Mr. Schnack attempted to redeem the CD in 2001 but the bank refused payment because it found no record of the CD. *Id.* Following a two-day bench trial, the Utah District Court found "that the CD had

[5] See also *Lin Pi-Luan L v. Citibank, N.A.*, 2016 N.Y. Misc. LEXIS 1957 (N.Y. Sup. Ct. 2016), wherein the New York Supreme Court denied defendant Citibank's motion for summary judgment (in a case involving an auto-renewing CD purchased in 1979 which plaintiff attempted to redeem in 2012) finding that plaintiff's possession of the original CD and sworn testimony that she had not previously presented the CD for payment constituted sufficient proof to overcome N.Y.'s presumption of payment principle and warrant a trial. The New York Court found that it was not for it to weigh the evidence or assess credibility, and that if the jurors believed plaintiff, it is possible that they could render a verdict in her favor. *Id.* at p. 4.

already been redeemed, or, alternatively, that the claim was foreclosed by the doctrine of laches." *Id.* On appeal, the Tenth Circuit Court of Appeals affirmed the District Court's dismissal of the claim.

Importantly, and contrary to the case at bar, *Schnack* contains no mention of the subject CD having a requirement printed on its face that it must be returned properly endorsed to secure payment. Further, while Mr. Schnack may have believed that his CD would renew, there is no evidence in *Schnack* that the subject CD had an automatic renewal provision. *Id.* at 173. Also, Wesbanco does not assert in this appeal that Plaintiff's claims are barred by laches. The District Court in *Schnack* - the trier of fact for that matter - rendered its decision after hearing the evidence presented at trial which notably included evidence that Mr. Schnack likely used the proceeds of the subject CD to deposit over $500,000 into an escrow account in 1987. *Id.* at 170.

Therefore, *Schnack* presents a situation materially dissimilar to the instant matter, and represents the decision of its trier of fact after a two-day bench trial. Conversely, the jury, the trier of fact for Plaintiff's case, found that Wesbanco had breached its contract with Plaintiff and awarded stipulated damages. Such verdict should not be disturbed.

Spiller v. Sky Bank-Ohio Bank Region, 122 Ohio St. 3d 279, 910 N.E. 2d 1021 (2009): In this decision of the Ohio Supreme Court concerning a certificate of deposit, there is no mention mention of the subject CD having a requirement printed on its face that it must be returned properly endorsed to secure payment. In addition to that material distinction between the circumstances in *Spiller* and the case at bar, the Ohio Supreme Court's decision to dismiss the plaintiff's claim was the result of an Ohio banking statute concerning when records could permissibly be destroyed – thus, not the rationale utilized by this Court in *Peters v. Peters*.

Further, the *Spiller* Court relied heavily on the Ohio Supreme Court's decision of *Abraham v. Nation City Bank Corp.*, 50 Ohio St. 3d 175, 553 N.E. 2d 619 (1990). *Abraham* concerned a passbook savings account, not an automatically renewing certificate of deposit as in the case at bar. *See e.g. Brentlinger v. Bank One of Columbus*, 150 Ohio App. 3d 589, 782 N.E.2d 648 (Ohio Ct. of App., 10th Dist. 2002)(distinguishing the auto-renewing CD in *Brentlinger* from the passport savings account in *Abraham*, and holding that because the plaintiff still possessed the CD which had been in her safe deposit box, had never received written notification that the bank was not renewing the CD, and lived at the same address since 1941, "the only reasonable inference one can draw from these facts is that appellant's [CD] is still automatically renewing itself. . ." and the subject Ohio banking statute does not authorize the bank to "destroy records of an active automatically renewable certificate of deposit. . .").

As this Court has recognized, "[g]enerally, the existence of a contract is a question of fact for the jury." Syl. Pt. 10, *Davari v. W.Va. Univ. Bd. of Governors,* 857 S.E.2d 435 (W.Va. 2021), quoting Syl. Pt. 4, *Cook v. Heck's Inc.,* 176 W.Va. 368, 342 S.E.2d 453 (1986). In the instant case, however, Wesbanco's corporate representative testified affirmatively that the subject money market certificate is a contract, with its terms and conditions on its face and on the back of the certificate (A.R. 549:4-12), and those terms and conditions include that the certificate is payable on the return of the certificate properly endorsed (A.R. 552:7-16). As this Court has also recognized:

> in an action to recover damages for breach of contract, when the case has been fairly tried and no error of law appears, the verdict of a jury, based upon conflicting testimony and approved by the trial court, will not be disturbed unless the verdict is against the plain preponderance of the evidence.

Syl. pt. 3, *Franklin v. Pence*, 128 W. Va. 353, 36 S.E.2d 505 (1945). Moreover,

> [i]t is the peculiar and exclusive province of a jury to weigh the evidence and to resolve questions of fact when the testimony of witnesses regarding them is conflicting and the finding of the jury upon such facts will not ordinarily be disturbed.

Smith v. Clark, 241 W.Va. 838, 862, 828 S.E.2d 900 (2019)(internal citations omitted). In this action, the jury was appropriately permitted to hear and consider the evidence, judge the credibility of the witnesses, and render its decision as to whether Wesbanco breached its contract in refusing to pay Plaintiff the money market funds, plus interest. Particularly when considering the standard of review applicable to an appeal of a motion for judgment as a matter of law (referenced above) – including considering the evidence in the light most favorable to Plaintiff – it is evident that reasonable jurors could appropriately make the determination that Wesbanco breached its contract with Plaintiff. As such, the jury's decision should not be disturbed.

3. Plaintiff's claims are not barred by the statute of limitations.

a. W.Va. Code § 46-3-118(b)

Wesbanco incorrectly asserts that, pursuant to W.Va. Code § 46-3-118(b), Plaintiff's claims are barred by the statute of limitations. First, the Uniform Commercial Code (UCC) (W.Va. Code § 46-3-101, *et seq.*) applies to "negotiable instruments." W.Va. Code § 46-3-102(a). The Money Market Certificate at issue in this action explicitly states on its face that it is "Non-Negotiable."[6] A.R. 9. Second, assuming *arguendo* that the UCC is even applicable to the subject Money Market Certificate, Wesbanco remarkably fails to accurately represent the provisions of W.Va. Code § 46-3-118(b). More specifically, after stating that a certificate of deposit is "a note of the bank", pursuant to W.Va. Code § 46-3-104(j), Wesbanco proceeds to represent that pursuant to W.Va. Code § 46-3-118(b), Plaintiff's claim is barred because "an action to enforce the obligation of a party to pay the note must be commenced withing six years after the demand [for

[6] This fact is acknowledged by Wesbanco on page 17 of its appellate Brief.

payment of the note]," or if no demand for payment is made, "an action to enforce the note is barred if neither principal or interest on the note has been paid for a continuous period of 10 years." Pet. Brief at p. 15.

Wesbanco fails to acknowledge that W.Va. Code § 46-3-118(b) contains an express exception pertaining to certificates of deposit. In actuality, W.Va. Code § 46-3-118(b)(*emphasis added*) states:

> (b) ***Except as provided in subsection (d) or (e)***, if demand for payment is made to the maker of a note payable on demand, an action to enforce the obligation of a party to pay the note must be commenced within six years after the demand. If no demand for payment is made to the maker, an action to enforce the note is barred if neither principal nor interest on the note has been paid for a continuous period of ten years.

Subsection (d) of W.Va. Code § 46-3-118 relates to actions to enforce the obligations of a certified check or teller's check, cashier's check, or traveler's check, and thus is not relevant to the instant matter. Subsection (e) of W.Va. Code § 46-3-118 (*emphasis added*), however, states:

> (e) An action to enforce the obligation of a party to a **certificate of deposit** to pay the instrument **must be commenced within six years after demand for payment is made to the maker**, but **if the instrument states a due date and the maker is not required to pay before that date, the six-year period begins when a demand for payment is in effect and the due date has passed**.

In this case, as outlined above, the money market certificate expressly contains a maturity date of succeeding 26 week periods – which are multiple, with a first maturity date of July 1, 1981. A.R. 9. As Wesbanco representatives admitted during trial, this resulted in an auto-renewing certificate (A.R. 550-51), without any action required by the Ellifritzes. A.R. 591. Wesbanco Vice President William Buchanan agreed that if the Ellifritzes put the subject money market certificate in a safe or safe deposit box and let it sit there, it would continually and automatically renew. A.R. 591-92, see also testimony of Joan Miller at A.R. 582 (acknowledging that if the money market's funds are not withdrawn, "it would be able to roll over continuously"). Mr.

Buchanan agreed that the subject money market certificate would not expire after 10, 20, 30, or even 40 years because it automatically renewed. A.R. 592:2-5.

Moreover, as Plaintiff's first demand for payment was made in December 2018 (A.R. 658:19-20), and this litigation was commenced on April 4, 2019 (A.R. 788), Plaintiff's action to enforce the subject Money Market Certificate was unquestionably timely pursuant to W.Va. Code § 46-3-118.

b. W.Va. Code § 55-2-6

Initially, this Court should disregard Wesbanco's argument that Plaintiff's claims are barred by W.Va. Code § 55-2-6 insofar as, to Plaintiff's knowledge, Wesbanco did not rely upon such statute in support of its statute of limitations briefing below. *See* Syl. Pt. 1, *Wolford v. Landmark Am. Ins. Co.*, 196 W.Va. 528, 474 S.E.2d 458 (1996)("This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court.")(internal citations omitted); see also *State v. Costello*, 857 S.E.2d 51, 58, 2021 W.Va. LEXIS 153, 2021 WL 1232578 (W.Va. 2021)("In general, a party who has not raised a particular issue or defense below may not raise it for the first time on appeal.").

Second, beyond stating that W.Va. Code § 55-2-6 provides for a ten-year statute of limitations with respect to written contracts, Wesbanco fails to identify when, in this case, it believes such ten-year period began. Plaintiff submits that the statute of limitations for breach of contract begins to run when the breach of contract occurs or when the act breach the contract becomes known. *Harris v. Cnty. Comm'n of Calhoun Cnty.*, 238 W.Va. 556, 797 S.E.2d 62, 68 (2017), citing *McKenzie v. Cherry River Coal & Coke Co.*, 195 W.Va. 742, 749, 466 S.E.2d 810, 817 (1995). Further, "the time of this accrual has been said to coincide with the time when the performance contracted for is to commence or when a payment becomes due." *Thomas v. Branch*

Banking & Trust Co., 443 F.Supp. 2d 806, 809 (2006), citing *Gateway Communications, Inc. v. John R. Hess, Inc.*, 208 W.Va. 505, 541 S.E.2d 595, 599 (2000). In the present case, Wesbanco's breach of contract occurred when it failed to remit payment for Plaintiff's money market certificate, when initially presented in or about December 2018. Accordingly, Plaintiff's instant action for breach of contract, filed on April 4, 2019 (A.R. 788), was timely asserted.

Therefore, the Trial Court did not commit error in denying Wesbanco's Motion for Summary Judgment or otherwise rejecting Wesbanco's statute of limitations arguments.

4. Wesbanco is not entitled to a presumption that Plaintiff's money market certificate was "closed" long ago.

a. W.Va. Code § 31A-4-35

Wesbanco's assertion that W.Va. Code § 31A-4-35 has any applicability to this matter whatsoever is misplaced. First, with respect to W.Va. Code § 31A-4-35(a), and a bank's permissive ability to dispose of certain records after five years from the date of events set forth in the statute, that does not create a presumption that the subject money market funds were paid out prior to Plaintiff's 2018 demand for payment. As referenced above, the subject money market certificate was auto-renewing and records of the same should have remained in Wesbanco's records until Plaintiff's demand for payment. As the Court of Appeals of Ohio, Tenth Appellate District, held in *Brentlinger (supra),* such a statute "does not authorize [the bank] to destroy the records of an active automatically renewable certificate of deposit. . ." 150 Ohio App. 3d 589, 596. Similarly, the Second Circuit Court of Appeals in *Katzman (supra)* found that the District Court erred in drawing the inference in favor of defendant Citibank that "the [CD] account was paid out because it was Citibank's policy to destroy account records seven years after closing and Citibank had not records showing an open account after 1982." 298 Fed. Appx. 81, 83.

As the Trial Court suggested during motion practice during trial:

> [w]hen you destroy a record – you're entitled to destroy the record, but you had better be careful that you don't destroy a record that might have proof that will be used against you later on. All that does, it gives you the right to destroy the record.

A.R. 723:23-724:3. To which Wesbanco's counsel stated: "Yeah. I agree. . ." A.R. 724:4. Contrary to Wesbanco's assertion on appeal, however, the Trial Court did not "erroneously shift[] the burden of proof." Pet. Brief at p. 2. The Trial Court stated

> [y]ou don't have to prove anything, [Wesbanco's counsel]. The plaintiff has to prove that they had a contract and that they – and that the contract was not performed by the bank. And all of this other stuff that you're raising is parol evidence. The contract controls.

A.R. 724:8-12.

Second, W.Va. Code § 31A-4-35(c) (***effective 6/5/2020***) cannot be used for "retroactive application" by Wesbanco. West Virginia has disfavored the retroactive application of legislative enactments that affect substantive rights and liabilities in litigation. This principle has been repeatedly articulated in the decisions of the West Virginia Supreme Court. Consistent with that principle, for example in relation to tort claims, the law in effect on the date of injury - not the law in effect at the time of the verdict - governs the case. See, e.g., *Ryan v. Clonch Indus.*, 219 W. Va. 664, 668 n. 2, 639 S.E.2d 756, 770 n. 2 (2006) ("This statute has been amended; however, we apply the law in existence at the time of the injury.")(citation omitted); *Roderick v. Hough*, 146 W. Va. 741, 749, 124 S.E.2d 703, 707-708 (1961)("Therefore, rights accrued, claims arising, proceedings instituted, orders made under the former law, or judgments rendered before the passage of an amended statute, will not be affected by it, but will be governed by the original statute, unless a contrary intention is expressed in the later statute.")(emphasis added).

Further, in both tort and other civil actions, there is a well-established presumption against the retroactive application of new laws to causes of action that arose prior to their enactment absent a clear expression by the Legislature of its intent to do so:

> Because application of the new amendments to this case would be retroactive, the next step is to discern whether the Legislature intended the new amendments to apply retroactively. This inquiry examines a principle deeply rooted in our jurisprudence that absent some clear signal from the Legislature, a statute will not apply retroactively. In unbroken precedent, this Court has stated '[a] statute is presumed to operate prospectively unless the intent that it shall operate retroactively is clearly expressed by its terms or is necessarily implied from the language of the statute.'

Public Citizen v. First Nat'l Bank, 198 W. Va. at 335, 480 S.E.2d at 544 (quoting Syl. Pt. 3, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980) (regarding 1993 changes to the UCC)). The principle was reiterated in *Cabot Oil & Gas Corp. v. Huffman*:

> There is no indication that the Legislature intended either the 1961 original version of this statutory language, i.e., W. Va. Code § 20-4-3, or its subsequent recodified version, i.e., W. Va. Code § 20-5-2(b)(8), to be applied retroactively. Absent a direct expression of such intent by the Legislature, we are constrained to apply the law in effect at the time of the deed's execution.

227 W. Va. 109, 118, 705 S.E.2d 806, 815 (2010); see also Syl. Pt. 3, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 85, 576 S.E.2d 807, 812 (2002)("The presumption is that a statute is intended to operate prospectively, and not retrospectively, unless it appears, by clear, strong and imperative words or by necessary implication, that the Legislature intended to give the statute retroactive force and effect."); see also W. Va. Code § 2-2-10 (bb), which states, "A statute is presumed to be prospective in its operation unless expressly made retrospective."

Additionally, "[i]t has been stated repeatedly that new legislation should not generally be construed to interfere with existing contracts, rights of action, suits, or vested property rights." *Mildred L.M. v. John O.F.*, 192 W. Va. 345, 351, 452 S.E.2d 436, 442 (1994); *Roderick v. Hough*, 146 W. Va. at 749, 124 S.E.2d at 707-708 (Stating that "claims arising" under the former law will not be affected by an amended statute absent a contrary statement in the amendment).

As there is no expression of legislative intent that W.Va. Code § 31A-4-35(c) should apply retroactively, it has no impact or applicability to Plaintiff's instant action, filed over one year prior

to this statutory provision's effective date. Stated succinctly, Wesbanco has wholly ignored the foregoing, governing law such that Wesbanco's request for appellate relief should be denied.

Third, *even if* W.Va. Code § 31A-4-35(c) were deemed applicable to this matter, it would not affect the outcome because it purports to provide a statute of limitations period with respect to actions "based on the contents of records for which a period of retention or preservation is set forth above. . ." Plaintiff's instant breach of contract action is not solely based or dependent upon the contents of the bank's internal records. More particularly, in light of the admitted contractual provisions of Plaintiff's money market certificate – requiring presentment of the properly endorsed certificate at time of payment – the contents of the bank's records are unnecessary for Wesbanco to honor its contract. Thus, Plaintiff's claim is based on Wesbanco's breach of a written contract between her and Wesbanco. In the event, as in this case, an authentic money market certificate is presented to the bank with a demand for payment by an appropriate individual, Wesbanco was contractually obligated to issue the payment. That did not happen in this case, resulting in the instant civil action, trial, and jury verdict finding breach of contract.

b. W.Va. Code § 36-8-1, *et seq.*

Wesbanco's attempted reliance upon provisions of the Uniform Unclaimed Property Act (W.Va. Code § 36-8-1, *et seq.*) is misplaced. First, Wesbanco admitted that the subject money market certificate funds were never escheated to the State of West Virginia as unclaimed property. As testified by Wesbanco corporate representative Joan Miller:

> Q. In the context of WesBanco's investigation, did WesBanco analyze whether the funds at issue under the money market certificate had been submitted to the state as unclaimed property?
>
> A. Can you rephrase that?
>
> **Q. Certainly. In the context of the investigation of whether the funds should or should not have been paid to Ms. Ellifritz, did**

WesBanco investigate whether the funds were tendered to the state as unclaimed property by WesBanco?

A. Yes.

Q. What conclusions were reached by WesBanco after that investigation?

A. That it was never returned to unclaimed property. (emphasis added).

Q. Why did WesBanco, having reached that conclusion, in Exhibit 2, refer Ms. Ellifritz to the state auditor's office?

A. I do not know.

Emphasis added, A.R. 537-38. In short, Wesbanco cannot now argue a presumption of unclaimed property when Wesbanco factually conceded that the Money Market Certificate funds did not escheat to the State of West Virginia.

Second, as referenced above, Wesbanco employee witnesses confirmed that the Ellifritzes needed to do nothing to renew the subject money market certificate, as it was subject to automatic renewal. This auto-renewal was reflected, in writing, within the contractual terms on the money market certificate itself – thus, precluding any presumption of abandonment pursuant to W.Va. Code § 36-8-29(a)(5). Therefore, the Ellifritzes needed to do nothing to indicate their continued interest in the subject money market certificate. As the Second Circuit Court of Appeals in *Katzman (supra)* found, the District Court erred in drawing the inference in favor of defendant Citibank that "the relevant account was closed because neither Citibank nor New York State had records showing the account was treated as abandoned property." 298 Fed. Appx. 81, 83("that the relevant account was not treated as abandoned property by Citibank or New York State does not, without more, warrant an inference that the account was closed, and drawing any inference in Citibank's favor was improper.").

Wesbanco boldly suggests that since there is no record of the subject money market funds being escheated to the State of West Virginia, and Wesbanco has no record of the account, "there can only be one logical conclusion; that the funds were redeemed years ago, and the Account closed." Pet. Brief at p. 20. As recognized by the Trial Court, Wesbanco is essentially saying "because there's no record, that equals payment." A.R. 735:5. As the Trial Court aptly noted, "if I'm to assume that, then why can't I assume that the records were lost, or that somebody within the bank made a mistake either intentionally or negligently moving the proceeds from that certificate to somewhere that it shouldn't be and thus lost."[7] A.R. 735:6-10. Wesbanco corporate representative Joan Miller admitted that a bank's electronic record system is "only as good as the data which somebody inputs." A.R. 546, 559.

Wesbanco asserts that the subject money market certificate "does not constitute competent evidence of an existing deposit relationship" with no citation to authority. Pet. Brief, p. 21. Wesbanco presented its arguments and evidence regarding assumptions it wished the jury to make that the money market funds were paid out prior to 2018 via four employee witnesses. Such witnesses testified about their search of Wesbanco's electronic databases, check of the State's unclaimed property records, the bank's practice of issuing 1099 forms to account holders, and so forth. The jury was permitted, and in fact instructed, to judge the credibility and believability of witnesses and determine the weight of the evidence. A.R. 753:16-19. The Trial Court committed no error in permitting this action to proceed to verdict, and Wesbanco's appeal should be denied.

B. THE TRIAL COURT DID NOT COMMIT ERROR IN REFUSING TO GIVE WESBANCO'S PROPOSED JURY INSTRUCTIONS NO. 2 AND 3.

[7] The Trial Court provided the parties with two hypothetical examples as to why Wesbanco may not have record of the subject money market account – (1) the bank teller takes the Ellifritzes' deposit and "goes to Vegas", or (2) the record of the account "gets lost because there's been a couple of business dealings later or that it just slipped through the crack someway." A.R. 725:1-8.

1. Standard of Review

This Court has observed that

> [t]he formulation of jury instructions is within the broad discretion of a circuit court, and a circuit court's giving of an instruction is reviewed under an abuse of discretion standard.

Syl. Pt. 6, *Tennant v. Marion Health Care Found., Inc.,* 194 W.Va. 97, 459 S.E.2d 374 (1995).

Further,

> [i]t will be presumed that a trial court acted correctly in giving or in refusing to give instructions to the jury, unless it appears from the record in the case that the instructions were prejudicially erroneous or that the instructions refused were correct and should have been given.

Syl. pt. 1, *State v. Turner,* 137 W.Va. 122, 70 S.E.2d 249 (1952). Moreover,

> [a] trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, revised as a whole, sufficiently instructed the jury so they understood the issues involved and were not misle[d] by the law. . .

Syl. pt. 4, *State v. Guthrie,* 194 W.Va. 657, 461 S.E.2d 163 (1995).

2. Wesbanco's proposed jury instructions nos. 2 and 3 were appropriately rejected by the Trial Court.

Wesbanco's proposed instructions 2 and 3 are set forth on page 22 of Petitioner's Brief and at A.R. 398 and 399, respectively. The Trial Court's discussion and ruling rejecting these instructions is found in the trial transcript at A.R. 745:4-747:24. As discussed at length above, and as found by the Trial Court in ruling on Wesbanco's instructions 2 and 3, *Peters* is "not applicable in this case because the defendant has answered, and the evidence is that this is a contract case. And although this was a correct statement in Peters, the circumstances in Peters were considerably different. And this legal statement is not pertinent to the case being tried here today." A.R. 747:7-12. This Court has recognized that "[i]nstructions should be based upon and correctly state the evidence." *Franklin v. Pence*, 128 W.Va. 353, 362, 36 S.E.2d 505, 510 (1945), citing *State v.*

Davis, 52 W.Va. 224, 43 S.E. 99 (1902), *Campbell v. Hughes*, 12 W.Va. 183 (1877). Moreover, "[a]n instruction which tends to mislead and confuse the jury should be refused." *Id.* at 364 (internal citations omitted).

As referenced numerous times above, Wesbanco's Rule 30(b)(7) corporate representative witness Joan Miller testified:

> Q. Can we agree that [the money market certificate – Exhibit 3 to Ms. Miller's deposition] is a contract?
>
> A. Yes.
>
> Q. It's a contract that actually has terms and conditions on the reverse side as well, correct?
>
> A. Yes.
>
> Q. In addition to the fact that it has terms and conditions on the face of [the money market certificate], correct?
>
> A. Yes.

A.R. 549:4-12

> . . .
>
> Q. Okay. You agreed with me earlier it's a contract, correct?
>
> A. Yeah.
>
> Q. And contracts at Wesbanco have terms and conditions, correct?
>
> A. Yes.
>
> Q. And the terms and conditions here [on the money market certificate] say that this item is payable on the return of this certificate properly endorsed, correct?
>
> A. Yes.
>
> Q. Wesbanco expects its consumers to fulfil contracts, correct?
>
> A. Yes.
>
> Q. Just like consumers expect Wesbanco to fulfil contracts, correct?

A. Yes.

A.R. 552:7-22.

As previously noted by this Court:

> [a]t a Rule 30(b)(7) deposition, the testimony elicited represents the knowledge of the organization, not that of the individual deponent. The designated witness is speaking for the organization so that his/her testimony must be distinguished from that of a mere organization employee.

State ex rel. Universal Underwriters Ins. Co. v. Wilson, 241 W.Va. 335, 825 S.E.2d 95, FN8 (2019), citing Louis J. Palmer, Jr., et al., *Litigation Handbook on West Virginia Rules of Civil Procedure,* § 30(b), at 874 (5th Ed. 2017).

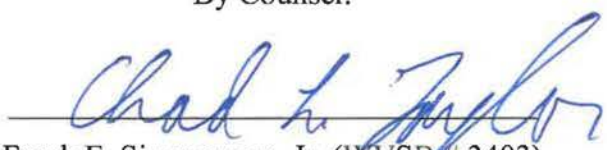
Based upon this testimony, and for the reasons set forth in argument section V.A.1. above, the underlying circumstances in the instant case are materially different from those in *Peters*. Therefore, regardless of whether Wesbanco's proposed instructions 2 and 3 were correct citations to the *Peters* decision, the giving of those instructions would not be based upon and correctly state the evidence present in *this* case, and would likely tend to mislead and/or confuse the jury. Accordingly, the Trial Court did not commit error in refusing to give instructions 2 and 3, and certainly did not abuse its discretion in formulating, with the assistance of counsel for the parties, its charge/instructions to the jury.

V. CONCLUSION

On appeal, Wesbanco abandoned its request for a new trial, and solely moves this Court for judgment as a matter of law on Plaintiff's breach of contract claim. Based upon the evidence in the record and argument set forth above, Plaintiff respectfully requests that this Court affirm the Trial Court's rulings on Wesbanco's motion for summary judgment and motion for judgment as a

matter of law, affirm the Judgment Order entered by the Circuit Court of Monongalia County, West Virginia, and thus, leave the jury's verdict undisturbed.[8]

Respectfully submitted,
Respondent,
By Counsel:



Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB# 10564)
Frank E. Simmerman, III (WVSB # 11589)
SIMMERMAN LAW OFFICE, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906

[8] For the reasons set forth herein, Plaintiff similarly requests that this Court deny any and all relief sought by the "*Amicus Curiae* Brief of the Community Bankers of West Virginia and the West Virginia Bankers Association Supporting Petitioner's Request for Reversal."

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 21-0913

WESBANCO BANK, INC.,

Defendant below, Petitioner,

vs.

Appeal from an order of the
Circuit Court of Monongalia County
(Civil Action No. 19-C-87)

CRYSTAL GAYLE ELLIFRITZ,

Plaintiff Below, Respondent.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Respondent's Brief of Crystal Gayle Ellifritz*" was served upon the following counsel of record, by U.S. Mail and email on March 31, 2022:

James A. Walls (WV Bar # 5175) SPILMAN THOMAS & BATTLE, PLLC 48 Donley Street, Suite 800 Post Office Box 615 Morgantown, West Virginia 26507-0615 Ph. (304) 291-7920 Fax (304) 291-7979 jwalls@spilmanlaw.com *Counsel for Petitioner*	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 *Counsel for Petitioner*
Joseph A. Ford (WV Bar # 12984) SPILMAN THOMAS & BATTLE, PLLC 300 Kanawha Blvd., East Charleston, WV 25301 jford@spilmanlaw.com *Counsel for Petitioner*	Sandra M. Murphy (WV Bar # 4359) Thomas A. Heywood (WV Bar # 1703) J. Mark Adkins (WV Bar # 7414) Peter G. Markham (WV Bar # 9396) BOWLES RICE LLP 600 Quarrier Street P.O. Box 1386 Charleston, WV 25315-1386 *Counsel for Amicus Curiae Community Bankers of West Virginia and West Virginia Bankers Association*

Chad L. Taylor (WVSB# 10564)