IN THE SUPREME COURT OF OHIO

SKY BANK – OHIO BANK REGION,	:	CASE NO.2008-0900
Appellant	:	On Appeal from the Logan County Court of Appeals,
vs.	:	Third Appellate District
MAXINE F. SPILLER,	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT SKY BANK – OHIO BANK REGION

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STATEMENT OF THE FACTS

A. Introduction.

Appellee Maxine F. Spiller ("**Mrs. Spiller**") commenced this action to require Appellant Sky Bank – Ohio Bank Region ("**Sky Bank**") to redeem four certificates of deposit issued in 1974, 1975, 1976, and 1979 by Bellefontaine Federal Savings and Loan Association ("**Bellefontaine Federal**").[1] The specific certificates of deposit are as follows:

1. Savings Certificate No. 4346 in the amount of Five Thousand Dollars ($5,000.00) originally issued by Bellefontaine Federal on February 13, 1974 to "Miss Roberta M. Stayrook P.O.D. Maxine F. Spiller." (Plaintiff's **Exhibit 1**, Supp. at 246.)

2. Savings Certificate No. 5242 in the amount of Three Thousand Dollars ($3,000.00) issued by Bellefontaine Federal on June 10, 1975 to "Maxine Spiller P.O.D. Roberta Stayrook." (Plaintiff's **Exhibit 2**, Supp. at 247.)

3. Savings Certificate No. 6059 in the amount of Ten Thousand Dollars ($10,000.00) issued by Bellefontaine Federal on July 31, 1976 to "Maxine Spiller or Roberta Stayrook." (Plaintiff's **Exhibit 3**, Supp. at 248.)

4. Savings Certificate No. 7256 in the amount of Twenty-Five Thousand Dollars ($25,000.00) issued by Bellefontaine Federal on January 2, 1979 to "Roberta M. Stayrook (P.O.D. Maxine F. Spiller)." (Plaintiff's **Exhibit 4**, Supp. at 249.) The four Savings Certificates are referred to collectively herein as the **"Savings Certificates."**

Each of the Savings Certificates was opened by Ms. Roberta M. Stayrook (**"Ms. Stayrook"**) without any involvement of Mrs. Spiller. (Tr. III at 45-47, 75, Supp. at 178-180, 208.)[2] Ms. Stayrook died on February 10, 2002 and Mrs. Spiller found the Savings Certificates unexpectedly several months later. Thereafter, Mrs. Spiller presented the Savings Certificates to

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[1] Sky Bank is the successor to Bellefontaine Federal by virtue of a series of name changes and mergers.

[2] "Tr. I" refers to the first of three transcripts of the trial held in this matter on January 17 and 18, 2007. The second and third transcripts are referred to as "Tr. II" and "Tr. III," respectively. All three transcripts are reproduced as part of Sky Bank's Supplement to the Brief, commencing at Supp. 1, 85, and 134, respectively.

Sky Bank for payment. When Sky Bank declined to pay them because it had no record showing that the Savings Certificates remained open, active, and unpaid, Mrs. Spiller brought suit.

B. The Relationship Of Mrs. Spiller And Ms. Stayrook.

Mrs. Spiller and Ms. Stayrook had been long-time friends since 1936. (Tr. III at 32, Supp. at 165.) During the 1970's, Ms. Stayrook opened each of the Savings Certificates with money obtained from cashing certain savings bonds. Mrs. Spiller was not with Ms. Stayrook when she opened any of the four Savings Certificates and contributed no money towards opening them. (Tr. III at 45-47, 75, Supp. at 178-180, 208.) She knew they were opened, but nothing else. She never had the Savings Certificates and never even knew where they were. (Tr. III at 73 and 87, Supp. at 206 and 220.) Even though one was opened in her name, Mrs. Spiller viewed them as Ms. Stayrook's money and would have assisted her in redeeming them if asked. (Tr. III at 73-74, Supp. at 206-207.)

Because of their close friendship, Ms. Stayrook (who was unmarried) lived with Mrs. Spiller and her late husband at various times. Specifically, Ms. Stayrook lived with the Spillers in Plainfield, Indiana from the mid-1960's until mid-1977, when Mrs. Spiller and her husband retired and moved to Bonita Springs, Florida. (Tr. III at 32-33, 40, Supp. at 165-166, 173.) Ms. Stayrook continued to work in Plainfield, Indiana and did not again reside with Mrs. Spiller until 18 months later in late 1978, after Mr. Spiller died and Ms. Stayrook retired. (Tr. III at 40-41, Supp. at 173-174.)

Ms. Stayrook nonetheless maintained her independence at all times. When they lived together in Bellefontaine and Plainfield, Ms. Stayrook "did some of her banking entirely by herself." (Tr. III at 77, Supp. at 210.) She drove her own car and could come and go as she wished. (Tr. III at 39, 74-75, Supp. at 172, 207-208.) Moreover, during the 18-month period of

time during 1977 and 1978 when they lived apart, Mrs. Spiller has no idea what Ms. Stayrook did with her finances (Tr. III at 71-72, Supp. at 204-205.)

Mrs. Spiller does know that Ms. Stayrook wanted to move her monies to Florida as part of her retirement to Florida. (Tr. III at 91, Supp. at 224.) To that end, Ms. Stayrook opened an account at Prudential. She told Mrs. Spiller "in her own words that it was being opened with money from her investments in Ohio." (Tr. III at 92, Supp. at 225.) Mrs. Spiller has no records to document what monies were used to open the Prudential account. (Tr. III at 94, Supp. at 227.)

In the twenty years they lived together in Florida, Ms. Stayrook and Mrs. Spiller had no discussions about the Savings Certificates:

> Q. And so, again, between the time that these were opened and the time of her death - - or time after her death when you found them, you had not had any specific conversation with Ms. Stayrook about these savings certificates?
>
> A. No.

(Tr. III at 80, Supp. at 213.)

C. <u>Mrs. Spiller And Ms. Stayrook Never Reported Any Interest Income From The Savings Certificates</u>.

Mrs. Spiller's and Ms. Stayrook's tax returns are also instructive. Mrs. Spiller testified that she always got the mail when Ms. Stayrook and she lived together, both in Plainfield, Indiana and Bonita Springs, Florida. (Tr. III at 48, Supp. at 181.) Yet, Mrs. Spiller testified that she never recalls receiving a single Form 1099 reporting interest on any of the Savings Certificates. (Tr. III at 57-58, 82-83, Supp. at 190-191.) Not surprisingly then, none of the tax returns of Mrs. Spiller or Ms. Stayrook reflect any interest earned on those Savings Certificates. Mrs. Spiller's available tax returns included the years 1998 to 2005. (Defendants' Exhibits B-I, Supp. at 264-293.) Ms. Stayrook's included the years 1999 to 2001. (Defendants' Exhibits J-L,

Supp. at 294-302.) None of them reflect any interest for any of the Savings Certificates. Mrs. Spiller knows that, if interest was being earned, they should have received a Form 1099 reporting it annually. (Tr. III at 82, Supp. at 215.) Ms. Rebecca Pennington, one of Mrs. Spiller's witnesses, also testified that a Form 1099 would issue annually for interest earned on a savings certificate. (Tr. I at 46-47, Supp. at 40.) Absence of Form 1099's compels the conclusion the Savings Certificates had been cashed sometime prior to 1998, the earliest year for which a tax return is available.

D. Mrs. Spiller Found The Savings Certificates Unexpectedly.

Also notably, Mrs. Spiller was not looking for the Savings Certificates after Ms. Stayrook died. (Tr. III at 87, Supp. at 220.) She died in February 2001 and her estate was already settled by October of the same year. (Tr. III at 87-88, Supp. at 220-221.) No one, including Mrs. Spiller, believed the Savings Certificates remained part of her affairs. (Tr. III at 88, Supp. at 221.) In the course of repainting what had been Ms. Stayrook's bedroom and moving a dresser, the Savings Certificates were found inside an envelope taped to the bottom of a dresser drawer. (Tr. III at 61-62, Supp. at 194-195.) The envelope also included $2,500. (Tr. III at 62, Supp. at 195.) Mrs. Spiller was "surprised because [she] had long forgotten about them." (Tr. III at 80, Supp. at 213.) Mrs. Spiller had no idea when or why the envelope was placed there, but knew Ms. Stayrook "liked to tuck money away." (Tr. III at 80-81, Supp. at 213-214.)

Ultimately, Mrs. Spiller cannot say what Ms. Stayrook did or not do with the Savings Certificates in the years between opening them and her death. Rather, her claim rests only on the fact that Ms. Stayrook never told her she cashed the Savings Certificates:

> Q. Isn't it possible, Mrs. Spiller, that the $2,500 was money remaining from those CDs after a point in time that Ms. Stayrook cashed them?

A. No, she didn't cash them. She'd have told me.

Q. Aside from the fact that she didn't tell you that she cashed them – well, **am I right that the only basis you have for saying that she didn't cash them is that she didn't tell you she cashed them?**

A. **Right.** (Emphasis added.)

(Tr. III at 90, Supp. at 223.)[3]

E. No Bank Records Exist Regarding Any Of The Savings Certificates.

After finding the Savings Certificates, Mrs. Spiller presented them to Sky Bank for payment. Sky Bank, however, has no record of any account for Ms. Stayrook or Mrs. Spiller on either its system-wide database for open accounts or any retained records.

All of Sky Bank's active, open accounts are reflected on a system-wide computer database. An account remains on this system while open and is accessible by name, account number, and social security number unless and until the customer closes the account. Ms.

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[3] Indeed, in a letter and complaint she sent to the Ohio Division of Securities (Defendants' Exhibits M and N, Supp. at 303-307), Mrs. Spiller asked only to know if the Savings Certificates had been redeemed. She did not know if they had or had not:

Q. In both of those documents you're not stating in either of them that you're certain that the certificates had or had not been redeemed?

A. Right.

* * *

Q. Certainly admitting the possibility that they were redeemed at some point in the years since they'd been issued?

A. Yes.

(Tr. III at 101, Supp. at 234.)

Patricia Brewer, a 28-year employee of Sky Bank and its predecessors (Tr. I at 50-51, Supp. at 43-44), testified on this point:

> Q. Ms. Brewer, just a few follow-up questions. Do you, with regard to the four certificates of deposit in issue, do you have personal knowledge that – as to whether any of those accounts are reflected in the computer system that Sky Bank uses to show its open active accounts?
>
> A. They are not in the computer system.
>
> Q. Okay. You personally know that?
>
> A. Yes.
>
> Q. What does that – knowing that, what does that tell you?
>
> A. That would tell me that they were either cashed or transferred to another account or another bank.

(Tr. I at 58-60, Supp. at 50.) Ms. Lori Householder, the head of Sky Bank's document retention and records research department, also testified:

> Q. You said that you use the term account to refer to an open account on our system I think was the term. Can you tell the Court and me what you mean by system?
>
> A. We have a database that houses all of the accounts that we have, that Sky Bank has, and the accounts are housed there. And transactions are posted to them daily if there's transactions that happen. Once they're closed, then there is a purge period where accounts are purged off, then that's where the records would come in to locate any type of information once the account has been closed.
>
> Q. Is an account ever purged off the system without being closed?
>
> A. No.

(Tr. II at 10, Supp. at 94.) Ms. Jennifer Schwaderer, the manager for Sky Bank's branches in Bellefontaine, Ohio, agreed. (Tr. III at 8-10, Supp. at 141-143.) Thus, absence from the system indicates closure.[4]

As to retained records, Sky Bank retains microfilm and computer images of account transactions for seven years (one year longer than the six-year period of time required by Ohio Rev. Code §1109.69, discussed further below). (Tr. II at 16-18, Supp. at 100-102.) According to Ms. Householder, neither she nor her staff could find any documents relating to the Savings Certificates or any other account for Ms. Stayrook or Mrs. Spiller despite several weeks of searching:

> Q. I would like you to tell the Court the efforts that have been taken by your research department to research those specific accounts.
>
> A. Initially, one of the girls in my department was given these names and account numbers to see if they could locate anything on any type of records that we still currently had, and she did a search on all four account numbers and on both names and nothing was located on any of the reports, like I said, we still currently had.
>
> Then it was brought to my attention to see if there was anything that I could do to see if there was possibly something that the girl that did the initial search, if there was something maybe that she missed or something that I knew of that maybe she didn't.
>
> So I actually went in and performed another search based on all of the account numbers. I had even asked for Social Security numbers. I did name searches on all of the records that we had and nothing was found.
>
> And then later on, there was a box of film located, of closed and open signature cards from Colonial Federal. I searched

[4] On cross-examination of Ms. Householder, Mrs. Spiller speculated that something else could have caused the Savings Certificates not to show as active accounts, such as embezzlement or a fire, but offered no evidence that either occurred here. (Tr. II at 46-48, Supp. at 130-132.)

those. And there was nothing found in any of those signature cards.

(Tr. II at 21-22, Supp. at 105-106.)

In the course of her investigation, Ms. Householder did find a "1993 End of Year Reporting All Account Listing" ("**All Account Listing**") for American Community Bank, N.A. ("**American Community**"), a successor by merger to Bellefontaine Federal. (Defendants' **Exhibit A**, filed under seal by Order of the Trial Court.)[5] The All Account Listing lists every interest-bearing account open at American Community at any time during 1993 so that IRS Form 1099's could be issued for interest income earned by customers that year. (Tr. II at 25-26, Supp. at 109-110.) Ms. Householder testified:

Q. If an account is not reflected on an all account listing, what does that tell you?

A. It's been closed.

Q. Why does it tell you that?

A. Because it's not appearing here for any type of interest reporting, and there's nothing here even under a Social Security number or name to show that there was even anything for 1993.

* * *

Q. So you anticipated a question. Did you check to see if there was any record of an account for either Roberta Stayrook or Maxine Spiller on the document that has been marked as Defendant's Exhibit A?

A. Yes, I did.

---

[5] Because the All Account Listing contains personal and confidential customer information, including names, addresses, account numbers, and social security numbers, it was admitted by the Trial Court as **Exhibit A** under seal. (Tr. II at 23-24, 31, Tr. III at 110, Supp. at 107-08, 115, & 243.) To preserve its confidentiality, Sky Bank has not reproduced it in the Supplement to the Brief; however, the All Account Listing is part of the record on appeal having been admitted into evidence by the Trial Court.

Q. And did you find any listing in an account for them, either of them?

A. No, I did not.

(Tr. II at 26-27, Supp. at 110-111.) Ms. Householder also made clear the All Account Listing is, as it sounds, all-inclusive. (Tr. II at 45, Supp. at 129.)

The existence of the original Savings Certificates does not mean they were not closed. Certificates of deposit were regularly closed without surrendering the original certificates. (Tr. I at 63-64 and 68-69, Supp. at 54-55 and 58-60.) That continues to be the case. (Tr. III at 6-7, Supp. at 139-140.) Thus, Ms. Stayrook could have redeemed the Savings Certificates without surrendering the originals. Even as to the single Savings Certificate actually placed in Mrs. Spiller's name (Plaintiff's Exhibit 2, Supp. at 247), no one knows how the signature card showed ownership of that Savings Certificate. If it indicated ownership by Ms. Stayrook, she could have cashed it without the Savings Certificate. (Tr. I at 64, Supp. at 55.) In that regard, the signature cards for open accounts are kept at the branch, no matter how old, yet none could be located for the Savings Certificates in question. (Tr. III at 8, 11-13, Supp. at 141, 144-146.) If the accounts were open, the signature cards would still remain there. (Tr. III at 12-13, Supp. at 145-146.) Again, their absence indicates closure.

G. Procedural History.

Mrs. Spiller brought suit against Sky Bank on March 15, 2005. Sky Bank moved for summary judgment on June 15, 2006 arguing that R.C. §1109.69(F) barred Mrs. Spiller's claim as a matter of law. The Trial Court denied Sky Bank's Motion on August 8, 2006.

The matter came on for bench trial on January 17 and 18, 2007. Following trial and submission of post-hearing briefs by both parties, the Trial Court found in favor of Mrs. Spiller

on Savings Certificate No. 5242 (Plaintiff's Exhibit 2, Supp. at 247), but dismissed Mrs. Spiller's claim on the remaining three.

Both Mrs. Spiller and Sky Bank timely appealed on March 8, 2007. The Court of Appeals of Logan County, Ohio affirmed the Trial Court's rulings in their entirety on March 24, 2008. Sky Bank timely filed its Notice of Appeal in the Ohio Supreme Court on May 8, 2008 and Mrs. Spiller filed her Notice of Cross-Appeal on May 19, 2008. On October 1, 2008, this Court accepted Sky Bank's appeal, but declined jurisdiction to hear Mrs. Spiller's cross-appeal.

ARGUMENT

PROPOSITION OF LAW NO. I: ANY CLAIM BROUGHT AGAINST A BANK BASED ON, OR THE DETERMINATION OF WHICH WOULD DEPEND UPON, THE CONTENTS OF RECORDS FOR WHICH A PERIOD OF RETENTION OR PRESERVATION IS SET FORTH IN R.C. §1109.69(A AND B) MUST BE BROUGHT WITHIN THE PERIOD OF TIME FOR WHICH SUCH RECORD MUST BE RETAINED OR PRESERVED.

When the Ohio legislature enacted R.C. §1109.69, it determined two important and mutually dependent public policies applicable to Ohio banks. One, an Ohio bank must only retain its records for the specific periods of time enumerated in the statute. Two, once the applicable retention period passes, an Ohio bank cannot be sued for claims "based on, or the determination of which would depend upon, the contents of [such] records." R.C. §1109.69(F). The two principles go hand in hand: Banks can only safely dispose of records after the passing of the permitted retention period if the bank cannot then be held liable on claims based on, or otherwise depending on, those records. In this appeal, Sky seeks to restore and protect this legislative balance.

Pursuant to R.C. §1109.69,[6] banks are only required to retain and preserve bank records for set periods of time. Some records need only be kept for one year (*see* R.C. §1109.69(A)(1)), but six years is the longest time a bank must keep any record. R.C. §1109.69(A)(2). The statute applies to all bank records. It identifies certain documents by category, including, for example, "deposit and withdrawal slips", "official checks, drafts, money orders, and other instruments for the payment of money issued by the bank," and "individual ledger sheets or other records serving the same purpose that show a zero balance." R.C. §1109.69(A)(2). Then, in a catch-all provision, R.C. §1109.69(B) states:

> Records that are not listed in division (A) of this section . . . shall be retained or preserved for six years from the date of completion of the transaction to which the record relates or, if the last entry has been transferred to a new record showing the continuation of a transaction not yet completed, from the date of the last entry.[7]

Plainly, the Ohio legislature intended to (and did) broadly capture all bank records in the statute.

Once the retention period for a given document has passed, the document may be destroyed by the bank. R.C. §1109.69(E) states:

> A bank may dispose of any records that have been retained or preserved for the period set forth in divisions (A) and (B) of this section.

In conjunction with allowing the disposal of bank records, the statute bars actions against Ohio banks brought after the retention period has passed for the documents needed to defend against the action. R.C. §1109.69(F) states:

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[6] The Ohio Legislature enacted the statute effective January 1, 1968 and it was originally codified as R.C. §1101.08.

[7] R.C. §1109.69(B) permits the Superintendent of Financial Institutions to specify retention periods for records not identified in R.C. §1109.69(A), but the Superintendent has not done so. *See* Ohio Adm. Code Ch. 1301.1 – Division of Financial Institutions: Banks.

> Any action by or against a bank based on, or the determination of which would depend on, the contents of records for which a period of retention or preservation is set forth in divisions (A) and (B) of this section shall be brought within the time for which the record must be retained or reserved. (Emphasis added.)

Notably, R.C. §1109.69(F) contains no exceptions; it applies to any kind of action against a bank involving any kind of bank record.

The Court has already recognized and upheld the public policy embodied in the statute. In *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175, 553 N.E.2d 619, the Supreme Court of Ohio applied the statute to bar a claim for payment of a passbook savings account on facts that are markedly similar to those presented here. In *Abraham*, the plaintiff had opened a passbook savings account in October 1969 at Capital National Bank, which eventually became part of National City Bank. The plaintiff misplaced the passbook in the 1970's, and found it unexpectedly in 1985. The last entry on the passbook showed a balance of $13,266.83 as of September 30, 1972. When the plaintiff presented the passbook, National City Bank found no record of the account. National City Bank ultimately located a January 4, 1977 list of open accounts (similar to Sky's All Account Listing) which had no listing of the plaintiff's account. Plaintiff, of course, maintained she had never closed or otherwise withdrawn the money from the passbook savings account (like Mrs. Spiller does here). *Id.* at 175 & 177, 553 N.E.2d at 619 & 621.

The Supreme Court affirmed dismissal of the lawsuit pursuant to the time bar of the predecessor statute to R.C. §1109.69(F). The Supreme Court stated:

> The intent and language of R.C. 1101.08(F) are clear. A bank would be foolish to destroy its records after six years in reliance on R.C. 1101.08(E) without the assurance provided in R.C. 1101.08(F) that it will not thereby leave itself open to litigation without the documents necessary to defend itself.

> Without its internal records, National City can only speculate about how and by whom Abraham's funds were removed from her account. Indeed, the records might show that the bank was at fault. **Abraham contends that the passbook plus her testimony should be sufficient to bring her case before a jury. The problem is that the passbook proves only that the account existed; it does not explain how the funds were removed from the account. Only the internal bank records could explain it. Because these internal bank documents are crucial evidence in Abraham's action and because without them the bank is unable to defend itself in this lawsuit, this is an action "the determination of which would depend upon, the contents of records" that R.C. 1101.08(E) authorized the bank to destroy. Therefore, R.C. 1101.08(F) applies to the facts of this case and mandates its dismissal.** (Emphasis added.)

Id. at 177, 553 N.E.2d at 621.

Mrs. Spiller's claim and evidence are very much like the plaintiff's in *Abraham*. Mrs. Spiller possesses the original Savings Certificates opened in the 1970's, but offered no evidence as to what happened to them after they were opened. She could only establish the dates on which Ms. Stayrook opened each Savings Certificate; she cannot establish anything that happened thereafter. That alone should have resulted in dismissal of her claims. Since her action was commenced more than six years after the dates on which the Savings Certificates had been opened, the retention period for records relating thereto had passed and they could legitimately be destroyed under R.C. §1109.69(E). R.C. §1109.69(F), therefore, barred her claims based on the evidence she adduced.

In addition to the foregoing analysis, Sky introduced evidence showing that all of the Savings Certificates had been closed no later than December 31, 1992. The All Account Listing located by Sky lists all interest-bearing bank accounts that were open at any time in the year 1993. The All Account Listing, however, does not list any account for either Ms. Stayrook or Mrs. Spiller. As was the case with the list of open accounts considered in *Abraham*, the absence

of any listing for Mrs. Spiller and Ms. Stayrook on the All Account Listing reveals that the Savings Certificates had been closed in some manner prior to 1993, *i.e.* no later than December 31, 1992. That being the case, the six-year period for the retention of the records relating to that closure ran no later than December 31, 1998. On January 1, 1999, at the latest, Sky Bank was free to destroy whatever records existed relating to the closure of the Savings Certificates.

R.C. §1109.69(F) required Mrs. Spiller to bring her claims against Sky Bank "within the time for which the record[s] must be retained or preserved." That being the case, her action had to be commenced no later than December 31, 1998 to be timely. Mrs. Spiller, however, did not file suit until 2005, long after the documents could legally be destroyed. R.C. §1109.69(F) therefore bars her action.

The Trial Court and Court of Appeals nonetheless rejected Sky Bank's defense relying on *Brentlinger v. Bank One of Columbus, N.A.* (2002), 150 Ohio App.3d 589, 782 N.E.2d 648. In *Brentlinger*, the plaintiff opened a certificate of deposit in 1982 with Bank One and kept the certificate of deposit in her safe deposit box at the local branch until 1999. When she found the certificate of deposit, she sought to withdraw the money, but Bank One had no record of the account. *Id.* at 591-92, 782 N.E.2d at 649-50. Based on the lack of records and the lapse of time, Bank One moved for summary judgment pursuant to R.C. §1109.69(F). The trial court in *Brentlinger* rightly granted Bank One's motion. *Id.* at 593, 782 N.E.2d at 651. On appeal, the Court of Appeals conceded that "[b]y enacting the six-year limitation period in R.C. 1109.69(F), the Ohio legislature intended to protect banks from having to defend themselves after destroying bank records pursuant to R.C. 1109.69(A), (B), and (E)," *id.* at 595, 782 N.E.2d at 652, but nonetheless reversed.

The Court of Appeals drew a distinction based on the automatic renewal provision of the certificate of deposit in question and essentially put the burden of proving when it was closed on the bank. The Court of Appeals held:

> Appellant still possesses the certificate that had been in her Bank One safe deposit box. Appellant never received written notification as specified in the agreement that Bank One was not renewing the deposit. Appellant has lived at the same address since 1941 and received other mail from Bank One at that address. Therefore, the only reasonable inference one can draw from these facts is that appellant's [certificate of deposit] is still automatically renewing itself . . . . R.C. 1109.69(E) does not authorize Bank One to destroy the records of an active automatically renewable certificate of deposit, and, consequently, Bank One cannot rely upon the destruction of records and R.C. 1109.69(F) to bar appellant's claims.

Id. at 596, 782 N.E.2d at 653. On this basis, the Court of Appeals reversed the lower court.

Brentlinger, however, errs in two critical respects. First, it wrongly modifies the statutory framework of R.C. §1109.69(F) by creating an exception not contained in the statute. Second, it does not follow this Court's ruling in *Abraham*. Both errors require its rejection.

First, no exception for automatically renewing certificates of deposit exists in R.C. §1109.69(E). As noted above, R.C. §1109.69 applies to all bank records of any kind. It makes no exception for an "automatically renewable" savings certificate or any other type of account. Indeed, the statute does the exact opposite by imposing a "catch-all" six-year retention period on all "[r]ecords that are not listed in division (A) of this section . . . ." R.C. §1109.69(B). R.C. §1109.69(E) permits destruction of "any records" once the applicable retention period has passed. The "exception" found by *Brentlinger* simply does not exist in the statute.

Courts cannot create exceptions where none exist; rather, they must apply statutes as written. *See, e.g., State ex rel. Sapp v. Franklin Cty. Court of Appeals* (2008), 118 Ohio St. 3d 368, 372, 889 N.E. 2d 500, 504 (a court cannot add an exception not contained in the plain

language of a statute); *State ex rel. Stoll v. Logan Cty. Bd. of Elections* (2008), 117 Ohio St.3d 76, 82, 881 N.E.2d 1214, 1222 ("But the statute contains no exception, and we cannot add one to its express language."); *State v. Hughes* (1999), 86 Ohio St.3d 424, 427, 715 N.E.2d 540, 543 ("In construing a statute, we may not add or delete words."). By finding an exception not contained in the statute, *Brentlinger* wrongly disregards the plain language of R.C. §1109.69.

Second, even aside from the plain language of the statute, the factual distinction made in *Brentlinger* cannot be reconciled with this Court's prior decision in *Abraham*. *Abraham* involved a passbook savings account; *Brentlinger* involved an automatically renewing savings certificate. Although *Brentlinger* reached a different result, no difference exists between a passbook savings account and an automatically renewable certificate of deposit as to how long they might remain open. A passbook savings account has no expiration date whatsoever; it simply remains open until it is closed. An automatically renewing certificate of deposit likewise renews until it is closed. Neither requires any action to continue; both require action only to close them. Since *Abraham* held that R.C. §1109.69(F) barred suit on a passbook savings account, the same result must obtain for automatically renewing savings certificates like those at issue in *Brentlinger* and the instant case. *Brentlinger* simply cannot stand in the face of *Abraham*.

Brentlinger has broad implications for Ohio banks. *Brentlinger* does not just create one exception for "automatically renewable certificates of deposit." It opens the door for Ohio courts to create other exceptions to the statute in an effort to soften the potential harshness of strict application of the statute. This Court, however, has already held that any harshness that might exist should be remedied by legislative, not judicial, action. This Court stated:

> We are not unmindful of the potential for harsh results under the clear mandate of the statute, but this is a legislative problem.

Abraham, 50 Ohio St.3d at 178, 553 N.E.2d at 622. The statute should be enforced as written.

If allowed to stand, however, *Brentlinger* encourages Ohio courts to do exactly what *Abraham* forbids. Without a clear pronouncement from this Court rejecting *Brentlinger*, any type of bank statement or other document showing a balance on deposit with a bank becomes fair game for a claim against a bank, no matter how old it might be. The bank may be unable to prove payment because it properly disposed of its records, but could still be held liable to a plaintiff who claims she has not been paid. This is exactly what R.C. §1109.69(F) is intended to prevent and requires that *Brentlinger* be rejected.

By following *Brentlinger*, the Court of Appeals erred when it rejected Sky Bank's defense under R.C. §1109.69(F) and *Abraham*. Just as *Brentlinger* should be rejected by this Court, the Court of Appeals should be reversed and judgment should enter for Sky Bank dismissing Mrs. Spiller's claims.

CONCLUSION

Under R.C. §1109.69(E), a bank can properly destroy its records after the statutory retention periods set forth in R.C. §1109.69(A & B) have passed. After that destruction, the bank no longer has the evidence needed for its defense against claims such as Mrs. Spiller's here, including, most critically, proof of payment. For this reason, R.C. §1109.69(F) bars suit against a bank that has disposed of records under the statute. *Brentlinger*, however, effectively presumes that certain accounts remain active unless a bank can prove they have been closed. To do so, the bank would have to keep the very records the statute allows it to destroy. *Brentlinger's* rubric thus turns R.C. §1109.69 on its head, requires banks to keep their records indefinitely, and robs R.C. §1109.69(F) of its protective value. The Ohio legislature did not intend such a result.

The Court of Appeals here followed *Brentlinger* to reject Sky Bank's defense based on R.C. §1109.69(F). By doing so, the Court of Appeals erred. The analysis of *Brentlinger* should be rejected by this Court and Mrs. Spiller's claims against Sky Bank should be dismissed in their entirety pursuant to R.C. §1109.69(F).

Respectfully submitted,

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PROOF OF SERVICE

I certify that a copy of this Merit Brief of Appellant Sky Bank – Ohio Bank Region was sent by First Class U.S. Mail to Steven R. Fansler, Esq., 212 N. Detroit St., P.O. Box 764, West Liberty, Ohio 43357-0764, Attorney for Appellee on December 2nd, 2008.

_____
Counsel for Appellant
Sky Bank – Ohio Bank Region

APPENDIX

IN THE SUPREME COURT OF OHIO

SKY BANK – OHIO BANK REGION,	:	CASE NO. 08-0900
Appellant	:	On Appeal from the Logan County Court of Appeals,
vs.	:	Third Appellate District
MAXINE F. SPILLER,	:	Court of Appeals Case No. CA8-07-03
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT SKY BANK – OHIO BANK REGION

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COUNSEL FOR APPELLANT
SKY BANK – OHIO BANK REGION

Notice of Appeal of Appellant
Sky Bank – Ohio Bank Region

Appellant Sky Bank – Ohio Bank Region hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Logan County Court of Appeals, Third Appellate District, entered in Court of Appeals case No. CA8-07-03 on March 24, 2008.

This case raises a question of public or great general interest.

Respectfully submitted,

By: _____
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By: _____
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I certify that a copy of this Notice of Appeal of Appellant Sky Bank – Ohio Bank Region was sent by First Class U.S. Mail to counsel for Appellee, Steven R. Fansler, Esq., 212 N. Detroit St., P.O. Box 764, West Liberty, Ohio 43357-0764 on May 21st, 2008.

_____
Counsel for Appellant
Sky Bank – Ohio Bank Region

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

LOGAN COUNTY

MAXINE F. SPILLER,

PLAINTIFF-APPELLEE, CROSS-APPELLANT,

v.

SKY BANK - OHIO BANK REGION, nka SKY BANK,

DEFENDANT-APPELLANT, CROSS-APPELLEE.

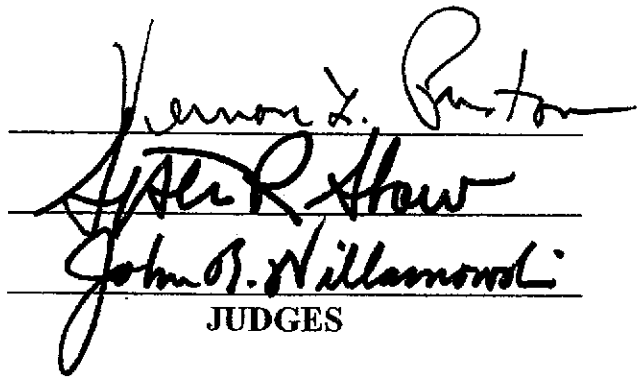
CASE NUMBER 8-07-03

JOURNAL ENTRY

For the reasons stated in the opinion of this Court rendered herein, the assignments of error are overruled, and it is the judgment and order of this Court that the judgment of the trial court is affirmed with costs to appellant and cross-appellant for which judgment is rendered and the cause is remanded to that court for execution.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently

herewith directly to the trial judge and parties of record.



JUDGES

DATED: March 24, 2008

30-22

COURT OF APPEALS
THIRD APPELLATE DISTRICT
LOGAN COUNTY

CA

MAXINE F. SPILLER,

PLAINTIFF-APPELLEE,
CROSS-APPELLANT,

v.

SKY BANK - OHIO BANK REGION,
nka SKY BANK,

DEFENDANT-APPELLANT,
CROSS-APPELLEE.

CASE NUMBER 8-07-03

OPINION

CHARACTER OF PROCEEDINGS: Appeal and Cross Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed.

DATE OF JUDGMENT ENTRY: March 24, 2008

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30-23

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PRESTON, J.

{¶1} Defendant-appellant/cross-appellee, Sky Bank-Ohio Bank Region, nka Sky Bank (hereinafter "Sky Bank"), appeals the judgment of the Logan County Court of Common Pleas. Plaintiff-appellee/cross-appellant, Maxine F. Spiller (hereinafter "Spiller"), also appeals the trial court's judgment. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} Ms. Roberta Stayrook opened four certificates of deposit with Bellefontaine Federal Savings and Loan Association. The four certificates of deposit included: Savings Certificate No. 4346, in the amount of $5,000.00 issued on February 13, 1974 to "Miss Roberta M. Stayrook p.o.d. Maxine F. Spiller" (hereinafter "Certificate No. 4346"); Savings Certificate No. 5242 issued on June 10, 1975, in the amount of $3,000 to "Maxine Spiller p.o.d. Roberta Stayrook" (hereinafter "Certificate No. 5242"); Savings Certificate No. 6059, in the amount of $10,000, issued on July 31, 1976 to "Maxine Spiller or Roberta Stayrook" (hereinafter "Certificate No. 6059"); and Savings Certificate No. 7256, in the

amount of $25,000, issued on January 2, 1979 to "Roberta M. Stayrook (p.o.d. Maxine F. Spiller)" (hereinafter "Certificate No. 7256"). (Pl. Ex. 1, 2, 3, 4, respectively).[1]

{¶3} Ms. Stayrook died on February 10, 2002. (Cert. of Death attached to Compl.; Tr. Vol. III, 28-29). Several months after Stayrook's death, Spiller found the certificates of deposit in an envelope after a chest of drawers was moved. (Tr. Vol. III, 61-62). The envelope also contained $2,500.00 in cash. (Id. at 62). Spiller subsequently presented the four certificates of deposit to Sky Bank, who declined to redeem them.

{¶4} On March 15, 2005, Spiller filed a complaint seeking to require Sky Bank to redeem the four certificates of deposit. Sky Bank filed a motion for summary judgment on June 15, 2006. The trial court denied the summary judgment motion. On January 17 and 18, 2007, a bench trial was held. Both parties subsequently filed post-trial briefs.

{¶5} On February 6, 2007, the trial court filed a judgment entry in which it found, "in favor of the Plaintiff upon the certificate of deposit dated June 10, 1975 in the original face amount of $3,000" and "in favor of the Defendant upon

[1] Bellefontaine Federal Savings and Loan Association was renamed Colonial Federal Savings and Loan Association in 1983. In 1991, Colonial Federal Savings and Loan Association was renamed Colonial Federal Savings Bank, which merged into American Community Bank in 1993. In 1998, American Community Bank merged into The Ohio Bank, which was subsequently renamed Sky Bank-Ohio Bank Region. Thereafter, Sky Bank-Ohio Bank Region was renamed Sky Bank. As a result, Sky Bank is the successor bank to Bellefontaine Federal Savings and Loan Association. (Exhibit F attached to Compl.; Tr. Vol. III, 28-29).

the other certificates of deposits on which this claim was brought." The trial court granted judgment in favor of Spiller "in the sum of $26,832 plus the statutory rate of interest of eight percent per annum from the date of the judgment entry." (JE 2/6/07).

{¶6} On February 9, 2007, Spiller requested findings of fact and conclusions of law pursuant to Civ.R. 52, which the trial court issued on February 22, 2007. The trial court made the following findings of fact:

1. **Plaintiff's exhibit two was a certificate of deposit issued by Bellefontaine Federal in the name of the Plaintiff; under the terms of that certificate it automatically renewed for the same term unless presented for withdraw not later than ten days after the maturity date except at least five days prior to the maturity date the association may give written notice to the depositor that the certificate would not be renewed at the stated rate and will thereafter earn interest at a different rate or will revert to the status of a regular savings account.**
2. **Plaintiff is the owner of said cd.**
3. **Plaintiff never cashed said cd.**
4. **The amount due under said cd is $26,832.00 as of January 31, 2007.**
5. **Plaintiff's exhibits one and four were certificates of deposit issued by Bellefontaine Federal to Roberta Stayrook, pod Maxine Spiller.**
6. **Plaintiff's exhibit three was issued by Bellefontaine Federal in the names of Maxine Spiller or Roberta Stayrook.**
7. **Roberta Stayrook was the owner or co-owner of Plaintiff's one, three[,] and four.**
8. **Defendant had no active account record of said cds.**
9. **There were no active account records of said cds in 1993 for Defendant's predecessor, American Community Bank.**

> **10. Neither Roberta Stayrook nor Maxine Spiller declared any income from said cds on their federal tax returns.**
> **11. Bellefontaine Federal cashed certificates of deposit without requiring surrender of said documents.**
> **12. Sky bank continues to cash certificates without requiring surrender of the document.**
> **13. Roberta Stayrook lawfully cashed Plaintiff's exhibits one, three[,] and four for which she was the owner or co-owner.**
> **14. Defendant is a successor in interest to Bellefontaine Federal.**

(Findings of Fact/Conclusions of Law, 2/22/07). The trial court also made the following conclusions of law:

> **1. This is an action on contract.**
> **2. Plaintiff has the burden to prove the formation and breach of contract by a preponderance of the evidence in order to recover damages.**
> **3. It is not the common law of Ohio that a certificate of deposit over twenty years old is presumed to have been cashed.**
> **4. Plaintiff sustained its burden as to Plaintiff's two but failed to do so as to Plaintiff's one, three[,] and four.**
> **5. Defendant owes Plaintiff $26,832.00 as of January 31, 2007.**

(Id.).

{¶7} It is from the trial court's judgment that Sky Bank appeals and asserts two assignments of error. Spiller also appeals the judgment of the trial court and asserts three assignments of error on cross-appeal. We have combined assignments of error where appropriate.

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ASSIGNMENT OF ERROR NO. I

THE TRIAL COURT ERRED IN DENYING SKY BANK'S MOTION FOR SUMMARY JUDGMENT BASED ON THE LIMITATION OF ACTION IMPOSED BY R.C. 1109.69.

{¶8} In its first assignment of error, Sky Bank argues that under R.C. 1109.69, banks are required to retain bank records for certain periods of time, with six years being the longest period of time, and banks are protected from liability once the records have been destroyed. Sky Bank further argues that the All Accounts Listing in 1993 did not contain any account for either Stayrook or Spiller. Thus, Sky Bank argues that, assuming that the accounts closed on December 31, 1992, the six year period of retention would have run until December 31, 1999, and Sky Bank was free to destroy any records on January 1, 2000.

{¶9} R.C. 1109.69 provides in pertinent part:

> **(A) Every bank shall retain or preserve the following bank records and supporting documents for only the following periods of time:**
> * * *
>
> **(2) For six years:**
> * * *
> **(b) Individual ledger sheets or other records serving the same purpose that show a zero balance and that relate to demand, time, or savings deposit accounts, and safekeeping accounts, after date of last entry, or, where the ledger sheets or other records show an open balance, after date of transfer of the amount of the balance to another ledger sheet or record;**

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> **(c) Official checks, drafts, money orders, and other instruments for the payment of money issued by the bank that have been canceled, after date of issue;**
> * * *
> **(h) Signature cards relating to closed demand, savings, or time accounts, closed safe deposit accounts, and closed safekeeping accounts, after date of closing;**
> * * *
>
> **(B) The superintendent of financial institutions may designate a retention period of either one year or six years for any records maintained by a bank but not listed in division (A) of this section. Records that are not listed in division (A) of this section and for which the superintendent has not designated a retention period shall be retained or preserved for six years from the date of completion of the transaction to which the record relates or, if the last entry has been transferred to a new record showing the continuation of a transaction not yet completed, from the date of the last entry.**
> * * *
>
> **(E) A bank may dispose of any records that have been retained or preserved for the period set forth in divisions (A) and (B) of this section.**
>
> **(F) Any action by or against a bank based on, or the determination of which would depend on, the contents of records for which a period of retention or preservation is set forth in divisions (A) and (B) of this section shall be brought within the time for which the record must be retained or preserved.**
> * * *

{¶10} In *Brentlinger v. Bank One of Columbus, N.A.*, the Tenth District held R.C. 1109.69(E) does not authorize the bank "to destroy the records of an active automatically renewable certificate of deposit * * *." 150 Ohio App.3d

7 30-29

589, 2002-Ohio-6736, 782 N.E.2d 648, ¶49. In that case, the terms of the certificate of deposit provided that the certificate automatically renewed every seven days. Id.

{¶11} In the present case, the four certificates contain language providing that the certificates will be automatically renewed. Thus, we find that the certificates of deposit, like those certificates in *Brentlinger*, are automatically renewable certificates of deposit. In addition, like the court in *Brentlinger,* we find the bank was not authorized to destroy the records of active automatically renewable certificates of deposit under R.C. 1109.69. *Brentlinger*, 2002-Ohio-6736, at ¶49.

{¶12} Sky Bank's first assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN GRANTING JUDGMENT TO SPILLER ON SAVINGS CERTIFICATE NO. 5242.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR NO. I

The Trial Court erred in granting judgment to Sky Bank on three certificates of deposit (Plaintiff's Exhibit 1, 3, and 4).

{¶13} Sky Bank argues, in its second assignment of error, that Spiller had to prove that the certificates of deposit have never been paid, and she has no such evidence. Sky Bank argues that there is a presumption of payment rule in Ohio, and in order to rebut the presumption, Spiller had to prove by clear and convincing

evidence that the certificates had not been cashed. Further, Sky Bank argues that Stayrook announced her intention to relocate her investment to Florida when she moved there in 1978, and she had an eighteen month window to redeem the certificates when Spiller did not live with her. Further, Sky Bank argues that neither Stayrook nor Spiller paid taxes on the certificates, and Spiller testified that they never received a single Form 1099 reporting interest during the time Spiller and Stayrook lived together.

{¶14} In her first assignment of error, Spiller argues that there was no basis for the trial court to find that Stayrook had lawfully cashed in three of the certificates of deposit. According to Spiller, she was aware that Stayrook opened the certificates; Stayrook never made any business decision without discussing it first; the Bank never sent 1099's for any of the certificates from their inception; and Spiller never cashed in the certificates.

{¶15} The presumption of payment rule "has been generally described as follows: A presumption of payment arises from a lapse of time-usually fixed at 20 years- between the creation of an obligation and the attempt to enforce it in the courts." *Brown v. National City Bank* (Feb. 4, 1980), 8th Dist. No. 40384, *3, citing 60 American Jurisprudence 2d Payments, §133, 706, See Generally Annot., 1 A.L.R. 779.

{¶16} "The presumption of payment rule is a rule of evidence * * *." 73

Ohio Jurisprudence 3d Payment and Tender, § 88. The presumption of payment "does not bar a suit, but merely shifts the burden of proof to the plaintiff to show nonpayment by clear and convincing evidence." *Brown*, 8th Dist. No. 40384, *3, citing *Boscowitz v. Chase National Bank* (1952), 202 Misc. 1016, 111 N.Y.S.2d 147; *Griffith v. Mellon Bank* (2004), 328 F.Supp.2d 536, 542, citations omitted.

{¶17} In *Brown*, the Eighth District discussed the reason for applying a presumption of payment rule. 8th Dist. No. 40384, at *3. The court stated,

> **The underlying basis for the rule of presumption of payment is the avoidance of litigation over claims which time has obscured.**
>
> **The presumption rests not only on want of diligence in asserting rights, but on the higher ground that it is necessary, to suppress frauds, to avoid long-dormant claims, which, it has been said, have often more cruelty than justice in them, that it relieves courts from the necessity of adjudicating rights so obscured by the lapse of time and the accidents of life that the attainment of truth and justice is next to impossible.**

Id. citing, 60 Am Jur.2d Payment § 134, 708.

{¶18} The presumption of payment rule has been applied by the Ohio Supreme Court. *Wright v. Hull* (1911), 83 Ohio St. 385, 94 N.E. 813; *Brown*, 8th Dist. No. 40384, at *3. In addition, the presumption of payment rule has been applied to a passbook savings account. *Brown,* 8th Dist. No. 40384. Although the presumption of payment rule has not been applied to certificates of deposit in Ohio, the rule has been applied to certificates of deposit under Pennsylvania law.

See *Griffith*, 328 F.Supp.2d at 542, citations omitted.

{¶19} However, we find it unnecessary to determine whether a presumption of payment rule applies in Ohio as to certificates of deposit. As previously noted, the presumption of payment rule is a rule of evidence that merely shifts the burden to the plaintiff to prove by clear and convincing evidence. *Brown*, 8th Dist. No. 40384, *3, citing *Boscowitz v. Chase National Bank* (1952), 202 Misc. 1016, 111 N.Y.S.2d 147; *Griffith*, 328 F.Supp.2d at 542, citations omitted. If the presumption of payment rule does not apply then Spiller would have to prove all the elements of her claim by a preponderance of the evidence. See *Ayers-Sterrett, Inc. v. Cilli* (Feb.22, 2002), 3d Dist. No. 15-01-09, *2, citations omitted.

{¶20} Since we find that Spiller has met her burden of proof, under either the clear and convincing evidence or preponderance of the evidence standards, as to Certificate No. 5242 but has failed to meet her burden of proof under either standard in regards to Certificates Nos. 4346, 7256, and 6059, we need not determine whether the presumption of payment rule applies to certificates of deposit in Ohio.

{¶21} At the trial, Spiller testified that she came to know Roberta Stayrook in 1935 or 1936, and at one point, Spiller was engaged to Stayrook's brother. (Tr. III, at 32). Sometime in the mid-1960's, Spiller moved to Plainfield, Indiana with

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her husband, and Stayrook lived with Spiller and her husband in Indiana for eleven years. (Id. at 32; 38-39). According to Spiller, Stayrook paid $50/week for room and board, and Stayrook owned her own car. (Id. at 39). In 1977, Spiller and her husband moved to Bonita Springs, Florida. (Id. at 32; 40). Stayrook did not initially accompany the Spillers to Bonita Springs; however, after Stayrook retired and Spiller's husband died, Stayrook moved to Florida and lived with Spiller. (Id. at 40). Spiller and Stayrook lived together from the time that Stayrook moved to Florida until Stayrook's death in 2002. (Id. at 42; Cert. of death attached to compl.).

{¶22} With regard to financial matters, Spiller testified that she and Stayrook maintained a joint checking account; Spiller took care of that account; and Stayrook and Spiller made financial decisions together. (Id. at 43). Stayrook and Spiller jointly opened a Prudential Account in 1980 with $25,000 which came from Stayrook's investment. (Id. at 52). According to Spiller, she and Stayrook would put extra money from their joint checking account into the Prudential account about every six months. (Id. at 54). In 1994, Spiller and Stayrook bought a lot for $20,000, and took the money out of the Prudential account. (Id. at 54-55).

{¶23} Spiller testified that the funds for the four certificates of deposit came from Stayrook's savings bonds. (Id. at 45-47). The certificates were opened by Stayrook. (Id. at 45-47). Spiller was not present when the certificates were

opened, but she testified that she knew about the certificates. (Id. at 45-47; 61). Further, Spiller testified that she was the person who got the mail; that Stayrook did not even have a key to the mailbox; that Spiller opened the mail; and that she never got any correspondence or interest statements on the certificates, even during the initial four year term. (Id. at 56; 58).

{¶24} Stayrook passed away on February 10, 2002. (Cert. of death attached to the Compl.). The certificates were found in October, following Stayrook's death, when Spiller and her daughter, Susan Hollycross, moved a chest of drawers in order to paint and an envelope fell out. (Id. at 61-62). The envelope contained the four certificates and $2,500 in cash. (Id. at 62). Spiller testified that she was not surprised to find the envelope because Stayrook had told her "if anything ever happened to her, I was to go through everything, not throw anything out until we checked everything." (Id. at 64).

{¶25} Moreover, Spiller testified to the following:

Q. Are you aware of any time that Roberta Stayrook ever went to the bank to cash in the certificates?
A. No.
Q. Did she ever tell you she was doing it?
A. No.
*** * ***
Q. That she was writing to them asking them to do it through the mail?
A. No.
Q. That you're aware of, did she ever receive a large sum of cash that was explained in any other way to you?
A. No.

Q. Is that true for the whole 30 years since they were taken out?
A. Yes.

(Id. at 66).

{¶26} Rebecca Pennington, a retired vice president of operations at Citizens Federal Savings and Loan in Bellefontaine, Ohio, calculated the value of the certificates. (Tr. I, at 10). Pennington calculated the value based on the terms of the certificate for the initial period, and by looking at rates offered by her institution on applicable dates to calculate the value of the certificates as if they had remained open through August 31, 2006. (Tr. I, at 10; 21-24). Pennington calculated the value of the certificates to be the following amounts: $42,576.44 for Certificate No. 4346; $26,479.16 for Certificate No. 5242; $84,512.73 for Certificate No. 6059; and $158,396.08 for Certificate No. 7256. (Id. at 26; 30; 34; Pl.Exhibit 7).

{¶27} Patricia Brewer, Lori Householder, and Jennifer Schwaderer, are current or retired employees of Sky Bank, who testified regarding certificates of deposit. (Id. at 58; Tr.Vol.II at 6-7; Tr. Vol.III at 5-6). Schwaderer and Householder testified regarding their search for the pertinent certificate accounts. Schwaderer testified that she searched on Sky Bank's computer for the accounts by names, account numbers, and social security numbers, and she did not find the accounts. (Vol. III. at 8-9).

{¶28} According to Householder, a person in her department was given the names and accounts numbers to search for the certificates and located nothing. (Tr.Vol II at 21). Householder also researched the certificates, including a search based on all the account numbers and names. (Id. at 22). During her search, Householder located a box of film of closed and open signature cards from Colonial Federal and found nothing in any of the signature cards regarding the accounts.[2] (Id. at 22). Householder did not find any records relating to the four certificates. (Id. at 23).

{¶29} An All Accounts Listing for American Community Bank for the year 1993 was found. (Id. at 24).[3] An All Accounts Listing, lists the name of the client, any accounts they have, and the interest that was paid to them in 1993. (Id. at 25). The listing is prepared for "IRS reporting for the end of each year, for anyone that has earned interest on an account or paid in on a loan." (Id. at 25). According to Householder, if an account is not reflected on an All Accounts Listing, then the account has been closed. (Id. at 26). Further, Householder testified that there was no listing on the All Account Listing for either Spiller or Stayrook. (Id. at 27). On cross-examination, Householder testified that she did not find: a copy of a check showing payment to Spiller or Stayrook; a copy of the

[2] Colonial Federal was of the successors to Bellefontaine Federal Savings and Loan. (Tr. Vol.II, at 22); See footnote one.
[3] American Community bank acquired Colonial Federal in 1993. See footnote one.

signature card; an affidavit of lost certificate; or any copies of 1099's being sent to either Spiller or Stayrook. (Id. at 32-33).

{¶30} Both Brewer and Schwaderer testified that individuals could close certificate accounts without the original certificate, as long as the person could prove who they were and that they were entitled to payment. (Tr. Vol. I at 69; Tr. Vol. III at 5-6). Further, Brewer testified that the bank did not require an affidavit if someone was redeeming a certificate without the actual certificate. (Tr. Vol.I at 63). Brewer testified that she had no knowledge that any of the certificates have been paid but testified on cross-examination, that in her opinion, the certificates of deposit had been redeemed. (Id. at 58).

{¶31} However, Charles Earick, who was employed at Citizens Federal Savings and Loan for thirty five years, testified that "[i]f there is a lost passbook or a lost certificate, we would have an affidavit of lost passbook or certificate signed and retain that. And the recommended retention period is indefinite for the affidavit." (Tr.Vol. III at 24). On cross-examination, Earick acknowledged that he had no formal education in banking, he has never worked at any other financial institutions, and he never received any training on record retention requirements. (Id. at 24-25). Further, Earick testified on cross-examination:

> **Q. * * * And, of course, with regard to the retention period for a lost certificate or an affidavit of lost certificate, that would presume that such an affidavit of lost certificate had ever existed.**

A. That's correct.
Q. And that would presume that the savings and loan or bank had required such an affidavit of lost certificate.
A. Correct.

(Id. at 26).

{¶32} Lori Householder, Jennifer Schwarderer, and Patricia Brewer, also testified regarding the closing of accounts and the retention of records. Householder testified that from 1999 to date, records are retained for seven years. (Tr. Vol.II, 6-7; 15). Householder testified:

(Mr. Harper) If an account is closed, do you know how long the account will remain on the bank's computer database of its accounts?
A. I don't know for sure how long it's maintained on the database before it's purged. I think it's a year.
Q. You use the word purged. Can you explain what you mean by that?
A. Sure. When an account is closed, it only remains on our current system for a certain time period, and then we do what is called a purge of accounts. And then that just purges off any closed accounts that are- - like I said, I think it's a year that they're purged off of our system. Then there's reports generated for that which are stored in our report system.
Q. How long are those reports retained?
A. Seven years.

(Id. at 16). In addition, Schwarderer testified that signature cards of open accounts are held as long as the accounts are open, and at the time of the closing transaction the signature cards are "pulled and set for retention." (Tr.Vol.III at 13). Moreover, Brewer testified:

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> *** * * are you aware of any circumstance by which an open account is removed from the system that reflects open accounts without it being closed, that is without it being cashed?**
> **A. No.**

(Tr.Vol.I at 59).

{¶33} Savings Certificate No. 5242, also known as Plaintiff's Exhibit No. 2, was issued to "Maxine Spiller p.o.d. Roberta Stayrook" on June 10, 1975. On cross-examination, Schwaderer testified:

> **Q. Would you agree from looking at Plaintiff's Exhibit No. 2—can you take a look at that.**
> **Plaintiff's Exhibit No. 2 is in the name of Maxine Spiller payable on death to Roberta Stayrook; is that correct?**
> **A. Yes.**
> * * *
> **Q. Does Roberta Stayrook, as a P.O.D. beneficiary, have any ownership interest in that certificate as long as Maxine Spiller is alive?**
> **A. Not the way I read it.**

(Tr. Vol.III at 11-12).

{¶34} Spiller presented the original certificates of deposit to Sky Bank, who declined to redeem the certificates. Householder and Schwarderer both searched for the certificate accounts, but were unable to locate any records involving the certificates of deposit. (Tr.Vol.II at 23; Vol.III at 8-9). Although Spiller presented the original certificates, Householder and Schwaderer testified that individuals could close certificate accounts without the original certificates.

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(Tr. Vol. I at 69; Tr.Vol. III at 5-6). Consequently, the mere fact that Spiller possesses the original certificates does not establish that the certificates had not been previously redeemed.

{¶35} "The lifetime owner of a payable-on-death certificate of deposit ('P.O.D. C.D.') has a complete present interest in the account, and may withdraw its proceeds, change the beneficiary, or pledge the P.O.D. C.D. as collateral for a loan." *Jamison v. Society National Bank* (1993), 66 Ohio St.3d 201, 611 N.E.2d 307, paragraph two of the syllabus. Furthermore, "[a] beneficiary of a P.O.D. C.D. has no interest in the proceeds of the P.O.D. C.D. until the death of the owner." Id. at 204, citing R.C. 2131.10.

{¶36} Certificate Nos. 4346 and 7256 were issued to Stayrook and p.o.d. Spiller, and Certificate No. 6059 was issued to "Spiller or Stayrook." Thus, although Spiller testified that Stayrook consulted her on all financial decisions, Stayrook was the owner of aforementioned three certificates and had the ability to cash in those certificates. As a result, we find that Spiller has failed to meet her burden of proof, under either a clear and convincing evidence or preponderance of the evidence standard, to establish that Certificates Nos. 4346, 7256, and 6059 have not been redeemed.

{¶37} However, Certificate No. 5242 was issued to Maxine Spiller and was payable on death to Roberta Stayrook. The terms of that certificate clearly

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establish that Maxine Spiller was the owner of the certificate, and Stayrook was the payable on death beneficiary. As a payable on death beneficiary, Stayrook only had an ownership interest in Certificate No. 5242 upon Spiller's death. See Id. Since Stayrook died before Spiller, Stayrook did not have an ownership interest in Certificate No. 5242, and thus, did not have the authority to redeem the certificate. Moreover, Spiller testified she had not asked the bank to pay on the certificate; she had never given any person power of attorney over her affairs; she never had a guardianship; and she had never received payment of that certificate. (Tr. Vol.III at 49-50). Thus, we find that Spiller has met her burden to prove nonpayment by even a clear and convincing evidence standard as to Certificate No. 5242. Accordingly, we find the trial court properly concluded that Spiller was entitled to the value of Certificate No. 5242 in the amount of $ 26, 832.00.

{¶38} Sky Bank's second assignment of error is, therefore, overruled. Spiller's first assignment of error is overruled.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR NO. II

The Court erred in excluding the testimony of expert witnesses Charles Earick and Mary Heaston.

{¶39} Spiller maintains, in her second assignment of error, that the testimony of her expert witnesses Charles Earick and Mary Heaston should not have been excluded by the trial court. According to Spiller, Earick and Heaston worked at banking institutions similar in size to Bellefontaine Federal Savings and

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Loan, and they know about banking institutions of that size. Further, Spiller maintains that the trial court excluded Earick and Heaston's testimony as fact and expert witness purposes, and if, the trial court did not qualify Earick and Heaston as experts, the trial court should have admitted their testimony as fact witnesses.

{¶40} "A trial court's ruling on the witness's qualification or competency to testify as an expert will ordinarily not be reversed on appeal unless there is a clear showing that the court abused its discretion." *Steele v. Buxton*, 93 Ohio App.3d 717, 719, 639 N.E.2d 861, citations omitted. An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, citations omitted.

{¶41} Evid.R. 702 provides in pertinent part:

> **A witness may testify as an expert if all of the following apply:**
>
> **(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;**
>
> **(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;**
>
> **(C) The witness' testimony is based on reliable, scientific, technical, or other specialized information.* * ***

{¶42} On January 16, 2007, Sky Bank filed a motion in limine to exclude all of the testimony of Spiller's "purported expert witnesses, Charles Earick and

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Mary Heaston." The trial court held a voir dire of Heaston on January 17, 2007 to determine whether Heaston was qualified to testify as an expert. After both sides had questioned Heaston regarding her qualifications, and both sides presented their arguments, the trial court stated:

> **THE COURT: The witness is certainly very knowledgeable about the practices of her own institution and maybe those practices are better practices than what was employed here, but the witness is not qualified to say what a regulatory standard or a community standard is. And I think that unless her testimony rises to that level it is not relevant. So I'm going to sustain the motion in limine.**

(Tr. Vol.1, 93).

{¶43} After reviewing the record, we cannot find that the trial court abused its discretion in excluding Heaston's testimony as an expert witness. It is clear that Heaston could testify as to the institution, Perpetual Federal Savings Bank, for whom she has worked for 26 or 27 years. (Id. at 74; 78). However, Heaston also testified that she has never worked at any other financial institutions, that she had no knowledge of other bank's banking procedures, and she had no knowledge as to how other banks handle the opening and closing of certificates of deposit. (Id. at 74; 76). Given Heaston's lack of knowledge regarding other bank's banking procedures, we cannot find the trial court abused its discretion.

{¶44} Earick testified as a fact witness rather than as an expert witness at trial. In his testimony, Earick indicated that he had no formal education in

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banking. (Tr. Vol.III, 24). While Earick testified that he worked at Citizens Federal Savings and Loan for thirty-five years, he also testified that he had never worked at any other financial institution. (Id. at 24-25).

{¶45} Given Earick's lack of formal education and the fact that he had never worked at any financial institutions other than Citizens Federal Savings and Loan for thirty-five years, we cannot find that the trial court abused its discretion.

{¶46} Furthermore, Spiller's argument that Earick and Heaston were excluded as both expert and fact witnesses, and the trial court should have at least allowed their testimony as fact witnesses, is without merit for the following reasons.

{¶47} First, Earick did in fact testify at the trial as a fact witness. (Id. at 19-26). Thus, the trial court clearly did not exclude Earick's testimony as a fact witness.

{¶48} Second, there is no indication that Spiller attempted to present Heaston's testimony as a fact witness, or requested that Heaston be allowed to testify as a fact witness.

{¶49} Accordingly, we find that Spiller's second assignment of error is overruled.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR NO. III

The Court erred in determining that these Bank certificates of deposit were not negotiable instruments.

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{¶50} In her third assignment of error, Spiller asserts that the bank certificates were negotiable instruments. According to Spiller, the certificates of deposit do not contain conspicuous statements indicating that the certificates are not negotiable instruments, thus, the certificates of deposit are negotiable instruments.

{¶51} R.C. 1303.03 provides:

> **(A) Except as provided in divisions (C) and (D) of this section, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it meets all of the following requirements:**
>
> **(1) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.**
>
> **(2) It is payable on demand or at a definite time.**

{¶52} The certificates of deposit, in this case, do not contain "pay to the order" or "pay to bearer" language; thus, the certificates do not meet the requirements under R.C. 1303.03(A)(1). Since the certificates of deposit do not meet all of the requirements under R.C. 1303.03, the certificates of deposit are not negotiable instruments.

{¶53} Accordingly, Spiller's third assignment of error is overruled.

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{¶54} Having found no error prejudicial to appellant or cross-appellant herein, in the particulars assigned and argued, we affirm the judgment of the trial court.

Judgment Affirmed.

SHAW, P.J., and WILLAMOWSKI, J., concur.
r

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IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
GENERAL DIVISION

MAXINE F SPILLER,

Plaintiff,

vs. Case No. CV 05 03 0118

SKY BANK - OHIO BANK REGION,

Defendant.

* * *

MEMORANDUM OF DECISION

This cause came before the Court for a bench trial on January 17 and 18, 2007. Attorney Steven Fansler represented the Plaintiff and Attorney Matthew Harper represented the Defendant. Plaintiff was ill the first day of trial; counsel agreed to waive her attendance and evidence was adduced. Plaintiff attended the second day of trial and testified on her own behalf. At the commencement of trial counsel requested leave to file post-trial briefs and the Court granted such leave. Said briefs have been timely filed.

Plaintiff's exhibit two is the savings certificate issued by the Bellefontaine Federal Savings and Loan Association for $3,000 dated June 10, 1975. The savings certificate certifies that Maxine Spiller holds the certificate of deposit for $3,000. This is not a custodian account but it was placed in the name of Maxine Spiller. The Defendant argues that Roberta Stayrook was the owner of this account.

The evidence from Mrs. Spiller is that Ms. Stayrook started all of these accounts from monies that were proceeds of savings bonds she had saved during her employment with the veterans' administration. The four cds in question were admitted into evidence as Plaintiff's exhibits one, two, three and four. Plaintiff's one was a $5,000 cd opened February 13, 1974 for a four-year term bearing interest at 7.5% per annum. The same was in the name of Roberta M. Stayrook, pod Maxine Spiller. The second cd, Plaintiff's two was for $3,000 opened June 10, 1975 for thirty months ending December 10, 1977 bearing interest at a rate of 6.75%. The same was in the name of Maxine Spiller, pod Roberta Stayrook. The third cd (Plaintiff's three) was for $10,000 dated July 31, 1976 for a four-year term bearing interest at a rate of 7.5% in the names of Maxine Spiller or Roberta Stayrook. The fourth cd was for $25,000 dated January 1, 1979 for a four-year term bearing interest at a rate of 7.5% in the name of Roberta M. Stayrook pod Maxine Spiller. All of these certificates automatically renewed for the same term unless presented for withdraw not later than ten days after the maturity date except at least five days prior to the maturity date the association may give written notice to the depositor that the certificate would not be renewed at the stated rate and will thereafter earn interest at a different rate or will revert to the status of a regular savings account. The Court concludes considering all of the evidence that the Plaintiff has not sustained its burden proved by a preponderance of the evidence that the Plaintiff is owed the amount of the deposit plus interest on Plaintiff's exhibits one, three and four. Ms. Stayrook was the owner or co-owner of said certificates and had a legal right to withdraw those certificates at any time. The lack of any current record or a record in 1993 is strong, although not conclusive, evidence that the account was closed.

Other circumstantial evidence that the account was not active was that neither Ms. Stayrook nor Plaintiff received 1099s for interest nor reported the same on their taxes.

Plaintiff's exhibit two is in the Plaintiff's name. Defendant, in its post-trial brief states that the same was "owned" by Ms. Stayrook. However, by placing it in Maxine Spiller's name without any evidence that this is a custodian account, the Court finds that Maxine Spiller was the owner and that through her direct testimony she never cashed this certificate of deposit. The only evidence of value was presented by the Plaintiff and the Court finds that Plaintiff's calculation was based on expert and well reasoned testimony. Accordingly, the Court finds that the Defendant owes Maxine Spiller the amount of $26,479.16 as of August 31, 2006 as testified to by Rebecca Pennington. An additional sum of $353.00 would be accrued interest through January 31, 2007, for a total amount of damages in the amount of $26,832.00

The Defendant in its post-trial brief argues that there is a common law that a certificate over twenty years old is presumed to have been cashed and there is a heavy burden on the depositor to prove that it has not been cashed. This Court declines to find that this is the common law of the State of Ohio. The Court finds instead that this case turns on the law of contract Plaintiff produced evidence that it had a deposit, a contract with the Defendant's predecessor; Plaintiff testified that she never cashed the certificate and the Defendant produced no evidence that she had withdrawn it. Circumstantial evidence upon which the Court relies to find that the other cds had been cashed is not sufficient to overcome the direct testimony of Plaintiff that she, the owner of the certificate, did not cash this certificate. The Court finds the Defendant breached its contract with Plaintiff to Plaintiff's damage in the amount of $26,832.

The Court will draft a proposed judgment entry and transmit it along with this decision via facsimile to both counsel.

s/Mark S. O'Connor

Mark S. O'Connor, Judge

cc: STEVEN R FANSLER
MATTHEW D HARPER

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
GENERAL DIVISION

MAXINE F SPILLER,

Plaintiff,

vs.

Case No. CV 05 03 0118

SKY BANK - OHIO BANK REGION,

Defendant.

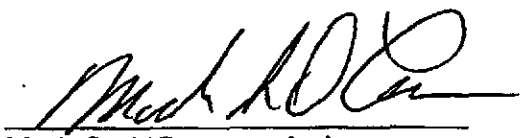
* * *

JUDGMENT ENTRY

This cause came before the Court for trial on the merits without jury on January 17 and 18, 2007. Plaintiff was represented by Attorney Steven Fansler. Plaintiff was present for the second day of trial; her appearance for the first day of trial was voluntarily waived by her counsel. Defendant Sky Bank was represented by Attorney Matthew D Harper and corporate representatives attended the trial. For the reasons stated in its memorandum of decision filed on January 31, 2007 the Court finds in favor of the Plaintiff upon the certificate of deposit dated June 10, 1975 in the original face amount of $3,000. The Court finds there is owing to the Plaintiff from the Defendant the sum of $26,832 as of January 31, 2007. The Court finds in favor of the Defendant upon the other certificates of deposits on which this claim was brought.

It is therefore **ORDERED, DECREED** and **ADJUDGED** that judgment is hereby granted in favor of the Plaintiff in the sum of $26,832 plus the statutory rate of interest of eight percent per annum from the date of this entry.

Costs to Defendant.

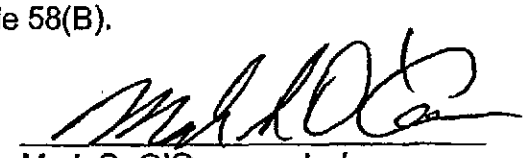


Mark S. O'Connor, Judge

ENDORSEMENT REGARDING NOTICE OF JUDGMENT

To the Clerk:

You are hereby directed to serve upon all parties Notice of Judgment and the date on which it was journalized pursuant to Civil Rule 58(B).



Mark S. O'Connor, Judge

cc: STEVEN R FANSLER
MATTHEW D HARPER

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
GENERAL DIVISION

MAXINE F SPILLER,

Plaintiff,

vs. Case No. CV 05 03 0118

SKY BANK - OHIO BANK REGION,

Defendant.

* * *

FINDINGS OF FACT/CONCLUSIONS OF LAW

The Court filed a memorandum of decision in this case January 31, 2007. One of the purposes of said memorandum was to satisfy the requirement of Rule 52 and Rule 41(B)(2). Plaintiff has now filed a written request for findings of facts and conclusions of law. Defendant had filed a similar request November 16, 2006. The Court will now reiterate its memorandum and number its findings and conclusions so that they are "stated separately" in conformity of Rule 52.

FINDINGS OF FACT

1. Plaintiff's exhibit two was a certificate of deposit issued by Bellefontaine Federal in the name of the Plaintiff; under the terms of that certificate it automatically renewed for the same term unless presented for withdraw not later than ten days after the maturity date except at least five days prior to the maturity date the association may give written notice to the depositor that the certificate would not be renewed at the stated rate and will thereafter earn

interest at a different rate or will revert to the status of a regular savings account.

2. Plaintiff is the owner of said cd.
3. Plaintiff never cashed said cd.
4. The amount due under said cd is $26,832.00 as of January 31, 2007.
5. Plaintiff's exhibits one and four were certificates of deposit issued by Bellefontaine Federal to Roberta Stayrook, pod Maxine Spiller.
6. Plaintiff's exhibit three was issued by Bellefontaine Federal in the names of Maxine Spiller or Roberta Stayrook.
7. Roberta Stayrook was the owner or co-owner of Plaintiff's one, three and four.
8. Defendant had no active account record of said cds.
9. There were no active account records of said cds in 1993 for Defendant's predecessor, American Community Bank.
10. Neither Roberta Stayrook nor Maxine Spiller declared any income from said cds on their federal tax returns.
11. Bellefontaine Federal cashed certificates of deposit without requiring the surrender of said documents.
12. Sky Bank continues to cash certificates of deposit without requiring surrender of the document.
13. Roberta Stayrook lawfully cashed Plaintiff's exhibits one, three and four for which she was the owner or co-owner.
14. Defendant is a successor in interest to Bellefontaine Federal.

CONCLUSIONS OF LAW

1. This is an action on contract.
2. Plaintiff has the burden to prove the formation and breach of the contract by a preponderance of the evidence in order to recover damages.
3. It is not the common law of Ohio that a certificate of deposit over twenty years old is presumed to have been cashed.
4. Plaintiff sustained its burden as to Plaintiff's two but failed to do so as to Plaintiff's one, three and four.
5. Defendant owes Plaintiff $26,832.00 as of January 31, 2007.

s/ Mark S. O'Connor

Mark S. O'Connor, Judge

cc: STEVEN R FANSLER
MATTHEW D HARPER

IN THE COMMON PLEAS COURT OF LOGAN COUNTY, OHIO
GENERAL DIVISION

MAXINE F SPILLER,

Plaintiff,

vs. Case No. CV 05 03 0118

SKY BANK - OHIO BANK REGION,

Defendant.

* * *

JUDGMENT ENTRY DENYING MOTION FOR SUMMARY JUDGMENT

This cause comes before the Court upon the motion of the Defendant for summary judgment filed June 15, 2006. Plaintiff filed a response July 19, 2006. The Court had granted the Plaintiff an extension of time to file said response. Defendant filed a timely reply.

The Defendant relies upon Section 1109.96 of the Revised Code and the Ohio Supreme Court case of *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175 which interpreted a similar predecessor statute. The Defendant attached to its motion for summary judgment the affidavit of one Susan Conley which stated she searched for records of the CDs in question and found no information. She then concludes with the inference upon which the Defendant's case rests. Namely, if the records cannot be located for an account, then the account was closed more than seven years ago. In *Abraham v. National City Bank Corp., supra* the Ohio Supreme Court, with two justices dissenting, affirmed the lower court's granting of a summary judgment on such an

argument pertaining to a passbook savings account. The Supreme Court concluded that it was "not unmindful of the potential for harsh results under the clear mandate of the statute."

The Plaintiff responded with a fairly detailed affidavit indicating that the CDs in question had been obtained from the predecessor of Sky Bank, that to the knowledge of the affiant these CDs had never been negotiated and the affiant in fact was in possession of these CDs. Plaintiff also attached its request for admissions which universally were objected to by Defendant's counsel.

The Plaintiff seeks to treat the certificates of deposits as negotiable instruments and therefore the negotiable instrument statute of limitation should apply. The Court does not agree with that analysis. Nevertheless, the Court also disagrees with the analysis of the Defendant. The Court believes that a self-renewing certificate of deposit is different than a savings passbook. As the Tenth District Court of Appeals stated in *Brentlinger v. Bank One of Ohio* 150 Ohio App.3d 89, 2002-Ohio-6736, the statute relied upon by the Defendant does not authorized the bank to destroy the records of an active automatic renewing certificate of deposit. The Court concluded, as this Court concludes in this case, that the bank cannot rely upon the destruction of record statute of limitations in Revised Code Section 1109.69(F) to bar Plaintiff's claims.

The Court finds there are genuine issues of material fact including whether or not the Defendant or any of its predecessor paid any of the certificates of deposit. Accordingly, the Court finds that the motion for summary judgment is not well taken. It is therefore **ORDERED, DECREED** and **ADJUDGED** that the motion of summary judgment of Defendant be, and hereby is **DENIED.**

s/ Mark S. O'Connor

Mark S. O'Connor, Judge

cc: STEVEN R FANSLER
DANA M FARTHING

LEXSTAT OH CODE 1109.69

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH NOVEMBER 11, 2008 ***
*** ANNOTATIONS CURRENT THROUGH SEPTEMBER 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH NOVEMBER 11, 2008 ***

TITLE 11. FINANCIAL INSTITUTIONS
CHAPTER 1109. BANKS -- POWERS
MISCELLANEOUS POWERS

Go to the Ohio Code Archive Directory

ORC Ann. 1109.69 (2008)

§ 1109.69. Retention of records

(A) Every bank shall retain or preserve the following bank records and supporting documents for only the following periods of time:

(1) For one year:

(a) Broker's confirmations, invoices, and statements relating to security transactions of the bank or for or with its customers, after date of transaction;

(b) Corporate resolutions, partnership authorizations, and similar authorizations relating to closed accounts, loans that have been paid, or other completed transactions, after date of closing, payment, or completion;

(c) Ledger records of safe deposit accounts, after date of last entry on the ledger;

(d) Night depository records, after their date;

(e) Records relating to closed Christmas club or similar limited duration special purpose accounts, after date of closing;

(f) Records relating to customer collection accounts, after date of transaction;

(g) Stop payment orders, after their date;

(h) All records relating to closed consumer credit loans and discounts, after date of closing;

(i) Deposit tickets relating to demand deposit accounts, after their date;

(2) For six years:

(a) Deposit and withdrawal tickets relating to open or closed savings accounts, after their date;

(b) Individual ledger sheets or other records serving the same purpose that show a zero balance and that relate to demand, time, or savings deposit accounts, and safekeeping accounts, after date of last entry, or, where the ledger sheets or other records show an open balance, after date of transfer of the amount of the balance to another ledger sheet or record;

(c) Official checks, drafts, money orders, and other instruments for the payment of money issued by the bank and that have been canceled, after date of issue;

(d) Records relating to closed escrow accounts, after date of closing;

(e) Records, other than corporate resolutions, partnership authorizations, and similar authorizations relating to closed loans and discounts other than consumer credit loans and discounts, after date of closing;

(f) Safe deposit access tickets and correspondence or documents relating to access, after their date;

(g) Lease or contract records relating to closed safe deposit accounts, after date of closing;

(h) Signature cards relating to closed demand, savings, or time accounts, closed safe deposit accounts, and closed safekeeping accounts, after date of closing;

(i) Undelivered statements for demand deposit, negotiable order of withdrawal, savings, agency, brokerage, or other accounts for which customer statements are prepared, and canceled checks or other items, after date of statement, provided the bank has attempted to send the statements and checks or other items to its customer, has held them pursuant to the instructions of or an agreement with its customer, or has made them available to its customer.

(B) The superintendent of financial institutions may designate a retention period of either one year or six years for any record maintained by a bank but not listed in division (A) of this section. Records that are not listed in division (A) of this section and for which the superintendent has not designated a retention period shall be retained or preserved for six years from the date of completion of the transaction to which the record relates or, if the last entry has been transferred to a new record showing the continuation of a transaction not yet completed, from the date of the last entry.

(C) The requirements of divisions (A) and (B) of this section may be complied with by the preservation of records in the manner prescribed in *section 1109.68 of the Revised Code*.

(D) In construing the terms set forth in division (A) of this section, reference may be made to general banking usage.

(E) A bank may dispose of any records that have been retained or preserved for the period set forth in divisions (A) and (B) of this section.

(F) Any action by or against a bank based on, or the determination of which would depend on, the contents of records for which a period of retention or preservation is set forth in divisions (A) and (B) of this section shall be brought within the time for which the record must be retained or preserved.

(G) Where a record may be classified under either division (A)(1) or (2) of this section, the record shall be retained or preserved for the period set forth in division (A)(2) of this section.

(H) The provisions of this section do not apply to those records maintained by a bank in its capacity as a trust company.

HISTORY:

RC § 1101.08, 132 v S 97 (Eff 1-1-68); *RC § 1109.69*, 146 v H 538. Eff 1-1-97.