

IN THE SUPREME COURT OF OHIO

08-0900

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

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**MEMORANDUM OF APPELLANT  
SKY BANK – OHIO BANK REGION  
IN SUPPORT OF JURISDICTION**

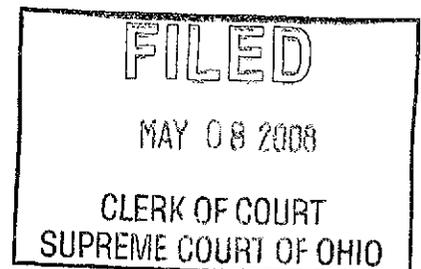
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**TABLE OF CONTENTS**

	<b><u>Page(s)</u></b>
<b>Table of Contents</b> .....	i
<b>I. EXPLANATION OF WHY THIS CASE INVOLVES A MATTER OF PUBLIC OR GREAT GENERAL INTEREST</b> .....	1
R.C. § 1109.69 .....	1, 3, 4
R.C. § 1109.69(F) .....	1, 2
R.C. § 1109.69(A)(1 and 2) .....	1
R.C. § 1109.69(B) .....	1
R.C. § 1101.08 .....	1
R.C. § 1101.08(F) .....	2
R.C. § 1101.08(E) .....	1, 2
Ohio Adm. Code Ch. 1301.1 .....	1
<i>Abraham v. National City Bank Corp.</i> (1990), 50 Ohio St.3d 175 .....	2, 4
<i>Brentlinger v. Bank One of Columbus, N.A.</i> (2002), 150 Ohio App.3d 589 .....	2, 3, 4
<b>II. STATEMENT OF THE CASE AND FACTS</b> .....	4
R.C. § 1109.69 .....	7
R.C. § 1109.69(F) .....	7
<i>Brentlinger v. Bank One of Columbus, N.A.</i> (2002), 150 Ohio App.3d 589 .....	7
<b>III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW</b> .....	8

**PROPOSITION OF LAW NO. 1**

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.....	8
R.C. § 1109.69(A and B) .....	8
R.C. § 1109.69 .....	8
R.C. § 1109.69(A)(1).....	8
R.C. § 1109.69(A)(2).....	8
R.C. § 1109.69(E).....	8, 10
R.C. § 1109.69(F) .....	8, 9, 10, 11
R.C. § 1101.08(F).....	9
R.C. § 1101.08(E).....	9
<i>Abraham v. National City Bank Corp.</i> (1990), 50 Ohio St.3d 175.....	8, 10, 11
<i>Brentlinger v. Bank One of Columbus, N.A.</i> (2002), 150 Ohio App.3d 589 .....	10, 11
<b>IV. CONCLUSION</b> .....	12
R.C. § 1109.69 .....	12
<i>Abraham v. National City Bank Corp.</i> (1990), 50 Ohio St.3d 175.....	12
<i>Brentlinger v. Bank One of Columbus, N.A.</i> (2002), 150 Ohio App.3d 589 .....	12

**Appendix**

- A. Journal Entry of the Court of Appeals of the Third Appellate District of Ohio, Logan County, in Spiller v. Sky Bank – Ohio Bank Region, Case No. 8-07-03, March 24, 2008.
- B. Opinion of the Court of Appeals of the Third Appellate District of Ohio, Logan County, in Spiller v. Sky Bank – Ohio Bank Region, Case No. 8-07-03, March 24, 2008.
- C. Memorandum of Decision of the Court of Common Pleas of Logan County, Ohio, in Spiller v. Sky Bank – Ohio Bank Region, Case No. CV 05-03-0118, January 31, 2007.

- D. Judgment Entry of the Court of Common Pleas of Logan County, Ohio, in Spiller v. Sky Bank – Ohio Bank Region, Case No. CV 05-03-0118, February 6, 2007.
- E. Findings of Fact/Conclusions of Law of the Court of Common Pleas of Logan County, Ohio, in Spiller v. Sky Bank – Ohio Bank Region, Case No. CV 05-03-0118, February 22, 2007.

**I. EXPLANATION OF WHY THIS CASE INVOLVES A MATTER  
OF PUBLIC OR GREAT GENERAL INTEREST**

When the Ohio legislature enacted R.C. § 1109.69<sup>1</sup>, 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.

The statute applies to all bank records of any kind. In R.C. § 1109.69(A)(1 and 2), the statute sets forth retention periods for specific categories of documents. The categories defined in the statute encompass virtually any bank document imaginable, 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.” Then, in R.C. § 1109.69(B) states that “[r]ecords that are not listed in division (A) of this section . . . shall be retained or preserved for six years . . . .”<sup>2</sup> The statute contains no exceptions for any type of bank document. Plainly, the Ohio legislature intended to (and did) broadly capture all bank records in the statute.

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<sup>1</sup> The Ohio Legislature enacted the statute effective January 1, 1968 and it was originally codified as R.C. §1101.08.

<sup>2</sup> The statute also permits the Superintendent of Financial Institutions to set different retention periods for certain types of records, but the Superintendent has not done so. *See* Ohio Adm. Code Ch. 1301.1 – Division of Financial Institutions: Banks.

The statute then specifically 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:

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.

Thus, once the retention period passes, a bank cannot be sued for any claim which is based on or would be determined by the records that have been disposed.

This Court recognized the statute's legislative balance in *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175, by stating:

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.

*Id.* at 177. Therein, the Court upheld summary judgment dismissing an action against a bank to recover the balance of a passbook savings account. *Id.* at 177-78. In closing, the Court recognized the “potential for harsh results under the clear mandate of the statute,” but stated that was a “legislative problem,” not one to be solved by Ohio's courts. *Id.* at 178.

Notwithstanding the Court's holding in *Abraham*, the Courts of Appeals for the Tenth and Third Appellate Districts have modified the application of the statute contrary to the plain meaning of the statute, the legislative intent, and the prior ruling of this Court. In *Brentlinger v. Bank One of Columbus, N.A.* (2002), 150 Ohio App.3d 589, the Court of Appeals for the Tenth Appellate District held that the statute did not apply to an “automatically renewable certificate of deposit” and thereby exposed banks to liability for claims even after the records needed to

defend the bank had been destroyed in compliance with the statute. *Id.* at 596. The effect of *Brentlinger* was visited upon Appellant when the Court of Appeals for the Third Appellate District embraced *Brentlinger's* ruling and held that the statute did not apply to transactions involving an automatically renewable certificate of deposit.

Neither the *Brentlinger* court nor the Court of Appeals below identified any statutory language to support their distinction. Rather, both simply presumed an exception in the perceived on-going character of a so-called automatically renewing certificate of deposit. These decisions thwart the legislative judgment and intent embodied in R.C. § 1109.69. If allowed to stand, the Courts of Appeals' decisions not only create an exception for "automatically renewable certificates of deposit" not contained in the statute, but invite other Ohio courts to create additional exceptions to the statute. That should not be permitted.

Without a clear pronouncement from this Court, 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. If the bank is unable to prove payment, then it can be held liable to a plaintiff who claims he/she has not been paid. This is exactly what R.C. § 1109.69 is intended to prevent.

As a result of the two Court of Appeals decisions, banks in Ohio must now retain all documents indefinitely that relate to any transaction involving an automatically renewable certificate of deposit in order to avoid liability. Further, given the possibility that other courts may use these decisions to narrow the scope of R.C. § 1109.69 even more, banks must legitimately question whether they can rely on R.C. § 1109.69 for the destruction of any documents or must retain all their documents indefinitely. Banks in Ohio process millions of separate transactions daily making this an unrealistic and unreasonable requirement. It is simply

not possible for banks to keep such records indefinitely, nor should they have to in light of R.C. § 1109.69's clear mandate.

Ohio's legislature has already determined Ohio's public policy regarding bank record retention and disposal and the protection afforded to a bank when it complies with that policy. This Court held in *Abraham* that modification of that policy must occur through the Ohio legislature, not Ohio courts. Both the *Brentlinger* decision and the decision of the Court of Appeals below disregard this Court's holding and wrongly change Ohio's public policy by creating an unwarranted exception to the statute. The statute applies to all banks in Ohio and these appellate rulings, therefore, have an impact on all banks in Ohio. As such, this is a matter of public or great general interest to all of Ohio (not just to the parties), which should be heard by this Court.

## **II. STATEMENT OF THE CASE AND FACTS**

Mrs. Spiller brought suit on March 15, 2005 to require Sky Bank to redeem four certificates of deposit issued in 1974, 1975, 1976, and 1979 by Bellefontaine Federal Savings and Loan Association ("**Bellefontaine Federal**").<sup>3</sup> 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."
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."
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."

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<sup>3</sup> Sky Bank is the successor to Bellefontaine Federal by virtue of a series of name changes and mergers.

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).” The four Savings Certificates are referred to collectively herein as the “**Savings Certificates.**”<sup>4</sup>

Each of the Savings Certificates was opened by Ms. Roberta M. Stayrook (“**Ms. Stayrook**”) without any involvement of Mrs. Spiller.

Mrs. Spiller and Ms. Stayrook had been long-time friends since 1936. 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. She knew they were opened, but nothing else. She never had the Savings Certificates and never even knew where they were. 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.

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

Mrs. Spiller’s and Ms. Stayrook’s tax returns are instructive. Mrs. Spiller testified that she always got the mail when Ms. Stayrook and she lived together, both in Plainfield, Indiana

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<sup>4</sup> Savings certificates are equivalent to certificates of deposit.

and Bonita Springs, Florida, but she did not recall ever receiving a Form 1099 reporting interest on any of the Savings Certificates. 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. Ms. Stayrook's included the years 1999 to 2001. None of them reflect any interest for any of the Savings Certificates. Absence of any Form 1099's compels the conclusion the Savings Certificates had been cashed and the account closed sometime prior to 1998, the earliest year for which a tax return is available.

Ms. Stayrook died in February 2001 and her estate was already settled by October of the same year without any thought to the Savings Certificates. No one, including Mrs. Spiller, believed the Savings Certificates remained part of her affairs. 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. Mrs. Spiller was "surprised because [she] had long forgotten about them."

After finding the Savings Certificates, Mrs. Spiller presented them to Sky Bank for payment.<sup>5</sup> Sky Bank, however, had 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 its 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. Sky Bank also retains microfilm and computer images of account transactions for seven years (one year longer than the six-year

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<sup>5</sup> Mrs. Spiller's possession of the original Savings Certificates does not determine the outcome because current and former bank employees testified that certificates of deposit were (and are) regularly closed without requiring the original certificate. Mrs. Spiller offered no contrary evidence. Thus, Ms. Stayrook could have easily redeemed the Savings Certificates without the originals.

period of time required by Ohio Rev. Code §1109.69). According to Ms. Lori Householder, the head of Sky Bank's document retention and records research department, 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

In the course of her investigation, Ms. Householder did find a 1993 "All Accounts Listing" for American Community Bank, N.A., a successor by merger to Bellefontaine Federal and a predecessor of Sky Bank. The All Account Listing listed every interest-bearing bank account (including certificates of deposit) open at any time during 1993 so that IRS Form 1099's could be issued for all interest income earned by customers that year. It did not list any account for either Mrs. Spiller or Ms. Stayrook meaning that the Savings Certificates had been redeemed sometime prior to January 1, 1993.

Given the absence of any records regarding the Savings Certificates, on June 15, 2006, Sky Bank moved for summary judgment based on the time bar of R.C. § 1109.69(F). The Court denied Sky Bank's Motion for Summary Judgment on August 8, 2006 in reliance on *Brentlinger*.

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 Court found in favor of Mrs. Spiller on Savings Certificate No. 5242 in the amount of \$26,832, 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 affirmed on March 24, 2008, also relying on *Brentlinger*.

### **III. ARGUMENT IN SUPPORT OF PROPOSITION OF LAW**

**PROPOSITION OF LAW NO. 1:** 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.

Pursuant to R.C. § 1109.69 (which has been in effect since January 1, 1968 – before any of the Savings Certificates were issued), banks are only required to retain and preserve bank records for the periods of time set forth in the statute. Some records need only be kept for one year (R.C. § 1109.69(A)(1)), while all others must be kept for six years. R.C. § 1109.69(A)(2).<sup>6</sup> Six years is the longest time a bank must keep a record. Moreover, under R.C. § 1109.69(E), “[a] bank may dispose of any records that have been retained or preserved for the period set forth” in the statute.

Additionally, R.C. § 1109.69(F) protects the bank from liability once the records have been destroyed in compliance with the statute:

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. (Emphasis added.)

In *Abraham v. National City Bank Corp.* (1990), 50 Ohio St.3d 175, this Court applied the statute to bar a claim for payment of a passbook savings account on facts that are markedly similar to those presented in this cause. 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

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<sup>6</sup> As noted previously, the statute encompasses all bank documents of whatever nature and makes no exceptions. R.C. § 1109.69 (A and B).

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 and requested payment, National City Bank found no record of the account. National City Bank ultimately located a January 4, 1977 list of open accounts (similar to the All Account Listing located by Sky Bank here) which had no listing of the plaintiff's account. Plaintiff maintained she had never closed or otherwise withdrawn the money from the passbook savings account (like Mrs. Spiller's testimony here).

This Court affirmed dismissal of the lawsuit pursuant to the time bar of the predecessor statute to R.C. § 1109.69(F) and 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.**

*Id.* at 177 (emphasis added).

Ms. Spiller's claim and evidence are the same. Ms. Spiller possesses the original certificates of deposit opened in the 1970's, but nothing else. She can only establish the accounts existed; not what happened to them. Sky, on the other hand, has located a 1993 "End of Year

Reporting All Account Listing” for American Community, a successor by merger to Bellefontaine Federal and a predecessor of Sky Bank. That document lists all accounts open at any time in the year 1993, yet reveals no account for either Ms. Stayrook or Ms. Spiller. Just as in *Abraham*, the absence of the accounts on the listing reveals that the accounts had been closed in some manner before 1993, at the latest.

Assuming closure on or before December 31, 1992, the six-year period of retention would have commenced no later than January 1, 1993 and would have ended on December 31, 1999, at the latest. This action was not filed until 2005, long after the documents could legally be destroyed. As such, R.C. § 1109.69(F) bars the action.

The lower courts rejected Sky Bank’s argument based on the holding of *Brentlinger v. Bank One of Columbus, N.A.* (2002), 150 Ohio App.3d 589. 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. Based on the lack of records and the lapse of time, Bank One moved for summary judgment pursuant to R.C. § 1109.69(F). Although the court recognized that “by 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,” *id.* at 595, it nonetheless distinguished *Brentlinger* from *Abraham*.

The Court of Appeals drew a distinction based on the automatic renewal provision of the certificate of deposit in question and held:

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. *Brentlinger's* distinction is faulty in two critical respects.

First, the statute does not provide the exception found by *Brentlinger*. There is simply no statutory basis to hold the statute does not apply to automatically renewing savings certificates, or any other type of account for that matter. For that reason alone, *Brentlinger* should be rejected.

Second, *Brentlinger's* distinction makes no sense: There is no difference between a passbook savings account (as was at issue in *Abraham*) and an automatically renewable certificate of deposit in regards to the period of time they can 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 continues until it is closed. Neither requires any action to continue; both require action only to close them. *Brentlinger's* use of the word "active" to distinguish the account, therefore, misses the point. All accounts are "active" until closed.

The correct point is this: Once a bank account of any kind is closed, the bank can properly destroy the records relating to that closure after the statutory retention period has passed. After that destruction, the bank no longer has the evidence needed for its defense against claims such as Mrs. Spiller's here, most critically, proof of payment. At that point, R.C. §1109.69(F) should bar any suit on the closed account. *Brentlinger*, however, effectively presumes an account remains active unless the bank can prove it is closed. For the bank to prove the account is closed, it would need the very records the statute says it could destroy. *Brentlinger's* rubric then turns the statute on its head, requires banks to keep these records indefinitely, and robs R.C. §1109.69(F) of its protective value. The Ohio legislature plainly did

not intend such a result. The *Brentlinger* rationale should be rejected by this Court and the Court of Appeals below should be reversed.

**IV. CONCLUSION**

The Supreme Court should correct the error of *Brentlinger* and restore Ohio's public policy to its proper state as embodied in R.C. § 1109.69 and as recognized in *Abraham*. Sky Bank respectfully urges this Court to hear this appeal, and to reverse the judgment of the Court of Appeals below.

Respectfully submitted,

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**PROOF OF SERVICE**

I certify that a copy of this Memorandum of Appellant Sky Bank – Ohio Bank Region in Support of Jurisdiction 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, Attorney for Appellee on May 7<sup>th</sup>, 2008.

  
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Sky Bank – Ohio Bank Region

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

LOGAN COUNTY

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MAXINE F. SPILLER,

<sup>CA</sup>  
CASE NUMBER 8-07-03

PLAINTIFF-APPELLEE,  
CROSS-APPELLANT,

JOURNAL

ENTRY

v.

SKY BANK - OHIO BANK REGION,  
nka SKY BANK,

DEFENDANT-APPELLANT,  
CROSS-APPELLEE.

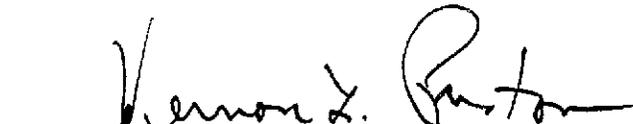
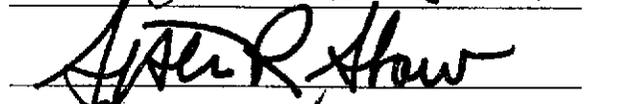
**FILED**  
COURT OF APPEALS  
MAR 24 2008  
DOTTIE TUTTLE  
CLERK, LOGAN COUNTY, OHIO

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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.

  
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\_\_\_\_\_  
JUDGES

**DATED: March 24, 2008**

COURT OF APPEALS  
THIRD APPELLATE DISTRICT  
LOGAN COUNTY

**FILED**  
COURT OF APPEALS

MAK 24 2008

DOTTIE TUTTLE  
CLERK, LOGAN COUNTY, OHIO

MAXINE F. SPILLER,

CASE NUMBER 8-07-03

PLAINTIFF-APPELLEE,  
CROSS-APPELLANT,

v.

OPINION

SKY BANK - OHIO BANK REGION,  
nka SKY BANK,

DEFENDANT-APPELLANT,  
CROSS-APPELLEE.

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**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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**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).<sup>1</sup>

{¶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

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<sup>1</sup> 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.

**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;**

**(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

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

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.<sup>2</sup> (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).<sup>3</sup> 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

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<sup>2</sup> Colonial Federal was of the successors to Bellefontaine Federal Savings and Loan. (Tr. Vol.II, at 22); See footnote one.

<sup>3</sup> 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 Schwaderer 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

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

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

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.**

{¶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.

Case Number 8-07-03

{¶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**

LOGAN COUNTY  
COMMON PLEAS COURT  
FILED

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

2007 JAN 31 PM 3:50

DOTTIE TUTTLE  
CLERK

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.

C

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

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Mark S. O'Connor, Judge

cc: STEVEN R FANSLER  
MATTHEW D HARPER

EXHIBIT A

LOGAN COUNTY  
COMMON PLEAS COURT  
FILED

2007 FEB -6 PM 4: 24

DOTTIE TUTTLE  
CLERK

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,

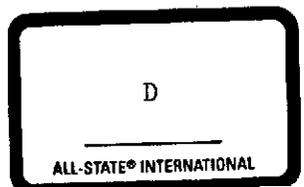
Defendant.

\* \* \*

**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.



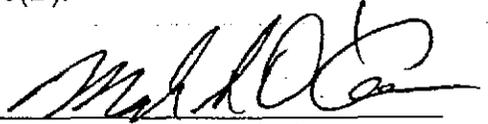
Costs to Defendant.

  
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.

LOGAN COUNTY  
COMMON PLEAS COURT  
FILED  
2007 FEB 22 AM 8:33  
DOTTIE TUTTLE  
CLERK

\* \* \*

**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

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Mark S. O'Connor, Judge

cc: STEVEN R FANSLER  
MATTHEW D HARPER