

IN THE SUPREME COURT OF OHIO

SKY BANK – OHIO BANK REGION,

APPELLANT,

vs.

MAXINE F. SPILLER,

APPELLEE.

CASE NO. 2008-0900

On Appeal from the  
Logan County Court of Appeals,  
Third Appellate District

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MERIT BRIEF OF APPELLEE,  
MAXINE F. SPILLER

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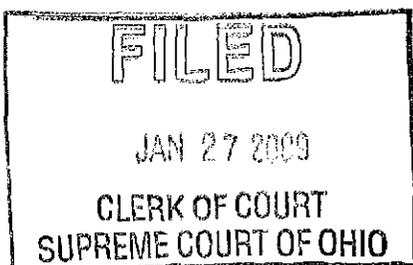


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## STATEMENT OF THE FACTS

As a supplement to the Statement of Facts filed by the Appellant Bank, we would add the following facts:

1. Maxine Spiller knew the source of funds used to open the certificate of deposit in question, namely, Roberta Stayrook's savings bond. (Supplement, page 180.)
2. Maxine Spiller was the person who opened the mail every day during the time they lived together. (Supplement, page 181 and 189.)
3. Neither Maxine, nor Roberta, received any correspondence from Bellefontaine Federal Savings and Loan Association or any of its successors in interest from 1974 until the present (Supplement, page 181.)
4. Maxine Spiller has never gone to Bellefontaine Federal Savings and Loan Association or any of its successors to cash her certificate. (Supplement, page 182.)
5. Maxine Spiller has never asked them to pay that certificate of deposit (Supplement, page 182.)
6. Maxine Spiller has never sent the bank or its successors anything in writing asking them to pay. (Supplement, page 182.)
7. Between 1975 and Roberta's death, Maxine Spiller never gave any other person power of attorney, never had a guardianship over herself, and never signed any written authorization granting any other person the right to act on her behalf as to this account. (Supplement, page 183).

8. Maxine Spiller has never received payment from Bellefontaine Federal Savings and Loan Association or any of its successors on the certificate in question. (Supplement, page 183.)

9. Although Appellant asserts that Mrs. Spiller has not been claiming the interest on her tax returns, Mrs. Spiller testified that they have never received 1099's from Bellefontaine Federal or any of its successors even during the initial terms of the certificates of deposit. (Supplement, page 191.)

### **STATEMENT OF AMICUS INTEREST**

The Appellee has no amicus interest to report. The Appellee believes that its merit brief is responsive to the amicus brief of The Ohio Bankers League.

### **ARGUMENT**

#### **ARGUMENT IN RESPONSE TO APPELLANT'S 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.

This case is very simple. The only account in question is an account created in my client's name, Maxine Spiller. That account was in the name of Maxine Spiller and was payable on death to some other person. Maxine Spiller and Maxine Spiller alone had rights in and to that account during her lifetime. It is irrelevant if someone else funded the account and it is irrelevant that someone else was the payable-on-death beneficiary. Once the account was established and once she was listed as the owner payable on death to someone else, she, and only

she, had control of the account. See O.R.C. §1109.07(B), O.R.C. §2131.10. The lifetime owner of a payable on death certificate of deposit has a complete present interest in the account and may withdraw its proceeds, change the beneficiary, or pledge the P.O.D. CD as collateral for a loan. A beneficiary of a P.O.D. CD has no interest in the proceeds of the P.O.D. CD until the death of the owner. *Jamison v. Society National Bank*, 66 Oh. State 3d 201, 611 N.E. 2d 307 (Ohio Supreme Court, 1993). This Court 16 years ago, therefore, has already passed on this issue and has ruled that the Ohio Revised Code is clear. Once this account was created in the name of Maxine Spiller payable on death to someone else, only Maxine Spiller had the right to do anything with this account for so long as she lived.

Clearly without equivocation, without hesitation, and without uncertainty, Maxine Spiller testified she never cashed in the account. The trial court and then the Third District Court of Appeals found that she met the burden of establishing this by clear and convincing evidence. One or both courts questioned whether the burden of proof was the preponderance of the evidence or clear and convincing evidence, but in the end both found that Maxine Spiller met this burden of proof by clear and convincing evidence. This Court should not substitute its judgment for either the trial court or the Court of Appeals. Appellant filed a 307 page supplement with its brief. Without reproducing the same supplement, reference is hereby made to page 182 of that Supplement, which is the direct examination of Maxine Spiller. The Court can see that Maxine Spiller never attempted to cash in the certificate, she never asked them to pay the certificate, she never sent them anything in writing asking them to pay the certificate, she never gave any other person power of attorney over her business affairs, she never had a guardianship over her, she never signed any written authorization granting any person the right to act on her behalf as to that account, and that she has never received payment from

Bellefontaine Federal Savings and Loan Association or any of those successors on that certificate. Nothing could be clearer. The only person who had the authority to act relating to that account during her lifetime did not act relating to that account during her lifetime and, as a result, the automatically renewing certificate of deposit has continued to automatically renew.

Since (not if) she has never redeemed the certificate, it has renewed every 30 months pursuant to the savings certificate, a banking contract or note created by, drafted by, and controlled by the Bank. See Plaintiff's Exhibit 2 in the Supplement filed by the Appellant Bank at page 247.

Testimony shows that the Bank has no evidence or record that it ever, (A), gave written notice to Maxine that it would not be renewed; (B), that a different rate would apply; (C), or that it would revert to the status of a regular savings account. Additionally, as can be seen by reference to pages 181 through 183 of Appellant's Supplement, Maxine Spiller testified positively and affirmatively that the Bank did not correspond with her at all.

Counsel for the Appellant Bank seems to seek a strict interpretation of Ohio Revised Code Section 1109.69(A) and (B). However, when following the Appellant's argument, it can be seen that the Bank is urging upon this Court a selective reading of that code section. We submit to this Court that there is no inconsistency between *Abraham v. National City Bank Corp.*, 50 Ohio State 3d 175, 553 N.E. 2d 619 (Ohio Supreme Court, 1990), and the only common pleas court case and the two courts of appeal cases which have determined that automatically renewing certificates of deposit are not controlled by *Abraham*. The reason there is no inconsistency is because a reading of the entire code section 1109.69 shows that the Appellant has refused or ignored the following words found in 1109.69(B), "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." The Bank would apparently have this Court believe that the triggering date is either the date that the certificate was taken out (which clearly is not the case) or an internally generated self-serving bank record which does not list this account as one of their accounts as of the close of 1992. When was the date of completion of the transaction or when was the date of the last entry? There has been none. The Bank cannot show any but wants to try to prove by reverse implication that their list of 1992 somehow shows that a last transaction occurred. This is a novel approach. For a bank to be able to say the bank must have closed the account because we have no records to show that it is still open, but we have nothing to prove our position, is absurd. We have clear and convincing evidence that Maxine Spiller was the only person on this account and that she never closed the account, cashed in the account, or received payment from the Bank.

An individual cannot go into a bank and say "I would like to open a certificate of deposit but, in doing so, I will use my own forms, not yours." Oh, no! The bank in every case drafts the form or instrument, and the bank sets the terms. The terms here are that the certificate of deposit would renew every 30 months unless:

1. Maxine, and only Maxine, cashed in or redeemed the certificate of deposit (presented for withdrawal). That did not happen.
2. The bank sent written notice that the CD would not be renewed. That did not happen.
3. The bank sent written notice the account would be converted to a regular savings deposit. That did not happen.

None of the conditions occurred. This certificate of deposit has renewed every 30 months and continues to do so. The Bank created the form that was used. Reference to the actual

certificate shown in the Supplement at page 247 shows us the form used by the Bank. The Bank invited my client to do nothing and let the certificate renew. That is what she did.

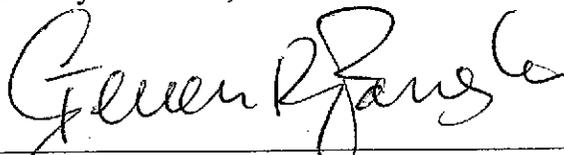
Banks gain by retaining money. That goes without saying. Appellant Bank invited her to take no action, leave her money with the Bank, and she has done so. It is not surprising that the lower courts found this by clear and convincing evidence because, frankly, the record supports this conclusion and does not support any other conclusion. Even using the alleged catch-all provision of Ohio Revised Code Section 1109.69(B) as is urged by the Bank, the date of completion or the date of the last entry has still not occurred and the six years has still not yet begun to run. The Third District Court of Appeals in this case made the right decision, as did the Tenth District Court of Appeals in the case of *Brentlinger v. Bank One of Columbus, N.A.*, 150 Ohio App. 3d 589, 2002-Ohio-6736, 782 N.E. 2d 648 (Tenth District, 2002). We agree with the pronouncement of this Court in the *Abraham* decision, *Abraham v. National City Bank Corp.*, 50 Oh. St. 3d 175, (Ohio Supreme Court, 1990), that *Abraham* created the potential for a harsh result. Nonetheless, the code section is clear and in the *Abraham* case, more than six years passed after the date of the last transaction. In our case, there is no date of last transaction. The Bank's unwillingness to consider the entire Section 1109.69 in this case is why the Bank cannot see the appropriate distinction between *Abraham*, *Brentlinger*, and this case. Our case does not present for your review a date of last entry, nor a date of completion of the transaction.

My 90-year-old client is entitled to her money and should get it before she dies. The Bank has failed to state a basis to reverse the Third District Court of Appeals and the Tenth District Court of Appeals. The only district courts of appeals which have considered this issue have ruled in a manner favorable to my client. We urge this Court to affirm the trial court and the Third District Court of Appeals.

Every other argument in Appellant's brief presupposes that Ohio Revised Code Section 1109.69 offers them the relief that they seek. Because a full reading of that code section does not offer them that relief, all of their other arguments must fail as well. We will not respond to the red herrings which constitute the remainder of Appellant's brief. Similarly, the amicus brief places its entire reliance as well upon an improper reading of Ohio Revised Code Section 1109.69. The amicus brief is also covered by our response herein.

We urge an affirmance of the lower courts' decisions.

Respectfully submitted,



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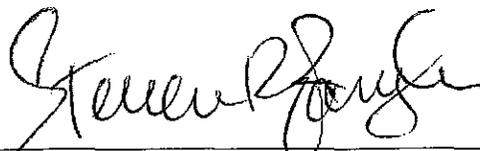
**CERTIFICATE OF SERVICE**

I certify that a true and accurate copy of this *Merit Brief of Appellee, Maxine F. Spiller*, has been served upon the following by regular U. S. mail this 21<sup>st</sup> day of January, 2009:

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# **APPENDIX**

## **2131.10 Payable on death accounts.**

A natural person, adult or minor, referred to in sections 2131.10 and 2131.11 of the Revised Code as the owner, may enter into a written contract with any bank, building and loan or savings and loan association, credit union, or society for savings, authorized to receive money on an investment share certificate, share account, deposit, or stock deposit, and transacting business in this state, whereby the proceeds of the owner's investment share certificate, share account, deposit, or stock deposit may be made payable on the death of the owner to another person or to any entity or organization, referred to in such sections as the beneficiary, notwithstanding any provisions to the contrary in Chapter 2107. of the Revised Code. In creating such accounts, "payable on death" or "payable on the death of" may be abbreviated to "P.O.D."

Every contract of an investment share certificate, share account, deposit, or stock deposit authorized by this section shall be deemed to contain a right on the part of the owner during the owner's lifetime both to withdraw the proceeds of such investment share certificate, share account, deposit, or stock deposit, in whole or in part, as though no beneficiary has been named, and to designate a change in beneficiary. The interest of the beneficiary shall be deemed not to vest until the death of the owner.

No change in the designation of the beneficiary shall be valid unless executed in the form and manner prescribed by the bank, building and loan or savings and loan association, credit union, or society for savings.

Effective Date: 08-29-2000

## **1109.07 Deposits payable to survivor - deposits payable on death.**

(A) When a deposit is made in the name of two or more persons, payable to either or the survivor, the bank may pay all of the deposit, any part of the deposit, or any interest earned on the deposit, to either of the named persons, or the guardian of the estate of either of the named persons, whether or not the other person is living. The receipt or acquittance of the person paid is a sufficient release and discharge of the bank for any payments made from the account to that person.

(B) A bank may enter into a written contract with a natural person for the proceeds of the person's deposits to be payable on the death of that person to another person or to any entity or organization in accordance with the terms, restrictions, and limitations set forth in sections 2131.10 and 2131.11 of the Revised Code.

Effective Date: 08-29-2000