VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 14th day of April, 2016.

Nancy Welton, Executor for the Estate
of James T. Welton, et al., Appellants,

against Record No. 150869
Circuit Court No. CL14-293

Branch Banking & Trust Company, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Dinwiddie County.

Upon consideration of the record, briefs, and argument of counsel, the Court is of the opinion that the judgment below should be affirmed.

Nancy Welton, executor for the estate of James T. Welton, and J. Andrew Welton ("the Weltons") filed a complaint against Branch Banking & Trust Company ("BB&T"), alleging they were entitled to the principal amount plus interest for a money market certificate James T. Welton had purchased in 1979 from First Colonial Savings and Loan Bank ("Bank")* in the amount of $10,000. The Weltons claimed that when James Welton presented the certificate to the Bank for payment in 2002, the Bank refused payment. The Weltons asserted they were entitled to the original principal amount of $10,000, plus interest, and asked for a judgment in the amount of "not less than $70,000."

BB&T filed a plea in bar, asserting that the statute of limitations had run on this claim. BB&T argued that, under Code § 8.3A-118.1, the cause of action accrued on March 7, 1979, the date the certificate was issued, and that the statute of limitations expired six years later. The Weltons filed a response to the plea in bar, and argued that the statute of limitations accrued in 2002, when James Welton presented the certificate to the Bank and demanded payment, and that therefore, under Code § 8.3A-118.1, their cause of action was timely filed. The trial court issued

* BB&T is the successor by merger to First Colonial Savings and Loan Bank.

a letter opinion in which it agreed with the Weltons that the cause of action accrued in 2002 instead of 1979, and overruled the plea in bar.

A jury trial was held on January 30, 2015. The Weltons presented evidence that James Welton purchased a certificate of deposit in March 1979, but that he lost track of the certificate. Years later, in 2002, when he was going through his safe to find certain documents he needed to apply for social security benefits, he found the certificate. After he found the certificate, James told his son John that he had always thought he had lost track of one of his investments. When James presented the certificate to the Bank in 2002, he was informed that it had already been paid. The certificate was received in evidence. By the terms of the certificate, as the trial court found, it had a six-month term, with an earnings rate of 9.748%, with interest compounding quarterly, and thereafter converted into a regular savings account.

At trial the Weltons called Raymond Santelli, a banker in Richmond, to testify as an expert witness regarding the interest that the savings account would have earned since 1979. Santelli testified that he had worked in the banking industry since 1994, and beginning in 2007 he joined the committee at his bank, First Capital Bank, "that sets interest rates for both loans and deposits." Plaintiff's counsel moved to qualify Santelli as an expert in the field of establishing interest rates. BB&T objected to qualifying Santelli as an expert because of his lack of qualifications to determine historic interest rates, and because any opinion he would give would be based upon speculation. The trial court sustained the objection, and held that, prior to 2007, Santelli had no experience or training in setting interest rates. The court held that he could not be qualified as an expert in setting interest rates prior to 2007. However, the trial court ruled that Santelli did qualify as an expert on interest rates beginning in 2007, when he joined the rates committee at his bank. Although the court determined that Santelli qualified as an expert on setting interest rates from 2007 forward, the trial court held that Santelli's opinion was not admissible. Because Santelli had not conducted "the more specific analysis of local savings rates," or "a specific analysis as it relates to [BB&T] itself," the court ruled that Santelli's opinion would be based upon speculation and was therefore inadmissible.

BB&T moved to strike the evidence, arguing there was no evidence of a legally enforceable obligation owed by BB&T to the Weltons. The trial court overruled the motion to strike. BB&T then presented evidence from a former bank teller that a customer was not

required to present the actual certificate in order to cash out his money market account. Instead, customers were permitted to present identification and then sign a "lost passbook affidavit." However, those records were only retained for seven years. Therefore, after seven years any record of a "lost passbook affidavit" would have been destroyed. BB&T also presented evidence that it was unable to locate any records of any bank accounts in James Welton's name. BB&T renewed its motion to strike, which the trial court again overruled. Before the case was submitted to the jury, the trial court ruled that because Santelli's opinion on interest rates had been excluded and there had been no other evidence as to the interest rate applicable to the certificate, the Weltons were not entitled to interest on the certificate beyond the six month term provided for in the certificate as part of the calculation of damages.

The jury returned a verdict in favor of the Weltons in the amount of $10,974.80. BB&T moved to set aside the verdict, but the trial court denied the motion. The trial court entered a final order on March 12, 2015, awarding judgment in favor of the Weltons for $10,974.80. The Weltons filed a petition for appeal to this Court, arguing that the trial court erred in refusing to qualify their damages witness as an expert witness. We granted the Weltons' petition for appeal, as well as BB&T's assignments of cross-error, which challenged the trial court's decision to overrule the plea in bar and to deny the motion to strike.

We review a trial court's decision whether to admit expert testimony under an abuse of discretion standard, only reversing if the record shows clearly that the witness was qualified. Sami v. Varn, 260 Va. 280, 284, 535 S.E.2d 172, 174 (2000); Landis v. Commonwealth, 218 Va. 797, 800, 241 S.E.2d 749, 750-51 (1978). Expert opinion may be admitted to assist the fact finder if such opinion satisfies certain requirements, "including the requirement of an adequate factual foundation." Forbes v. Rapp, 269 Va. 374, 381, 611 S.E.2d 592, 596 (2005); Va. R. Evid. 2:702 and 2:703. As we have stated, "[q]ualification of an expert witness does not insure admission of his every statement and opinion." Swiney v. Overby, 237 Va. 231, 233, 377 S.E.2d 372, 374 (1989). The admission of expert testimony is controlled by Rule 2:702, which provides in relevant part:

> (a) *Use of Expert Testimony.*
>
> (i) In a civil proceeding, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an

> expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
>
> * * *
>
> (b) *Form of opinion.* --Expert testimony may include opinions of the witness established with a reasonable degree of probability, or it may address empirical data from which such probability may be established in the mind of the finder of fact. Testimony that is speculative, or which opines on the credibility of another witness, is not admissible.

The trial court determined that Santelli did not qualify as an expert on the setting of interest rates prior to 2007. First, the trial court found there was no evidence that Santelli had any specific training in the area of setting interest rates. Second, the court found that Santelli had no experience in determining historical interest rates. All of Santelli's experience involved setting prospective rates. There is evidence to support the trial court's holding that Santelli did not have the necessary "knowledge, skill, experience, training, or education" needed in order to calculate historic interest rates, and the trial court did not abuse its discretion in refusing to qualify Santelli as an expert for the period of time prior to 2007.

From 2007 forward the trial court held that Santelli was qualified as an expert on setting interest rates. That expertise came from Santelli's experience, starting in 2007, of being a member of a committee at his bank that set interest rates. Despite qualifying Santelli as an expert for that time period, the trial court held that it could not admit Santelli's opinion because it was based upon speculation. The court held that Santelli's testimony was speculative because Santelli had relied on a single piece of data, the national savings rate, without knowing the specific correlation between that data point and the local savings rates. Further, Santelli had failed to make any inquiry into BB&T's interest rates from 2007 to the present.

Rule 2:702 (B) does not permit the admission of "testimony that is speculative." Further, as we held in Hyundai Motor Co. v. Duncan, 289 Va. 147, 155, 766 S.E.2d 893, 897 (2015), "[e]xpert opinion must be premised upon assumptions that have a sufficient factual basis and take into account all relevant variables." Id. In this case, Santelli failed to take into consideration the local rates and BB&T's rates during the time period in question. Those are all relevant variables, and by not taking those variables into account, Santelli's testimony was founded on assumptions that had no basis in fact, and was therefore inadmissible. Accordingly,

we hold that the trial court did not err in failing to admit this speculative testimony.

We review the trial court's decision to overrule the plea in bar de novo. Smith v. McLaughlin, 289 Va. 241, 251, 769 S.E.2d 7, 12 (2015). The parties agreed that the controlling statute of limitations in this matter is Code § 8.3A-118.1, which provides:

> An action to enforce the obligations of a bank to pay all or part of the balance of a deposit account or certificate of deposit (collectively, a deposit) must be commenced within six years after the earlier of the following:
>
> (1) If the deposit is a certificate of deposit to which subsection (e) of § 8.3A-118 applies, the date the six-year limitations period begins to run under subsection (e) of § 8.3A-118 [demand for payment]; or
>
> (2) The later of:
>
> (A) The due date of the deposit indicated in the bank's last written notice of renewal;
>
> (B) The date of the last written communication from the bank recognizing the bank's obligation with respect to the deposit; or
>
> (C) The last day of the taxable year for which the owner of the deposit or the bank last reported interest income earned on the deposit for federal or state income tax purposes.

The parties stipulated to the trial court that sections (2)(A) and (C) were not applicable. The Weltons argue that section (1) governs this case, and that the statute of limitations accrued in 2002 when James Welton presented the certificate for payment, while BB&T asserts that section (2)(B) applies, and that the issuance of the certificate itself in March 1979 was the "last written communication from the bank recognizing the bank's obligations with respect to the deposit."

We agree with the trial court's reasoning in its September 17, 2014 letter opinion that BB&T's argument with respect to section (2)(B) is "strained and unreasonable" as applied to these specific facts, where the deposit converted to a savings account, and that the "written communication from the bank recognizing the bank's obligations with respect to the deposit" means something other than the actual certificate of deposit. As such, because the parties stipulated that sections 2(A) and 2(C) were not applicable and are therefore not before us on appeal, the only remaining possible accrual date in this matter was in 2002, when James Welton

made a demand for payment. Accordingly, we will affirm the trial court's decision to overrule BB&T's plea in bar.

Finally, with regard to BB&T's motion to strike, we review the trial court's judgment using the same principles that applied in the trial court, accepting as true all the evidence favorable to the plaintiffs as the non-moving parties and "any reasonable inference a jury might draw therefrom" in support of the plaintiffs' case. Upper Occoquan Sewage Auth. v. Blake Constr. Co., 266 Va. 582, 590 n.6, 587 S.E.2d 721, 725 n.6 (2003). The judgment of the trial court is to stand unless plainly wrong or without evidence to support it. Nationwide Mut. Ins. Co. v. St. John, 259 Va. 71, 76, 524 S.E.2d 649, 651 (2000). The Weltons presented evidence that James Welton discovered the certificate in his safe, and that he had told his family members he always thought he had lost track of one of his investments. BB&T had no record of the account or of any lost passbook affidavit, and presented evidence that any records of a lost passbook affidavit would have been destroyed after seven years. However, such a records retention policy does not constitute evidence of payment. See Wool v. NationsBank, N.A., 248 Va. 384, 387, 448 S.E.2d 613, 615 (1994). A reasonable jury could find that, based upon the Weltons' production of the actual certificate and the testimony that James Welton had always believed he lost track of one of his investments, along with the lack of any bank records establishing payment, the account had not been paid. Accordingly, the trial court did not err in denying BB&T's motion to strike.

For the aforementioned reasons, the judgment of the trial court is affirmed. The appellants shall pay to the appellee two hundred and fifty dollars damages.

This order shall be certified to the said circuit court.

A Copy,

Teste:

John V Harrington

Clerk