SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. NO. 18342

ELAINE BRAFFMAN, CUSTODIAN FOR DAVID BRAFFMAN, ET AL

VS.

BANK OF AMERICA CORPORATION

BRIEF OF THE PLAINTIFFS- APPELLANTS

[With Separately Filed Appendix]

TO BE ARGUED BY:

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STATEMENT OF ISSUES

Where a debtor-creditor relationship existed between the plaintiffs and the defendant by virtue of custodial accounts opened in 1987 and 1988 at the Society for Savings; where the plaintiffs brought an action sounding in contract to obtain payment of the monies deposited into the custodial accounts, plus interest; where the successor in interest of Society for Savings was the defendant Bank of America; where the defendant bank had voluntarily destroyed its own account records at the earliest date allowed by Connecticut's document retention statute; where the defendant bank had no records whatsoever concerning the disposition of the custodial accounts; where the trial court placed the burden on the plaintiffs to prove that the defendant bank had not paid out the accounts; and where the trial court held that the plaintiffs had not met their burden and dismissed the action; did the court err:

1. In placing the burden on the plaintiffs to disprove the defendant's special defense of payment?
   (pp 18 to 24)

2. In transforming Connecticut's document retention statute, C.G.S. section 36a-40, into a judicially imposed statute of limitations?
   (pp 24 to 25)

3. In relying primarily on a case whose facts are readily distinguishable from those of the present matter?
   (pp 26 to 27)

I. STATEMENT OF PROCEEDINGS

The plaintiffs opened two passbook savings accounts at a bank formerly known as Society for Savings. One passbook was opened on or about November 9, 1988 with an initial deposit of $100,000.00, while the other passbook was opened on or about November 12, 1987 with an initial deposit of $33,079.37. There were no further transactions associated with either of the passbook savings accounts.

The defendant bank is the successor of Society for Savings. One of the plaintiffs presented the passbooks to the defendant on or about January 5, 2004. The defendant refused to honor the passbooks or make payment.

This action was filed on 8/13/2004. The plaintiffs brought this action to recover the sum of $133,079.37, plus interest and costs.

The plaintiffs requested permission to amend their complaint with a substituted complaint on 8/18/2006, which permission was granted.

The defendant filed its answer and special defenses on 9/28/2006. One of the special defenses stated, in full: "The plaintiffs' claims are barred because the defendant or its predecessor in interest has paid the amounts in full owned to the plaintiffs." The plaintiffs filed their reply to the special defenses on 4/10/2007.

The case was later tried to the court, beginning on 6/19/2008 and ending on 6/20/2008.

To summarize, the plaintiffs, who are both attorneys and who are magistrates within this court system, testified that no other person(s) had access to the passbooks from the inception of the accounts until the date payment was refused by the defendant bank. The plaintiffs testified that they had never used the passbooks

to withdraw funds from the accounts, as was also demonstrated by the admission into evidence of the original passbooks. The plaintiffs testified that they had never filed an affidavit of a lost passbook so as to withdraw funds from the accounts without entries being made on the original passbooks, nor had they ever given another person permission to do so. The court found that the plaintiffs' testimony had been credible.

It was undisputed that the defendant had destroyed its records after the minimum document retention period contained in C.G.S. section 36a-40. Thus, neither party had any records concerning the actual disposition of the two passbooks in question. The earliest lawful document destruction could not have occurred more than three years before the demand on the passbook for David Braffman.

Instead, the defendant's evidence consisted of the testimony of two bank employees. One witness had been an employee of Society for Savings during the time when the passbooks had been opened. The other witness is a current employee of the defendant Bank of America. The employees had no actual knowledge of the two accounts in question, but did testify as to the procedures generally in place during their relevant time periods. Neither witness was disclosed as an expert or admitted as an expert during the trial.

The court filed its memorandum of decision on 12/11/2008. Only two alternatives were considered by the court: either the plaintiffs had filed an affidavit claiming a lost or misplaced passbook, received the principal and interest, and closed out the accounts, or the money was still with the defendant bank. In fact, the plaintiffs had argued in their trial brief that the defendant also had the burden to prove

that any payment had been made to the plaintiffs, rather than inappropriately to some other person.

The court expressly declined to place the burden on the defendant to prove its special defense of payment, as requested by the plaintiffs and required by Practice Book section 10-50. The court placed the onus for the defendant's lack of records on the plaintiffs, holding that the "plaintiffs have not provided persuasive evidence that the accounts in question have not been paid by the defendant or its predecessors." Moreover, the court did not make any finding as to whether any hypothesized payment by the defendant had actually been made to the plaintiffs.

The court applied the wrong standard of decision to this case. The plaintiffs were given the burden of proof on the defendant's special defense of payment. This appeal followed.

II. STATEMENT OF FACTS

A. The trial court's introduction:

The trial court summarized the genesis of this lawsuit as follows:

> The seeds of this dispute were planted twenty years ago when a generous grandmother funded certificates of deposit for the benefit of her grandchildren. In 1987 and 1988, Mildred Spiers funded two investment savings accounts for her grandchildren, the plaintiffs, David and Susannah Braffman. The passbooks were turned over to David and Susannah's parents as the accounts' custodians, the plaintiffs, Gerald and Elaine Braffman. In January of 2004, Gerald Braffman presented the passbooks to the defendant, Bank of America. The defendant advised Gerald Braffman that there were no records of the accounts and therefore, the accounts must have been closed or had escheated to the State of Connecticut. After determining that the State of Con[illegible]t was not holding the escheated funds, the plaintiffs brought suit against the defendant asserting their entitlement to payment of the account balances plus the

accrued interest over the past twenty years. (Memorandum of Decision dated 12/11/2008 [the "Decision"]; App. A1).

B. Undisputed facts:

Prior to trial, the parties had entered into stipulations of fact. See Stipulation of Facts ["Stipulation"], 6/18/2008, App. A39-41. The most relevant stipulations are:

1. "Plaintiffs David S. Braffman and Susannah J. Braffman Amen are the children of plaintiffs Gerald H. Braffman and Elaine A Braffman." (Stipulation, App. A39).

4. "On the relevant dates of November 12, 1987 and November 9, 1988, Society for Savings was a Connecticut stock savings bank doing business in Connecticut." (Stipulation, App. A39).

5. "Society for Savings and its assets were transferred to defendant Bank of America through merger, acquisition, and consolidation." (Stipulation, App. A39).

6. "Defendant Bank of America Corp. ["Bank of America"] is the successor in interest to Society for Savings and its assets." (Stipulation, App. A39).

7. "Plaintiff Gerald H. Braffman opened a certificate of deposit on behalf of his then minor child, Susannah J. Braffman, during November 1987. The Society for Savings passbook bears account number 02340081914." (Stipulation, App. A40; see App. A19-22 for a true copy of the passbook).

8. "Plaintiff Elaine A. Braffman opened a certificate of deposit on behalf of her then minor child, David S. Braffman, during November 1988. The Society for Savings passbook bears account number 02340082276." (Stipulation, App. A40; see App. A23-26 for a true copy of the passbook).

9. "Plaintiff Gerald H. Braffman visited the Fleet Bank located at 445 Boston Post Road, Orange, CT on or about January 5, 2004. He presented either the passbooks themselves or copies thereof to Vice President and Branch Manager Cindi Norris. His demand for payment has been declined by Fleet Bank and defendant Bank of America." (Stipulation, App. A40).

10. "Defendant Bank of America does not have any records concerning the Society for Savings passbooks bearing the account numbers 02340081914 or 02340082276." (Stipulation, App. A40).

C. The testimony of the witnesses and the trial court's finding of facts:

1. As to plaintiff Gerald Braffman:

As set forth above, plaintiff Gerald Braffman is the father of plaintiffs David Braffman and Susannah Braffman Amen. On November 12, 1987, he opened a Society for Savings passbook in the amount of $33,079.37 as the custodian of Susannah. (App. A19-22).

Some of plaintiff Gerald Braffman's testimony was summarized in the trial court's opinion. The funds had been provided by Susannah's grandmother, Mildred Spier, with the understanding that the funds would not be given to Susannah until the occurrence of a major life cycle event. (Decision, App. A8). Mr. Braffman testified that "he thought the certificates of deposits were gold-edged investments, which would be safe and that they would continue to roll over and earn interest. Therefore, he believed these accounts did not require frequent monitoring, as a stock investment would require." (Decision, App. A8-9).

Plaintiff Gerald Braffman adamantly denied receiving any payment from the passbooks. He did not communicate with the defendant or its predecessors regarding these accounts until his demand for payment in 2004. He denied filing any affidavit of lost or misplaced passbooks that would allow him to make a withdrawal from the accounts without presenting the original passbooks. (Decision, App. A8). In this regard, the original passbooks were in evidence. The passbooks clearly

demonstrate the deposit on November 12, 1987, with no subsequent activity. See App. A19-22.

Plaintiff Gerald Braffman had had a very successful law practice for many years. Consequently, he had never needed these funds. At the time of trial, he still resided in the house that he had bought for cash during 1982, well before Mildred Spier had funded the passbooks at issue. All three of his children are now attorneys, and all three had attended private schools from elementary school through law school. He had always been able to pay his children's educational expenses out of current earnings without having incur any loans. (Decision, App. A9).

The trial court found that plaintiff Gerald Braffman's testimony had been credible, "without any indication of an intent to deceive or hide facts from the court." (Decision, App. A15). There is nothing in the trial court's credibility assessment that limits its effect to the testimony specifically addressed by the trial court. Some additional uncontroverted testimony is, therefore, set forth here to flesh out the observations made by the court.

Gerald Braffman testified that he is a practicing lawyer with offices in Orange, CT. He graduated from the University of Connecticut School of Law in 1962, after which he worked for Berdon & Berdon. He opened his own practice for a few years in the 1960's, and then took a position as an attorney for the United States National Labor Relations Board. He married Elaine in 1967 and they came back to New Haven in 1970 and started practicing privately, this time with Elaine's father, Charles Albom. (T. 6/19/2009, App. A77-78).

Mr. Braffman has practiced in the New Haven area since 1970 to the present. He was elected to the New Haven Board of Alderman, he was chair of the New Haven Jury Committee, chair of North Haven Planning & Zoning Commission, and was a fact finder under the Connecticut Municipal Employees Relation Act. He was vice president of Ezra Academy, a lecturer at Quinnipiac College and was appointed to the State Department of Education Arbitration Panel. He is currently a Magistrate in the State Judicial System. He functions as a magistrate one or two half days a week. He stated that he was appointed by the chief administrate judge in the judicial district and has been serving as a magistrate for three to four years. (T. 6/19/2009, App. A79-80).

At the time that the CD was opened, his mother, Mildred Spier, was of an advanced age and aware of her mortality. Ms. Spier and Mr. Braffman were both present at Society for Savings. (T. 6/19/2009, App. A81-82). It had been Ms. Spier's decision to open the CD. (T. 6/19/2009, App. A87-88). Ms. Spier reminded Gerald Braffman that his father had put him through school and that it was his duty to do the same for Susannah. The money was not to be used for his children's education. It was to be held long-term and reserved for a "special family life cycle event." (T. 6/19/2009, App. A82-83). Mr. Braffman complied, having paid for all of his children's educational expenses out of current earnings from his law office. (T. 6/19/2009, App. A83-84 & 86).

Mr. Braffman thought a certificate of deposit did not require monitoring, and that it was like a US savings bond with no expiration. He explained his understanding that US savings bond have a maturity date but no expiration, and

continue to accumulate interest even after maturity. His belief was that the same was true with the certificate of deposit, and that it was covered by FDIC insurance, and that it was a no miss investment. (T. 6/19/2009, App. A88-89 & 98 & 106).

He testified that he put both of the passbooks at issue in this lawsuit in a safe deposit box at Union Trust Company. He moved the box when he moved his practice to Orange. He did not remember the name of the bank at the time, but it is now Bank of America. He kept other documents in the box. The passbooks were kept in a manila envelope at the bottom of the box. (T. 6/19/2009, App. A90-92 & 97).

He went to the bank in January 2004 because his daughter indicated that she was trying to get pregnant. This was the type of thing his mother wanted the money used for. He also testified that David had indicated that he was looking for an apartment to buy. He felt that in order to implement his mother's wishes he thought the money should be withdrawn. (T. 6/19/2009, App. A90-92). When the passbooks were presented, the bank could not find any records of the accounts and denied payment. (T. 6/19/2009, App. 93-96).

The passbooks had been kept in the safe deposit box at all times. He and his wife, plaintiff Elaine Braffman, had the keys. Plaintiff Gerald Braffman's testimony was unequivocal: he had never cashed in the CDs, had never received any money from the bank on these accounts, he had never authorized anyone else to withdraw the funds, and he had never requested the bank to issue a replacement passbook to him. He had never instructed the bank to mail the funds to him. (T. 6/19/2009, App. A96-98).

2. As to plaintiff Elaine Braffman:

Plaintiff Elaine A. Braffman is the wife of plaintiff Gerald Braffman. She and her husband Gerald Braffman have three children: Susannah born June 3, 1972; David born March 25, 1975: and Matthew born December 3, 1980. She explained that although David would be testifying, her daughter Susannah , who resides in California, would not be testifying as she is having back surgery and her physician has advised her against traveling. Susannah did travel to Connecticut for her deposition. (T. 6/19/2009, App. A54-56).

Much of Elaine's testimony was discussed by the trial court in conjunction with the testimony of Gerald Braffman. On November 9, 1988, she opened a Society for Savings passbook in the amount of $100,000.00 as the custodian of David Braffman. (Decision, App. A1, 2, 5 & 23-26).

As had her husband, plaintiff Elaine Braffman testified adamantly that she had never sought to withdraw funds from this account in any manner, nor had she ever authorized anyone else to do so. (Decision, App. A8). The trial court deemed her testimony to have been credible and forthright. (Decision, App. A15). Again, there is nothing in the trial court's credibility assessment that limits its effect to the testimony specifically addressed by the trial court. Some additional uncontroverted testimony is, therefore, set forth here to flesh out the observations made by the court.

Elaine Braffman testified that she is a lawyer and Superior Court Magistrate. She is in private practice with her husband at the Law Firm of Albom & Braffman, now located in Orange, CT. She has been in practice for 33 years. (T. 6/19/2009, App. A63-64).

She was present with her mother in law, Mildred Spier, when the CD was opened at Society for Savings. Ms. Spier was very clear about her intentions for the money. It was not to be dribbled away by the purchase of a car, or a stereo, or a trip to Europe. Ms. Spier and her husband had paid for plaintiff Gerald Braffman's education, and she expected Gerald and Elaine Braffman to do the same for their children. The funds were to be reserved for a momentous event, such as the birth of a child or the purchase of a home. T. 6/19/2009, App. A57-61).

Elaine gave the passbook to Gerald when she got home. She did not see it again until the time when it was presented for payment to the defendant. (T. 6/19/2009, App. A62-63). She doesn't think that she ever went to the safe deposit box. (T. 6/19/2009, App. A67). She assumed that the CD would roll over at the prevailing interest rate. (T. 6/19/2009, App. A65-66). The demand for the money in 2004 was triggered by the news that her daughter, Susannah Braffman, was going to have a baby. (T. 6/19/2009, App. A69-70).

Elaine Braffman's testimony was unequivocal: She never received any funds from the CD, never authorized anyone else to receive the money, never requested a substitute passbook, and never instructed the bank to mail the money to any person. This would have been contrary to Ms. Spier's instructions. (T. 6/19/2009, App. A67-68).

3. As to plaintiff Susannah Braffmen:

The trial court noted in footnote five that Susannah had testified that she only became aware of the gifts in 2004, when her father advised them of the defendant's

refusal to pay the accounts and his intent to file suit on their behalf. (Decision, App. A8 n.5).

This statement is based on Susannah Braffman Amen's deposition, wherein she testified that she had not even seen the passbook at issue in her claim prior to the inception of this litigation. (Deposition of Susannah Braffman Amen, 5/15/2007, App. A140-143). The trial court agreed to mark her deposition as a full exhibit because Ms. Amen had been too ill to travel from California to Connecticut for the trial. (T. 6/19/2009, App. A107-108).

4. As to plaintiff David Braffman:

As with plaintiff Susannah Braffman, the trial court noted his testimony that he had only become aware of the gifts in 2004, when his father advised him of the defendant's refusal to pay the accounts and his intent to file suit on David's behalf. (Decision, App. A8 n.5).

As with all other witnesses, David's testimony was deemed to be credible and forthright. (Decision, App A15). Again, there is nothing in the trial court's credibility assessment that limits its effect to the testimony specifically addressed by the trial court. Some additional uncontroverted testimony is, therefore, set forth here to flesh out the observations made by the court.

David testified that he is currently employed as counsel to a financial services company in New York. He had been 13 years old when the CD was opened for him during November of 1988. He does not remember knowing about the gift at that time. He learned about the gift after demand was made on the bank around January

5, 2004. Just before that date he had told his father he was thinking about getting an apartment, or owning instead of renting. (T. 6/19/2009, App. A71-73 & 74).

David never authorized anyone to have access to his custodial account. He never interacted with any bank and he did not instruct the bank to mail the money to him. He didn't know about the custodial account until after his father had tried unsuccessfully to cash in the CDs. (T. 6/19/2009, App. A75-76).

5. As to Renee Meucci:

Ms. Meucci was a non-party witness called by the plaintiffs. She is employed at the State of Connecticut Office of the Treasurer as a claims supervisor for the unclaimed property division. (T. 6/19/2009, App. A99). Primarily, she testified that she had performed a search of the division's records, and had not found any indication that the accounts at issue had escheated to the State. (See, e.g., T. 6/19/2009, App. A101).

Her testimony was significant on other points. While one of the defendant's witnesses testified (see below) that the bank destroys its records of accounts seven years after closure to save money, Ms. Meucci testified that the State has maintained its records of escheated accounts since the 1960s and is expected to do so "forever." (T. 6/19/2009, App. A100 & 102-103). Ms. Meucci's testimony on this point would indicate that electronic document retention beyond the statutory seven year minimum is not particularly burdensome.

Second, Ms. Meucci testified that her department conducts regular audits of banks that are incorporated in Connecticut, an activity that would be purposeless if banks never made mistakes:

Q: Why don't the banks want to hold on to the money?

A. I don't know that they don't.

Q. Is there any - -

A. It's a mandated law.

Q. - - obligation - - how do you know that some bank isn't holding onto the money?

A. We don't, honestly.

Q. You don't.

A. We do conduct audits of, you know, different companies if they're incorporated here.

Q. Okay. So you would conduct an audit as the office - - for the office of the treasurer as opposed to the banking commissioner?

A. Correct.

(T. 6/19/2009, App. A104)

Ms. Meucci took for it for granted that accounts can be lost through the merger and acquisition process. The following exchange occurred when Ms. Meucci was asked by the court why dormant accounts are escheated to the State, rather than held by the banks:

A. I have, you know, I think they do it basically for the reasons of how these banks get taken over - -

Q. Hm-hmm.

A. - - and changed from one bank to the next to the next. At least if it's with the state, it's there forever for you to claim it. If the banks lose track of it changing account numbers through the changes of banks, you might not ever see it again.

Q. Certainly somebody in this courtroom would agree with that, and somebody would disagree with that. All right.

A. I learned from experience.

Q. Pardon?

A. I learned from experience.

(T. 6/19/2009, App. A105)

6. As to Cynthia Norris:

Ms. Norris was the first of the defendant's two witnesses. She had never worked for Society for Savings, the bank where the two accounts at issue had been opened. (T. 6/19/2009, App. A115 &117-118). She did not have any personal knowledge as to the disposition of these accounts. (T. 6/19/2009, App. A114-116). She had never been disclosed as an expert witness and the defendant did not seek to have her admitted as an expert at trial.

Ms. Norris had 29 years of experience from working in various banks. She had worked at several of the banks involved in the change of corporate structure from Society for Savings to Bank of America. She had started at Connecticut Bank & Trust, which failed and was taken over by the FDIC, then at Fleet, and then at Bank of America. She had never really changed jobs; rather, the employers had changed. (T. 6/19/2009, App. A109-111).

Ms. Norris confirmed the stipulation set forth as number nine at section II(B), above. Plaintiff Gerald Braffman had brought the original passbooks to her on or about January 5, 2004. She had declined payment after failing to find records.

Ms. Norris's testimony was that she has never seen a lost account in her 29 years of experience. (T. 6/19/2009, App. A112-113). As mentioned above, Ms. Norris had not been disclosed as an expert witness nor did she testify that she had

personal knowledge of the disposition of every account at the banks she had worked at.

On questioning from the trial court, Ms. Norris volunteered that the funds could have been withdrawn by someone other than the plaintiffs, if there was a fraud:

> Q: Are there any circumstances under which somebody other than, an example, for Exhibit 2, Elaine Albom Braffman or David Braffman, could somebody else other than those two individuals on this account remove the funds? Can you think of any?
>
> A. Well, if there was a fraud, yes.
>
> (T. 6/19/2009, App. A117)

7. As to Christian Muller:

The last witness in the case was defense witness Christian Muller. He is not a party to this action.

Mr. Muller was currently employed by a temporary services agency. His role was to provide consulting services to Webster Bank. (T. 6/20/2009, App. A120). Ending in 1995, he had worked for Society for Savings and Bank of Boston for a continuous period of 13 years. The first 11 of those years had been at Society for Savings and the last two at Bank of Boston. (T. 6/20/2009, App. A120-123). At no time did Mr. Muller testify as to any actual knowledge of the accounts at issue in this case.

Mr. Muller testified that the banks maintain procedures to maintain the accuracy of their records. He concluded his direct by testifying that accounts do not get lost, to his knowledge. (T. 6/20/2009, App. A124). On cross examination, Mr. Muller reluctantly admitted that accounts can get lost, but not "generally:"

Q: Now, as a matter of fact, when you answered counsel's question concerning that issue, you indicated that accounts are not lost and added the word "generally." Remember that?

A. Yes, I do.

Q. All Right. And the - - fact is that it can happen?

A. In my 44 years - -

Q. I understand in - -

A. - - I haven't seen it happen.

Q. - - your 44 years and - - and that's fine, but I'm asking you whether it can happen and you - - you admit that - - and your answer reflected that when you said "not generally."

A. Yes.

(T. 6/20/2009, App. A126, see also A131).

Like Ms. Norris, Mr. Muller had not been disclosed as an expert witness, nor did he ever testify that his factual knowledge extended to all of the accounts at the various banks he had worked at. The defendant did not move to have him admitted as an expert at trial.

Mr. Muller testified that all of the records of Society for Savings had been maintained electronically. These records were passed from bank to bank as the mergers and acquisitions occurred. Each of the successor banks also maintained their records electronically. (T. 6/20/2009, App. A127-128). The account record was entirely electronic except for the signature card. (T. 6/20/2009, App. A134-135).

Mr. Muller agreed that the Connecticut statute gives banks the discretion to destroy their records after seven years from the date that the account is closed, but does not mandate the banks to do so. (T. 6/20/2009, App. A127-128). The

electronic records are transferred to offsite storage on a disk drive when the account closes. They are destroyed seven years after that. (T. 6/20/2009, App. A129-130). Mr. Muller testified that the records are destroyed to save money on off-site storage (T. 6/20/2009, App. A132-133) but he did not testify that the savings are substantial or that a longer storage period would present any particular burden. Mr. Muller conceded that the State of Connecticut maintains its records indefinitely. (Id.) The bank cannot destroy its records any earlier than is allowed by statute, but it "can go beyond and keep it longer." (T. 6/20/2009, App. A136).

Regarding the possibility of fraud, Mr. Muller testified that the bank's requirement for I.D. when withdrawing funds without a passbook would prevent such an occurrence:

> Q. All right. Why - - I have a situation where the depositors say they've never withdrawn the funds.
>
> A. Hm-hmm.
>
> Q. And the bank says they don't have the funds. I guess one option is that somebody else took the funds out of the account, but that's - - you're saying that - - and tell me if I'm wrong, you'd say that couldn't be done because they'd have to show some identification that persuaded us that either the person was Eugene [sic] Braffman or Elaine Braffman, right?
>
> A. That is correct.
>
> (T. 6/20/2009, App. A137).

Again, this testimony was offered as a fact witness, not as an expert.

Additional facts will be referenced as necessary in the argument.

III. STANDARD OF REVIEW

In this lawsuit between creditors and a debtor, the defendant pleaded the special defense of payment: "The plaintiffs' claims are barred because the defendant or its predecessor in interest has paid the amounts in full owned to the plaintiffs." (App. A36).

"Practice Book § 10-50 provides in relevant part: 'No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus ... payment (even though nonpayment is alleged by the plaintiff) ... must be specially pleaded....' The burden of proving the special defense of payment rests upon the defendant." Selvaggi v. Miron, 60 Conn. App. 600, 601 (2000) (parentheses appear in the original).

"The issue of whether the court held the parties to the proper standard of proof is a question of law. When issues in [an] appeal concern a question of law, this court reviews such claims de novo." Id.

IV ARGUMENT

A. Pursuant to P.B. section 10-50, the burden to prove payment rested with the defendant:

After discussing the testimony, the trial court held that "[u]pon this evidence, the court finds that the plaintiffs have not met their burden of proof." (Decision, App. A15). This holding was made despite the statement in the next sentence that all of the testimony in the case was credible.

The trial court summarized its opinion by stating: "Based upon all of the above evidence, the court finds that the plaintiffs have not sustained their burden of proof with regard to the claims of count one and count two. The plaintiffs have not provided persuasive evidence that the accounts in question have not been paid by the defendant or its predecessors." (Decision, App. A17-18).

The trial court's holding that the "plaintiffs have not provided persuasive evidence that the accounts in question have not been paid by the defendant or its predecessors" begs the question, did the trial court apportion the burden of proof correctly. "The issue of whether the court held the parties to the proper standard of proof is a question of law. When issues in [an] appeal concern a question of law, this court reviews such claims de novo." Selvaggi, 60 Conn. App. at 601.

In Connecticut, our practice book provides that certain defenses can only be raised at trial if they are specifically pleaded by the defendant. Practice Book section 10-50 provides, in relevant part:

> No facts may be proved under either a general or special denial except such as show that the plaintiff's statements of fact are untrue. Facts which are consistent with such statements but show, notwithstanding, that the plaintiff has no cause of action, must be specially alleged. Thus, ... payment (even though nonpayment is alleged by the plaintiff) ... must be specially pleaded ... .

The burden to prove payment belongs to the defendant. Selvaggi, above, at 601-02; Pieri v. City of Bristol, 43 Conn. App. 435, 441 (1996).

"It is fundamental in our law that the party asserting a fact has the obligation of proving it. ... Whenever the existence of any fact is necessary in order that a party may make out his case or establish his defense, the burden is on the party to show

the existence of such fact. ... This is generally so even when the fact to be proven is a negative one." ." Albert Mendel & Son, Inc. v. Krough, 4 Conn. App. 117, 124 (1985) (internal citations and punctuation omitted).

"Generally, in any affirmative or special defense, the burden of proof rests with the defendant." Lumberman's Mutual Casualty Co. v. Scully, 3 Conn. App. 240, 245 n.5 (1985).

Mendel, above, is particularly illustrative because the plaintiff in that case was prejudiced by the fact that the defendant controlled the information necessary to prove or disprove its defense. Requiring the plaintiff to disprove matters known only to the defendant would be patently unfair. "The proper allocation of the burden of proof may be distilled to a question of policy and fairness based on experience in different situations. ... A number of variables are considered in determining where the burden properly lies. One consideration is which party has readier access to knowledge about the fact in question. While this consideration is by no means controlling ... in this case it is persuasive. ... For the plaintiff, the task of showing what [the defendant's] investigation revealed would be difficult, if not impossible. ... We thus conclude that the trial court properly placed upon the defendant the burden of proving matters of which, in all likelihood, it alone would be aware." Mendel, 4 Conn. App. at 124-25 (internal citations and punctuation omitted).

In the present case, the trial court placed the burden on the plaintiffs to prove that "the accounts in question have not been paid by the defendant or its predecessors." (Decision, App. A15 & 17-18). In doing so, the trial court placed an impossible burden on the plaintiffs. The plaintiffs had testified unequivocally as to

what they did. They had not withdrawn the funds. The burden to prove what the defendant did or did not do never belonged to the plaintiffs; it belonged to the defendant. This proof was to be found in the defendant's electronic account records, which the defendant had chosen to destroy to save the cost of off-site storage. There was no testimony in this case that prolonged storage of computer disks is burdensome or impractical.

The trial court in Stripling v. New England Savings Bank, 8 Conn. L. Rptr. 460, 1993 WL 73565, held that the defendant bank had failed to prove its special defense of payment. While the bank's evidence tended to prove that the CD had been paid out, the evidence did not prove that it was paid to the plaintiffs.

In the present case, defense witness Norris explained that the funds could have been withdrawn by someone other than the plaintiffs, if there was a fraud. Whether the potential for a fraud matters to the outcome of this case depends on whether the plaintiff or the defendant has the burden to prove non-payment. If the plaintiff has the burden of proof, then the potential for fraud is somewhat speculative even though it is obvious. But when the burden of proof is placed on the defendant bank, then an essential element of the defense is that payment was made to the plaintiff rather than improperly to a third party.

The trial court erred by placing the burden of proof for the defendant's special defense of payment on the plaintiffs. A trial court's application of an incorrect burden of proof constitutes plain error. American Diamond Exchange v. Alpert, 101 Conn App. 83, 104 n.14 (2007) (citing Herrera v. Madrak, 58 Conn.App. 320, 325-26, 752 A.2d 1161 (2000) (failure to instruct jury on proper burden of proof constitutes plain

error)). As the plain error affects the entire outcome of this case, a remand for a new trial is required. Herrera, above (a remand for a hearing in damages is appropriate where the improper burden of proof did not affect the liability phase of the trial).

B. Connecticut is not the only state that requires the defendant to prove its defense of payment:

The facts of Handy v. U.S. Bank, 177 P.2d 80 (Utah 2008), are considerably different from those of the present case, in that the plaintiff testified that he had not deposited any funds into the account, did not know how his name came to be on the account, and did not know who was authorized to make withdrawals from the account. Id. at 81-82. It is hardly surprising that Mr. Handy did not prevail. Nonetheless, his case provides a good synopsis of the common law pertaining to suits on savings accounts.

When a creditor sues a debtor for payment and provides evidence that the debt exists, the burden shifts to the debtor to prove payment. Id. at 85, citing Kahl v. Pool, 613 P.2d 1078, 1081 (Or. 1980). Likewise, when a depositor sues a bank and provides evidence of deposit and no withdrawal, the bank has the burden to prove payment to the depositor or some other lawful disposition. Id. at 87. Within twenty years, the [common] law presumes tha' the debt has remained unpaid, and the burden is on the debtor to prove payment, but after 20 years, the creditor is bound to show by something more than his bond that the debt has not been paid. Id. at 85

At least five states other than Utah also place the burden to prove payment on the defendant bank once the plaintiff has produced evidence of non-payment. See Pagano v. United Jersey Bank, 648 A.2d 269, 272-73 (N.J. 1994); Olko v. Citibank, 842 N.Y.S.2d 437, 438 (2007); Kahl v. Pool, above (Oregon); Flanagan v. Fidelity

Bank, 652 A.2d 930, 931 n.2 (Pa. 1995); and Blackstone v. First National Bank of Cody, 192 P.2d 411, 413 (Wyoming 1948).

A seventh state, Virginia, achieves the same result by an evidentiary standard. Wool v. Nationsbank of Virginia, 448 S.E.2d 613 (Va. 1994), holds that a bank's lack of records is not competent evidence from which to infer the defense of payment. "There were no indications of payment or cancellation on the certificate. These facts are affirmative evidence supporting a conclusion of non-payment. In contrast, the record contains no affirmative evidence of payment. The bank had no record of the certificate, of paying the certificate, or of execution of a lost certificate affidavit to obtain payment without production of the certificate. NationsBank explains that the lack of any record concerning the certificate results from a standard records retention program that allows destruction of records after ten years. While such a records retention program may be in compliance with industry standards, it does not constitute evidence of payment." Id. at 615.

Application of these common law principles to the present case will not result in an unjust result for the defendant bank. As the Pagano court noted, a bank only needs to keep a minimal amount of records to protect itself in the circumstances presented by the present case. If the depositor is in possession of the original passbook, and the passbook has not been stamped with a withdrawal, then the funds have not been withdrawn. The sole exception to this rule would be if the bank had issued a substitute passbook at the depositor's request. Therefore, the bank can protect itself merely by keeping a list of accounts in which a substitute passbook has been issued.

> Thus one would also assume that in its own interest, banks would resort to the simple expedient of long-term retention of some sort of lost-passbook affidavit record without regard to any more permissive governmental regulation or internal policy.
>
> (Pagano, 648 A.2d 274).
>
> We are of the view that the depositor of funds into a bank savings account is ordinarily entitled to believe, and does in fact expect, that the deposit is entirely safe, that the funds will be indefinitely available, and that no demand need be made and no action need be taken to protect the right to obtain those funds at any time the passbook is presented. ... Consequently, the failure of a depositor to demand payment for an extended period of time is perfectly consistent with the depositor's understanding of what a passbook savings account is all about.
>
> (Id., 648 A.2d at 273-74).

C. **The Connecticut document retention statute, C.G.S. section 36a-40, does not immunize banks for actions brought after they have destroyed their records, and should not be read to achieve that result:**

The document retention statute provides, in full:

> The commissioner may, by regulation adopted in accordance with chapter 54, prescribe periods of time for the retention of records of any Connecticut bank or Connecticut credit union.[1] Records which have been retained for the period so prescribed may thereafter be destroyed, and no liability shall thereby accrue against the Connecticut bank or Connecticut credit union destroying them. In any cause or proceeding in which any such records may be called in question or be demanded of any such bank or credit union or any officer or employee thereof, a showing that the period so prescribed has elapsed shall be sufficient excuse for failure to produce them.

The plain language of the statute only provides a bank with immunization for the destruction of the records themselves. If the legislature had wanted to provide immunity for all "causes or proceedings" brought after the retention period, it would have done so.

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[1] The trial court found that the relevant document retention period was seven years. See Decision at App. A14 n. 7.

Ohio appears to be the only state that grants an immunity coinciding with the retention period. Ohio Revised Code section 1109.69 provides for a mandatory retention period of six years for bank account records. Subsection (F) provides, in full:

> 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.

A similar result ought not to be read into Connecticut's statute absent an amendment by the legislature. To do otherwise would be to create a new, judicially imposed statute of limitations within which a depositor can assert his or her right to withdraw his or her funds. A similar invitation was rejected by the Supreme Court of New Jersey:

> The federal regulations [allowing document destruction after a period of five years] were adopted for the purpose of assisting criminal, tax, or regulatory investigations or proceedings. ... They were not intended to regulate or define the bank-depositor relationship. They did not become the de facto standard for all purposes as urged by [United Jersey Bank] and Amicus [New Jersey Bankers Association]. If the five year record retention requirements were intended to regulate the bank-depositor relationship, the enabling statute, most likely, also would have insulated banks from liability in actions ... implicating records that the bank has destroyed in reliance on the regulations. ...
>
> * * * * *
>
> What the bank seeks essentially is a judicial statute of limitations, to be applied retroactively, barring a claim on a passbook or savings account ... Such a pronouncement must come from the Legislature ... .
>
> (Pagano, above, 670 A.2d at 513 & 514 (internal punctuation and citations omitted)).

D. The facts of Schiavone v. Bank of America are readily distinguishable from those of the present case:

The defendant is expected to rely on Schiavone v. Bank of America, N.A., 102 Conn. App. 301 (2007), as it did in its trial brief. The Court is invited to read this case very carefully, as it does not address the clear import of P.B. 10-50..

The underlying problem is that the facts of Schiavone are very different from those of the present case. First, the plaintiff in Schiavone did not remember whether he had cashed in the certificate that he found in his safety deposit box. He could not testify that he had never received the funds from the bank. His case rested solely on the existence of the certificate, unsupported by testimony from himself or anyone else. As stated in the trial court opinion:

> In February of 2000, [the plaintiff] found the certificate in the safety deposit box and took it to the Essex branch of the defendant. He told the branch manager of the bank that he could not remember whether he had cashed in the certificate or not.
>
> (Id., at 303).

By contrast, Gerald, Elaine and David Braffman all appeared before the trial court to testify unequivocally that they did not cash in the passbooks, did not receive the funds, did not apply for or receive substitute passbooks, did not allow anyone else to have access to the passbooks, and did not authorize anyone else to act on their behalf. Their testimony was deemed to have been credible.

Second, the plaintiff in Schiavone had seen his income drop precipitously during the time that he had held the certificate, from more than one million dollars to approximately $360,000.00, leading to the conclusion that he would have had to access the certificate. Id. at 302. In the present matter, all of the plaintiffs are

successful attorneys. Gerald and Elaine Braffman purchased their house for cash five years before the first of the passbooks was opened. They had never had to take out loans to pay for their children's education at private schools. The inference drawn from the Schiavone case has no application to the present matter.

Third, the income tax returns for the plaintiff in Schiavone demonstrated interest consistent with the certificate during 1988 and 1989, but not thereafter. In the present case, there was no comparable evidence.[2]

Finally, Gerald and Elaine Braffman are judicial magistrates. None of the Braffmans have any incentive to risk damage to their financial and professional status. Gerald Braffman promptly instituted this action after the passbooks were dishonored. The Braffmans' testimony has already been summarized above and need not be repeated here.

On appeal, the plaintiff in Schiavone claimed that the trial court's factual findings were clearly erroneous. The Appellate Court sustained the lower court. On the basis of all of the facts found by the trial court, the Appellate Court held that the trial court could have properly determined that the plaintiff did not sustain his burden of proof. Schiavone, 102 Conn. App. at 305. This is hardly surprising given that the plaintiff in Schiavone could not testify that he had not been paid on the account. There is no discussion in Schiavone as to what the burden of proof is for the special defense of payment, or which party bears the burden. Consequently, Schiavone is inapposite to the present case.

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[2] In this regard, it is expected that the defendant would agree that the plaintiffs provided authorizations to the IRS for all years encompassed in this matter during discovery. Further, a change in interest income of the sort discussed in Schiavone was not demonstrated.

V. CONCLUSION

For the foregoing reasons, this case should be remanded to the lower court for retrial.

RESPECTFULLY SUBMITTED,

THE PLAINTIFFS-APPELLANTS,
Elaine Braffman, et al

By: 

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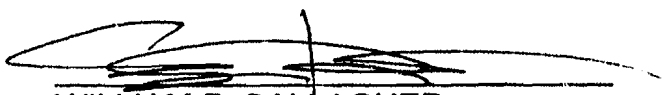
Their Attorneys.

CERTIFICATION RE §67-2

This brief complies with all the provisions of the rules in §67-2.



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CERTIFICATION OF SERVICE

Pursuant to Section 67-2, the plaintiff-appellant has on this 13th day of July, 2009, forwarded copies of this brief with separately filed appendix to the following:

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