SUPREME COURT

STATE OF CONNECTICUT

NO. S.C. 18342

ELAINE ALBOM BRAFFMAN, CUSTODIAN FOR DAVID S. BRAFFMAN, ET AL

-VS-

BANK OF AMERICA CORPORATION

BRIEF OF THE DEFENDANT, BANK OF AMERICA CORPORATION (AS APPELLEE ON THE APPEAL)

SEPTEMBER 2, 2009

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COUNTER STATEMENT OF THE FACTS AND PROCEEDINGS

The plaintiffs in this matter, Elaine Albom Braffman, Custodian for David S. Braffman ("Elaine"), and Gerald Braffman, Custodian for Susannah Joy Braffman ("Gerald"), who are husband and wife, and their adult children, David S. Braffman ("David") and Susannah Joy Braffman-Amen ("Susannah"), claim that the defendant, Bank of America Corporation, wrongfully withheld the funds contained in two certificate of deposit passbook accounts, originally opened with one of the defendant's predecessor entities, Society for Savings ("Society") (Substituted Complaint, Defendant's Appendix at A-1 – A-4). The first of the two accounts was established by Gerald in November of 1987 for the benefit of his daughter, Susannah, who was still a minor at that time (her date of birth is June 30, 1972) (Stipulation of Facts, Defendant's Appendix at A-13). The second account was established by Elaine in November of 1988 for the benefit of her son, David, who was also a minor at that time (his date of birth is March 25, 1975) (Id.).

The plaintiffs claim that they never withdrew the funds in either account, but that, on January 5, 2004, Gerald presented himself at Fleet Bank ("Fleet")[1] in Orange, Connecticut and made demand for payment of the sums allegedly contained in the two accounts. In response to the demand, Fleet's representative, Cynthia Norris ("Norris"), informed Gerald that Fleet had no record of either account and, accordingly, no moneys were available for distribution to him (TR, pp. 101, 103 – 104). The plaintiffs filed the present action on August 13, 2004 (Record, at ___), claiming that the defendant has wrongfully withheld their

[1] Fleet was one of the successor entities to Society, having merged with BankBoston, N.A. f/k/a Bank of Boston Connecticut, which had acquired Society in approximately 1993. See Memorandum of Decision, Defendant's Appendix, at A-35, footnote 1.

money following the demand to be paid the sums allegedly owed for the two passbook accounts (Substituted Complaint, Defendant's Appendix, at A-3, A-5). The Bank vigorously denies this contention and asserts that the evidence indicates that the accounts were closed more than seven years prior to the time of Gerald's January 2004 demand. Specifically, because more than seven years had elapsed since the accounts had been closed by January of 2004, records of the accounts no longer exist, such records having been discarded in the normal course of the Bank's record retention procedures (Memorandum of Decision, Defendant's Appendix, at A-43 – A-47). Accordingly, the defendant asserted the special defense of payment in response to the plaintiffs' claims.

The matter was tried to the Court (Cosgrove, J.) over the course of two days on June 19 and 20, 2008. At trial, the plaintiffs introduced each of the certificate of deposit passbooks into evidence, over the defendant's hearsay objections.[2] Neither of the passbooks reflected that any withdrawals had been made from the accounts, or that the accounts had been closed or otherwise deactivated (Plaintiffs' Exhibits 2 and 3). The plaintiffs also testified as to the circumstances by which the two accounts in question came into existence. In each instance, the accounts were funded by Gerald's mother, the late Mildred Spirer ("Spirer"), who made two gifts to her grandchildren, David and Susannah, when both were still minors. The gift to Susannah in the amount of $33,079.37 was made in November of 1987 when Susannah was then 15 years of age. Gerald, accompanied by Spirer, used the gift money to open a one-year certificate of deposit account at Society, claiming that Spirer had surveyed the rates being offered by various banks and had

[2] The operative portions of the transcript are included in the Defendant's Appendix, at A-28 – A-33, in accordance with Practice Book §67-4(d)(3) and (5).

determined that Society had the best rates. The gift to David for $100,000 was made in November of 1988, when he was 13. In this instance, the account was opened by Elaine who again, accompanied by Spirer, established a three-year certificate of deposit at Society, because Spirer had supposedly identified Society as the bank offering the most favorable rates (TR, pp. 12 – 15, 43 – 44, 93 – 94).

Both Gerald and Elaine testified that Spirer had been adamant that the gifts were not to be used for Susannah and David's college educations.[3] Spirer, they claimed, had reminded Gerald that his father had financed Gerald's post-high school education, and she expected Gerald to do the same for his own children (TR, pp. 88 – 89). Rather, it was their understanding of Spirer's intentions that these gifts were to be held for the children's benefit, and that the money was not be used until a major "life cycle event" had occurred (TR, pp. 3, 6, 11 – 15, 24 – 25, 87 – 89, 93 – 94). Both Gerald and Elaine defined "major life cycle events" as the birth of a child or the purchase of a home although Elaine, when pressed on cross-examination, could not think of any other type of event that would fall into this category. In fact, she conceded that, even if David never had children and never bought a home, he would nevertheless be entitled to the money at some unspecified point in the future, perhaps when he was 50 years of age (TR, pp. 12, 42 – 43, 89).

After establishing the two accounts, Gerald placed both passbooks in his safe deposit box, where they remained until 2004. In late 2003, David allegedly informed his parents that he was considering the purchase of an apartment in New York and,

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[3] Cf. Susannah's deposition testimony, where she stated that her assumption was that her grandmother's gift could be used for her college education (see Plaintiffs' Exhibit 4, pp. 24-25).

coincidentally, Susannah informed her parents that she was pregnant.[4] These were the acts that ostensibly precipitated Gerald's decision, after 16 and 17 years respectively, to liquidate the funds in the two certificate of deposit accounts (TR, pp. 15, 96, 98 – 99).

The plaintiffs also offered the live testimony of David and the deposition testimony of Susannah and the plaintiffs' family accountant, John Salvatore ("Salvatore"). In addition, the plaintiffs called Renee Meucci ("Meucci"), an employee with the Office of the Comptroller of the State of Connecticut's Unclaimed Property Division.

Following the close of the plaintiffs' case, the defendant presented the testimony of two career bankers, Norris and Christian Muller ("Muller"), who, collectively, have more than seven decades of experience in the banking field (TR, pp. 194, 232). Muller was Vice President of Branch Administration for both Society and, later on, BankBoston. In that capacity, Muller was the person charged with the responsibility for ensuring the bank's adherence to its account processing policies and procedures and was responsible for the implementation and maintenance of, as well as compliance with, Society's procedures for the administration of certificate of deposit accounts (TR, pp. 232 – 233). Muller has never worked for the Bank of America, nor has he ever worked for Fleet. In fact, he has not been associated with any of the defendant's predecessor institutions for 13 years, having left BankBoston in 1995 (TR, pp. 230 – 232).

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[4] When cross-examined on this point, Elaine was reminded that Susannah did not give birth until October 9, 2004; therefore, it would have been impossible for Susannah to have informed her parents that she was pregnant at the time that Gerald made his demand upon the defendant for payment of the two certificates of deposit on January 5, 2004. Confronted with this reality, Elaine changed her testimony to indicate that her daughter had merely informed her parents that she was attempting to get pregnant (TR, pp. 39 – 40).

Muller testified that certificate of deposit accounts, such as those at issue in this action, bearing the legend, "INTEREST WILL NOT BE PAID AFTER MATURITY DATE UNLESS RENEWED OR REDEPOSITED" are *autcmatically* renewed unless instructions to the contrary are furnished to the bank by its customer. Thus, the accounts at issue would be automatically renewed at the then-prevailing certificate of deposit rate for the term of the certificate in question (i.e. the one-year rate for Susannah's account, and the three-year rate for David's), and no action whatsoever was required by the customer (TR, pp. 235 – 238). Hence, they would continue to accrue interest which would, in turn, trigger the generation of a 1099 form that would have necessitated reporting on Susannah and David's tax returns as long as the accounts were in existence (TR, p. 279).

Second, Muller testified that, contrary to the plaintiffs' contentions, customers were not required to surrender the passbook to their account at the time the account was closed. Rather, a customer could represent to the bank that he or she has lost or misplaced the passbook, fill out an affidavit to that effect, present suitable identification and then, gain access to his or her money. In such a scenario, the passbook would never, obviously, be stamped or annotated to indicate that the account had been closed. And, because all account records for this type of certificate of deposit are discarded seven years after the account is closed, no record of such affidavit would have existed when Gerald made demand, if the accounts were closed more than seven years prior to January 5, 2004 (TR, pp. 239 – 240).

Third, consistent with the testimony of Norris, Muller testified that it would have been virtually impossible for the defendant to have lost the accounts belonging to Susannah and

David. Despite the mergers of the institutions that were successors to Society, with the concomitant changes in the accounts' numbers, the *names* and *social security numbers* on the accounts did not change, and therefore, the Bank would have been able to locate the accounts had they still existed in January of 2004. Muller was emphatic in stating that it would have been particularly unlikely to have lost *two* accounts, such as the ones at issue in this action, that had been opened over a year apart and merely "sat there" without activity for an extended period. There would have been no reason for the Bank to have touched the accounts and thus, virtually no opportunity to miscode or somehow misplace them. And, while he allowed for the *possibility* that accounts may conceivably become permanently lost, he stated unequivocally that, in his 44 years of banking, he has never even heard of an account being lost or misplaced (TR, pp. 196 – 197, 242 – 245, 247, pp. 280 – 283).[5]

Muller emphasized the strict due diligence and auditing controls that are instituted by banks undergoing merger transactions, noting that, in the first instance, the acquiring entity ensures itself that all accounts in a particular category (eg. certificates of deposit) existing at the predecessor institution are accounted for at the new institution and that, in the second instance, *each individual* account is then verified so that the acquiring bank can confirm that it is properly transferred through the merger process. In fact, when questioned by the Court, Muller stated unambiguously that merging banks never make a "correcting entry" to balance accounts when moneys belonging to customers are unaccounted for. In

[5] The suggestion that the defendant lost both Susannah and David's accounts becomes even more implausible, taking into consideration that a third child or Gerald and Elaine has brought a nearly identical claim against a *different* bank. See infra, at p. 11.

other words, there is no way for the two certificates at issue to have simply been lost (TR, pp. 282 – 283).

Muller also testified as to the regularity of communication that the defendant had with its certificate of deposit customers, particularly as the certificates approached their maturity dates. Specifically, the defendant would, 45 days prior to the maturity date, apprise its customer of the upcoming maturity. If the customer did not instruct the defendant to the contrary, or if there were no response from the customer, the certificate of deposit would be renewed automatically. Such notices were always sent to the account address established by the customer (TR, pp. 241).

Likewise, where there had been no activity on an account for at least four years, the defendant would send a registered letter, return receipt requested, to the account holder, apprising the account holder that the account would be subject to escheatment in a year's time. Upon receipt of such a notice, all the customer needed to do was communicate with the defendant during that one-year interval, which would prevent escheatment from occurring (TR, p. 251).

In addition to the evidence described above, the defendant introduced David and Susannah's tax returns for some of the years during which the plaintiffs claim that their accounts existed, i.e. 1987 – 2004. Salvatore does not keep records of the returns dating back more than a few years. And, conveniently, the Braffmans' own copies were destroyed in a series of "mini floods" to the basement where they stored their personal records (TR, p. 101). Despite the unavailability of tax returns for the years 1987 – 1997, the Bank was able to produce returns for Susannah for the years following, i.e. 1999 – 2003 (Defendant's

Exhibits C – G), as well as three returns for David, 2000, 2002 and 2003 (Defendant's Exhibits H -- J). In Susannah's case, no significant interest from Fleet is noted on any of her tax returns for the years 1998 – 2003 and, in David's case, no interest is reported for the few returns available for him, i.e. 2000, 2002 and 2003 TR, pp. 146 – 157). On none of them does Schedule B (which denotes interest and dividend income) reflect sufficient interest from the defendant or any of its predecessors to account for the interest on the certificates of deposit in question (TR, pp. 146 – 157).

Gerald testified that it was too difficult a task to keep track of all the 1099s that were being issued annually for his children. Nevertheless, he also testified that, beginning in 2000, he had consolidated all of his children's tax portfolio securities with a single brokerage firm, that resulted in just a single 1099 being issued (TR, pp. 99, 107, 153 - 154). Recognizing the implausibility of the claim that he had not been mindful of the status of the certificate of deposit accounts, Gerald testified that the responsibility for the monitoring of his bank accounts fell to Salvatore, implying that it was his accountant who failed to notice the allegedly-missing 1099s (TR, pp. 164 – 170).

Salvatore, whose testimony was offered through his deposition, indicated that he would have notified Gerald of any discrepancies in the tax information that had been provided. Specifically, when asked how he went about preparing the plaintiffs' annual tax returns, Salvatore testified:

> Q: Do you have this list of the documentation committed to memory, or is it something you would have to look at to fully and completely recite it for me?
>
> A: Probably 99 and nine-tenths of it is committed to memory. What I would do—let's clarify this. What I do and what I do *with each and*

> *every client*, if they're not supplying me with a tax organizer, we have a copy of the previous year's tax return in front of me; and as we're going through the information, I will take it off against the previous year's tax return, which is the same as ticking it off against a tax organizer ...

Plaintiff's Exhibit 4 (p. 16, lines 11-23, emphasis supplied). Accordingly, Salvatore would have made inquiry of Gerald about any "missing" 1099s for the two accounts in question and, if interest on the accounts had been reported in one year, but was not reported in a subsequent year, Salvatore would have asked Gerald whether a 1099 had been issued for those accounts.

Furthermore, Susannah's tax return for 1998 (Exhibit B) shows insufficient interest from Fleet Bank to correspond to the certificate of deposit established for her benefit, indicating that the account had certainly been closed by that point in time—and may well have been closed for some time prior thereto. This fact is entirely consistent with the Bank's belief (as testified by Norris, who had been unable to locate the account in January of 2004 when Gerald made demand for it) that the accounts had been closed for at least seven years prior to January of 2004 (TR, p.197). The same holds true for David's account, whose tax returns were available dating back to 2000.

Following the conclusion of the evidence, the parties submitted memoranda of law. The plaintiffs made arguments based upon case law from other jurisdictions that the Trial Court should adopt a burden-shifting analysis, under which the plaintiffs, simply by introducing the uncancelled passbooks, had established a prima facie case. Thereafter, according to the plaintiffs, the burden should shift to the defendants to prove payment. The defendants argued that the plaintiffs' position was in direct conflict with Schiavone v. Bank

of America, 102 Conn. 301 (2007) in which the Appellate Court held the plaintiff was required to do more than merely introduce an unpaid passbook into evidence to establish a prima facie case.

The Trial Court issued a Memorandum of Decision on December 11, 2008 (see Defendant's Appendix, at pp. A-34 – A-51) in which the Court found all issues in favor of the defendant. In particular, the Trial Court devoted a substantial portion of its decision to a discussion of the proper allocation of the burden of proof. The Court rejected the plaintiffs' contention that the plaintiffs' mere introduction of uncancelled passbooks[6] shifted the burden of proof to the defendant. Rather, the Court held that "[t]he burden of proof by a fair preponderance of the evidence *remains on each party with regard to their respective assertions*" (Memorandum of Decision, Defendant's Appendix, at A-41) (emphasis supplied). In other words, the plaintiffs would bear their burden of proof on the issue of nonpayment of the accounts' proceeds; the defendant would bear its burden of proof on its special defense of payment of the accounts' proceeds.

The Trial Court then delineated the evidentiary ledger that had been created by both sides at the trial, ultimately finding that the defendant had presented the more persuasive evidence on the issue of payment. On the plaintiffs' side of the evidentiary ledger is (a) their presentation of the passbooks into evidence and (b) their contention that they never requested payments of the passbooks' proceeds until January of 2004. Id.

[6] The Trial Court held: "*Schiavone* approved the trial court's weighing of *all* the evidence in evaluating the plaintiff's claim of non-payment." Memorandum of Decision, Defendant's Appendix, at A-41 (emphasis in original).

On the other side of the ledger, the defendant introduced evidence that (a) there was no record of either account when the January 2004 demand was made, (b) the defendant employs scrupulous procedures to ensure that accounts are properly maintained, particularly when financial institutions undertake mergers (c) records of accounts, including affidavits regarding lost passbooks, are discarded seven years after accounts are closed, (d) no interest had been reported on the plaintiffs' tax returns for the accounts on any of the returns they produced, dating back to 1999, suggesting that the accounts had been closed prior to then, (e) Salvatore utilized a procedure by which he compared the previous year's tax return to the current year's records to determine if any source of income reported on the prior year's return was omitted in the current year and, had he detected such an absence, he would have questioned Gerald about it, (f) the plaintiffs' contention that the defendant had lost two separate accounts, created a year apart, by different family members, under different names and social security numbers and (g) judicial notice taken of another lawsuit brought by Matthew Braffman, making substantially similar allegations against another bank[7] (the incredulity of which was not lost on the Trial Court).[8] Id., at pp. 10 – 12, 16 – 17). The Trial Court held that, "[b]ased upon *all* of tne 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." Memorandum of Decision, Defendant's Appendix, at A-50 (emphasis supplied).

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[7] Matthew Braffman v. Webster Bank, Superior Court for the Judicial District of New Haven, Docket Number CV 07-5013397S (noted by the Trial Court in its Memorandum of Decision, at p. 17)

[8] "This court finds it *improbable* that two banking institutions would lose three separate accounts held by members of the same family" (Memorandum of Decision, Defendant's Appendix at A-50) (emphasis supplied).

ARGUMENT

I. THE TRIAL COURT PROPERLY ALLOCATED THE BURDEN OF PROOF, REGARDING THE PLAINTIFFS' CLAIM OF NON-PAYMENT AND THE DEFENDANT'S SPECIAL DEFENSE OF PAYMENT.

A. Standard of Review

"The issue of whether the court held the parties to the proper standard of proof is a question of law, which this court reviews de novo." American Diamond Exchange v. Alpert, 101 Conn. 83, 105, *cert. denied*, 284 Conn. 901, *on remand*, 2008 WL 3852739 (2007), citing Litchfield Asset Management Corp. v. Howell, 70 Conn. App. 133, 139, *cert. denied*, 261 Conn. 911 (2002).

B. The Plaintiffs Have Mischaracterized the Manner in Which the Trial Court Allocated the Burden of Proof and, Even if There Were Any Ambiguity as to How the Trial Court Did So, the Plaintiffs Have Failed to Create a Proper Record for Review of Such Issue.

The focal point of the plaintiffs' argument and, indeed, the sole material issue upon which they base this appeal, is their inaccurate claim that the Trial Court improperly assigned the burden of disproving the defendant's special defense of payment to the plaintiffs (Plaintiffs' Brief, at p. iii). It is a fallacy to suggest that this describes how the Trial Court approached its decision-making function in this case. By focusing on two isolated sentences in the final paragraph of a 17-page Memorandum of Decision, while simultaneously ignoring the detailed discussion of the Trial Court's reasoning in allocating the burden of proof the way it did on pages 5 – 8 of that Memorandum (see Defendant's Appendix, at A-38 – A-41), the plaintiffs have attempted to create an issue where none truly exists.

The Trial Court's Memorandum of Decision makes clear that it never placed the burden of disproving the defendant's defense of payment upon the plaintiffs. To the contrary, it assigned each party their/its respective burden, in the manner consistent with the rules of practice (particularly Practice Book §10-50), and decided the case based upon an evaluation of **all** the evidence, an evaluation that culminated in its decision that the plaintiffs' evidence was less persuasive and less sufficient than the evidence provided by the defendant. The defendant submits that there were no ambiguities regarding the Trial Court's decision on this issue, and there is no reasonable basis upon which the plaintiffs can support their belief that the Court's ruling "begs the question, did the trial court apportion the burden of proof correctly" (Plaintiffs' Brief, p. 19).

Nevertheless, if any ambiguity remains, it was incumbent upon the plaintiffs to address any such uncertainty through a Motion for Articulation pursuant to Practice Book §66-5. This Court has repeatedly held that it is the obligation of the appellant to create a proper record for review. Recently, in Stiffler v. Continental Ins. Co., 288 Conn. 38 (2008), this Court held: "It is the appellant's responsibility 'to move for an articulation or rectification of the record where 'he trial court has failed to state the basis of a decision ... to clarify the legal basis of a ruling ... or to ask the trial judge to rule on an overlooked matter.'" Id., at 52, quoting Bingham v. Department of Public Works, 286 Conn. 698, 704, n. 5 (2008). See also Dickinson v. Mullaney, 284 Conn. 673, 681 (2007); Schoonmaker v. Brunoli, 265 Conn. 210, 232 (2003).

In Dickinson, this Court remarked, "[i]t is axiomatic that '[a]n appellate tribunal cannot render a decision without first fully understanding the disposition being appealed.'"

Dickinson v. Mullaney, 284 Conn. at 681, quoting Desrosiers v. Henne, 283 Conn. 361, 366 (2007). In the present case, the plaintiffs appear to be conceding that the Trial Court's decision is ambiguous when they ask rhetorically, "did the trial court apportion the burden of proof correctly." Having perceived such an ambiguity, "'the petitioner has a duty to provide this court with a record for review ... The [petitioner's failure to comply with this section [Practice Book §66-5] renders the judgment inadequate and] ... the petitioner's [claims] must fail.'" Dickinson v. Mullaney, 284 Conn., at 682, quoting Evans v. Commissioner of Correction, 37 Conn. App. 672, 689, *cert. denied*, 234 Conn. 912 (1995). For this reason alone, the plaintiffs' appeal must fail.

C. The Plaintiffs' Presentation of the Uncancelled Passbooks Did Not, Absent More, Relieve Them of Their Responsibility to Prove the Defendant's Nonpayment of the Proceeds of the Accounts. Reliance Upon Schiavone v. Bank of America was Proper.

In the proceedings below, the Trial Court properly allocated each party's burden of proof in accordance with both the rules of practice and the Appellate Court's holding in Schiavone v. Bank of America, 102 Conn. App. 301 (2007). The plaintiffs argue that their mere introduction of the uncancelled passbooks into evidence, in and of itself, was sufficient to establish their prima facie case, particularly with respect to the element of non-payment of sums owed by the defendant. Their contention is that such evidence automatically and immediately shifted the burden of persuasion to the defendant to prove payment. While this may present a provocative academic issue for this Court's consideration, it bears no resemblance to what actually transpired at trial.

In point of fact, the plaintiffs produced appreciably more evidence than the passbooks themselves. In addition to the testimony of Gerald and Elaine, only a small

fraction of which involved the introduction into evidence of the passbooks, their son David and Meucci provided live testimony, while the deposition testimony of Susannah, as well as Salvatore's, were introduced through exhibits (Plaintiffs' Exhibit 5 and 4). In other words, the plaintiffs provided a substantial amount of testimony and other evidence, aside from the introduction of the passbooks.

Thereafter, the defendant did *not* move for dismissal of the case, pursuant to Practice Book §15-8. To the contrary, the defendant called two witnesses, Norris, a current employee of the defendant, and Muller, a former employee of the defendant's predecessor, Society. The defendant's case in chief began on the afternoon of the first day of trial and continued into the late morning of the second day. Therefore, this was not a situation in which the plaintiffs merely presented the uncancelled passbooks, and rested their case. Nor was it a situation in which the defendant declined to proffer evidence. Under the holding of the Appellate Court in Schiavone, the Trial Court's decision was proper in light of the evidence presented at trial.

Much of the plaintiffs' argument is devoted to the incorrect proposition, supported by case law from other states, that a depositor with an original, uncancelled passbook is entitled to payment, and that possession of such a passbook shifts the burden of proof to the defendant. Nevertheless, contrary to the plaintiffs' contention, our Appellate Court has recently affirmed, in a per curiam opinion, a trial court's finding that a "plaintiff's possession of the original certificate of deposit, in light of the [defendant] bank's procedures [regarding administration of certificate of deposit accounts], *was not proof that [the plaintiff] had not cashed in that certificate*," and that the burden of proof that a certificate of deposit has not

been paid *lies with the plaintiff.*" Schiavone v. Bank of America, N.A., 102 Conn. App., at 304 (emphasis added).

The Schiavone decision is directly applicable here, and the facts of that case closely mirror many aspects of this case. In Schiavone, the plaintiff brought suit against the bank, demanding payment of funds in a certificate of deposit account that he opened in August 1988, which had a maturity date of February 1989. Id., at 302. The plaintiff testified that he placed the account passbook in a safe deposit box in 1988, later found the passbook in that safe deposit box and made a demand for payment on the bank in February 2000. Id., at 303. The plaintiff possessed the original, uncancelled passbook, yet the bank had no record of the account. Id. The defendant relied upon the *defense* of payment, evidenced by the conspicuous absence of any account records which strongly suggests that the account was closed more than seven years prior to the plaintiffs' demand. The Trial Court found in favor of the defendant on the grounds that the plaintiff had failed to meet his burden of proof, and the Appellate Court affirmed.

On appeal, the plaintiff claimed that several findings of the Trial Court were clearly erroneous. The Appellate Court rejected the plaintiff's argument, finding that the trial court's consideration of the bank's policies and procedures concerning the administration of certificate of deposit accounts was proper. Id., at 304 – 305. Likewise, the Trial Court had properly considered evidence of the bank's document retention policy, specifically that, if the entire amount of the account were withdrawn, the account would be closed, and the bank would maintain records of the account for only seven years. Id., at 303. Thus, because the bank had no record of the plaintiff's account, the Court found no error in the

trial court's inference that the proceeds in the plaintiff's account had been withdrawn and the account had been closed prior to 1993 (more than seven years prior to the plaintiff's demand). Id. Also held admissible was the bank's practice that it would routinely mail statements to the plaintiff and, in addition, mail notices ten days prior to the maturity date of a certificate of deposit. The Appellate Court affirmed the propriety of the trial court's inference that the plaintiff had received such statements which would remind him of the account's existence and the upcoming maturity thereof, given that he lived at the same address during the entire period in question. Id., at 304.

Similarly, in this case, Muller testified that the Braffmans would have received maturity notices approximately 45 days prior to the maturity date on each of the accounts in question. Thus, in the case of Susannah's certificate of deposit, the Braffmans would have been sent maturity notices in late September of each year, while with David's account, the Braffmans would have received notices in late September every third year, beginning in 1991. It is difficult to imagine, therefore, why Gerald claims he was not mindful of the accounts' existences, given the annual and triennial reminders he was receiving of Susannah and David's accounts respectively.[9]

As in the present case, the defendant in Schiavone presented evidence that it was the bank's policy that presentment of a passbook was *not* a prerequisite to withdrawal where a customer presented two forms of identification, thus negating the plaintiff's

[9] The Trial Court noted that, [a]t the time these accounts were opened and until the date of trial Elaine and Gerald Braffman resided on Brookwood Drive in Woodbridge, Connecticut, which they purchased for cash in 1982" (Memorandum of Decision, Defendant's Appendix, at A-42). Thus, there is no question that the defendant mailed its notices to the plaintiffs at the proper address, i.e. the one at which each of the parental custodians resided continuously since prior to the accounts' creation.

argument that his possession of the original passbook demonstrated that he had not cashed in the certificate of deposit. Id., at 303. Finally, the plaintiff's federal income tax returns were properly considered as they showed interest from the bank for two years in "amounts that could have included the interest that would have accrued for the certificate at issue. The subsequent income tax returns did not reflect such interest." Id. This tended to prove that the discontinuation of the reporting of interest was the likely result of the closing of the CD account, i.e. when the proceeds would have been paid to the plaintiff years earlier. In light of the bank's evidence, the Court affirmed the trial court's finding that the *plaintiff failed to meet his burden of proof* that payment had not been made on the account. Id., at 305 (emphasis added). Moreover, despite the plaintiffs' contentions to the contrary (see plaintiffs' brief at pp. 26 – 27), the Schiavone facts are remarkably similar to the facts of this case.

First, the plaintiff in Schiavone testified that he could not recall whether he had redeemed the certificate of deposit at issue. And, while it is true that the plaintiffs maintain that they distinctly recall *not* redeeming the two passbook accounts, and while the Trial Court believed that the plaintiffs were testifying credibly, it also found that their memories were less than fully reliable, given their personal circumstances. Coupled with the lack of any corroborating documentary evidence, the Trial Court reached the factual finding that the plaintiffs had simply forgotten that they had redeemed the certificates years earlier:

> It is clear to the court, however, that the plaintiff parents were very successful and busy individuals. The events that were critical to the court's determination occurred more than a decade before the plaintiffs' testimony in this case. With such a lapse of time, the court is wary of relying solely upon memory testimony. For the significant time period in this case - - the plaintiff nor the defendant possessed or offered

> documentary evidence that would have corroborated the plaintiff's testimony ... It is understandable to the court that the plaintiffs may have forgotten filing lost or misplaced passbook affidavits as early as 1989 or 1991 ... It is also significant to the court that this suit involves not one but two accounts opened on separate dates and under separate social security numbers. It is unlikely that the defendant would lose not one, but two, of the plaintiffs' accounts. *Furthermore the court takes judicial notice of the case of Matthew Braffman v. Webster Bank, Superior Court judicial district of New Haven, Docket No. CV 07 5013397, in which another child of Elaine and Gerald Braffman asserts that Webster Bank refused to pay on a certificate of deposit opened in 1989 ... The claims made by Matthew Braffman are substantially similar to the claims asserted in this case. The court finds it improbable that two banking institutions would lose three separate accounts held by members of the same family.*

Memorandum of Decision, Defendant's Appendix, at A-48 – A-50 (emphasis supplied).

Second, the plaintiffs' family was apparently dealing regularly with hundreds of thousands of dollars for their various educational commitments, home purchase and individual stock portfolio funding for each of the children. At trial, Gerald and Elaine's testimony portrayed Spirer as an exceedingly careful and discerning person, who insisted that the significant financial gifts to her grandchildren be invested in the bank that had the best rate of return on its certificates of deposit. They claimed that Spirer had researched this issue and had determined in both 1987 and 1988 that Society had the best rates available. Nevertheless, the testimony also indicated that Spirer did not pass away until 1993, several years after each of the accounts came to their initial maturity dates (TR, pp. 5, 43 – 44).[10] There was no testimony, however, that Spirer, Gerald or Elaine ever re-evaluated the rates of area banks to consider whether it made good financial sense to *keep* the money at Society, rolling over at whatever rate happened to be in effect on the maturity

[10] The 1987 certificate had a one-year term and reached its maturity in 1988. The 1988 certificate had a three-year term and reached its maturity in 1991 (Plaintiffs' Exhibits 2, 3).

dates of the two certificates.[11] Instead, Gerald testified that, after opening the accounts, he simply stored the passbooks in his safe deposit box and thereafter put the matter of the accounts' statuses "out of his mind" (TR, pp. 96 – 97, 145).

At trial, Gerald portrayed himself as nothing short of a financial automaton, working long days at his law practice, often until the wee hours of the morning, to earn enough to support his family. And support them, he did. According to his testimony, he paid for a total of 58 years' worth of private education for his children[12] and still had enough left over to amass securities in stock portfolios worth $250,000 apiece for each of his three children. He also paid cash for the residence he purchased in Woodbridge in 1982, for $180,000. He boasted that his accountant informed him that Gerald earned as much money as "senior partners at large Waterbury law firms." In short, Gerald presented himself as both a money-making machine *and* a financial genius (TR, pp. 158 – 163). Nevertheless, Gerald's

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[11] In fact, the evidence established that a *third* certificate of deposit account was opened with another gift from Spirer made to Gerald and Elaine's son, Matthew at *First Constitution Bank* n/k/a Webster Bank ("FCB") in 1989. By 1989, however, the one-year certificate of deposit established for Susannah would have reached its maturity anniversary at least once, i.e. in November of 1988. If the Braffmans were truly intent on keeping their children's gift moneys in the institutions that had the best rates, why didn't they switch Susannah's account to FCB in 1989? Obviously, by 1989, Spirer had determined that FCB's certificate of deposit interest rates were higher than Fleet's; otherwise, Matthew's account would have been opened at Fleet instead of at First Constitution Bank.

[12] The evidence presented by Gerald and Elaine indicated that (a) Susannah attended Ezra Academy, a private Conservative Jewish grammar school in Woodbridge from kindergarten through sixth grade, then entered Hopkins School where she completed her junior and high school education, then went to the University of Pennsylvania for her undergraduate and law degrees (20 years), (b) David attended Ezra Academy from kindergarten through eighth grade, detoured briefly into public school for the first two years of high school before entering Hopkins for his junior and senior years, followed by four years as an undergraduate at the University of Pennsylvania and three years at the Boston University School of Law (18 years) and (c) Matthew followed the same track as his sister had at Ezra Academy and Hopkins, before departing for Brown University and the University of Miami Law School (20 years).

trial testimony also established that he simply forgot that he was not receiving 1099 forms from the Bank to report the interest on these accounts that he claims existed until 2004.

Gerald was exceedingly proud of the fact that he never had to borrow money to pay for his children's education, funding the entire sum from his current earnings. It is certainly more than plausible that, with all of this spending and reallocation of cash resources taking place over the years, Gerald and Elaine could easily lose track of the two certificate of deposit accounts at issue. And, while the Schiavone plaintiff saw a precipitous drop in his personal income, strongly suggesting that he needed access to the money in his certificate of deposit years before he brought his lawsuit, the suggestion is equally strong that the plaintiffs, dealing with such significant sums, disposed of the two accounts in question years earlier.

Third, the Schiavone plaintiff's tax returns showed the absence of interest income on the account at issue after 1989. Likewise, David and Susannah's tax returns showed no interest attributable to the accounts. This is consistent with Salvatore's testimony that he would have alerted Gerald to the absence of any 1099 for interest on these accounts, following any year in which such 1099s had been produced. Moreover, it was the *plaintiffs* who failed to produce tax returns for all of the years in question, carelessly maintaining such documentation in their flood-prone basement.[13]

Finally, and rather remarkably, the plaintiffs assert that, unlike the plaintiff in the Schiavone case, their testimony should go unquestioned—merely because they are all

[13] Gerald testified that the returns were lost in "a series of mini floods." One must wonder why, after the *first* of such floods, he didn't employ measures to safeguard important records that were later destroyed in the *subsequent* floods.

lawyers, and the two elder Braffmans work as Small Claims Court Magistrates. Sadly, it is hardly true that, simply because a person is an attorney and has a lot at risk professionally and reputationally, that is a sufficient disincentive to stop a person from misrepresenting the truth. Were this the case, there would have no need for our General Assembly to have created the Client Security Fund, as provided by C.G.S. §51-81d. In relevant part, this statute provides for the establishment of a fund to "reimburse claims for losses caused by the dishonest conduct of attorneys admitted to the practice of law in this state and incurred in the course of an attorney-client relationship ..." And, anyone who has been practicing law for at least 25 years is certainly cognizant of the tragic circumstances involving the late Richard Nahley, the judge of probate for the City of Danbury, who bilked clients out of millions of dollars.[14]

In any event, it is simply not the case that the Trial Court disbelieved the plaintiffs. In fact, the Trial Court remarked that it "finds all of the testimony in this case provided by the plaintiffs and the defendant was credible" (Memorandum of Decision, Appendix, at A-48). Rather, the Trial Court was confronted with a very typical situation, i.e. that of conflicting testimony, in which it indisputably possesses the sole right to resolve such differences as it sees most fit. Pandolphe's Auto Parts, Inc. v. Town of Manchester, 181 Conn. 217, 220 (1980).

Like it or not, the Braffman plaintiffs are remarkably similar to the Schiavone plaintiff, and the result in this case should be no different from the result in that one.

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[14] See Richard L. Madden, "Mystery Envelops Case of Judge Found Hanged," New York Times, November 29, 1987, reproduced in the Appendix, at A-56 – A-57.

D. Alternatively, Even if the Burden of Proof Shifted to the Defendant, Following the Plaintiffs' Introduction Into Evidence of the Uncancelled Passbooks, the Defendant Presented Ample Credible Evidence of Payment, Allowing it to Rebut Successfully any Evidence of Nonpayment.

The defendant's evidence persuasively demonstrates that plaintiffs' accounts had been redeemed and closed more than seven years prior to Gerald's January 2004 demand. As in Schiavone, the defendant's record retention procedure called for disposing of all closed account records seven years after the account is closed. See Conn. State Agen. Regs. 36a-40-3(c)(3)(F) (requiring banks to maintain records of certificate of deposit accounts for "seven years after date paid."), see also Conn. State Agen. Regs. 36a-40-3(c)(3)(B) and (E) (requiring banks to maintain records of affidavits of lost passbooks for seven years and records of unclaimed accounts for three years after escheatment to the State). See Defendant's Appendix, at A-60. The fact that the defendant has no records of the plaintiffs' accounts, therefore, suggests that payment was made, and the accounts were redeemed and closed more than seven years prior to January of 2004.

The defendant also introduced substantial evidence of its procedures regarding mailing statements and notices to account holders. See TR, at pp. 241, 251. For instance, it cannot be seriously disputed that the plaintiffs received regular notices from the defendant regarding these accounts. In particular, the defendant's policy called for a renewal notice to be sent to an account holder approximately 45 days prior to the maturity date of the certificate of deposit account, apprising the account holder that the account would be automatically renewed unless the customer requested that the defendant close the account. Furthermore, if the account holder allowed the certificate to renew automatically for four years beyond the initial maturity date, the defendant would have sent

the customer an escheatment notice approximately a year prior to the fifth anniversary of the account, notifying the account holder that, due to inactivity, the account would escheat to the State of Connecticut within a year. Therefore, the defendant's evidence strongly suggests that the plaintiffs were well aware of the procedures governing the administration of their accounts, and received the defendant's notices regarding the accounts' status, particularly those regarding renewal and/or escheatment.

Moreover, the defendant easily countered the plaintiffs' contentions that they were not given any instructions as to how the passbook savings accounts would be administered, given the notations on the passbooks themselves: "INTEREST WILL NOT BE PAID AFTER MATURITY DATE UNLESS RENEWED OR REDEPOSITED." It is disingenuous for Gerald to claim that he never read this legend, when juxtaposed to his testimony about how concerned he was to honor the spirit of his late mother's intentions by ensuring that the gifts to her grandchildren earned the highest rate possible. Why wouldn't someone, mindful of such an important concern, not bother to read a scant 12 words of clear, all-uppercase text found two inches below the interest rate and date of maturity and 1½ inches above the line on which the date and amount of the opening balance appears. He testified that, at the time the account was opened, all he focused on was the interest rate and the opening balance. Thus, on one hand, Gerald wants this Court to believe that he is an extraordinarily talented lawyer, earning as much in his two-person practice as a senior partner at large Waterbury law firms; on the other hand, he is so careless that he neglects to read a large print 12-word, all-uppercase legend found smack-dab between the interest rate and the opening balance in the passbook.

Moreover, Muller testified that, in 1987 and 1988, the defendant's procedure provided that the certificate would either renew automatically upon maturity for the same term as the original term or, at the customer's request, the defendant would send a check to the customer for the account proceeds, including all interest accruing thereon, at maturity. All four of the plaintiffs are attorneys, two of whom have been licensed to practice in the State of Connecticut for more than 45 years and 33 years respectively. The plaintiffs, as sophisticated and well-educated individuals, surely cannot deny that they were aware of the methods by which their accounts would be administered.

Furthermore, the lack of records of escheatment to the State of Connecticut does not support a conclusion that the account proceeds were never paid to the plaintiffs, as they contend.[15] In fact, it goes to prove the contrary. Considering the defendant's lack of records for these accounts, coupled with the absence of any escheatment records with the State of Connecticut's Treasurer's Unclaimed Property Division, the only reasonable conclusion to draw is that the accounts were liquidated and closed more than seven years before Gerald's January 5, 2004 demand, because the defendant, in the normal course of

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[15] In view of Connecticut's escheatment provisions, the plaintiffs' reliance upon the case of Pagano v. United Jersey Bank, 276 N.J. Super 489 (1994) is misplaced. In particular, the plaintiffs have cited that portion of the Pagano holding that states: "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* ..." Id., at 498 (emphasis supplied); see plaintiffs' brief, at p. 24. This proposition is wholly inapplicable in Connecticut, however, given the uncontroverted testimony of Meucci of the State of Connecticut's Unclaimed Property Division that "It's a mandated law" that funds in inactive bank accounts be turned over to the State. TR, at 104. Hence, in Connecticut, there is no reasonable basis for a depositor to believe that the funds in his account will remain "indefinitely available."

its record retention procedures, disposed of all closed account records seven years after the account was closed.

Here, as in Schiavone, the defendant's evidence supported the Trial Court's finding that the plaintiffs' accounts were redeemed and closed more than seven years prior to plaintiffs' 2004 demand, thereby supporting its conclusion that "the plaintiffs have not sustained their burden of proof ... that the accounts in question have not been paid by the defendant or its predecessors." Memorandum of Decision, Defendant's Appendix, at A-50 – A-51.

Finally, there was no evidence presented at trial to suggest that a *third party* somehow defrauded the defendant into paying the accounts' proceeds to such third party. The plaintiffs have attempted to distort Norris's testimony to imply that the *possibility* of a third party perpetrating such a fraud is a reasonable *probability* that such a fraud was, in fact, perpetrated. See plaintiffs' brief, at pp. 15, 21. In doing so, they suggest that it was not only the defendant's burden to prove that payment had been made, but also to *disprove* that payment had not been made to a fraudulent third party.

The plaintiffs' testimony, particularly Gerald's, is that, after opening each of the accounts, he placed the passbooks in his safe deposit box where they remained until 2004 when he removed them and presented them to the defendant. Neither David, nor Susannah indicated that they were even aware of the accounts' existence until after Gerald had made demand. In fact, there was no evidence that, anyone other than Spirer (who passed away more than a decade before the 2004 demand), Gerald, Elaine and Salvatore, was even aware of the accounts' existence. It is almost laughable for the plaintiffs to

suggest that there is any realistic probability that a third party would know of the accounts' existence, and somehow convince the defendant to pay such third party the proceeds of such accounts. It's even more ludicrous to suggest that a conspiracy was involved in such a fraud, insofar as it would be necessary for two people to perpetrate it, i.e. one to impersonate Gerald and another to impersonate Elaine.

E. The Trial Court Properly Construed the Document Retention Statute.

In contending that the Trial Court improperly interpreted the document retention provisions of C.G.S. §36a-40,[16] by equating the provisions of this statute to an actual statute of limitations period, the plaintiffs have misinterpreted the Trial Court's holding. There is nothing in the Memorandum of Decision to suggest that a limitations period was in play.

To the contrary, the evidence at trial merely went to show that the defendant's record retention procedure called for disposing of all closed account records seven years after the account is closed (TR, p. 242). See Conn. State Agen. Regs. 36a-40-3(c)(3)(F) (requiring banks to maintain records of certificate of deposit accounts for "seven years after date paid."), see also Conn. State Agen. Regs. 36a-40-3(c)(3)(B) and (E) (requiring banks to maintain records of affidavits of lost passbooks for seven years and records of unclaimed accounts for three years after escheatment to the State). The fact that the defendant has no records of the plaintiffs' accounts, therefore, suggests that payment was made, and the accounts were redeemed and closed more than seven years prior to January of 2004. The absence of the account records, therefore, is merely part of the substantial body of

[16] The text of this statute is reproduced in the Defendant's Appendix, at A-58.

evidence adduced by the defendant, showing that payment of the accounts proceeds had been made to the plaintiffs more than seven years prior to Gerald's demand in 2004.

Curiously, the plaintiffs cite the language of the document retention statute, including the provision that "no liability shall thereby accrue against the Connecticut bank or Connecticut credit union destroying them," but simultaneously suggest that the defendant should nevertheless be held liable in this instance for the destruction of the very records it is permissible to destroy under that statute. They even attempt to utilize Meucci's testimony to suggest that, if the State of Connecticut can keep records of accounts indefinitely, the defendant should be able to do so as well. Meucci is not the Commissioner of Banking for the State of Connecticut, however, so her opinion as to the feasibility of the defendant keeping records indefinitely for every closed account in its institutional history is nothing that the Trial Court was obliged to credit.

Nevertheless, the plaintiffs persist in hectoring the defendant for not doing what is *possible*, as opposed to doing that which is practicable. Certainly, if the defendant's resources were limitless, it could probably afford to keep records of each and every one of the accounts that have been closed during its entire institutional history. It chooses not to, and the fact that such choice may be predicated upon financial considerations makes it no less legitimate of a choice. The incontrovertible fact remains that the General Assembly of Connecticut saw fit to pass legislation, permitting financial institutions to discard their records of accounts closed more than seven years earlier. And, equally significantly, the General Assembly purposely immunized financial institutions that opted to do so.

The legislative hearings on the bill that evolved into this statute illustrate this point precisely: "This bill will authorize the banking commissioner to establish schedules for the retention of records, and after the expiration of the time prescribed by him, a bank might destroy the records. *It would relieve a bank from a possible claim that it was negligent in failing to retain records longer than the period prescribed by the Commissioner.*" H. 259, 1963, H 67 (Conn. 1963). See Defendant's Appendix, at A-53. Moreover, the legislature expressly acknowledged the practical problems of expense and space of maintaining records of long-closed accounts: "This bill would relieve the banks of substantial expense in terms of record keeping and the further problem of space required." Id., at A-54.

Moreover, while not expressly incorporating a provision equating the retention period to a statute of limitations period, clearly this was in the mind of our legislators in defining the objectives and purposes of the legislation: "It has been the feeling of the department [of Banking] that a bank should retain its records as long as they may be needed for any right of dissent, *which usually depends on the statutes of limitation.*" Id. (emphasis supplied).

Clearly, the objectives of the statute and its accompanying regulatory scheme are to provide a practical mechanism for determining when records of closed accounts may be discarded and to relieve financial institutions of any liability for their failure to produce such records, once such periods have run. The plaintiffs seek to eradicate the latter of these two objectives by seeking to hold the defendant liable for being unable to produce the records of their closed accounts. In doing so, the plaintiffs either fail to appreciate, or choose to ignore, the strong circumstantial evidence that the defendant adduced because of the *absence* of those very records. It is no less persuasive that there are *no* records of the two

accounts at issue, insofar as this supports the defendant's claim that the accounts' proceeds were previously redeemed and paid to the plaintiffs more than seven years before Gerald's 2004 demand. Coupled with the evidence of the non-escheatment of the accounts to the State of Connecticut, and Muller's testimony that the accounts could still be accessed by the plaintiffs without producing the passbooks, there is only one reasonable conclusion that can be drawn, i.e. the accounts' proceeds had *already* been paid to the plaintiffs years earlier.

II. ALTERNATE GROUNDS EXIST TO AFFIRM JUDGMENT FOR THE DEFENDANT BECAUSE THE TRIAL COURT ERRED IN ADMITTING THE CERTIFICATE OF DEPOSIT PASSBOOKS INTO EVIDENCE OVER THE DEFENDANT'S HEARSAY OBJECTIONS.

A. Standard of Review

In considering the propriety of the Trial Court's evidentiary rulings allowing the introduction of the passbooks, this Court must apply an abuse of discretion standard. Specifically, this Court has "held that [t]he trial court has broad discretion in ruling on the admissibility [and relevancy] of evidence ... The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion." Urich v. Fish, 261 Conn. 575, 580 – 581 (2002), quoting State v. Pappas, 256 Conn. 854, 878 (2001) (holding that trial court's reliance on hearsay evidence in calculating damage award was not harmless error and ordering a new trial); See also George v. Ericson, 250 Conn. 312, 327 (1999).

Had the Trial Court not abused its discretion by admitting the passbooks into evidence, the plaintiffs would have been precluded from proving any aspect of their case, thereby preempting their appeal based upon the issues articulated herein. The Trial

Court's erroneous evidentiary rulings were clearly not harmless. As more particularly described infra, if the passbooks had not come into evidence, it would have been legally impossible for the plaintiffs to prove their case, irrespective of the allocation of the burden of proof.

B. The Passbooks Constitute Hearsay, and the Foundation for Their Introduction Into Evidence Failed to Satisfy any of the Requirements to Demonstrate that They Fell Within any Recognized Exception to the Hearsay Rule.

In Connecticut, it is well established that a statement made out of court that is offered to establish the truth of the facts contained in the statement is hearsay. Murray v. Supreme Lodge, N.E.O.P., 74 Conn. 715, 718 (1902). See also Connecticut Code of Evidence §8-1(3).[17] Where a party seeking admission of hearsay evidence fails to set forth grounds demonstrating an applicable exception to the hearsay rule, a trial court acts well within its discretion in excluding it. United Components, Inc. v. Wdowiak, 239 Conn. 259, 263 – 264 (1996), citing Ellice v. INA Life Ins. Co. of New York, 208 Conn. 218, 222 (1988); State v. Fritz, 204 Conn. 156, 157 (1987); State v. Boucino, 199 Conn. 207, 225 (1986).

Here, the passbooks were documents created out of court, which were introduced to prove the truth of their contents, i.e. that the passbooks had never been marked "paid," "cancelled" or other words to that effect. In this case, the plaintiffs contend that the mere introduction of the uncancelled passbooks into evidence sets forth a *prima facie* case for establishing the defendant's liability, stemming from its refusal to pay over the accounts' proceeds to the plaintiffs, and that such evidence, moreover, shifts the burden of proof to

[17] This provision of the Code defines "hearsay" as "a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted."

the defendant. If the passbooks had not been admitted into evidence, however, the plaintiffs would have been legally precluded from advancing their chief claim on this appeal, regarding the Trial Court's allocation of the burden of proof. The passbooks are inadmissible under the hearsay rule.[18]

Moreover, the passbooks do not fall within the bounds of any recognized exception to this rule. Perhaps, had the plaintiffs sought to introduce them into evidence through a qualified witness, such as Muller, they may have been able to argue that the passbooks are business records and are, accordingly, admissible through the statutory exception to the hearsay rule, delineated at C.G.S. §52-180. See Defendant's Appendix, at A-59. This, however, they failed to do. The passbooks were introduced through the plaintiffs themselves, who are hardly qualified to lay the necessary foundation for establishing that the passbooks constitute business records of the defendant's predecessor, Society.

None of the other hearsay exceptions, either those delineated in the Connecticut Code of Evidence, the Practice Book or the General Statutes, has any application to the items in question. As such, their admission was improper. Moreover, had the passbooks not been admitted, the plaintiffs would not be in the position they advance through this appeal. It would be unnecessary for this Court to consider whether the Trial Court should have employed a burden-shifting analysis because, absent the introduction of the passbooks into evidence, the plaintiffs would have been unable to establish that the passbooks themselves were not cancelled or otherwise paid.

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[18] "Hearsay is inadmissible, except as provided in the Code, the General Statutes or the Practice Book." Connecticut Code of Evidence, §8-2 (Hearsay Rule)

The defendant anticipates that the plaintiffs may contend that the defendant's cross-appeal is rendered moot by the parties' joint submission of a certain Stipulation of Facts (Appendix, at A-14), which includes the following:

> 7. Plaintiff Gerald H. Braffman opened a certificate of deposit on behalf of his then minor child, Susannah J. Braffman, during November of 1987. The Society for Savings passbook bears account number 02340081914. A true copy is attached as Exhibit A.
>
> 8. Plaintiff Elaine A. Braffman opened a certificate of deposit on behalf of her then minor child, David S. Braffman, during November of 1988. The Society for Savings passbook bears account number 02340082276. A true copy is attached as Exhibit B.

It should be noted, however, that the defendant's willingness to stipulate to the facts found in paragraphs 7 and 8 did not relieve the plaintiffs of their duty to lay a proper evidentiary foundation for the admission of the passbooks themselves. The Stipulation was *not* a trial exhibit and, accordingly, any materials appended to it required an independent evidential basis upon which to be made a part of the record of the proceedings below. Stated differently, the defendant never stipulated to the admissibility of the exhibits to the Stipulation.

CONCLUSION AND RELIEF REQUESTED

The Trial Court properly allocated the respective burdens of proof between the parties. Its decision was based upon the totality of the evidence adduced by each side, the overwhelmingly persuasive portion of which easily tipped the scales in favor of the defendant. The factual findings made by the Trial Court are amply supported by the evidence and may not be disturbed on appeal. Pandolphe's Auto Parts, Inc. v. Town of

Manchester, 181 Conn., at 220. There is no suggestion in the record that the Trial Court improperly placed the burden of disproving the defendant's defense of payment upon the plaintiffs. To the contrary, the Trial Court's decision makes clear that it held each of the parties to their respective burdens of proof. Accordingly, this Court should affirm the Trial Court's judgment.

The plaintiffs claim that, if this Court finds that the Trial Court committed reversible error, they are then entitled to a retrial of the entire case. Under the circumstances of this matter, however, such a remedy is entirely unwarranted. Although the defendant disputes that any error was committed by the Trial Court regarding the allocation of the parties' respective burdens of proof, even if such error were not harmless, the appropriate disposition would be confined to a remand to the Trial Court to decide the case utilizing the proper standard of proof.

For more than a century, it has been the position of this Court that, even in instances in which the Trial Court may have improperly allocated the burden of proof, no retrial is required where the facts found by the Trial Court affirmatively establish the defense asserted by the defendants. In Mooney v. Mooney, 80 Conn. 446 (1908), a dispute regarding the legitimacy of an intrafamily transfer of real property, the plaintiff/appellant claimed that the Trial Court had failed to apply the proper standard of proof which would have placed the burden upon the defendant to show the absence of undue influence over the plaintiff. In rejecting such claim, the Court held:

> [I]t is immaterial in this case, whether the Court ruled correctly upon the plaintiffs' claim of burden of proof or not. It plainly appears from the whole record that the defendants did undertake to establish affirmatively the fairness of the transaction

> between Frank and his mother, and that upon the whole evidence the court was fully satisfied of the fairness of the transaction, and that Ann Mooney executed and delivered the deed to Frank of her own free will, and expressed therein her own wishes uninfluenced by any fraud.

Id., at 452 – 453. This is entirely analogous with the present case. Even if the Court improperly allocated the burden of proof by requiring the plaintiffs to prove non-payment of the accounts' proceeds, the evidence adduced at trial was more than sufficient to prove the defendant's position that the proceeds had been paid to the plaintiffs years earlier.

Moreover, it is well established that, to merit a reversal and retrial, the claimed error must be harmful " ... in the sense that it is likely to have affected the result." Evans v. Santoro, 6 Conn. App. 707, 712 (1986), citing Anonymous v. Norton, 168 Conn. 421, 430, *cert. denied*, 423 U.S. 935 (1975). In Evans, the Appellate Court observed:

> An examination of the memorandum of decision reveals that the trial court's ultimate decision was based on a consideration of *all* the evidence presented by *both* sides and the standard which it applied to the evidence was that of the best interest on the child ... The error, therefore, was harmless because it is not likely the result would have been affected.

Evans v. Santoro, 6 Conn. App., at 712 (emphasis supplied). See also Top of the Town, LLC v. Somers Sportsmen's Ass'n, Inc., 69 Conn. App. 839, 849 (2002).

Moreover, even if such error were not harmless, a retrial is not necessarily the appropriate remedy on remand. As this Court held in Fitch v. State, 139 Conn. 456:

> "The reversal of a judgment annuls it, *but does not necessarily set aside the foundation on which it rests*. This foundation may be sufficient to support a judgment of a different kind, and may be such as to require it. A reversal therefore is never, standing alone, and *ex vi termini*, the grant of a new trial. *If the error was first in drawing the wrong legal conclusion from facts properly found and appearing on*

the record, it would be an unnecessary prolongation of litigation again on the work of ascertaining them."

Id., at 460, quoting Couglin v. McElroy, 72 Conn. 444, 446 (1899) (emphasis supplied). Applying these principles to the present case, it is clear that a retrial would be unwarranted. The factual findings of the Trial Court may stand; the evidence, after all, is the same, irrespective of the allocation of the burden of proof. The Trial Court, if necessary, may reevaluate the case with the proper standard in mind, should this Court determine that the incorrect standard of proof was applied in the proceedings below.

This is precisely what the Appellate Court ordered in the matter of Barber v. Skip Barber Racing School, LLC, 106 Conn. App. 59 (2008), where it was found that the Trial Court had failed to utilize the proper burden-shifting analysis in passing on the counterclaim plaintiff's claim that the counterclaim defendant had breached his fiduciary duty:

> [O]nce evidence was admitted regarding [the counterclaim defendant's] dual and conflicting positions of trust, the court should have shifted the burden to [the counterclaim defendant] to prove fair dealing by clear and convincing evidence ... We, therefore, must remand this portion of the case to the trial court for further proceedings in accordance with the more exacting clear and convincing standard of proof.

Id., at 76. Likewise, in the present case, if indeed the Trial Court failed to shift the burden of persuasion on the issue of payment/nonpayment of the certificates of deposit, a remand with appropriate instructions to apply the appropriate burden-shifting analysis to the facts previously found by the Trial Court is all that is reasonably required to address any such

error.[19] There is no need to retry the case, merely to derive the factual findings that have already been made.

Finally, the plaintiff's appeal is moot, if this Court finds that it was harmful error for the Trial Court to have allowed the admission of the passbooks into evidence, absent a proper foundation. As inadmissible hearsay, the passbooks should not have come into the record. Had they not, the plaintiff's position would be completely eradicated. Without the passbooks, even the plaintiffs would be compelled to concede that their evidence would fall short of what would be required of them, irrespective of the allocation of the burden of proof. The decision of the Trial Court should be affirmed in favor of the defendant.

Respectfully submitted:

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[19] In contrast to Herrera v. Madrak, 58 Conn. App. 320 (2000), the case cited by the plaintiffs in support of their contention that an entire retrial is necessary (see Plaintiffs' Brief, at 21 – 22), the present case was not tried to a jury. Thus, unlike the scenario in which an improper instruction regarding the burden of proof has been given, and the jury has subsequently been dismissed, the identical error by a Trial Court in a bench trial can be rectified by a remand with direction to apply the proper standard, obviating a retrial.