

1988

# Garth Youd v. Richard B. Johnson and Howard Lewis & Peterson, a partnership : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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GARTH YOUD,	)	
	)	
Plaintiff-Appellant,	)	BRIEF OF APPELLANT
	)	
v.	)	
	)	
RICHARD B. JOHNSON and	)	Case No. 880431-CA
HOWARD LEWIS & PETERSON,	)	148
a partnership,	)	
	)	
Defendants-Respondents.	)	

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APPEAL FROM THE JUDGMENT OF THE  
FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
THE HONORABLE GEORGE E. BALLIF, DISTRICT COURT JUDGE

---

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COURT OF APPEALS

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- Addendum No. 1: Ruling granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment, March 21, 1988
- Addendum No. 2: Order granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment, April 6, 1988
- Addendum No. 3: \$10,000 certificate of deposit and Zions copy of the \$10,000 certificate of deposit (attached because it is more legible)
- Addendum No. 4: \$15,000 certificate of deposit and Zions copy of the \$15,000 certificate of deposit (attached because it is more legible)
- Addendum No. 5: Deposition of Donna Jensen, May 16, 1984, p. 14-16, 21, 30.

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### **JURISDICTION**

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Article VIII, §5 of the Utah Constitution, Utah Code Ann. §78-2a-3(2)(a) and (j) (1953 as amended), and Rule 3(a), Rules of the Utah Court of Appeals.

### **NATURE OF PROCEEDINGS**

This is an appeal from an Order entered by the Honorable George E. Ballif, Fourth Judicial District Court of Utah County, State of Utah, on April 6, 1988, granting Defendants' Motion for Summary Judgment and denying Plaintiff's Motion for Summary Judgment.

### **STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Does the question of whether Zions had completed the reissuance of the \$10,000 certificate of deposit payable to "Garth Youd" before the time Zions acted to replace the same \$10,000 certificate of deposit with a certificate of deposit payable to "Wilford Youd, Leona Warner and LaRaine Mackley" pursuant to Wilford Youd's instructions, constitute a genuine issue of material fact raised by Defendants' Motion for Summary Judgment so as to render the trial court's grant of summary judgment erroneous?

2. Because of his possession and due presentment of the \$10,000 certificate of deposit, was Plaintiff entitled as a matter of law to payment of the \$10,000 certificate pursuant to §70A-3-116 and the terms stated on the face of the certificate?

3. Did W. Youd's "request" to prevent payment to Plaintiff fail to comply with §75-6-101 such that court's grant of summary judgment was erroneous as a matter of law?

4. Did a bailment of the \$10,000 and \$15,000 certificates of deposit exist such that Zions' issuance of new \$10,000 and \$15,000 certificate in the names of W. Youd and his daughters constitutes conversion?

#### **STATEMENT OF THE CASE**

##### **1. Nature of the Case**

Plaintiff, Garth Youd, brings this action to recover for Defendants' negligent prosecution of an action on behalf of Plaintiff against Zions First National Bank ("Zions"). The action against Zions was based on Zions' improper payment of two certificates of deposit to Plaintiff's father, Wilford Youd (hereafter "W. Youd"), and his daughters.

## 2. Course of Proceedings

On or about February 26, 1987, Plaintiff filed a Complaint against Defendants alleging that Defendants had negligently represented Plaintiff in an action against Zions and that as a result, Plaintiff was prevented from pursuing his claim against Zions. Pursuant to a Stipulation and Order dated September 9, 1987, Plaintiff and Defendants stipulated that Defendant, Johnson, was negligent in failing to appear at the pre-trial conference and in failing to file an appellate brief. An Order entered by the Fourth Judicial District Court limited the issues in the case to causation and damages.

On or about January 27, 1988, Defendants filed a Motion for Summary Judgment and on or about February 11, 1988, Plaintiff filed a cross Motion for Summary Judgment. The Fourth Judicial District Court heard arguments of counsel on their respective Motions for Summary Judgment at the pre-trial conference on February 26, 1988. On March 21, 1988, the Honorable George E. Ballif issued a Ruling denying Plaintiff's Motion for Summary Judgment and granting Defendants' Motion for Summary Judgment. Addendum No. 1. An

Order reflecting the Judge's Ruling was entered on April 6, 1988. Addendum No. 2. Plaintiff filed a Notice of Appeal with the Utah Supreme Court on April 20, 1988. On July 7, 1988, the Utah Supreme Court poured this case over to the Utah Court of Appeals.

### 3. Statement of Facts

#### a. Facts Surrounding Defendants' Negligent Prosecution of the Zions Action

In early 1983, Plaintiff employed Defendant, Johnson, who at the time was an attorney practicing with Defendant law firm, Howard, Lewis and Peterson, to prosecute a civil action against Zions (the "Zions Action"). (Record on Appeal, Garth Youd v. Richard B. Johnson and Howard, Lewis & Peterson, civil no. CV87-457 (hereafter "R."), p. 1, ¶4 and p. 12, ¶1.) Defendants filed a Complaint against Zions on behalf of Plaintiff in the United States District Court in and for the District of Utah, Central Division, on or about November 15, 1983, Garth Youd v. Zions First National Bank, civil no. C83-1368W. (R. 94-103.) Thereafter, Defendants negligently failed to appear at a pre-trial conference in the Zions Action. (R. 24.) As a result of Defendants' failure to appear, the United States District Court in and for the District of Utah, Central Division, entered an Order of Dismissal, dismissing the Complaint in the Zions Action

with prejudice. (R. 108-109.) Defendants filed a Motion to Set Aside Order of Dismissal which was denied by the Honorable David K. Winder on December 20, 1985. (R. 2, 12-13.)

On January 17, 1986, Defendants filed a Notice of Appeal to the United States Court of Appeals for the Tenth Circuit, appealing Judge Winder's Order, Garth Youd v. Zions First National Bank, case no. 86-1143. Thereafter, Defendants negligently failed to file an appellant's brief in the appeal of the Zions Action. (R. 24.) As a consequence, the Clerk of the Court of Appeals ordered that the appeal be dismissed for lack of prosecution. (R. 111.)

On or about February 26, 1987, Plaintiff filed this action against Defendants alleging their negligent representation of Plaintiff in the Zions Action and that, as a result of their negligence, Plaintiff was prevented from pursuing his claim against Zions. (R. 1-3.) Plaintiff and Defendants entered into a Stipulation dated September 9, 1987, that Defendants were negligent in failing to appear at a pre-trial conference and for failing to file and appellate brief in the Zions Action appeal. (R. 24-25.) The Fourth Judicial District Court entered an Order limiting the issues in the case to causation and damages. (R. 26.)

b. Facts of the Zions Action

The Complaint in the Zions Action alleges that Zions was liable to Plaintiff for wrongfully paying two certificates of deposit to W. Youd. (R. 94-103.) The two time certificates of deposit in the Zions Action were issued by Zions and are identified as follows:

1. A six-month time certificate of deposit dated March 6, 1980, in the sum of \$10,000, number 31-600964-6, payable to "Wilford Youd or Garth Youd;" and

2. A six-month time certificate of deposit dated October 27, 1980, in the sum of \$15,000, number 31-616341-9, payable to "Wilford Youd or Garth Youd."

(R. 115-118.) Addendum Nos. 3 and 4. Both certificates state on their face that

THIS CERTIFIES THAT there has been deposited in this Bank the amount of . . . payable to Wilford Youd or Garth Youd . . . interest at a rate of . . . per annum, commencing from . . . and payable to depositor, or if more than one, to either of any said depositors . . . in current funds upon presentation and surrender of this certificate properly endorsed.

The certificates were kept in a safety deposit box at Zions which could be accessed by Plaintiff or his sisters, Leona Warner or LaRaine Mackley. (Deposition of Garth Youd, November 7, 1984 (hereafter "G. Youd Depo."), p. 53, 55.) On February 26, 1982, Plaintiff accessed the above-described safety deposit box and took into his possession both certificates of deposit. Id. at 69-70. On or about September 7, 1982, Plaintiff took the certificates of deposit to the Spanish Fork Branch of Zions. The \$10,000 certificate of deposit had matured a day earlier, on September 6, 1982. (R. 177.) The \$15,000 certificate of deposit was unmatured and would not mature until October 27, 1982. (R. 177.)

Plaintiff instructed Zions' personnel to recover the interest on the \$10,000 certificate of deposit which had been paid paid to Plaintiff's sister, Leona Warner, and to pay that sum to Plaintiff. G. Youd Depo. at 71-72. Plaintiff further gave Zions specific instructions renew the \$10,000 certificate of deposit in his name alone and to place the \$15,000 certificate of deposit which had not yet matured and the reissued \$10,000 certificate of deposit in Plaintiff's personal safety deposit box. Id. at 75. After

Plaintiff endorsed the \$10,000 certificate of deposit, he presented it to Zions and Zions took possession of it and the \$15,000 certificate of deposit. Id. at 74.

In his Memorandum in Opposition to Defendants' Motion for Summary Judgment, Plaintiff asserted that Zions completed issuing the \$10,000 certificate of deposit in Plaintiff's name alone. (R. 87.) In support of its assertion, Plaintiff cited depositional testimony of Donna Jensen, who was at the time of the subject events a commercial loan secretary with Zions. (R. 87, 136-140.) In her deposition, Ms. Jensen testified that she remembers having dealt with Plaintiff regarding two certificates of deposit on two occasions. (Deposition of Donna Jensen, May 16, 1984, (hereafter "Jensen Depo.") p. 14-16, 21; Addendum No. 5.) Her testimony indicates that on both occasions, Plaintiff presented a certificate of deposit payable to "Wilford Youd or Garth Youd" and requested that they be renewed in Plaintiff's name only. Id. at 14. Ms. Jensen testified that on both occasions she completed Plaintiff's instructions and filled out a certificate of deposit for the same amount in Plaintiff's name alone. Id. at 14-16, 21, 30.<sup>1</sup> Neither Richard Roach nor Irene Brunson, the two

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<sup>1</sup> The disposition and location of the \$10,000 certificate

other Zions' employees who were involved in the transaction, disputed Ms. Jensen's testimony that the certificate has been reissued. Deposition of Richard Roach, May 16, 1984, ("Roach Depo."), p. 30-45; Deposition of Irene Brunson, May 16, 1984, ("Brunson Depo."), p. 17-18.

After Plaintiff presented the \$10,000 and \$15,000 certificates of deposit to Zions, Richard Roach, the branch manager of the Spanish Fork Branch of Zions, became aware of Plaintiff's request regarding the certificates. Roach Depo. at 36; Jensen Depo. at 22-26. Though the exact time is not certain, Mr. Roach met with Leona Warner, W. Youd's daughter, who informed Mr. Roach that the "family" was concerned about the expenses which W. Youd would incur later in his life. Roach Depo. at 38-41. Mr. Roach then requested that Ms. Warner have W. Youd contact him. Roach Depo. at 39.

Apparently responding to Mr. Roach's request, Wilford Youd called Mr. Roach at the bank. Roach Depo. at 42. Mr. Roach informed W. Youd that Plaintiff had made a request to remove W. Youd's name from of the \$10,000 and \$15,000 certificates of deposit, and to put the certificates in Plaintiff's name alone. Mr. Roach, however, did not know

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of deposit issued in Plaintiff's name alone is unknown. Roach Depo. at 32-24.

whether the process of reissuing the \$10,000 certificate to Plaintiff had been completed. Roach Depo. at 36, 37, 42-43. W. Youd instructed Mr. Roach to take Plaintiff's name off both certificates of deposit and to place the certificates in the names of W. Youd's and his two daughters, Leona Warner and LaRaine Mackley, and to not pay the \$10,000 certificate of deposit to Plaintiff under any circumstances. Roach Depo. at 44. Mr. Roach agreed to carry out W.Youd's request. Id.

#### SUMMARY OF ARGUMENTS

##### ARGUMENT I, Points 1 and 2

Summary judgment is proper only where there is no genuine issue of material fact and where the moving party is entitled to judgment as a matter of law. In considering a Motion for Summary Judgment, a court should view the evidence in a light most favorable to the party opposing the motion.

In this case, there is clearly a genuine issue of material fact. The deposition of a Zions' employee indicates that Zions immediately carried out Plaintiff's instructions to reissue the \$10,000 certificate of deposit as a single party account in the name of Plaintiff alone, immediately after receiving the instructions. This testi-

mony conflicts with Defendants' assertion that the \$10,000 certificate remained a multiple-party account, payable to "Wilford Youd or Garth Youd."

The resulting question of fact is material for the reasons that if the \$10,000 certificate of deposit had been renewed in Plaintiff's name alone, §75-6-112 does not apply to protect Zions from liability, and Zions may be rendered liable to Plaintiff for conversion of the certificate of deposit. Accordingly, this case should be remanded to the trial court for trial on the issue of whether the \$10,000 certificate of deposit had been renewed in Plaintiff's name alone as a single-party account.

**ARGUMENT II, Point 1**

If the court accepts the trial court's finding that there was no genuine issue of material fact and that Zions had not reissued the \$10,000 certificate in Plaintiff's name alone, §§75-6-108 and 75-6-112, still do not apply to protect Zions from liability for three reasons. First, Plaintiff was entitled to immediate payment of the \$10,000 certificate of deposit, in the form of a reissued certificate, pursuant to §70A-3-116 of the Uniform Commercial Code. That section establishes that an alternate payee on an instrument who has possession of the instrument is

entitled to payment of the instrument. Plaintiff was entitled to immediate payment for the additional reason that he complied with the payment requirements clearly stated on the face of the certificate.

Because Zions refused to accept Plaintiff's due presentment, Plaintiff acquired an immediate right of recourse under §70A-5-307, as well as a cause of action for breach of contract. Section 75-6-112 has absolutely no application to the question of whether a financial institution must pay a duly presented and matured certificate of deposit. That section applies to protect the financial institutions from liability only after payment has been made on a duly presented multiple-party instrument.

**ARGUMENT II, Point 2**

The second reason why Plaintiff is entitled to recover against Zions as a matter of law is that, W. Youd failed to make a "proper request" as required by §§75-6-108 and 75-6-101. Sections 75-6-108 and 75-6-101 require that in order for a financial institution to be relieved of liability for payment of a multiple-party account, it must have received a "proper request" for payment. "Proper request" is defined as a request which complies with the conditions of the account, which in this case are 1) pre-

sentment, 2) endorsement, and 3) surrender of the certificate. W. Youd did not present the certificate, endorse the certificate or surrender the certificate, but merely made an oral request over the telephone to change the payee on the certificate of deposit. Because W. Youd failed to make a proper request, Zions should not have complied with his instructions and should have paid the certificates of deposit pursuant to Plaintiff's instructions. Accordingly, Zions should not have prevailed as a matter of law.

ARGUMENT II, Point 3

Finally, Zions is subject to liability for Zions' conversion and negligent handling of the \$10,000 and \$15,000 certificates of deposit. Plaintiff's entrusting of the certificates of deposit to Zions gave rise to a bailee-bailor relationship which obligated Zions to exercise due care in complying with Plaintiff's instructions. In complete disregard of Plaintiff's instructions to renew the \$10,000 certificate and place both certificates of deposit in Plaintiff's safety deposit box, Zions acted to extinguish Plaintiff's ownership interest in both certificates and replace the certificates with certificates in the names of

W. Youd and his daughters. For this additional reason, the trial court's grant of summary judgment was erroneous as a matter of law.

#### ARGUMENT I

##### BECAUSE A GENUINE ISSUE OF MATERIAL FACT EXISTED, THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Rule 56(c), Utah Rules of Civil Procedure, states that

summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Emphasis added.) The summary judgment procedure is intended to avoid the time and expense of litigation where the facts are undisputed and there is no issue of law. Rich v. McGovern, 551 P.2d 1266, 1267-1268 (Utah 1976); Western Pacific Transport Co. v. Beehive State Agricultural Co-Op., 497 P.2d 854, 855 (Utah 1979). However, summary judgment is a drastic remedy and should be granted with extreme care. Housley v. Annaconda Co., 527 P.2d 390, 393 (Utah 1967).

In determining whether a genuine issue of material fact exists, the trial court must evaluate the pleadings, affidavits and depositions on file in the case in a light most favorable to the party opposing summary judgment. Frisbey v. K & K Construction Co., 676 P.2d 387, 389 (Utah 1984). If there is any doubt or uncertainty whether a question of fact exists, the doubt must be resolved in favor of the party opposing the motion. Id. If a court grants summary judgment where there is a doubt as to whether a question of fact exists, the opposing party is unjustly denied the opportunity to conduct discovery and present additional evidence to resolve the question. Furthermore, unjustified granting of summary judgment fails the goal of avoiding unnecessary litigation and instead results in even greater expenditures. Western Pacific Transport Co., 597 P.2d at 855.

In ruling on Defendants' Motion for Summary Judgment, the trial court concluded that no genuine issue of material fact existed between the parties. (R. 195.) However, the court contradicted its conclusion on page three of the ruling by acknowledging that Plaintiff did dispute one of Defendants' factual assertions. (R. 196.)

Defendants' arguments, as outlined in their Memorandum Supporting Defendants' Motion for Summary Judgment, are premised on the fact Zions had not reissued the \$10,000 certificate of deposit in Plaintiff's name alone at the time W. Youd requested that the certificate be put in his and his daughters' names.<sup>2</sup> (R. 43-47, 179-183). Contravening Defendants' representation of the facts, Plaintiff asserted in his Motion in Opposition to Summary Judgment that the reissuance of the \$10,000 certificate of deposit had been completed before W. Youd instructed Zions to not make payment to Plaintiff. (R. 87.) In support of this assertion, Plaintiff cited depositions of the Zions employee most involved in the transaction indicating that the \$10,000 certificate of deposit was reissued in the name of Plaintiff alone before W. Youd contacted the bank. (R. 87.)

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<sup>2</sup> Defendants even entitled one of their arguments, "The Certificates of Deposit Were 'Joint Accounts' Under Utah Law," clearly implying that the certificates of deposit were never reissued as a single party account. (R. 43.) Additionally, Defendants' statement of fact in its Memorandum in Support of Summary Judgment assumes that the \$10,000 certificate of deposit was not reissued in Plaintiff's name alone, prior to W. Youd's instructions to do otherwise. (R. 39-40.) Finally, Defendants argued in their Memorandum Opposing Plaintiff's Motion for Summary Judgment that Zions followed W. Youd's instructions and, impliedly, not those of Plaintiff. (R. 179.)

Donna Jensen, in her deposition of May 16, 1984, testified that one of her normal duties as commercial loan secretary with Zions was the issuance and reissuance of certificates of deposit. Jensen Depo. at 6. She further testified that she dealt with Plaintiff on two occasions regarding certificates of deposit payable to "Wilford Youd or Garth Youd." Id. at 20. On each occasion, Plaintiff presented Ms. Jensen with a certificate of deposit payable to "Wilford Youd or Garth Youd" and instructed her to reissue it in Plaintiff's name alone. Id. at 12.

The following testimony of Donna Jensen indicates that she complied with Plaintiff's instructions and completed the physical process of reissuing a new certificate of deposit in Plaintiff's name alone:

QUESTION: And his [Garth Youd's] simple instruction to you was simply to do what with the time certificate?

JENSEN: He wanted to renew it and just have it put in his name.

QUESTION: What did you say?

JENSEN: I did it.

QUESTION: And did you take a time certificate he had furnished you and fill out another time certificate that would be in the same

amount with interest in his name only?

JENSEN: Yes.

Jensen Depo. at 14. Plaintiff cited this testimony, together with testimony on page 21 of Ms. Jensen's deposition, in his Memorandum in Opposition to Summary Judgment. (R. 87.) Additional testimony by Ms. Jensen, not cited by Plaintiff, further supports the fact that the certificate of deposit had been reissued. Jensen Depo. at 30.

The trial court apparently disregarded this evidence clearly supporting Plaintiff's view of the facts, despite Defendants' failure to cite any evidence whatsoever supporting their position. Richard Roach, the Branch Manager of the Spanish Fork Branch of Zions, testified that he simply did not know whether Ms. Jensen had completed reissuing the \$10,000 certificate in Plaintiff's name alone. Roach Depo. at 36, 37. Additionally, Irene Brunson, the other Zions employee involved in the transaction, testified that she had no recollection of Plaintiff's instructions to renew the \$10,000 certificate of deposit and to place both certificates in Plaintiff's safety deposit box. Brunson Depo. at 10-14, 16-18.

The only evidence which might be argued to support Defendants' position that the certificate of deposit was not reissued is the physical absence of the reissued certificate. According to the testimony of Plaintiff, both certificates were left with the bank in order that they be placed in his safety deposit box. G. Youd Depo. at 77-78. However, the bank has been unable to locate the reissued certificate of deposit or a copy of the reissued certificate of deposit. Roach Depo. at 34. If the certificate exists, it must be assumed that the bank misplaced it or destroyed it upon W. Youd's instructions to reissue the certificate without Plaintiff's name. In any event, this evidence (or rather absence of evidence) was not raised by Defendants.

When the testimony of Donna Jensen is viewed in a light most favorable to Plaintiff, it is apparent that a factual dispute existed involving the reissuance of the \$10,000 certificate of deposit. In view of this question of fact, the trial court erred in granting Defendants' Motion for Summary Judgment. The materiality of the disputed fact is outlined below in Points 1 and 2. It should be noted that this factual issue involves only the \$10,000 certificate of deposit and not the \$15,000 certificate, which had not yet matured.

**POINT 1:**        Whether the reissuance of the \$10,000 certificate of deposit had been completed is a material fact for the reason that, if completed, §§75-6-108 and 75-6-112 do not protect the bank from liability.

The question of whether the transaction had been completed before W. Youd contacted Zions is very clearly a material issue of fact. It is material for the reason that a finding by the court that the \$10,000 certificate of deposit was reissued would preclude Zions from the protection afforded by §§75-6-108 and 75-6-112, Utah Code Ann. (1953 as amended).

Utah Code Annotated §75-6-108 states in relevant part that "[a]ny multiple party account may be paid, on request, to any one or more of the parties." (Emphasis added.) Section 75-6-112 "discharges a financial institution from all claims or amounts . . . [paid under §75-6-108]." These statutes operate to protect the bank from liability to one party on a multiple party account for payment duly made to another party to the account.

In the instant case, there is a question as to whether the \$10,000 certificate was a single or multiple party account at the time W. Youd contacted the bank. If the \$10,000 certificate of deposit was reissued in Plaintiff's

name alone, the account lost its status as a multiple party account and became a single party account. Plaintiff therefore became the sole owner of the certificate and as such was the only person entitled to enforce, receive payment of, and otherwise deal with the certificate. W. Youd had absolutely no interest in or control over the account. Accordingly, §§75-6-108 and 75-6-112 no longer applied to protect the bank for payment of the account according to W. Youd's instructions. Neither W. Youd nor Zions had a right, statutory or otherwise, to change the payee on the account. Sections 75-6-108 and 75-6-112 do not apply to protect the bank from interfering with the ownership rights of a single party account holder at the request of a former party to the account.

The trial court erred in not properly examining the facts surrounding the reissuance of the \$10,000 certificate of deposit. A finding that the certificate was reissued results in the inapplicability of Utah Code Ann. §§75-6-108 and 75-6-112. Without the protection of these statutes, it must be concluded that Zions caused Plaintiff's loss of the value of the \$10,000 certificate of deposit.

**POINT 2:**      The issue of whether the \$10,000 certificate of deposit had been reissued is material for the further reason that, if completed, Zions is subject to liability for conversion of the certificate.

An action for conversion is generally based on 1) ownership of the property, 2) a right to possession of the property, and 3) the alleged wrongdoer's unauthorized dominion over the property resulting in damages to the property owner. Farmer State Bank of Victor v. Imperial Cattle Co., 708 P.2d 223, 227 (Mont. 1985); see H.L. Allred v. Hinkley, 8 Utah.2d 73, 328 P.2d 726, 728 (Utah 1958). As a named payee on the \$10,000 certificate of deposit, Plaintiff was an owner of the certificate. As an owner of the certificate, Plaintiff had a right to possession and did in fact have possession of the \$10,000 certificate. Finally, Zions's removal of Plaintiff's name from the certificate and replacement of his name with the names of W. Youd's daughters, constitutes Zions' exercise of unauthorized interference with Plaintiff's rights to the certificate.

The facts indicate that W. Youd contacted Richard Roach, the Branch Manager of the Spanish Fork Branch of Zions, and instructed Mr. Roach to remove Plaintiff's name from the \$10,000 and \$15,000 certificates of deposit and to

replace it with the names of his two daughters. He specifically instructed Mr. Roach to not allow Plaintiff payment of the \$10,000 certificate under any circumstances.

However, if Zions completed the renewal of the \$10,000 certificate of deposit in Plaintiff's name alone, Plaintiff was the sole owner of the certificate and as such was the only person entitled to enforce, receive payment of, and to otherwise deal with the certificate. As a single-party account, W. Youd no longer had any kind of ownership interest in the certificate. Consequently, at the time W. Youd contacted Zions, he had no right to change the payee on the account or to otherwise deal with the account. Nevertheless, Zions complied with W. Youd's instructions and filled out a new \$10,000 certificate of deposit, replacing Plaintiff's name with the names of W. Youd, LaRaine Mackley, and Leona Warner. The effect of Zions' actions was to not only interfere with Plaintiff's ownership of the certificate, but to extinguish all of Plaintiff's ownership right in the certificate. Zions should therefore be liable for conversion of \$10,000, the face amount of the certificate.

## ARGUMENT II

### ACCEPTING THE TRIAL COURT'S FINDING OF FACT THAT THE TRANS- ACTION HAD NOT BEEN COMPLETED, DE- FENDANTS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW

In order to grant a party's motion for summary judgment, a trial court must find that the party is entitled to judgment as a matter of law. Rule 56(c), Utah Rules of Civil Procedure. In this case, Defendants were not entitled to judgment as a matter of law on three alternative grounds. These grounds are set forth below as Points 1, 2 and 3.

POINT 1:      Because Plaintiff had possession  
of, endorsed, and duly presented  
the \$10,000 certificate of de-  
posit, Zions is liable to Plain-  
tiff for refusing to make payment

Section 70A-3-116, Utah Code Ann. (1953 as amend-  
ed), of the Utah Uniform Commercial Code states that

An instrument payable to the order  
of two or more persons

a) if in the alternative is  
payable to one of them and may  
be negotiated as charged or  
enforced by any of them who  
has possession of it; . . .

See Smith, Inc. v. Bankers Trust Co. of Western New York, 80  
A.D.2d 496, 439 N.Y.2d 543 (1981).

The \$10,000 and \$15,000 certificates of deposit involved in this case were payable to "Wilford Youd or Garth Youd." According to §70A-3-116, whoever had possession of either certificate of deposit was entitled, by mere possession of the certificate, to immediate payment upon presentment. There is no dispute that Plaintiff had possession of the matured \$10,000 certificate of deposit. Additionally, Defendants admit that Plaintiff took the \$10,000 certificate of deposit to Zions and requested that the certificate be "rolled over" in Plaintiff's name alone. (R. 39.) It should be noted that Plaintiff's request that the certificate be "rolled over" is no less a request for payment than a request for cash. In renewing the \$10,000 certificate, the funds from the matured certificate would have been used to fund the new certificate. By reissuing the \$10,000 certificate, Zions would have effectively made payment to Plaintiff. Plaintiff's actions therefore constituted due presentment of the certificate which gave rise to an obligation on Zions' part to accept and make payment of the certificate.

Section 70A-3-507 provides that an instrument is dishonored when presentment is duly made and due acceptance or payment is refused. §70A-3-507(1)(a). Accordingly,

Zions' failure to renew the \$10,000 certificate of deposit according to Plaintiff's instructions constituted a dishonor of the certificate. Section 70A-3-507 also provides that when an instrument is duly presented and dishonored, the holder requires an immediate right of recourse against the bank. Based on §§70A-3-316 and 70A-3-507, Zions is liable to Plaintiff for refusing to pay the \$10,000 certificate of deposit as requested by Plaintiff.

Zions is further liable to Plaintiff for failing to pay the \$10,000 certificate on the basis that Zions violated the contractual terms stated on the face of the certificate of deposit. Those terms require that payment be made when the certificate is 1) properly endorsed, 2) duly presented, and 3) surrendered to the bank. In this case, Plaintiff complied with all three requirements and was therefore contractually entitled to payment.

The trial court apparently failed to recognize Plaintiff's statutory and contractual rights to payment acquired by virtue of Plaintiff's possession of the \$10,000 certificate of deposit. Apparently assuming that §70A-3-116 does not apply, the court concluded that §75-6-112 controls the question of whether Plaintiff was entitled to payment.

Contrary to the unstated assumption of the court, Plaintiff's statutory and contractual rights to payment are not abrogated by §75-6-112 under the facts of this case.

Defendants rely on §75-6-112 to claim that Zions is not liable to Plaintiff for failing to renew the \$10,000 certificate in Plaintiff's name. As previously stated, §75-6-112 "discharges the financial institution from all claims for amounts [paid under §75-6-108 to one party of a multiple-party account]." This statute does not, however, extend to relieve Zions of liability for failing to pay a duly presented instrument. Section 75-6-112 does not endow a financial institution with the discretion to determine whether or not to pay a duly presented certificate of deposit. In fact, the Uniform Probate Code sections have absolutely no application to the question of payment of a duly presented instrument. Section 70A-3-116 of the Uniform Commercial Code clearly requires that a financial institution must make payment of a duly presented certificate of deposit by an alternate payee who has possession of the certificate. Where two requests have been made, Zions must comply with the first duly made request for payment, but is protected by §75-6-112 from liability for doing so.

To construe §75-6-112 to mean that financial institutions cannot be held liable for refusing to pay a duly presented instrument would strip §70A-3-116 of meaning and negate the remedy afforded under §70A-3-507. Additionally, §§75-6-108 and 75-6-112 were designed to relieve banks from the burden of determining the ownership interests of the various parties in multiple-party accounts prior to making payment on the account. If §75-6-112 were construed to give financial institutions the discretion to determine whether to pay duly presented instruments, those institutions would be encouraged to investigate the ownership interests of the various parties to assist them in determining whether to make payment on a multiple-party account. This result would directly contradict the stated purpose of the statutes protecting financial institutions for payment made on multiple-party accounts.

In the instant case, the \$10,000 certificate of deposit had matured, was endorsed by Plaintiff who was a named payee, and was duly presented and surrendered to the bank. Rather than pay the certificate of deposit as required by §§70A-3-116 and 70A-3-507 and the terms of the certificate of deposit, Zions dishonored the instrument and chose to await the instructions of the other party to the

account. The trial court erred in failing to apply §70A-3-116 and in improperly applying 75-6-112 to protect Zions from its refusal to pay the duly presented certificate of deposit.

**POINT 2:**      Wilford Youd's request that the two certificates of deposit be re-issued in his name and the names of his two daughters was not a "proper request" as required by Utah Code Ann. §§ 75-6-108 and 75-6-101(12)

Looking again at §75-6-108, Utah Code Ann. (1953 as amended):

Any multiple-party account may be paid, on request, to any one or more of the parties . . .

(Emphasis added.) Defining the term "request," §75-6-101(12) provides that:

"Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of financial institutions. . . .

(Emphasis added.) In view of §75-6-101, §75-6-112 does not provide protection to a financial institution which complies with a request for withdrawal of funds that is in violation of the terms of the account.

The terms of the two certificates of deposit at issue are listed on the face of each certificate. These terms require that, in order that payment be made, the certificates be 1) presented to Zions; 2) surrendered to Zions; and 3) properly endorsed. W. Youd's "request" consisted of a telephone conversation with Richard Roach orally requesting that Mr. Roach remove Plaintiff's name from the certificates and replace Plaintiff's name with the names of Leona Warner and LaRaine Mackley. Roach Depo. at 44. W. Youd neither presented nor surrendered the certificates of deposit to Zions, nor did he endorse either of the certificates. Zions followed W. Youd's telephone instructions despite the fact that W. Youd failed to meet the payment requirements clearly set forth on the face of the certificates of deposit. Zions' conduct violated the contractual language which Zions drafted and set forth on its own pre-printed certificates of deposit.

Because W. Youd's request was not a "proper request" as required by §75-6-101, Zions is not entitled to the protection of §75-6-112. To allow Zions protection under §75-6-112 against liability from payment pursuant to

an improper request would relieve financial institutions from any responsibility of complying with the terms of the multiple-party accounts in distributing funds under those accounts.

**POINT 3:**      Even if the \$10,000 certificate of deposit had not been reissued, Zions is subject to liability for conversion of both the \$10,000 and the \$15,000 certificates of deposit

A bailee/bailor relationship exists when there is a delivery of the bailor's property and an acceptance by the bailee of that property. Webb v. Aero International, Inc., 633 P.2d 1044, 1045 (Ariz. App. 1981). Plaintiff testified that he left the \$10,000 certificate of deposit with Zions to be reissued and placed, together with the \$15,000 certificate in his safety deposit box. G. Youd Depo. at 73-74. Zions accepted the \$10,000 certificate of deposit agreeing to renew the certificate and to place both certificates in Plaintiff's safety deposit box. G. Youd Depo. at 74.

The resulting bailee-bailor relationship which existed between Zions and Plaintiff required that Zions exercise ordinary care in safeguarding the certificates of deposit according to Plaintiff's instructions. M. Bruenger

& Co., Inc. v. Dodge City Truck Stop, 675 P.2d 864, 868 (Kan. 1984). Ordinary care is defined as the care which a person in similar circumstances would customarily use towards similar bailed property. McGinness v. Grossman, 391 P.2d 967, 969 (Wash. 1964). Zions failed to exercise ordinary care by neglecting to reissue the \$10,000 certificate of deposit. Zions was also negligent by failing to place the reissued \$10,000 and the \$15,000 certificates of deposit in Plaintiff's safety deposit box. Zions' disregard for the terms of the bailment in caring for the \$10,000 and the \$15,000 certificates of deposit, as entrusted to it by Plaintiff, constitutes negligence.

Where a bailee's acts clearly indicate a repudiation of the bailor's ownership rights to the property, the bailee is liable for conversion of the bailed property. Torix v. Allred, 606 P.2d 1334, 1339 (Idaho 1984). Furthermore, conversion may be established where it is demonstrated that the bailee's conduct is in derogation of the bailor's possessory rights. Merchant's Leasing Co. v. Clark, 540 P.2d 922, 925 (Wash. App. 1975).

In this case, Plaintiff was a named payee on both certificates of deposit and as such had ownership rights to

the certificates of deposit. Furthermore, because Plaintiff had possession of both the \$10,000 and the \$15,000 certificates of deposit, it was he, and not W. Youd, who had the right to enforce, receive payment of, and to otherwise deal with the certificates. Zions failed to place the certificates of deposit presented to Zions by Plaintiff in Plaintiff's safety deposit box. Instead, Zions deliberately filled out new certificates of deposit, leaving off Plaintiff's name and replacing it with the names of Leona Warner and LaRaine Mackley. Zions' deliberate failure to comply with Plaintiff's instructions clearly constitutes a repudiation of Plaintiff's rights to the certificates of deposit acquired by virtue of Plaintiff's possession of the certificates of deposit. Accordingly, Zions is liable to Plaintiff for conversion of both the \$10,000 and the \$15,000 certificates of deposit.

Zions is liable for conversion for the additional reason that in issuing the \$10,000 certificate of deposit according to W. Youd's instructions, Zions failed to obtain W. Youd's endorsement. Section 70A-3-419, Utah Code Ann. (1953 as amended), states that "(1) an instrument is converted when . . . (c) it is paid on a forged endorsement."

It is well settled that payment on a missing endorsement is equivalent to payment on a forged endorsement, which establishes conversion. Humberto Decorators, Inc. v. Plaza National Bank, 434 A.2d 618, 621 (N.J. 1981); Federal Deposit Insurance Corp. v. Marine National Bank, 431 F.2d 341, 344 (5th Cir. 1970); Berkheimer's, Inc. v. Citizens Valley Bank, 529 P.2d 903, 905 (Or. 1974).

The \$10,000 certificate of deposit had already been endorsed by Plaintiff for the purpose of renewing the \$10,000 certificate in Plaintiff's name alone. Plaintiff's possession and endorsement of the \$10,000 certificate entitled him to payment of the certificate. Instead, Zions made payment to W. Youd by filling out a new \$10,000 certificate in the names of W. Youd and his daughters without obtaining the endorsement of W. Youd. Zions had no right to make payment to W. Youd without W. Youd's possession, presentment, and endorsement of the certificate. Zions payment to W. Youd without his endorsement constitutes Zions' conversion of Plaintiff's ownership interest in the certificate. Zions is therefore liable to Plaintiff for the face amount of the instrument. §70A-3-419(2).

### CONCLUSION

The facts of the instant case, when viewed in a light most favorable to Plaintiff, present a genuine issue of material fact as to whether Zions completed the process of reissuing the \$10,000 certificate of deposit in Plaintiff's name alone. In view of this question of fact, the trial court's grant of summary judgment was erroneous and the case should be remanded to the lower court for a trial on the disputed fact.

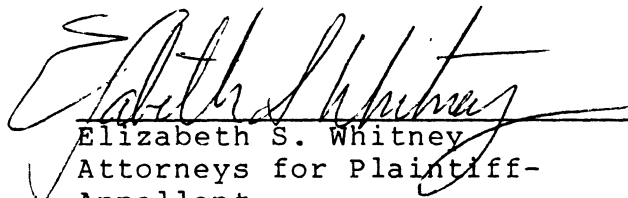
In addition to the factual issue, Defendants were not entitled to judgment as a matter of law. Plaintiff had possession of, duly presented, endorsed and surrendered the \$10,000 certificate of deposit. According to the Uniform Commercial Code and the terms stated on the face of the certificate, he was therefore entitled to immediate payment. Zions' wrongful refusal to make payment to Plaintiff constituted a dishonor of the instrument and created a right of recourse in Plaintiff.

Defendants were not entitled to judgment as a matter of law for the further reason that W. Youd's request to prevent payment to Plaintiff was not a "proper request." Finally, as a bailee of the certificates, Zions reissuance of the certificates in W. Youd's and his daughters' names

constituted conversion of both of the certificates. Because Defendants were not entitled to judgment as a matter of law, Plaintiff respectfully requests that this court reverse the lower court's judgment and grant judgment in favor of Plaintiff.

DATED this 5 day of August, 1988.

BIELE, HASLAM & HATCH

  
Elizabeth S. Whitney  
Attorneys for Plaintiff-  
Appellant

ADDENDUM NO. 1

FILED  
FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY STATE OF UTAH

March 21, 1988  
WILLIAM F. HUSH, CLERK  
K DEPUTY

IN THE FOURTH JUDICIAL DISTRICT COURT  
UTAH COUNTY, STATE OF UTAH

\*\*\*\*\*

GARTH YOUD,	)	Case Number	CV 87 457
Plaintiff,	)		
vs.	)	RULING	
RICHARD B. JOHNSON,	)		
HOWARD, LEWIS & PETERSEN, a	)		
partnership,	)		
Defendants.	)		

\*\*\*\*\*

In this matter cross motions for summary judgment have been made and submitted to the court in accordance with Rule 2.8, and the court having considered the memorandum of law, and arguments presented at the pretrial held on February 26, 1988, and having fully considered the matter now enters its:

RULING

The court denies the plaintiff's motion for summary judgment.

The court grants defendants' motion for summary judgment.

The stipulation of the parties leaves the only issue in the case to be whether, although the defendant Johnson was guilty of negligence in not attending to matters in a timely way, was this negligence a proximate cause of the plaintiff's loss of the

Federal District Court lawsuit? To put it another way, would the Federal Court lawsuit have succeeded, or was likely to succeed had counsel been diligent in pursuing the case to a decision on its merits?

There is no material issue of fact between the parties. The only fact issues relates to whether or not, accepting the plaintiff's view of the facts, his dictation of a note to the tellers at Zions Bank that interest on the \$10,000.00 CD be recovered and added to that certificate and rolled over into a new certificate and issued in the name of plaintiff and placed in his safety deposit box, was sufficient to give plaintiff the benefit of the notice required by 75-6-112 Utah Code Annotated 1953 as amended in that such a note if complying with that statutes required notice would invalidate any subsequent action taken by the bank in honoring the oral request of the other co-tenant, Wilford Youd, plaintiff's father, that Garth's name be removed from the certificate and two other family members along with Wilfords be placed thereon.

The bank received an oral request from the co-tenant, Wilford Youd, who it recognized as the purchaser of the CD and whose direction they elected to take in the handling of the \$10,000.00 certificate which had matured. The provisions of Utah Code Annotated, 75-6-108 relieves the bank from liability in making a decision as to how to pay a multi-party account. The

making a decision as to how to pay a multi-party account. The only circumstance where the bank would not escape liability by making a Section 108 decision is where the bank ". . . has received written notice from any party able to request payment to the effect that withdrawals in accordance with the terms of the account should not be permitted." The notice given by the plaintiff and written down by the bank employees, does not convey the message required of the above cited statute which is in effect a statement that there is a problem or conflict as to the interests of the parties in the CD and until resolved or such notice withdrawn the CD is to remain as is. The message given the bank by plaintiff was convert this account to his exclusive dominion and control which the bank chose not to honor and elected to honor the direction of the other co-tenant.

The bank is therefore exonerated on both notes since the message went to both, but there is another reason the \$15,000.00 CD was not affected by any notice of either party in that the \$15,000.00 CD had not matured and it could not be paid to either tenant until maturity.

As to the other contention of the plaintiff that before receiving any instruction from Wilford Youd that the bank employees had made the changes requested by plaintiff on the \$10,000.00 CD. This is contrary to the facts established by those who would have made the change to who said that it was not

done before the bank manager was consulted and Wilford Youd contacted them with other requests which were followed.

Therefore, it is clear that the Federal litigation would have been adverse to plaintiff.

Counsel for the defendant is directed to prepare and appropriate order granting summary judgment if within ten (10) days from the date hereof plaintiff has not filed written requests for further proceedings.

DATED at Provo, Utah, this 21<sup>st</sup> day of March, 1988.

  
\_\_\_\_\_  
GEORGE E. BALLIF, JUDGE

ADDENDUM NO. 2

FILED  
FOURTH JUDICIAL DISTRICT COURT  
OF UTAH COUNTY STATE OF UTAH  
April 6, 1988  
WILLIAM F. HUISE, CLERK  
DEPUTY

STEPHEN B. NEBEKER (A2371),  
THOMAS L. KAY (A1778) and  
PAUL D. NEWMAN (A4889) of  
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Attorneys for Defendants  
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P. O. Box 45385  
Salt Lake City, Utah 84145-0385  
Telephone: (801) 532-1500

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH  
-----oo0oo-----

GARTH YOUD,	:	ORDER GRANTING DEFENDANTS'
	:	MOTION FOR SUMMARY
Plaintiff,	:	JUDGMENT AND DENYING
	:	PLAINTIFF'S MOTION FOR
v.	:	SUMMARY JUDGMENT
	:	
RICHARD B. JOHNSON and	:	Civil No. CV-87-457
HOWARD, LEWIS & PETERSON,	:	
a partnership,	:	Judge Ballif
	:	
Defendants.	:	

-----oo0oo-----


This matter is before the Court on plaintiff's motion for summary judgment and defendants' motion for summary judgment submitted pursuant to Rule 2.8. Arguments of counsel were heard at the pretrial conference on February 26, 1988. After reviewing the memoranda filed by the parties, hearing the arguments of counsel, and good cause appearing, and pursuant to the Court's Ruling dated March 21, 1988,

IT IS ORDERED that plaintiff's motion for summary judgment is denied.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted.

DATED this 6<sup>th</sup> day of April, 1988.

BY THE COURT:

  
George E. Ballif  
District Judge

CERTIFICATE OF SERVICE

I hereby certify that on the 24<sup>th</sup> day of March, 1988, a true and correct copy of the foregoing ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, to the following:

Roy G. Haslam  
BIELE, HASLAM & HATCH  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101



### ADDENDUM NO. 3

[illegible]

Maturity 10.50%  
 North Florida  
 617-638-1111  
 PAY ANNUAL P.E.O.  
 NATIONAL SAVINGS  
 BANK OF THE CITY OF NEW YORK  
 31-51

FORM 99-0243

G. L. NUMBER

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ZIONS FIRST NATIONAL BANK

NON-NEGOTIABLE

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TYPE

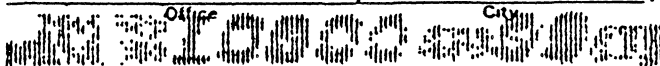
Issued at

Branch

Spanish Fork

Utah

Date

THIS CERTIFIES THAT there has been  
deposited in this Bank the amount of

10,000.00

payable to Wilford Youd or Garth Youd

Social Security  
or Identification Number 529-24-3562

Address 360 East 400 North

City Spanish Fork, U State Utah Zip Code 84600

Interest at the rate of 14.72% per annum commencing from March 6, 1980, and payable Sept. 6, 1980.

depositor, or if more than one, to either or any of said depositors or the survivor or survivors in current funds upon presentation and surrender of this certificate properly endorsed. Interest payable: ☐ quarterly ☒ maturity.

This certificate shall be automatically renewed for successive like maturity periods if the certificate is not presented and surrendered for payment within ten (10) days after the original or any renewed maturity date, or unless the Bank issues or mails notice to the contrary to depositor(s) or to either or any of said depositors at least ten (10) business days before any such maturity date, and any mailed notice shall be sent to the address above or then designated on Bank's records. The interest rate for each renewal period shall be the prevailing rate of the Bank on new Time Certificates of like duration on renewal date. Certificate transferable only upon books of the Bank. Subject to applicable present and future state and federal laws and regulations.

Certificate not redeemable prior to original or final renewed maturity, and deposit bears no interest after original or final renewed maturity.

Interest to be paid by ☐ Compound ☐ Deposit Checking Account

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BRANCH COPY FILE ALPHABETICALLY

☒ Remit by Mail☐ Deposit Savings Account

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By

Authorized Signature

FORM 99-0243

## ADDENDUM NO. 4

[illegible]

2001

FORM 99-0243

NON-NEGOTIABLE

G. L. NUMBER

-	-	-	-	-	-	-	-	-	-
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ZIONS FIRST NATIONAL BANK

3	7	-	0	1	6	3	4	1	-	9
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Issued at Spanish Fork Branch Spanish Fork . Utah, Oct. 27, 1980

CERTIFIES THAT there has been  
 led in this Bank the amount of

Wilford Youd or Garth Youd

360 East 400 North

Social Security  
 or Identification Number 529 24 3562

City Spanish Fork State Utah Zip Code 84660

t at the rate of 11.65% per annum commencing from Oct. 24, 19 80 and payable April 24, 19 81.

isitor, or if more than one, to either or any of said depositors or the survivor or survivors in current funds upon presentation and surrender of this certifi

operly endorsed Interest payable ☐ quarterly ☒ maturity

rtificate shall be automatically renewed for successive like maturity periods if the certificate is not presented and surrendered for payment within ten (10)  
 ter the original or any renewed maturity date, or unless the Bank issues or mails notice to the contrary to depositor(s) or to either or any of said de  
 , at least ten (10) business days before any such maturity date, and any mailed notice shall be sent to the address above or then designated on Bank's

The interest rate for each renewal period shall be the prevailing rate of the Bank on new Time Certificates of like duration on renewal date Certificate  
 able only upon books of the Bank Subject to applicable present and future state and federal laws and regulations

ite not redeemable prior to original or final renewed maturity, and deposit bears no interest after original or final renewed maturity

to be paid by ☐ Compound ☐ Deposit Checking Account

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BRANCH COPY FILE ALPHABETICALLY

☒ Remit by Mail ☐ Deposit Savings Account

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By [Signature]  
 Authorized Signature

ADDENDUM NO. 5  
IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

\* \* \*

GARTH YOUD,	:	
Plaintiff,	:	Civil No. C83-1368W
vs.	:	Deposition of:
ZIONS FIRST NATIONAL BANK,	:	<u>DONA JENSEN</u>
Defendant.	:	

\* \* \*

Deposition of DONA JENSEN, taken at the instance and request of the Plaintiff, at the law offices of Howard, Lewis & Petersen, 120 East 300 North, Provo, Utah, on the 16th day of May, 1984, at the hour of 9:00 a.m., before LANETTE SHINDURLING, a Certified Shorthand Reporter, Utah License No. 122, and Notary Public in and for the State of Utah.

\* \* \*

ASSOCIATED PROFESSIONAL REPORTERS  
420 Kearns Building  
Salt Lake City, Utah 84101  
Telephone: 322-3441

1           Q     Do you understand that there's a difference between  
2     the adjunctive "and" and the conjunctive "or"?

3           A     Yes, I do.

4           Q     Did you determine that the time certificate had, in  
5     fact, and/or on it?

6           A     Yes.

7           Q     And his simple instruction to you was simply to do  
8     what with that time certificate?

9           A     He wanted to renew it and just have it put in his  
10    name.

11          Q     What did you say?

12          A     I did it.

13          Q     And did you take a time certificate that he had  
14    furnished you and fill out another time certificate that would  
15    be in the same amount with interest in his name only?

16          A     Yes.

17                MR. PRATT: Off the record, if I can go off the  
18    record. I think we may have a confusion as to dates here.

19          Q     (BY MR. JOHNSON) Let me handle it and we'll see  
20    where we go.

21                How long did that process take, just five or ten  
22    minutes?

23          A     Ten minutes at the most.

24          Q     And Mr. Youd then received the time certificate for  
25    the initial amount plus interest?

- 1           A     Yes.
- 2           Q     And walked out the door?
- 3           A     Yes.
- 4           Q     You personally delivered that to him?
- 5           A     Yes.
- 6           Q     And that was the end of your dealings with him?
- 7           A     Yes.
- 8           Q     Now, do you remember another occasion?
- 9           A     I think he brought in another certificate.
- 10          Q     At another time?
- 11          A     A couple of days or three days -- well, some days
- 12 later.
- 13          Q     But in September of '82?
- 14          A     I'm not sure.
- 15          Q     And what happened on that occasion, did he again
- 16 come to you?
- 17          A     Yes.
- 18          Q     Because he dealt with you now once before?
- 19          A     Yes.
- 20          Q     And what certificate did he give to you at this time?
- 21          A     I'm not sure. It was just a -- I do not remember
- 22 the dollar amount.
- 23          Q     Was it another certificate again in the name of
- 24 Wilford Youd or Garth Youd?
- 25          A     Yes, it was.

1 Q What was his instruction to you on that occasion?

2 A The same as before.

3 Q Do you know where he had come from?

4 A No.

5 Q Did you follow his instructions?

6 A Yes.

7 Q And did you give him back another time certificate  
8 of deposit in his name only with the face amount of the  
9 initial deposit together with interest?

10 A Yes.

11 Q And he walked out the door?

12 A Yes.

13 Q Did anything else happen?

14 A Not that I recall.

15 Q No other conversations?

16 A No.

17 Q Did you meet with Mr. Youd again?

18 A I'm not sure. I can't remember.

19 Q If you did, you don't remember it?

20 A I don't remember.

21 Q And if you met with Mr. Youd before these two  
22 occasions that you've just described for me, you can't  
23 remember them?

24 A Not definitely.

25 Q You just have a memory that you may have seen him

1           Q     Would you tell me what Irene's job was vis-a-vis  
2 your job as of September of 1982?

3           A     She's installment loan secretary and would deal with  
4 new accounts if the need arose.

5           Q     Now, you're confident that the two times that you  
6 met with Mr. Youd you were able to complete his instructions,  
7 correct?

8           A     Yes.

9           Q     There was no holding onto the time certificates, you  
10 did what he said while he was there?

11          A     Yes.

12          Q     Now, did you ever have a telephone conversation with  
13 Mr. Youd?

14          A     Not that I remember.

15          Q     Could you have had a conversation and don't recall  
16 it?

17          A     Possibly, yes.

18          Q     Now, did you ever deal with Leona Warner concerning  
19 her time certificates?

20          A     I could have.

21          Q     Do you have any memory of that?

22          A     Not definitely, no.

23          Q     Taking you back to about the same time period,  
24 September of 1982 and when you dealt with Mr. Youd, do you  
25 remember within a time period close thereto seeing Leona

1 where the bank has money on deposit in any form and various  
2 people are making a claim to that money?

3 A Not directly.

4 Q Well, do you know of a bank policy that if more than  
5 one person are claiming the same moneys that the bank refuses  
6 to give it to anyone and pays it into Court or waits to be  
7 ordered by the Court to pay it to a certain person?

8 A No, I personally don't know that.

9 MR. JOHNSON: That's all I have. Give us one  
10 second.

11 (Short recess.)

12 MR. JOHNSON: No more questions.

13 EXAMINATION

14 BY MR. PRATT:

15 Q I just have a couple of questions. Mr. Johnson  
16 asked you about two separate occasions on which Mr. Garth Youd  
17 came to you and presented to you certificates that were  
18 payable to either he or Wilford Youd and I think you testified  
19 earlier that you had complied with his instructions, is that  
20 right?

21 A Yes.

22 Q You issued him on both those occasions certificates  
23 of deposit in the same amount that were payable just to Garth  
24 Youd?

25 A Yes.

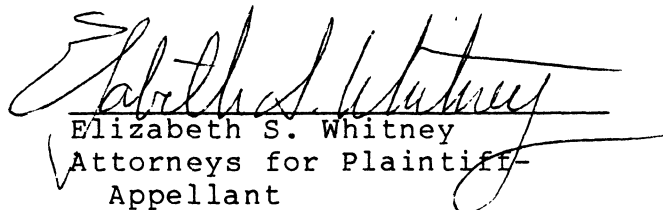
**CERTIFICATE OF SERVICE**

I hereby certify that on the 5 day of August, 1988, I caused four true and correct copies of the foregoing BRIEF OF APPELLANT to be hand delivered to the following counsel of record:

Stephen B. Nebeker  
Thomas L. Kay  
Paul D. Newman  
RAY, QUINNEY & NEBEKER  
79 South Main St. #400  
Salt Lake City, UT 84145-0385

DATED this 5 day of August, 1988.

BIELE, HASLAM & HATCH

  
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Appellant