

1988

## Youd v. Johnson : Brief of Respondent

Utah Court of Appeals

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Thomas L. Kay; Steven J. Aeschbacher; Ray, Quinney & Nebeker; Attorneys for Defendants-Respondents.

Roy G. Haslam; Elizabeth S. Whitney; Behle, Haslam & Hatch; Attorneys for Plaintiff-Appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

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Plaintiff-Appellant, : BRIEF OF RESPONDENTS  
v. :  
RICHARD B. JOHNSON and HOWARD : Case No. 880431-CA  
LEWIS & PETERSON, 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 Judge

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THOMAS L. KAY and  
STEVEN J. AESCHBACHER of  
RAY, QUINNEY & NEBEKER  
Attorneys for Defendants-  
Respondents  
400 Deseret Building  
79 South Main Street  
P. O. Box 45385  
Salt Lake City, Utah 84145-0385  
Telephone: (801) 532-1500

ROY G. HASLAM and  
ELIZABETH S. WHITNEY of  
BEHLE, HASLAM & HATCH  
Attorneys for Plaintiff-Appellant  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101  
Telephone: (801) 328-1666

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THOMAS L. KAY and  
STEVEN J. AESCHBACHER of  
RAY, QUINNEY & NEBEKER  
Attorneys for Defendants  
Respondents  
400 Deseret Building  
79 South Main Street  
P. O. Box 45385  
Salt Lake City, Utah 84145-0385  
Telephone: (801) 532-1500

ROY G. HASLAM and  
ELIZABETH S. WHITNEY of  
BEHLE, HASLAM & HATCH  
Attorneys for Plaintiff-Appellant  
50 West Broadway, 4th Floor  
Salt Lake City, Utah 84101  
Telephone: (801) 328-1666

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4. Utah Code Ann. § 75-6-112
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### JURISDICTION AND PROCEEDINGS BELOW

The Utah Court of Appeals has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(j) (1988).

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. Whether Utah Code Annotated § 75-6-112 (1975) bars plaintiff's recovery for Zions' failure to pay him under joint Certificates of Deposit, which were instead reissued at the direction of the owner of the Certificates of Deposit.

2. Whether the testimony of one bank teller, in contravention of the testimony of all the other witnesses in the case, including the plaintiff, and which if believed still requires that the plaintiff fail to recover against Zions, constitutes a genuine issue of material fact sufficient to preclude the granting of summary judgment in favor of the defendants.

### STATEMENT OF THE CASE

This is a legal malpractice action. Plaintiff Garth Youd ("Youd") retained defendants to pursue an action against Zions First National Bank ("Zions") to recover amounts Youd claimed due him under two Certificates of Deposit. Judgment was entered in favor of Zions and against Youd, and Youd then initiated this action against defendants.



Defendants admitted negligence, and the issues involved in this action were limited to questions of causation and damages -- whether defendants' negligence harmed the plaintiff.

Defendants filed a motion for summary judgment in this action based upon the statutory protection Zions enjoyed against the very claim the plaintiff asserted -- claims of improper payment on multiple-party Certificates of Deposit. Plaintiff responded by filing a cross-motion for summary judgment. These motions were argued at the pre-trial conference. Judge Ballif denied plaintiff's motion for summary judgment and granted defendants' motion for summary judgment.

#### STATEMENT OF FACTS

1. Defendants were retained by plaintiff to represent him in an action against Zions First National Bank ("Zions"). Complaint at ¶ 4, R. 1.

2. In connection with defendants' representation of plaintiff, defendants filed an action entitled Garth Youd v. Zions First National Bank, Civ. No. C83-1368-W, in the United States District Court for the District of Utah (the "Zions action").

3. Defendant Richard B. Johnson failed to appear at a pre-trial conference in the Zions action, and failed to file an appellate brief in the United States Court of Appeals for the Tenth Circuit on the appeal of the Zions action. R. 112-114.

4. Zions issued two Certificates of Deposit in the joint names of Wilford Youd and Garth Youd in the amounts of \$10,000.00

and \$15,000.00. Complaint in Zions Action at ¶ 5, R. 50. The \$10,000.00 Certificate matured on September 6, 1982 and the \$15,000.00 Certificate matured on October 27, 1982. R. 177.

5. On September 7, 1982, plaintiff took the two Certificates of Deposit to the Zions Spanish Fork Branch and spoke with Dona Jensen and Irene K. Brunson, two employees of the Zion's Spanish Fork Branch. Plaintiff requested that they recover the interest that had been paid to plaintiff's sister on the \$10,000.00 Certificate of Deposit, roll the interest into the principal, and issue a new Certificate of Deposit for the principal and interest amount in plaintiff's name only. Once this was done, they were to place the new Certificate of Deposit and the \$15,000.00 Certificate of Deposit into plaintiff's safety deposit box. Plaintiff was going to mail the key to the safety deposit box so that this could be accomplished. Garth Youd Deposition at pp. 70-75 and 81, R. 62-68.

6. Plaintiff's request was not in writing. Garth Youd Deposition at pp. 75 and 81, R. 67-68.

7. On September 7, 1982, Richard B. Roach, Manager of Zion's Spanish Fork Branch, spoke with Dona Jensen and Irene K. Brunson regarding plaintiff's request. Richard B. Roach Deposition at pp. 36-44, R. 71-79.

8. On September 7, 1982, Richard B. Roach met with Leona Warner, daughter of Wilford Youd, who informed him that Wilford was concerned about his money, that the family was concerned about medical expenses Wilford might incur, and that it was not the time

to be dividing up money among children. Roach Deposition at pp. 38-40, R. 73-75.

9. On September 7, 1982, Wilford Youd directed Richard B. Roach to have the Certificates of Deposit taken out of Wilford and Garth's names and placed in the names of Wilford and his two daughters, Leona Warner and LaRaine Mackley. Roach Deposition at pp. 42-44, R. 77-79.

10. Richard Roach complied with Wilford Youd's request. Roach Deposition at p. 44, R. 79.

11. Garth Youd did not pay anything for the Certificates of Deposit involved in this action. Youd Deposition at p. 57, R. 149.

12. Dona Jensen testified that on two occasions she reissued Certificates in the name of Garth Youd and returned the new Certificates to Youd before he left the bank. Dona Jensen Deposition at pp. 14-17, R. 137-140.

13. Zions First National Bank has a practice and procedure of reissuing Certificates of Deposit, including changing the names on the Certificate, without endorsement. Roach Deposition at p. 47, R. 151.

#### SUMMARY OF ARGUMENT

In order to prevail in an action for legal malpractice, the plaintiff must establish all elements of the cause of action. Failure to prove causation or damages bars recovery despite an admission of negligence on the part of the defendants. Youd is

barred by law from recovering against Zions and therefore has no damages, so summary judgment in defendants' favor is proper.

The \$15,000.00 Certificate of Deposit was not mature, was not presented for payment, and could not be paid to Youd on September 7, 1982. The fact that the owner of the Certificate, Wilford Youd, later chose to have the Certificate reissued without Garth Youd's name on it does not give rise to a cause of action by Garth Youd against Zions. Youd could not recover under any theory with respect to the \$15,000 Certificate. The issues in this case are properly limited to the disposition of the \$10,000.00 Certificate.

Utah Code Ann. § 75-6-112 provides an absolute discharge of any claims Youd could assert against Zions concerning the disposition of the \$10,000.00 Certificate. Zions received instructions from both named beneficiaries, and chose to honor the Certificate's owner's instructions. This section discharges Zions from any liability for making that decision.

Similarly, there is no genuine issue of material fact concerning the reissuance of the \$10,000.00 Certificate. Youd now attempts to create an issue of fact by relying upon the testimony of a Zions' employee who claimed that she had reissued a certificate in Youd's name and given it back to him before he left the bank. It is not clear that this testimony refers to the Certificate involved in this case. If it does, it is contradicted by Youd's own testimony as well as by the testimony of the other Zions' employees. Even assuming as we must that the employee's

testimony is true, Zions would still be entitled to summary judgment because Youd would have had the \$10,000.00 Certificate in his possession and issued in his name alone, and no claim that Zions had not followed his directions could arise. The trial judge properly found that there was no genuine issue of material fact concerning this issue.

Plaintiff's reliance on the presentment provisions of the U.C.C. and those contained in the Certificates of Deposit is also misplaced. As noted above, the \$15,000.00 Certificate was not mature and not eligible for payment or presentment at the time Youd was in the bank. The \$10,000.00 Certificate was mature, but Youd did not request present payment. Rather, he instructed the bank to recover the interest it had paid on the Certificate to Youd's sisters and to issue a new Certificate in his name alone for the current principal plus the interest recovered. Since there was no presentment for payment, the U.C.C. provisions upon which plaintiff relies are not applicable, nor are the provisions of the Certificate of Deposit quoted by plaintiff.

Plaintiff's claim that Zions violated a bailment he created concerning the Certificates of Deposit is without merit. The duty of a bailee also runs to the true owner of the property. It is undisputed that under Utah law, Youd's father, Wilford Youd, was the owner of both Certificates of Deposit. Zions' actions of which plaintiff complains were merely to carry out the wishes of Youd's father, Wilford Youd, in reissuing the Certificates in the name of Wilford Youd and the plaintiff's sisters, Leona Warner and

LaRaine Mackey. Zions had no duty running to the plaintiff which superceded its duty owed to the owner, Wilford Youd.

Zions' actions do not subject it to liability to the plaintiff. Accordingly, Zions would have prevailed in the original federal district court action and defendants' negligence in representing the plaintiff did not cause plaintiff any damage. For these reasons, the Court's ruling of summary judgment in favor of the defendants is proper and should be affirmed.

#### ARGUMENT

I. PLAINTIFF MUST ESTABLISH ALL ELEMENTS OF A LEGAL MALPRACTICE CLAIM TO PREVAIL.

The plaintiff in a legal malpractice action must prove each and every one of the following elements in order to establish the cause of action:

1. That an attorney-client relationship existed;
2. That the attorney had a duty to the client;
3. That the attorney failed to perform the duty;
4. That the client suffered damages; and
5. That the attorney's negligence proximately caused the damage to the client.

Stangland v. Brock, 109 Wash.2d 675, 747 P.2d 464 (1987); Phillips v. Clancey, 152 Ariz. 415, 733 P.2d 300 (Ct. App. 1986); Chocktoot v. Smith, 280 Or. 567, 571 P.2d 1255 (1977); R. Mallen and V. Levit, Legal Malpractice, § 657 (2d Ed. 1981) (hereinafter referred to as "Legal Malpractice").

In a case such as this, where the alleged error is an omission, the test of causation is: Had the attorney performed the act, would the plaintiff have benefited? Dunn v. McKay, Burton, McMurray & Thurman, 584 P.2d 894, 895 (Utah 1978) (appropriate to inquire as to what the plaintiff's position would have been if the attorney had performed the act properly); see also Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686, 689 (1968); Legal Malpractice, § 102. This inquiry is referred to as "a suit within a suit." Chocktoot v. Smith, 571 P.2d at 1257.

In this case, there is no dispute concerning the existence of the attorney-client relationship and defendants have admitted that they were negligent in representing the plaintiff in the underlying action. Therefore, the plaintiff must establish the final elements of damages and causation in order to recover in this case. These elements are established by examining the "suit within a suit" and what would have happened if the federal district court action had been decided on the merits.

The manner in which the plaintiff can establish what should have transpired in the underlying action necessarily depends upon the nature of the attorney's error. If the action never took place, as where it was barred by a statute of limitations or concluded by a default judgment, as in this case, the plaintiff will be required to recreate, i.e., litigate, an action which was never tried. Legal Malpractice § 656.

Recreating the underlying action involves calling and examining those persons who would have been parties and witnesses and presenting

the demonstrative and documentary evidence which would have been presented but for the attorney's negligence. This procedure of presenting the evidence which should have been offered at the trial of the underlying action is known as a 'suit within a suit' or 'trial within a trial.' This is the accepted and traditional means of resolving issues involved in the underlying proceedings in a legal malpractice action.

Id. See Kessler v. Gray, 77 Cal. App. 3d 284, 143 Cal. Rptr. 496 (Ct. App. 1978); Michael Kovach, P.A. v. Pearce, 427 So. 2d 1128, 1129 (Fla. Dist. Ct. App. 1983), pet. den., 434 So. 2d 888 (Fla. 1983); Fuschetti v. Bierman, 128 N.J. Super. 290, 319 A.2d 781, 785 (Super. Ct. Law Div. 1974); Lewandowski v. Continental Casualty Co., 88 Wis. 2d 271, 276 N.W. 2d 284, 289 (1979). In other words, the client must show that he would have won the first suit as one step in order to win the second one. Harding v. Bell, 265 Or. 202, 508 P.2d 216, 217 (1973).

II. PLAINTIFF CAN OBTAIN NO RECOVERY AGAINST ZIONS AS A MATTER OF LAW, AND THEREFORE, PLAINTIFF IS UNABLE TO ESTABLISH EITHER CAUSATION OR DAMAGES.

In the Zions action, plaintiff claimed that he and his father, Wilford Youd, were the named payees of two Certificates of Deposit issued by Zions in the amount of \$15,000.00 and \$10,000.00, respectively. Plaintiff testified that on September 7, 1982, he took the two Certificates of Deposit to Zions' Spanish Fork Branch and instructed Zions to recover the interest on the \$10,000.00 Certificate of Deposit, roll the interest into the principal, and issue a new Certificate of Deposit in the plaintiff's name. Then Zions was to place the new Certificate of Deposit and the



(unmatured) \$15,000.00 Certificate of Deposit into plaintiff's safety deposit box. Garth Youd Deposition at pp. 70-75, R. 62-67. Plaintiff claimed in the Zions action that Zions failed to follow his instructions and acted wrongfully in reissuing the Certificates of Deposit in the names of his father and his two sisters.

Zions had an absolute defense to the claims asserted by plaintiff in the Zions action.

A. The Certificates of Deposit Were "Multiple-Party Accounts" Under Utah Law.

Utah Code Ann. § 75-6-101(1) defines "account" as follows:

"Account" means a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account and other like arrangement.

(Emphasis supplied.)

Utah Code Ann. § 75-6-101(4) defines "joint account" as follows:

"Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

Utah Code Ann. § 75-6-101(5) defines "multiple-party account" to include joint accounts as defined under § 75-6-101(4).

Under the terms of § 75-6-101(1), (4) and (5), the Certificates of Deposit issued by Zions to plaintiff and his father were multiple-party accounts.

B. Zions' Conduct Discharges It from Liability for Plaintiff's Claim in the Zions Action.

Utah Code Ann. § 75-6-108 provides:

Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request of any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

(Emphasis supplied.)

Utah Code Ann. § 75-6-112 provides in pertinent part:

Payment made pursuant to Section 75-6-108 . . . discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties . . . . The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple party accounts.

(Emphasis supplied.)

Only one Utah case has discussed the aforementioned statutory provisions. In Smith v. Utah Central Credit Union, 727 P.2d 219 (Utah 1986), the plaintiff brought an action to recover funds deposited to a joint savings account and withdrawn by his wife. The plaintiff alleged that the credit union failed to honor his telephone request that no money be withdrawn by his wife without his approval. The trial court entered judgment against plaintiff. On appeal, the Utah Supreme Court cited the provisions of Utah Code Ann. §§ 75-6-108 and 75-6-112 and affirmed the judgment against the plaintiff, relieving the credit union of liability and stating that the plaintiff's oral statements to the credit union were not "written notice" under § 75-6-112. Here plaintiff complains that his oral instructions to Zions were not followed, and that Zions' reissuance of the Certificates at Wilford Youd's request entitles him to recovery. Just as in Smith, the financial institution's actions should be protected and judgment affirmed.

In plaintiff's deposition taken in the Zions action, plaintiff admitted that his instructions to Zions were oral. Garth Youd deposition at pp. 72-75, R. 64-67. Therefore, there is no possible way the exception in § 75-6-112 concerning receipt of written notice from any party "able to request present payment" applies. No written notice was given, and Youd's own testimony shows that in any event his instructions were not to refuse "withdrawals in accordance with the terms of the account," and so would not trigger the exception.

In the Zions action, Richard B. Roach, Branch Manager of Zions, testified that on September 7, 1982, he had a conversation with Dona Jensen and Irene K. Brunson, two employees of Zions, who informed him of plaintiff's requests. He further testified, that on that same day, he was contacted by Leona Warner, the daughter of Wilford Youd, who told him that the family was concerned about medical expenses Wilford Youd might incur later in life and that that was not the time to be dividing his money among the children. She also told him that Wilford Youd was concerned about what was happening with his money. Mr. Roach asked Leona to have Wilford Youd call him. On September 7, Wilford Youd telephoned Mr. Roach who told him about Garth's request. In response, Wilford Youd told Mr. Roach to take Garth's name off of the Certificates of Deposit, and to have the Certificates of Deposit reissued in Wilford Youd's name and the names of his two daughters. Richard Roach Deposition at pp. 36-45, R. 71-80. Zions complied with the request of Wilford Youd, and reissued the Certificates of Deposit in his name and the names of his two daughters.

Under § 75-6-108, Zions had the right to follow the instructions of Wilford Youd. Section 75-6-112 discharges Zions from all of plaintiff's claims for following the request of Wilford Youd.

C. Wilford Youd's Request for Reissuance of the Certificate of Deposit was a "Proper Request".

Plaintiff argues that Wilford Youd's telephone instructions to Richard Roach do not constitute a "request" as

defined in Utah Code Ann. § 75-6-101(12), and so Zions cannot enjoy the protection of § 75-6-112. Appellant's Brief at 29-31.

Section 75-6-101(12) defines a request to be:

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 the financial institution . . . .

Wilford Youd requested Zions to reissue the two Certificates of Deposit in his name and the names of his two daughters. Roach Deposition, pp. 42-44, R. 77-79. Zions complied with that request. The Certificates of Deposit do not specify any conditions for their reissuance, and plaintiff has failed to establish that any conditions for reissuance exist under the terms of the Certificates, or under any laws or regulations concerning financial institutions. Zions had a practice and procedure permitting a party to a joint account to orally request the change of the names on the account, without endorsement. Roach Deposition, pp. 47-48, R. 151-152. Zions followed Wilford Youd's request based on this policy and procedure. Id. Therefore, Wilford Youd's request met all the "conditions of the account" as required by § 75-6-101(12) and was a proper request, entitling Zions to the protection of § 75-6-112.

Section 75-6-112 protects a financial institution from claims for not dividing up the proceeds of a joint account according to its beneficial ownership. Here Zions was faced with conflicting claims by each named payee. It could have thrown up its hands and paid the money into court. The court then would

have looked to who provided the funds, i.e., who was the owner of the account pursuant to Utah Code Ann. § 75-6-103(1), and decided in favor of the owner, Wilford Youd. Zions should not and cannot be held liable for coming to the same conclusion a court would have.

III. THERE IS NO GENUINE ISSUE OF MATERIAL FACT CONCERNING THE REISSUANCE OF THE \$10,000.00 CERTIFICATE.

In plaintiff's Appeal Brief he claims that the district court erred in not finding that there was a genuine issue of material fact concerning the alleged reissuance of the \$10,000.00 Certificate in his name alone. It is interesting to note that while the plaintiff did mention the testimony which supports this claim below, he argued instead for summary judgment in his favor and that there were no genuine issues of material fact. Plaintiff's claim that there is a genuine issue of material fact as to whether the \$10,000.00 Certificate was reissued in his name alone is based upon the testimony of Dona Jensen. Deposition of Dona Jensen at pp. 14-17, R. 137-140. Her testimony was that on two separate occasions Youd came into the bank with a certificate of deposit of \$10,000.00 or more and requested that the interest be added to the principal and a new certificate be issued in his name alone. Jensen testified that on both occasions she reissued the new certificate, handed it to Youd, who then left the bank. She also testified that sometime after these two certificates had been reissued, she was advised by Richard Roach, the branch manager, that he had talked to Wilford Youd and that a problem had

come up about some Certificates of Deposit. Jensen Depo. pp. 22-24. There is nothing to connect the certificates she discusses with those involved in this action. According to the testimony of all the other players involved, including the plaintiff, he brought both Certificates in on the same day, only one of which was mature and able to be cashed. He left the Certificates with Zions with instructions to recover the interest on the \$10,000.00 Certificate and only then reissue it in a new amount, including the interest, in his name alone. Later that same day, the bank was contacted by Wilford Youd and given different instructions.

Plaintiff's attempt to create an issue of fact is a red herring. If Ms. Jensen's testimony refers to these Certificates of Deposit and is correct, then Youd left the bank with reissued Certificates of Deposit in his name alone. If this is the case, the Zions action would never have been filed since he had the Certificates to do with as he pleased. Zions could not have reissued the Certificates again after they had been given to Youd. Ms. Jensen's testimony is not at all specific as to the date these events occurred, except that it was prior to her conversation with Richard Roach concerning his conversation with Wilford Youd. When asked what Roach told her to do concerning the Certificates of Deposit, Jensen testified that as to the certificates she had reissued, "they were over and done with," and that there were "apparently other certificates." Jensen Deposition at pp. 23-24.

This does not create a genuine issue of material fact. If Jensen's testimony is accurate and actually refers to the Certificates of Deposit involved in this case, which is nowhere indicated in her testimony, this action would not exist. If the testimony refers to other certificates of deposit she reissued for plaintiff, her testimony is of no relevance to Zions actions with respect to these two Certificates of Deposit. Plaintiff's testimony regarding what he did with the two Certificates involved in this action was that he spoke to Dona Jensen and Irene Bronson, but that he talked Irene and gave her (not Dona) instructions concerning what to do with the Certificates of Deposit. Youd's Deposition at pp. 72-74, R. 125-127.

The trial court properly concluded that Ms. Jensen's testimony concerning reissuing new certificates of deposit and delivering them to Garth Youd did not raise a genuine issue of material fact in this case. If Ms. Jensen's testimony is correct, Youd received a reissued Certificate of Deposit and Zions did not act improperly; plaintiff has no claim. If her testimony is not correct, Zions is protected by Utah law in its decision to honor the wishes of the owner of the Certificates of Deposit, and is not liable to the plaintiff. Either way, summary judgment in favor of the defendants is appropriate. As Professor Moore states, "[t]he function of the summary judgment is to avoid a useless trial. . . ." 6 Moore's Federal Practice ¶ 56.15 [1.-0] (2d Ed. 1988). A trial over this issue (the only issue plaintiff even attempts to argue is disputed) would indeed be useless -- no



matter the decision regarding Ms. Jensen's testimony, plaintiff cannot recover against Zions.

To successfully oppose a motion for summary judgment, a party's facts "must be material and of a substantial nature, not fanciful, frivolous, gauzy, spurious, irrelevant, gossamer inferences, conjectural, speculative, nor merely suspicions." 6 Moore's Federal Practice ¶ 56.15 [3] (2d Ed. 1988). While defendants hesitate to categorize plaintiff's alleged issue of fact, its determination is of no influence on the outcome of this action and should not be considered a genuine issue of material fact.

IV. NO PRESENTMENT WAS MADE AND THEREFORE THE U.C.C. PROVISIONS AND TERMS OF THE CERTIFICATE OF DEPOSIT CONCERNING PRESENTMENT DO NOT APPLY.

It is undisputed that the \$15,000.00 Certificate was not mature on September 7, 1982, and therefore, Youd could not have presented it for payment. Similarly, Zions cannot be liable for dishonor of presentment for that Certificate. It is also undisputed that Youd did not present the \$10,000.00 Certificate for present payment. Rather, as he testified, he requested that the bank recover the interest paid on the Certificate, add the amount of interest to the principal, and reissue a new certificate in his name alone. Youd Deposition at pp. 72-77, R. 125-129. Since plaintiff did not request present payment of the Certificates, the U.C.C. provisions and provisions of the Certificate relied upon by the plaintiff are not relevant or dispositive in this case.

It is clear under the U.C.C. that presentment requires a demand for present payment. Utah Code Ann. § 70A-3-504(1). For example, in Bank of Miami v. Banco Industrial Y Ganadero Del Beni, S.A., 515 So. 2d 1038, 1040, 4 U.C.C. Rep. Serv. 2d 1522 (Fla. App. 1987), review dismissed, 520 So. 2d 583 (Fla. 1988), the court held that submitting a check for collection (i.e., payable if and when sufficient funds are deposited in the drawer's account to cover the amount of the check, is not "presentment" within the meaning of § 3-504, because it is not a "present demand for payment." See also, Western Air & Refrigeration, Inc. v. Metro Bank, 599 F.2d 83, 88 (5th Cir. 1979) (check presented for collection is not presentment); Iverson v. First Bank of Billings, 712 P.2d 1285 (Mont. 1985) (check sent to payor bank for payment once funds become available to pay it not presented under § 3-504).

In this case plaintiff never made a demand for present payment. Rather, he requested that Zions hold the Certificate until it recovered the interest it had paid on it and then issue a new Certificate in his name alone for the new total, including both the old principal and the interest. This type of arrangement is not a present demand for payment and not a presentment within the meaning of § 70A-3-504. Without presentment, plaintiff's arguments concerning Zions' refusal to make payment, appellant's Brief at pp. 24-29, are not relevant to this case.

The only question is whether there are any provisions of law or contractual provisions which permit names on joint accounts to be changed by one of the payees. No such law or contractual

provisions have been presented by the plaintiff or located by the defendants. In this case, Zions received conflicting instructions on the same day from both named payees. It chose to follow the instructions given by Wilford Youd, the owner of the Certificates.<sup>1</sup>

Since plaintiff did not present the Certificates for present payment, Zions could not have and is not liable for dishonored presentment of the Certificates.

V. ZIONS IS NOT LIABLE TO PLAINTIFF AS A BAILEE.

There is no evidence that in receiving the two Certificates from Garth Youd, Zions agreed to follow his instructions. As a result, there is nothing to indicate the acceptance of a bailment by Zions. However, even if we assume that a bailor-bailee relationship existed between Garth Youd and Zions, Zions would not have been liable to Garth Youd.

It is generally accepted that delivery of property subject to a bailment to the true owner, in good faith, is a valid defense to an action brought by the bailor against the bailee. See 8 Am. Jur. 2d, Bailments, §§ 194-197. It is also recognized that the bailee's obligations run to the paramount titleholder as

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<sup>1</sup>Utah Code Ann. § 75-6-103(1) provides that a joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent. In this case, it is undisputed that all of the funds for both Certificates of Deposit were provided by Wilford Youd.

well as to the bailor. See, Christensen v. Hoover, 44 Colo. App. 501, 608 P.2d 372, 374, (1979), aff'd in part, rev'd in part on other grounds, 643 P.2d 525 (Colo. 1982).

As set forth above, § 75-6-103(1) provides that as between the parties on joint accounts, the account belongs to the parties in proportion to their contributions. In the Zions action, Wilford Youd was the owner of the Certificates by application of § 75-6-103(1). It is undisputed that Zions understood the ownership rights to the Certificates consistently with the provisions of § 75-6-103(1), and based on that understanding followed the instructions of Wilford Youd. Richard Roach Depo. pp. 44-45, R. 79-80. In following the instructions of the owner, Wilford Youd, Zions incurs no liability to Garth Youd.

Zions cannot be liable to plaintiff for conversion since it did not retain the Certificates or obtain any benefit from them, but rather disposed of them in accordance with the wishes of the true owner of the Certificates, Wilford Youd.

VI. IN NO EVENT CAN PLAINTIFF RECOVER CONCERNING THE \$15,000.00 CERTIFICATE.

It is undisputed that the \$15,000.00 Certificate was not mature at the time Youd brought the Certificates to the bank. He could not present it for payment, nor could he request payment, or even provide written notice as a "party able to request present payment" pursuant to § 76-5-112. Therefore, under none of the theories advanced by the plaintiff could Zions have become liable for its actions concerning the \$15,000.00 Certificate or its

reissuance of that Certificate in the names of Wilford Youd and the plaintiff's sisters.

#### CONCLUSION

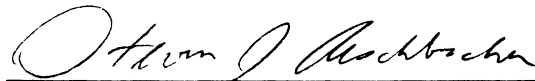
Plaintiff must establish that he was damaged and that his damage was caused by the defendants' negligence. In this case, plaintiff did not suffer any damage caused by the defendants' negligence because he could not, as a matter of law, have recovered from Zions. Zions' actions were protected by Utah statute. Wilford Youd's request to reissue the Certificates in his name and those of his daughters was proper and the bank's decision to honor that request may not subject it to claims by plaintiff. Plaintiff did not present the Certificates of Deposit for present payment, and so Plaintiff's claims of dishonored presentment or breach of contract are not applicable. Similarly, plaintiff's attempt to manufacture a genuine issue of material fact fails. If the testimony upon which plaintiff relies is determined to actually apply to the Certificates of Deposit involved in this case, then plaintiff does not have a claim, since Zions followed his instructions. If the testimony does not refer to these Certificates or is not accurate, then the bank's actions were protected by statute. Either way, plaintiff cannot recover against Zions. There is no genuine issue of material fact when either resolution of the issue will end up with the same outcome.

Plaintiff was unable to obtain the funds from the Certificates of Deposit purchased by his father. Zions, however, acted properly and is not subject to liability to plaintiff,

because the trial court was correct in determining that Zions was protected by Utah Code Ann. § 75-6-112 in its determination to reissue the Certificates as requested by Wilford Youd. Therefore, plaintiff was barred from recovering against Zions and accordingly suffered no damages in this case. Summary judgment in favor of the defendant is proper and the district court's decision should be affirmed.

DATED this 5<sup>th</sup> day of October, 1988.

RAY, QUINNEY & NEBEKER



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Thomas L. Kay  
Steven J. Aeschbacher

Attorneys for Defendants-Respondents

2825a

CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of October, 1988,  
four true and correct copies of Brief of Respondents was mailed,  
postage prepaid, to the following:

Roy G. Haslam  
Elizabeth S. Whitney  
BEHLE, HASLAM & HATCH  
50 W. Broadway, 4th Floor  
Salt Lake City, UT 84101  
Attorneys for Appellant

Kathy Sorg

2825a

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and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof.

History: C. 1953, 75-5-608, enacted by  
L. 1975, ch. 150, § 6.

75-5-609. Construction of this part.—(1) This part shall be so construed as to effectuate its general purpose to make uniform the law of those states which have enacted the Uniform Gifts to Minors Act.

(2) This part shall not be construed as providing an exclusive method for making gifts to minors.

History: C. 1953, 75-5-609, enacted by  
L. 1975, ch. 150, § 6.

## CHAPTER 6

### NONPROBATE TRANSFERS

#### Part 1. Multiple-Party Accounts

- |           |   |
|-----------|---|
| Section   |   |
| 75-6-101. | Definitions.  |
| 75-6-102. | Ownership as between parties, and others—Protection of financial institutions.            |
| 75-6-103. | Ownership during lifetime.  |
| 75-6-104. | Right of survivorship.  |
| 75-6-105. | Effect of written notice to financial institution.  |
| 75-6-106. | Accounts and transfers nontestamentary.   |
| 75-6-107. | Rights of creditors.  |
| 75-6-108. | Financial institution protection—Payment on signature of one party.                       |
| 75-6-109. | Financial institution protection—Payment after death or disability—Joint account.         |
| 75-6-110. | Financial institution protection—Payment of P.O.D. account.                               |
| 75-6-111. | Financial institution protection—Payment of trust account.                                |
| 75-6-112. | Financial institution protection—Discharge.   |
| 75-6-113. | Financial institution protection—Setoff—Attachment, garnishment, and other legal process. |
| 75-6-114. | Financial institution protection—Costs and attorneys' fees.                               |
| 75-6-115. | Agency accounts.  |

#### Part 2. Provisions Relating to Effect on Death

- 75-6-201. Provisions for payment or transfer at death.

### Part 1

#### Multiple-Party Accounts

75-6-101. Definitions.—As used in this part:

(1) "Account" means a contract of deposit of funds between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement.

(2) "Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee.

(3) "Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, industrial loan corporations with thrift certificate authorization, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

(4) "Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

(5) "Multiple-party account" means any of the following types of account: (a) A joint account; (b) A P.O.D. account; or (c) A trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization, or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

(6) "Net contribution" of a party to a joint account as of any given time is the sum of all deposits to it made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a prorata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question.

(7) "Party" means a person, including a minor, who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A P.O.D. payee or beneficiary of a trust account is a party only after the account becomes payable to him by reason of his surviving the original payee or trustee and includes a guardian, conservator, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal.

(8) "Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any setoff, reduction, or other disposition of all or part of an account pursuant to a pledge.

(9) "Proof of death" includes a death certificate or record or report which is prima facie proof of death under section 75-1-107.

(10) "P.O.D. account" means an account payable on request to one person during lifetime and on his death to one or more P.O.D. payees, or to one or more persons during their lifetimes and on the death of all of them to one or more P.O.D. payees.

(11) "P.O.D. payee" means a person designated on a P.O.D. account as one to whom the account is payable on request after the death of one or more persons.

## MULTIPLE-PARTY ACCOUNTS

(12) "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 the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this part the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

(13) "Sums on deposit" means the balance payable on a multiple-party account, including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(14) "Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; and it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

(15) "Withdrawal" includes payment to a third person pursuant to check or other directive of a party.

History: C. 1953, 75-6-101, enacted by L. 1975, ch. 150, § 7.

### Editorial Board Comment.

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten Trust account. An account "payable on death" is also authorized.

As may be seen from examination of the sections that follow, "net contribution" as defined by subsection (6) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

Various signature requirements may be involved in order to meet the withdrawal requirements of the account. A "request" involves compliance with these requirements. A "party" is one to whom an account is presently payable without regard for whose signature may be required for a "request."

### Cross-References.

Bank deposits in name of fiduciary or principal, 22-1-7 to 22-1-11.

### Collateral References.

Banks and Banking—129, 134, 138, 142, 143, 301, 315 (3); Joint Tenancy—3, 6, 10, 14; Trusts—34.

9 C.J.S. Banks and Banking §§ 286, 296-308, 334, 353, 994, 998, 1003, 1057; 48 C.J.S. Joint Tenancy §§ 3, 6, 13, 18; 89 C.J.S. Trusts § 54.

10 Am. Jur. 2d 330 et seq., Banks § 369 et seq.

Attachment: joint bank account as subject to attachment, garnishment, or execution by creditor of one of the joint depositors, 11 A. L. R. 3d 1465.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A. L. R. 3d 908.

Bank's right to apply third person's funds, deposited in debtor's name, on debtor's obligation, 8 A. L. R. 3d 235.

Death of beneficiary as terminating or revoking trust of savings bank account over which settlor retains rights of withdrawal or revocation, 64 A. L. R. 3d 221.

Fingerprints as signature on instrument purporting to create joint tenancy, 72 A. L. R. 2d 1268.

Gift to survivor, creation of joint savings account or savings certificate as, 43 A. L. R. 3d 971.

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written agreement or contract by showing that because of fraud, duress, undue influence, mistake, incapacity or other infirmity that in equity and good conscience it should not be enforced; because

of the verity accorded written instruments, its effect can be overcome only by clear and convincing evidence. *Pagano v. Walker*, 539 P. 2d 452 (4-1 decision).

**75-6-102. Ownership as between parties, and others—Protection of financial institutions.**—The provisions of sections 75-6-103 through 75-6-105 concerning beneficial ownership as between parties, or as between parties and P.O.D. payees or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of sections 75-6-108 through 75-6-113 govern the liability of financial institutions who make payments pursuant thereto, and their setoff rights.

**History:** C. 1953, 75-6-102, enacted by L. 1975, ch. 150, § 7.

**Editorial Board Comment.**

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must have in order to be induced to offer multiple-party accounts for use by their customers, while preserving the

opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to avoid unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

**75-6-103. Ownership during lifetime.**—(1) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(2) A P.O.D. account belongs to the original payee during his lifetime and not to the P.O.D. payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (1) of this section.

(3) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account belongs beneficially to the trustee during his lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (1) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary.

**History:** C. 1953, 75-6-103, enacted by L. 1975, ch. 150, § 7.

**Editorial Board Comment.**

This section reflects the assumption that a person who deposits funds in a

multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds represented by the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be dis-

ADDENDUM NO. 3

written demand by a surviving spouse, a creditor, or one acting for a minor or dependent child of the decedent; and no proceeding shall be commenced later than two years following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof or make it liable to the estate of a deceased party unless before payment the institution has been served with process in a proceeding by the personal representative.

**History.** C. 1953, 75-6-107, enacted by L. 1975, ch. 150, § 7.

**Editorial Board Comment.**

The sections of this chapter authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to provide a remedy to these classes of persons which should assure them that multiple-party accounts cannot be used to reduce the essential protection they would be entitled to if such accounts were deemed a special form of specific devise. Under this section a surviving spouse is automatically assured of some protection against a

multiple-party account if the probate estate is insolvent; rights are limited, however, to sums needed for statutory allowances. The phrase "statutory allowances" includes the homestead allowance under section 75-2-401, the family allowance under section 75-2-403, and any allowance needed to make up the deficiency in exempt property under section 75-2-402. In any case (including a solvent estate) the surviving spouse could proceed under section 75-2-201 et seq. to claim an elective share in the account if the deposits by the decedent satisfy the requirements of section 75-2-202 so that the account falls within the augmented net estate concept. In the latter situation the spouse is not proceeding as a creditor under this section.

**75-6-108. Financial institution protection—Payment on signature of one party.**—Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on request, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account, for purposes of establishing net contributions.

**History:** C. 1953, 75-6-108, enacted by L. 1975, ch. 150, § 7.

**75-6-109. Financial institution protection—Payment after death or disability—Joint account.**—Any sums in a joint account may be paid, on request, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under section 75-6-104.

**History:** C. 1953, 75-6-109, enacted by L. 1975, ch. 150, § 7.

**75-6-110. Financial institution protection—Payment of P.O.D. account.**—Any P.O.D. account may be paid, on request, to any original

ADDENDUM NO. 4



party to the account. Payment may be made, on request, to the P.O.D. payee or to the personal representative or heirs of a deceased P.O.D. payee upon presentation to the financial institution of proof of death showing that the P.O.D. payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as P.O.D. payee.

History: C. 1953, 75-6-110, enacted by  
L. 1975, ch. 150, § 7.

**75-6-111. Financial institution protection—Payment of trust account.**—Any trust account may be paid, on request, to any trustee. Unless the financial institution has received written notice that the beneficiary has a vested interest not dependent upon his surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as trustee or beneficiary. Payment may be made, on request, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

History: C. 1953, 75-6-111, enacted by  
L. 1975, ch. 150, § 7.

**75-6-112. Financial institution protection — Discharge.**—Payment made pursuant to section 75-6-108, 75-6-109, 75-6-110 or 75-6-111 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, P.O.D. payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party able to request present payment to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

History: C. 1953, 75-6-112, enacted by  
L. 1975, ch. 150, § 7.

**75-6-113. Financial institution protection—Setoff—Attachment, garnishment, and other legal process.**—(1) Without qualifying any other

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 Warner at the bank?

2 A Yes.

3 Q Do you remember talking to her on that occasion?

4 A Not definitely.

5 Q Do you know who she talked with?

6 A Not for sure.

7 Q And you don't remember anything that took place at  
8 that time?

9 A (Indicating negatively.)

10 Q Were you ever advised by Mr. Roach that he had  
11 talked with Mr. Wilford Youd?

12 A Yes.

13 Q And when were you so advised?

14 A After he talked to him.

15 Q When was that?

16 A Then, I guess.

17 MR. PRATT: What's your best memory of when that  
18 would have been?

19 THE WITNESS: The same time -- within the same time  
20 frame that Garth Youd had been in and cashed certificates.

21 Q (BY MR. JOHNSON) Before or after?

22 A After that.

23 Q And how did that conversation come about?

24 A I don't know for sure.

25 Q But he approached you and told you about the

1 conversation?

2 A Only -- yes.

3 Q What did he say?

4 A Well, just simply that there had been a problem come  
5 up about certificates and where I had helped them, Garth, with  
6 a couple of them.

7 Q What did he say specifically to you?

8 A I don't know for sure.

9 Q Well, he said there had been a problem that came up.  
10 Did he tell you what the problem was?

11 A Only some family -- just there was a problem with  
12 the way we were handling the certificates.

13 Q Did he give you instruction?

14 A He could have.

15 Q Well, did you do anything relative to the time  
16 certificates of deposit you testified that you reissued to Mr.  
17 Garth Youd?

18 MR. PRATT: If you can recall.

19 MR. JOHNSON: Counsel --

20 THE WITNESS: Once those certificates had been  
21 reissued to Mr. Youd, that was over with and done.

22 Q (BY MR. JOHNSON) That's what I'm asking you. After  
23 he says something vague to you about "There's been a problem  
24 with the Youd time certificates", doesn't he say anything more  
25 to you about that?

1           A     There were apparently other certificates.

2           Q     So did he give you instruction as it related to the  
3 other certificates?

4           A     Not that I remember.

5           Q     Well, did he say, "Don't cash anymore", or, "Talk to  
6 me", or "Go back and do something with these certificates  
7 you've issued", anything like that?

8           MR. PRATT: Objection as to form. She's already  
9 said she doesn't remember.

10          Q     (BY MR. JOHNSON) Go ahead and answer the question.

11          MR. PRATT: You can if you can answer it.

12          THE WITNESS: What was the question again?

13          Q     (BY MR. JOHNSON) The question was: After he told  
14 you about the vague problem, that there was some problem among  
15 the family, as I understand your testimony, did he tell you  
16 with regard to the other certificates not to cash them, to  
17 talk to him, or did he tell you to go back and do something  
18 with the time certificates of deposit you had apparently  
19 issued to Mr. Youd?

20          MR. PRATT: Object as to form. She's already said  
21 she doesn't remember.

22          Q     (BY MR. JOHNSON) Go ahead.

23          A     Probably to talk to him before anything was done.

24          Q     But you were not asked to go back and do anything  
25 with regard to what had already taken place?