2008 WL 8597120 (Conn.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Connecticut.
Fairfield County

Florence HAAS,

v.

Arthur HAAS.

No. CV054006216.
September 22, 2008.

Plaintiff's Post-Trial Memorandum of Law

Linnea J. Levine, Juris No. 405238, Attorney for Plaintiff, 1071 Post Road West, Westport, CT 06880, 203 557-0850.

INTRODUCTION

Trial was held before Judge John R. Downey on August 19, 20 and 21, 2008. This memorandum of law is filed with the court pursuant to Judge Downy's bench order at the end of trial on August 21, 2008. All facts stated in this memorandum are included in Plaintiff's Proposed Statement of Undisputed Facts attached herewith as Exhibit A.

POINT I: DEFENDANT IS LIABLE TO PLAINTIFF FOR BREACH OF HIS FIDUCIARY DUTIES OWED TO PLAINTIFF

Defendant, the son of Plaintiff, had a confidential relationship with her and admits that he had a fiduciary duty to prepare her tax returns and to manage her AG Edwards and Nutmeg's brokerage accounts which were under Defendant's full possession and control from 1986 when he placed his name on Plaintiff's AG Edwards account (which later was transferred to a Nutmeg account), when he had all of Plaintiff's AG Edwards brokerage statements mailed to his home address and when he made all **financial** investment decisions involving Plaintiff's AG Edwards and Nutmeg brokerage account funds.
"It is well settled that a fiduciary or a confidential relationship is characterized by a unique degree of trust and confidence between the parties one of whom has superior knowledge, skills or expertise and is under a duty to represent the interests of the other." *Macomber v. Travelers Property and Casualty Corp.*, 261 Conn. 620, 640; 804 A.2d. 180 (2002).

Defendant, formerly a certified public accountant, had the knowledge and expertise to timely file Plaintiff's taxes, to prudently manage Plaintiff's AG Edwards and Nutmeg brokerage accounts and to account to Plaintiff regarding the management of these accounts and the filing of her tax returns. Plaintiff, an **elderly** woman, unsophisticated in tax and **financial** matters, relied on Defendant to manage Plaintiff's money and to file her tax returns.

Defendant breached the following **financial** duties he owed to Plaintiff;

1. *Defendant's Duty to Account:* Defendant failed to inform Plaintiff of the existence, the location and the amount of the AG Edwards and Nutmeg brokerage accounts. Disclosure to Plaintiff of all of the brokerage account statements was not provided by Defendant until the 2008 shortly before and on the first day of trial on August 19, 2008. Defendant has yet to account for all of the withdrawals from the accounts from 1986 through 2000. Establishment of a fiduciary duty is in itself sufficient to demand an account. *Zuch v. The Connecticut Bank and Trust Co. Inc.*, 5 Conn. App. 457, 460.

2. *Defendant's' Duty to Prudently Manage the AG Edwards/ and Nutmeg Brokerage Accounts* Defendant failed to file tax returns with the Internal Revenue Service, State of Connecticut for tax years 1990 through 2000 and to provide the federal and state taxing authorities with basis of each of the stock sales in the brokerage accounts under the control of Defendant. Consequently the majority of the funds in the brokerage accounts were diverted to the IRS by multiple tax levies of the AG Edwards and Nutmeg brokerage accounts as well as the diversion to the IRS of all of the savings and income in Plaintiff's possession to pay for taxes interest and penalties which should not have been owed by the Plaintiff

3. *Defendant's Duty of Loyalty to Plaintiff;* displayed multiple and continuous acts of disloyalty to and concealment from Plaintiff from 1986 through the year 2008 as follows:
A. Defendant originally told Plaintiff that she was on extension for filing her tax returns and she should not worry;

B. Defendant failed to file the tax returns for the years 1990 through 2000 after he was on notice of the $70,462.00 tax levy by the IRS in 2000 for the Nutmeg brokerage account under his control, after his notice of the 2001 levy of $49,1 10.00 from Plaintiff's Merrill Lynch account even though testified that he knew that the IRS would return the tax overpayments if correct tax returns were filed within two years of the date of the tax levies pursuant to I.R.C. § 65-11 and even though possessed the requisite tax basis information to file correct tax returns for the years 1995 through 2000.

C. Defendant failed to respond to Attorney Samuel Stark's multiple requests to assist Plaintiff in straightening out her tax issues solely because Defendant was “embarrassed” and “afraid of being sued”.

D. Defendant failed to inform Plaintiff that he lost his CPA license.

E. Defendant negligently or purposefully destroyed Plaintiff's brokerage account statements in a fire in his home office in December 2005.

F. Defendant failed to inform Plaintiff, until 2008, of the location of her AG Edwards and Nutmeg brokerage accounts and that $70,462.00 was levied from the Nutmeg account in 2000.

G. Defendant, by his former attorney, acted in bad faith by denying all discovery requests from Plaintiff, and by not responding to letters, facsimiles and overnight mail to Defendant's counsel to resolve discovery issues and to Plaintiff's filed motion to compel Defendant's response to Plaintiff's discovery requests.

POINT II DEFENDANT IS LIABLE TO PLAINTIFF FOR FRAUDULENT CONVERSION AND STATUTORY THEFT

A. *Conversion:* The tort of conversion is well established in the law of Connecticut, and has been defined by our Supreme Court thusly:
“Conversion is an unauthorized assumption in exercise of the right of ownership over goods belonging to another and to the exclusion of another, to the exclusion of the owner's rights...It is some unauthorized act which deprives another of his property permanently or for an indefinite time... some unauthorized assumption and exercise of the powers of the owner to his harm. The essence of the wrong is that the property rights of the Plaintiff have been dealt with in a manner adverse to him, inconsistent with his right of dominion and to his harm”. *Aetna Life and Casualty v. Union Trust Company*, 230 Conn. 779, 790-791 (1994); *Deming v. Nationwide Mutual Ins. Co.*, 279 Conn. 745, 905 A.2nd 623 (2006); *Hi-Ho Tower Inc. v. Corn Tronics*, 255 Conn. 20, 761 A.2nd 1268 (2000); *Devitt v. Manulik*, 176 Conn. 657, 410 A.2nd 465 (1979).

Conversion applies equally to things as well as to money.

"Accordingly a claim for conversion may be brought when the relationship is one of bailor and bailee, but not when it is one for debtor and creditor". *Mystic Color Lab Inc. v. Auctions Worldwide, LLC, Et Al.,* 284 Conn. 408, 419 (2007).

"...A relationship of bailor-bailee arises when the owner, while retaining general title, delivers personal property to another for some particular purpose upon an express or implied contract to deliver goods when the purpose has been fulfilled..." *Mystic*, supra at 419-420

Connecticut has characterized bailment as involving fiduciary duties. "Fiduciaries appear in a variety of forms, including agents, partners, lawyers, directors, trustees, executors, receivers, bailees and guardians." *Falls Church Group v. Tyler, Hooper and Alcorn, LLP,* 281 Conn. 84, 108-09, 912 A.2d 1019 (2007). In the instant case the elements of the tort of conversion of Plaintiff's **financial** records by Defendant are inconvertible and are obvious even to the casual eye:

Defendant arranged to have Plaintiff's brokerage and bank records sent to his home address not to Plaintiffs. Defendant had the address on the A.G. Edwards and Nutmeg brokerage accounts changed to his address with his name the first name on the brokerage documents. 2. Defendant exercised complete dominion and control over Plaintiff's brokerage account records and did not even furnish copies to her, going so far as to refuse to furnish any information regarding these accounts to Attorney Samuel Starks, a lawyer representing Plaintiff despite his written and oral requests, making the lawyer's job impossible to perform. 3. Despite Defendant's claim, which is of questionable credibility to begin with, that her records, at least some of them, were destroyed by a fire in his home office and despite his testimony that he was unable to obtain the cost bases of her investments from the brokerage firms, he miraculously produced on August 21, 2008, the final day of trial, a clean, neat, unburned or even singed, well organized statement of cost basis of her investments for the years 1995 through 2000 (Exhibit D). Prior to that last day of trial Defendant had within his possession, dominion, and control all of the bank statements as well as the bases for stock sales from 1995 through 2000 to prepare correct tax returns in order to prevent Internal Revenue Service from incorrectly levying overpayment of taxes and interest and penalties that would not have occurred but for Defendant's acts.

B. *Theft:* C.G.S. § 52-564 provides; "Any person who steals any property of another, or knowingly receives and conceals stolen property shall pay the owner treble his damages. C.G.S. § 52-564 is synonymous with larceny under C.G.S. § 53a-119. Pursuant to C.G.S.§ 53a-119 a person commits larceny when, with intent to deprive another of property or to appropriate the same to himself *or to a third person* (em*phasis added*,) he wrongfully takes, obtains or [withholds} such property from an owner, *Deming v. Nationwide Mutual Insurance Co.* 279 Conn. 745, 771, 905 A. 2d 623; *Chernick v Johnson.* 100 Conn. App. 276.Cearly, Defendants acts of concealment, failure to stop the incorrect tax seizures, and failure to respond to any and all plaintiff's pleas for help rise to the level of larceny and theft.

Whether or not there was conversion and theft of monies directly to the Defendant in addition to her **financial** records and in addition to the monies incorrectly diverted to the Internal Revenue Service, in the form of overpayment of Plaintiff's income tax liability and unnecessary penalties and interest, would depend on the outcome of an accounting as there apparently were withdrawals from A.G. Edwards bank accounts not accounted for by Defendant.

POINT III: BECAUSE PLAINTIFF HAS MET HER BURDEN OF PROVING THAT DEFENDANT, AS HER FIDUCIARY, COMMITTED FRAUD AGAINST HER, THE BURDEN SHIFTS TO DEFENDANT TO PROVE CLEARLY AND CONVINCINGLY THAT HE DEALT FAIRLY WITH PLAINTIFF

The elements necessary to sustain an action of fraud are: 1. A representation made as a statement of fact; 2.That the representation was untrue and known to be untrue by the party making it; 3. That it was made for the purpose of the other party to act upon it; 4. That the other party was in fact induced to action therein; and 5. That he did so act to his injury. *Harper v. Adametz,* 18 Conn. Sup. 435 (1953).

In the instant case, Defendant led Plaintiff to believe that (1) he was a CPA when in actuality he had lost his CPA license over 20 years ago; (2) that would file her tax returns which he did not do for the years 1990 to 2000; (3) Defendant led P to believe that she was on extension while in fact the extension periods had run out; (4) Defendant led Plaintiff to believe that she still had funds under's control when in fact the IRS had levied $70,462.00 from her Nutmeg brokerage account. Further, as a former CPA with a college degree in accounting, Defendant had superior knowledge and ability than Plaintiff to obtain the necessary cost basis required to prepare accurate and timely filed tax returns for Plaintiff. Plaintiff's detrimental reliance on Defendant's false representations to her resulted in federal tax levies of her property in the amount of $129,057.52 and outstanding state tax liabilities of $31,538.00 as of October 2007.

Where a fiduciary relationship exists, the burden of proving fair dealing property shifts to the fiduciary, *Alaimp v. Royer 188 Conn. 36*, See also *Worobey v. Sibieth*, 136 Conn. 352, 359, 71 A. D2d 80 (1949); *Murphy v. Wakelee*, 247 Conn. 396, (1998) (Burden shift to fiduciary in cases of fraud, self dealing or conflict of interest). First, the burden shifts to the fiduciary and second, the standard of proof is clear and convincing evidence. *Murphy*, supra, 400; See also *Dunham v. Dunham*, 2004 Conn. 303,322-23. 528 A. 2d 1123 (1987).

Defendant did not present any evidence of his fair dealing with Plaintiff. Defendant's acts were intentional as he testified that his reasons for not responding to Plaintiff's numerous requests by her and her attorneys for assistance and disclosure of her assets were Defendant's “embarrassment” and his “fear of being sued.”

POINT IV: BECAUSE PLAINTIFF HAS MET HER BURDEN OF PROOF THAT FRAUDULENTLY CONCEALED THE EXISTENCE OF PLAINTIFF'S CAUSE OF ACTION THE BURDEN SHIFTS TO THE DEFENDANT TO PROVE THAT HE DEALT WITH PLAINTIFF IN A FAIR MANNER

Pursuant to Connecticut law, the burden is on Plaintiff to prove with clear, concise and unequivocal evidence that concealed the cause of action by not disclosing the underlying facts. *Bartone v. Robert L. Day Co. Inc.*, and 232 Conn., 527, 533 citing *Beckenstein v. Potter and Carrier, Inc.*, 191 Conn. 150, 163, 464 A.2d. 18 (1983). The *Bartone* elements of fraudulent concealment are: I.Defendant's actual awareness of the facts necessary to prove P's cause of action. 2. Defendant's intentional concealment of these facts from Plaintiff. 3. The Defendant's concealment of these facts was for the purpose of obtaining delay on Plaintiff's part in filing a complaint on their cause of action. *Bartone* supra at 533. See also *Falls Church Group Ltd. v. Tyler, Cooper and Elcorn, LLP*, 89 Conn. App. 459, 475.

In the instant case Defendant knew, but did not disclose, to Plaintiff that he did not file Plaintiff's tax returns from 1990 through 2000; that as a direct result of Defendant's not filing Plaintiff's tax returns $70,462.00 in 2002 was garnished from Plaintiff's Nutmeg brokerage account: that pursuant to IRC 6511 Plaintiff could recuperate assets levied by the Internal Revenue Service if corrected tax returns were filed within two years of the date of the tax levy, that lost his CPA license; that there were no funds left in the Nutmeg brokerage account. Further, Defendant failed to provide Plaintiff with copies of a brokerage account statement. Rather, they were destroyed in 2005 in a suspicious fire in Defendant's home office. Finally, Defendant failed to account to Plaintiff for withdrawals from her brokerage account; the same brokerage account that he never disclosed the location and amount to Plaintiff until 2008.

Some of the above facts were first disclosed on September 21, 2006 during Defendant's cross-examination at the PJR hearing which preceded this proceeding. However, the tax levy of $70,462.00 as well as the provision of the AG Edwards Nutmeg account statements and the basis of the stock sales from this brokerage account were not provided by Defendant to Plaintiff until 2008 shortly before or during trial even though these were requested either informally by attorney Samuel Starks in 2002 or formally during discovery for this proceeding in 2006 and 2007.

Pursuant to CT G.S. 52-595 “If any person, liable to an action by another fraudulently conceals from him the existence of the cause of such action, such action shall be deemed to accrue against such person so liable therefore at the time when the person entitled to sue upon first discovers its existence.”

Despite several requests from Plaintiff and her attorneys, the tax levy of $70,462.00 was never disclosed by Defendant to Plaintiff until 2008. Defendant continued to conceal his negligent intentional acts right up until trial. Therefore, the statute of limitations of tort, contract and breach of fiduciary duty, should be tolled and barred as an affirmative defense due to Defendant's fraudulent concealment of material facts to this action

POINT V. PATTERN OF CONTINUING COURSE OF CONDUCT

Pursuant to Connecticut case law, a finding of a continuous course of conduct is sufficient to toll the applicable statute of limitations:
Where we have upheld a finding that a duty continued to exist after the cessation of the "act or omission" relied upon, there has been evidence of either a special relationship between the parties giving rise to such a continuing duty or some wrongful conduct of a defendant related to the prior act. See *Giglio v. Connecticut Light and Power Co.*, 180 Conn. 230, 241, 428, 429 A.2d. 486 (1980) ("repeated instructions and advice given to the plaintiff by the defendant concerning a furnace it had previously converted and left in defective condition"); *Giamboci v. Peters*, 127 Conn. 380, 385, 16 A.2d. 833 (1940) ("[w]hen ... injurious consequences arise from a course of treatment [by a physician] statute does not begin to run until the treatment is terminated"); see *F. Handler v. Remington Arms Co.*, 144 Conn. 316, 130 A.2d. 793 (1957) (duty to warn of danger of defective cartridge, "an inherently dangerous article", held to continue in existence until time of injury.) *Fichera v. Mine Hill Corp.*, 207 Conn. 204 (1988); see also, *Blanchette v. Barrett*, 229 Conn. 256, 275, 640 A.2d. 74 (1994).

"The continuing course of conduct is conspicuously fact bound", *Sanborn v. Greenwald*, 39 Conn. App. 289. This doctrine "reflects the policy that, during an ongoing relationship, losses are premature, because specific tortious acts or omissions may be difficult to identify and may yet be remedied." *Sanborn supra.* 295, 296.quoting *Blanchette.*

In the instant case defendant did not end its fiduciary duties until 2008 when he disclosed and returned plaintiff's brokerage account records and the basis of her stock sales and when he accounts for all of her brokerage account transactions. Further, defendant intentionally and totally ignored plaintiff's requests and demands for defendant's disclosure of the nature and location of her property under defendant's control. The destruction of plaintiff's **financial** records in December 2005 in a suspicious fire in defendant's home/office caused by either a "defective paper shredder or smoking materials" and the defendant's former attorney's refusal to comply with plaintiff's discovery requests and to respond to the multiple telephone, facsimile, regular and overnight mail requests from plaintiff's attorney, constitute an intentional, continuous pattern of deception and fraudulent acts by defendant up until 2008 when defendant retained new counsel and with new counsel, defendant did not disclose the basis of plaintiff's stock sales until August 21, 2008 which defendant apparently had in his possession in May of 2000. Finally, it is difficult if not impossible to pinpoint the dates of the multiple tortious acts of defendant regarding the non-filing of plaintiff's tax returns because of filing extension dates and pursuant to IRC Sec. 6501(c) there is no statute of limitations for assessment of tax interest and penalties in instances of non-filing of federal tax returns..

Without knowledge or access to the A. G. Edwards and Nutmeg brokerage accounts, plaintiff could not determine the cause of her tax liabilities alleged by the Internal Revenue Service and the State of Connecticut. Further plaintiff kept getting notices of levies for prior tax years up until 2006 when Lauren Filiberto, Esquire in response to plaintiff's 2006 IRS income garnishment for tax year 1995 was able to convince the IRS to halt tax collection against plaintiff during plaintiff's life.

Clearly and convincingly the undisputed facts show an intentional continuous pattern of fraudulent concealment by defendant up until trial. Therefore, the statute of limitations of tort pursuant to CT GS 52-577; contract pursuant to C.G.S. and to breach of fiduciary duty, C.G. S. _____ should be tolled and barred as an affirmative defense due to Defendant's continuous pattern of conduct.

POINT VI

PLAINTIFF'S ORAL CONTRACT WITH DEFENDANT IS OUTSIDE THE STATUTE OF FRAUDS AND ENFORCEABLE UNDER THE STATUTE OF LIMITATIONS

A. *Statute of Frauds:* The oral contract between defendant and plaintiff to care for and manage her assets does not fall within the statute of frauds because it is a contract of "infinite duration." Generally, an oral contract that cannot be performed within one year s unenforceable under the Connecticut Statute of Frauds. C.G.S. § 52-550. However, under Connecticut law an oral contract that does not say in express terms, that the performance is to have a specific duration beyond one year is the functional equivalent of a contract of infinite duration for purposes of the statute of frauds and, as such, is unenforceable as outside the proscriptive force of the statute of frauds, regardless of how long completion of performance actually takes. *C.R. Klewin, Inc. v. Flagship Properties. Inc.* 600 A.2d 777, 220 Conn. 569 (1991). Additionally when the statute of frauds is asserted as a defense, the doctrine of estoppel may be applied to prevent the use of that statute to accomplish a fraud. C.G.S. § 52-550. Because the oral contract in the present case is a functional equivalent of a contract of "infinite duration," due to the fact that defendant was to manage plaintiff's assets for her use and benefit for the remainder of her life, it is outside of the prescriptive force of the statute of frauds and is enforceable based on the doctrine of promissory estoppel as described below.

B. *Promissory Estoppel:* Pursuant to Connecticut law, promissory estoppel provides an alternative that allows enforcement of a promise even without the usual indicia of conventional bargain for consideration, *Peralta v. Cendant Corp.*, 123 F. Supp. 2d 65 (2000). The existence of an enforceable contract is not a necessary precondition to recovery under the doctrine of quantum meruit or promissory estoppel. See, *C. L. Klewin, Inc. v. Flagship Properties, Inc.*, 955 F.2d 5 (1992). Under the doctrine of promissory estoppel, such a promisor would reasonably expect to induce action forbearance on the part of the promisor or third person and in which does not do such action is binding if the injustice can be avoided only by enforcement of the promise. *McCall v. City of Danbury,* 116 F. Supp. 2d 316 (2000). The essential elements of a claim for promissory estoppel are: 1. A clear and definite promise, sufficiently clear and definite that the promisor can reasonably expect to induce reliance, 2. The change in position and reliance on the promise, and 3. Resulting in injury. *Chem Tek, Inc. v. General Motors Corp.*, 816 F. Supp. 123 (1993).

The defendant entered into a clear and definite promise to manage plaintiff's **finances** upon the death of Bernard Haas. Based on the fact that plaintiff had no **financial** knowledge or expertise and that defendant at the time was a licensed and certified Connecticut public accountant. Further, the defendant as promisor can reasonably expect his promise to induce reliance on the plaintiff's behalf based on the close relationship and position of trust he had with the plaintiff, as her son. Plaintiff clearly changed her position and reliance on said promise by trusting her son to manage **financial** assets in her best interest. Finally the plaintiff was injured by her reliance on defendant's promise to manage her assets for her use and benefit since every single cent of the $70,462.00 in the Nutmeg brokerage account under defendant's sole control was levied by the IRS with the loss of interest that should have accrued had it been properly invested, plus the $49,118.98 levied by the IRS from plaintiff's Merrill Lynch account and the $8,156.00 from plaintiff's Fleet checking account, plus other levies of income all of which total $160,595.35 including an outstanding lien of $37,678.91 as of October 2007 by the State of Connecticut Department of Revenue. Based on the foregoing the court should enforce the defendant's promise despite absence of conventional consideration and bargained for exchange, in order to prevent injustice. Finally, based on defendant's intentional and continuing practice of fraudulent concealment of the basic facts required for plaintiff to sue for damages and to mitigate same., are grounds to grant equitable relief.

POINT VIII PLAINTIFF TOOK REASONABLE STEPS TO MITIGATE HER DAMAGES CAUSED BY DEFENDANT

Plaintiff must take reasonable action to mitigate her damages. What constitutes reasonable effort under the circumstances of a particular case is a question of fact for the trier, *Vespoli v. Daglirulo,* 212 Conn. 1 (1989); *Connecticut Life and Power Co. v. Costello,* 161 Conn. 430, 442, 288 A.2d 415 (1971).

The duty to mitigate damages does not require plaintiff to sacrifice any substantial right of her own. *Eastern Sportswear Co. v. Augstein and Co.*, 141 Conn. 420, 425, 106 A.2d 476 (1954).

Defendant's bad faith acts and his intentional concealment of same completely impoverished plaintiff of all of her savings and some of her income. Plaintiff, an **elderly** woman unknowledgeable about **finances**, tax laws, and the legal system hired an **elder** law attorney, Samuel Starks, in 2001 to help her restore her Social Security retirement checks, update her estate plan, and to solicit defendant's help in a collaborative non-threatening manner to stop the IRS tax levies of plaintiff's assets. Since defendant had all the information required to restore plaintiff's assets, soliciting defendant's aid was the most reasonable, effective means for plaintiff to mitigate her damages in 2001. In 2001 it would have been unreasonable for plaintiff to initiate a lawsuit against defendant for the following reasons:

1. Samuel Starks in 2001 had removed the tax lien on plaintiff's residence and restored her Social Security retirement. All plaintiff believed she lost was $49,118.00 from her Merrill Lynch account and $8,156.00 from her personal bank account. Plaintiff was indigent and would have cost her approximately $50,000.00 in legal fees to mount a lawsuit against defendant.

2. Plaintiff lost one son at age 21 in a car accident and her other son is mentally retarded and lives in a special home. Plaintiff could not bring herself in 2001 to sue her only son whom she still believed would eventually do the right thing and return her money.

3. Plaintiff did not know in 2001 that all of her savings had been levied by the IRS. Had she known that her overall tax liability was $160,595.35 she would have understood in 2001 that she no choice but to sue the defendant.

4. Plaintiff and her attorneys had no knowledge that pursuant to IRC §6511 her tax levies might be returned to her if correct tax returns with the required stock base to be filed with the IRS within two years of the dates of the tax levies. Defendant however did know about the two year tax overpayment recovery rule yet he continued to breach his fiduciary duties by not informing defendant and Mr. Starks of IRC §6511 and by fraudulently concealing the basis of the stock sales and of the A.G. Edwards and Nugmeg brokerage accounts and of the 2000 levy of $70,462.00 for the Nutmeg brokerage account.

5. On November 30, 2005 plaintiff did retain attorneys to initiate a lawsuit against defendant. However one month later on December 31,2005 defendant had a suspicious fire in his home which allegedly destroyed most of plaintiff's **financial** records.

6. On September 26, 2006 the plaintiff brought on a PJR hearing the result of which an attachment of $450,000.00 is placed on defendant's house.

7. In 2006 the plaintiff initiated a lawsuit against defendant. However, despite the PJR and trial discovery request defendant did not cooperate and come forth with the necessary bank statements and stock sale bases to assist plaintiff in mitigation until the trial held on August 19-21, 2008. Therefore even if plaintiff had sued defendant in 2001 she would have missed the two year window pursuant to IRC §6511 due to Defendant's intentional and continuing pattern of fraudulent concealment.

8. Plaintiff continued to receive IRS tax notices of past due tax and demanded payments of same. When her small salary of $8.25 an hour for a part time job was garnished by the IRS for tax year 1995 she had the opportunity to demand an IRS hearing at which time she and her attorney, Lauren Filiberto, Esq., and her accountant, Keith H. Dommreis, CPA, convinced the IRS to shift half of the outstanding tax liability to defendant with the result that $20,000.00 was returned to plaintiff. However, at no time was plaintiff able to have money returned from the garnishments of $129,057.52 or relief of her Connecticut tax liability of $37,678.91.

9. Plaintiff hired Keith H. Dommreis, CPA to prepare and file her tax returns from 1996 through 2007 (except for tax years 2000, 2001, and 2002 which attorney Starks prepared for plaintiff as a courtesy). The $20,000.00 returned to plaintiff has been fully expended in paying her attorney $8,000.00, the IRS hearing and negotiations, $3,000.00 to attorney Starks for his assistance,

and $5,000.00 to Keith H. Dommreis, CPA with the remaining $4,000.00 spent on trial deposition transcripts and proceedings. Clearly and convincingly plaintiff took all reasonable steps expected of an **elderly** and impoverished unsophisticated and uninformed woman who was the mother of defendant. Defendant on the other hand, had all of the knowledge, training, and **financial** resources to timely file the tax returns pursuant to IRC §651; yet he wantonly, recklessly and intentionally failed to disclose any information or take any action to assist Plaintiff with her mitigation efforts.

POINT IX

UNDER BLACK LETTER LAW PLAINTIFF IS ENTITLED TO RECOVER PUNITIVE DAMAGES FROM DEFENDANT

"It is well settled in Connecticut that in the court's discretion a plaintiff can recover common law punitive damages from a defendant where the defendant's acts and omissions constitute wanton or malicious misconduct, or a reckless indifference to the rights of others and in intentional or wanton violations of those rights." *Label Sys. Cor. v. AG Hamohammadi*, 270 Conn. 291, 835 (204); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 489 (1967).

Based upon the admissions of defendant as articulated by his counsel and defendant's own unequivocal testimony that he knowingly failed to file his mother's tax returns, failed to notify her that his CPA license had been revoked, stonewalled his mother's attorneys and refused to furnish them with his mother's **financial** records right up through August 21, 2008 the last day of trial, and all he could say in explanation was that he was embarrassed and "afraid of being sued", there could be no clear or undisputed case of wanton disregard and reckless indifference for the imposition of punitive damages on defendant.

In Connecticut the general rule is that common law punitive damages are limited to attorney's fees and nontaxable cause. *Bodner v. United Serv. Auto Ass'n.*, 222 Conn. 480, 492, (1922). Plaintiff testified on cross-examination that her attorney's fees pursuant to her retainer agreement will be 25 percent of any recovery. She has also paid and will pay the cost of litigation. Therefore it is respectfully submitted that there could be no reasonable argument against plaintiff recovering punitive damages from defendant based upon these disputed facts and omissions proven at trial and the long-established law of Connecticut. However, this court also has the authority to grant treble damages for theft if the court finds defendant guilty of diverting Plaintiff's funds to another even if such allegation is not in the complaint, Practice Book Sec. 10-4, *Implied Duty.*

POINT X THIS COURT HAS THE AUTHORITY AND SHOULD GRANT EQUITABLE RELIEF EVEN IF THE APPLICABLE STATUTE OF LIMITATIONS HAVE EXPIRED

In an equitable proceeding, the Court may provide a remedy even though the governing statute of limitations has expired, just as it has discretion to dismiss for laches an action initiated within period of statute. *Dunham v. Dunham*, 528 A.2d 1123, 204 Conn. 303, (1987). Although courts in equitable proceedings often look by analogy to statute of limitations to determine whether, in interests of justice, particular action should be heard, courts are by no means obliged to adhere to time limitations. Id. Practice Book § 10-27 provides: "[a] party seeking equitable relief shall specifically demand it as such, unless the nature of the demand itself indicates that the relief sought is equitable relief."(Emphasis added.) "Where the nature of the case and the nature of the Plaintiff's demand is such that equitable relief is clearly being sought, a specific demand for equitable relief is not necessary." *Dorsey v. Mancuso*, 23 Conn. App. 629, 634, 583 A.2d 646 (1990), cert. denied, 217 Conn. 809, 585 A.2d 1234 (1991). Since the nature of the Plaintiff's demand itself, indicates that the relief sought is equitable, the Court should provide a remedy to the Plaintiff in the present case, even if the Court finds the governing statute of limitations has expired.

There are many equitable considerations in the Plaintiff's case that warrant an equitable remedy, that have been discussed throughout this memorandum of law. Particularly of note, however, are the following equitable considerations: The Defendant's fraudulent concealment in his continuing course of conduct as fiduciary was specifically designed to have any applicable statutes of limitation to run. 2. It is difficult to pinpoint the time damages occurred to Plaintiff, because there is no statute of limitations to levy taxes where tax returns have not been filed. Defendant's acts impoverished Plaintiff leaving her no ability

to hire professionals. 3 The Plaintiff is eighty-five years old, unsophisticated in money and tax matters, and as the direct result of the Defendant's conduct, has been living below the poverty line for many years, and has suffered immeasurable emotional pain. 3. Despite all of the above Plaintiff in 2005 did file a PJR action and a lawsuit against Defendant. Defendant, however, did not comply with disclosure demands until 2008.

Based on equity, the Court should provide a remedy to the Plaintiff regardless of whether the governing statute of limitations periods have expired.

CONCLUSION

Based upon the undisputed facts proven at trail as set forth in Exhibit A, the testimony presented at trial and the applicable Connecticut law presented at trial and in this memorandum, Plaintiff requests the Court to find for Plaintiff on all counts as follows: Demand for Accounting, Fraud, Fraudulent Conversion, Theft, Punitive Damages and for such other and further relief at equity and in law as this court may deem just and proper.

Dated: September 22, 2008

Respectfully submitted,

<<signature>>

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