

THE SUPREME COURT OF OHIO

LAWRENCE J. SELEVAN,

Appellant,

-vs

LEAH SELEVAN,

Appellee.

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12-1026

**On Appeal from the Hamilton
County Court of Appeals, First Appellate
District**

**Court of Appeals Consolidated
Case Nos. C-110591/C-110657**

**MEMORANDUM OF APPELLANT LAWRENCE J. SELEVAN IN SUPPORT OF
JURISDICTION**

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST

This case presents an issue of great general and public interest.

The jury verdict should not be permitted to stand which is the result of expert witnesses being permitted, over objection, to testify to inconsistent standards of proof relating to breach of fiduciary duty and compensatory damage proximately caused by the breach, as well as, the amount of damage so caused, notwithstanding the fact that the court correctly instructed the jury on same.

Specifically, the trial court, over defense objection, permitted one of plaintiff's experts to testify that it was a breach of defendant trustee's fiduciary duty to fail to diversify, in a 60/40 ratio, investments in plaintiff beneficiary's portfolio.

The other expert called by the plaintiff was permitted to testify, over defense objection, that the damages proximately caused by the breach should be calculated using the most conservative investment vehicle, a six month CD and without any diversification whatsoever.

In summary, the trial court permitted one expert to testify that the fiduciary breached his duty by failing to diversify, and a second expert to calculate damage proximately caused to the beneficiary with no portfolio diversification. This should not be permitted in the courts of this state, and the general public should have a vested interest in making sure it does not.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

This case was initially tried to the Honorable Judge Melba Marsh, was appealed to the Court of Appeals, First Appellate District, which reversed and remanded. The case was then rolled to the Honorable Judge Steven Martin, Hamilton County Court of Common Pleas.

The re-trial proceeded with the empaneling of a jury and commencement of presentation of Plaintiff's case on 29 October 2010. Plaintiff's testimony consisted of the Plaintiff Leah Selevan, the Defendant Lawrence Selevan, and two expert witnesses, Robert J. Sicking, Jr., and Jon Hoffheimer, as well as, numerous exhibits.

At the conclusion of Plaintiff's case on 3 November 2010, the defense moved for a directed verdict on the issue of punitive damage. This motion was denied. The defense then rested and again moved for a directed verdict, which was again denied. Jury instructions were

discussed and the defense objected to the instruction on punitive damage. The court overruled the objection. Following summations and jury instructions, the court excused the alternate juror, instructed the jury and the jury retired to the jury room. During deliberations the jury had two questions, both of which were responded to by the court without objection.

On 2 November 2010, the jury returned a verdict finding for the plaintiff. The award included \$82,807.64 in compensatory damage less a set off of \$32,189.00 for a total of \$50,618.64 and \$50,618.64 for punitive damage and an award for attorney's fees to be determined by the court.

On 15 November 2010, the defendant timely filed a motion for judgment notwithstanding the verdict. On 8 March 2011 the court denied the motion.

On 4 March 2011, the court granted plaintiff's motion for attorney fees based on the finding of punitive damage and awarded \$128,212.50.

On 4 March 2011, the court granted plaintiff's motion for litigation expenses based on the jury's award of punitive damages and awarded \$5,738.25.

On 18 April 2011, the defendant timely filed a Notice of Appeal from the trial court's Final Judgment Entry of 28 March 2011. Plaintiff/Appellee filed a Motion to Dismiss The Appeal given the fact that a Motion for Prejudgment Interest remained pending in the trial court. The Court of Appeals granted the Motion to Dismiss The Appeal and remanded to the trial court for further proceedings.

On 19 September 2011, the Motion for Prejudgment Interest was denied.

On 23 September 2011, defendant timely filed a Notice of Appeal from the court's Amended Final Judgment Entry of September 19, 2011.

On 19 October 2011, the plaintiff timely filed a cross-appeal Case No. C1100657.

On 26 October 2011, the appeal and the cross-appeal were ordered consolidated under Case No. C110657.

On 9 May 2012, both the appeal and cross appeal were found to be without merit by the Court of Appeals for the First Appellate District.

On 29 May 2012, a motion for Appellate fees was filed by the Plaintiff-Appellee/Cross Appellant.

On 8 June 2012, Defendant-Appellant/Cross Appellee filed a response to the motion for appellate fees. Both motion and response remain pending in the court of appeals.

B. Statement of Facts.

Lawrence Selevan, was trustee of an irrevocable inter vivos trust established by his brother Daniel, in March 1984 for Daniel's daughters, Leah and Amy. The trust agreement provided that Lawrence, as trustee, was to manage the trust until Leah reached the age of 21, at such time the trust was to terminate and a final distribution made. In May 1984, Larry purchased a \$10,000, 15 year certificate of deposit (CD) yielding 13.25% annual return for Leah's trust held at Fifth Third Bank (successor to Cottage Savings). In 1992, 20 shares of Consolidated Stores were contributed by the grantor of the trust, 10 shares to Leah and 10 shares to Amy. Leah's trust CD fully matured to approximately \$72,000 in May 1999. The proceeds were then deposited into an account at Fifth Third Bank, Lawrence J. Selevan, Trustee, Leah M. Selevan Trust. In April 2000, Leah planned to go to film school in New York. Leah's plans required a move from Cincinnati to New York City to attend New York University (NYU) Film School. In order to generate sufficient funds for her to attend film school in New York, Larry was forced

to adopt a new investment strategy to address the changing circumstances created by Leah's film school goals. In April 2000, Larry opened an account at Morgan Stanley (MS) in New York with an initial contribution of \$50,000 from the Fifth Third trust account to commence this new strategy. Later on, the trust contributed an additional \$5,000 for a total of \$55,000 in the Morgan Stanley account.

CD rates had fallen dramatically and Larry could not accomplish Leah's goals without this new investment strategy. To cover Leah's increased expenses, Larry invested the \$55,000 in the equity markets. By August 2000, the corpus of the trust had increased to \$80,000. In November 2000, the trust corpus had grown to \$199,000 but thereafter the entire stock market collapsed and the investment was lost. Leah was still in film school in December 1999. Leah became aware of the stock market crash and then asked Larry if the monies were still in the stock market. Larry stated the monies were all lost, but that he would personally cover all of Leah's expenses for the next seven months so that she could graduate from film school. In June 2001, Leah graduated from NYU film school after Larry provided his personal monies to achieve Leah's dream. In July 2001, Larry made additional payments to Leah and then again in October 2001 even though Leah had already graduated from film school. On October 14, 2004, Leah filed suit against Lawrence, as trustee, for breaching his fiduciary duties in handling the trust by not diversifying the investment portfolio.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

Proposition of Law No. 1: Inconsistent expert testimony admitted over objection which is clearly misleading to the jury is an egregious error and clearly an abuse of discretion by the trial court and impossible to correct by jury instruction.

Plaintiff's expert witness, Jon Hoffheimer, a lawyer certified by the Ohio Supreme Court in estate planning was called primarily to testify to standard of care of a trustee. Hoffheimer, over defense objection, testified that the fiduciary standard would require 60/40 diversification. This represents 60% in equities and 40% in cash or CD(s). This, of course, was not the legal standard for fiduciaries in Ohio at the time and only related to trustees appointed by probate court.

Compounding this problem was the fact that the trial court permitted a second plaintiff's expert, Robert J. Sicking Jr., an accountant, to testify to the measure of damage proximately caused by the supposed breach using the most conservative vehicle according to him, a six month CD and employing no portfolio diversity whatsoever.

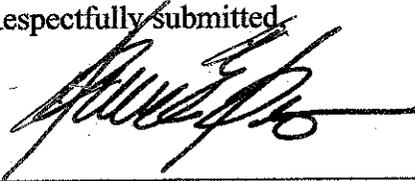
The combination of this flawed expert opinion testimony being permitted resulted in the jury being misled and a skewed verdict.

If Hoffheimer had made damage calculations based on 60/40 diversification it would have been as follows: \$72,000 multiplied by 60% invested in equities equals \$43,200 invested in equities multiplied by an 85% loss creating a \$36,720 loss leaving only \$6,480 net proceeds from equities. In addition, 40% invested in cash (CD) of the \$72,000 equals \$28,800. The \$6,480 (60% in equities) plus the \$28,800 (40% invested in cash/CD) equals \$35,280. The \$35,280 less what the plaintiff acknowledged she received, \$32,189, equals only \$3,091 in proximate damages. This is a far cry from \$50,618.64 in damages from a non-diversified cash investment. These egregious errors by the trial court clearly rose to the level of abuse of discretion and no amount of jury instruction could remedy the situation.

CONCLUSION

The appellant respectfully urges the Court to grant discretionary review and fully hear this matter.

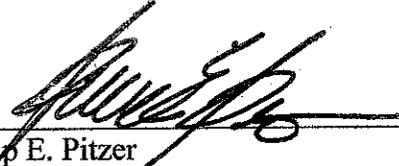
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have delivered a true and accurate copy of this Memorandum in Support of Jurisdiction to Michael B. Ganson, Attorney for Appellee, at 2306 Park Avenue, Suite 101, Cincinnati, Ohio 45206 on this 14th day of June, 2012.



Philip E. Pitzer

APPENDIX A

JUDGMENT ENTRY OHIO FIRST DISTRICT COURT OF APPEALS of 9 May 2012

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

LEAH SELEVAN,

Plaintiff-Appellee/
Cross-Appellant,

vs.

LAWRENCE SELEVAN,

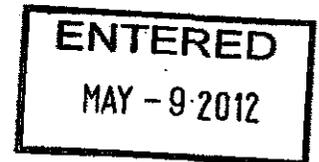
Defendant-Appellant/
Cross-Appellee.

APPEAL NOS. C-110591

C-110657

TRIAL NO. A-0408342

JUDGMENT ENTRY.



We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* S.Ct.R.Rep.Op. 3(A); App.R. 11.1(E); Loc.R. 11.1.1.

In 1984, Daniel Selevan established a trust for the benefit of his daughter, plaintiff-appellee/cross-appellant Leah Selevan. He named his brother, defendant-appellant/cross-appellee Lawrence Selevan, as trustee.

In 2004, Leah filed suit against Lawrence for breach of various fiduciary duties, including the duty to properly invest and account for the trust corpus, the duty to file all applicable tax returns for the trust, and the duty to keep the trust corpus separate from his own personal property. Following a bench trial in 2007, Leah was awarded \$15,000 plus "the amount of money equal to all taxes and penalties due to the I.R.S." This court, however, reversed that judgment in *Selevan v. Selevan*, 183 Ohio App.3d 544, 2009-Ohio-3877, 917 N.E.2d 859 (1st Dist.).

Following a jury trial in 2010 on remand, Leah was awarded \$50,618.64 in compensatory damages and \$50,618.64 in punitive damages. The court also awarded her \$128,212.50 for attorney fees and \$5,738.25 in litigation expenses related to the second trial. Both Lawrence and Leah now appeal from that judgment.

Lawrence raises four assignments of error. In his first assignment of error, he argues that the trial erred in allowing the testimony of two expert witnesses. Lawrence contends that Jon Hoffheimer premised his testimony on an erroneous rule for prudent investors, and that Robert Sicking, Jr., employed a flawed methodology in calculating Leah's compensatory damages. The jury was instructed, however, on the correct rule for prudent investors set forth in former R.C. 1339.53, and there is no indication that the trial court abused its discretion in allowing the testimony of either witness. *See, e.g., State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 147; *Thoma Opticians v. Barnes*, 151 Ohio App.3d 566, 2003-Ohio-673, 784 N.E.2d 1207, ¶ 13 (1st Dist.), citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). His first assignment of error is overruled.

In his second and third assignments of error, Lawrence argues that the awards of compensatory and punitive damages, respectively, were contrary to the manifest weight of the evidence. The record, however, contains competent, credible evidence going to all the essential elements of Leah's claim for breach of fiduciary duty, and showing that Lawrence had acted with actual malice, including his threat of litigation that would have depleted the trust corpus mere months before he lost the entire corpus in extremely risky stock market transactions. *See C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 376 N.E.2d 578 (1978), syllabus; *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶ 64 (1st Dist.),

quoting *Preston v. Murty*, 32 Ohio St.3d 334, 336, 512 N.E.2d 1174 (1987). His second and third assignments of error are overruled.

In his fourth assignment of error, Lawrence argues that the trial court erred in denying his motions for directed verdict and for judgment notwithstanding the verdict. Construing the evidence most strongly in favor of Leah, however, we cannot say that reasonable minds could have come to but one conclusion that was adverse to her. See *Wood v. U.S. Bank, N.A.*, 160 Ohio App.3d 831, 2005-Ohio-2341, 828 N.E.2d 1072, ¶ 40 (1st Dist.). His fourth assignment of error is overruled.

Leah raises two assignments of error. In her first, she argues that the trial court erred in failing to award prejudgment interest under R.C. 1343.03(A). This provision is inapplicable, however, because her claim for breach of fiduciary duty sounded in tort. See, e.g., *Desai v. Franklin*, 177 Ohio App.3d 679, 2008-Ohio-3957, 895 N.E.2d 875, ¶ 33 (9th Dist.). Her first assignment of error is overruled.

In her second assignment of error, Leah argues that the trial court erred in not awarding her litigation expenses related to the 2007 bench trial; however, she cites no authority for this proposition. Her second assignment of error is overruled.

The judgment of the trial court is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and FISCHER, JJ.

To the clerk:

Enter upon the journal of the court on May 9, 2012

per order of the court *Hildebrandt*
Presiding Judge