

[Cite as *Deming v. Smith*, 2010-Ohio-4134.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 94106**

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**DAVID W. DEMMING, JR., ET AL.**

PLAINTIFFS-APPELLANTS

vs.

**ALICE SMITH, INDIVIDUALLY,  
AND AS TRUSTEE OF THE LILLIAN  
DEMMING TRUST, ET AL.**

DEFENDANTS-APPELLEES

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**JUDGMENT:**  
**AFFIRMED IN PART; REVERSED  
AND REMANDED IN PART**

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Civil Appeal from the Cuyahoga  
County Common Pleas Court  
Probate Court Division

Case No. 07 ADV 0131320

**BEFORE:** Sweeney, J., Gallagher, A.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** September 2, 2010

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JAMES J. SWEENEY, J.:

{¶ 1} Plaintiffs-appellants, David W. Demming, Jr. and Laura Demming (“plaintiffs”), appeal the Probate Court’s decision awarding them money damages after finding that defendant-appellee, Alice Smith (“defendant”), breached her fiduciary duty as trustee of the Lillian Demming Trust (“the trust”). After reviewing the facts of the case and pertinent law, we affirm in part and reverse and remand in part.

{¶ 2} On October 22, 1990, Lillian Demming created the trust, naming her daughter, defendant, as trustee and beneficiary of one-half of the trust’s assets. The other half of the trust’s assets were for the benefit of plaintiffs, Lillian Demming’s grandchildren, and defendant’s nephew and niece, to be held until the youngest, Laura, turned 25 on November 14, 2009. Plaintiffs and defendant have been estranged since before the trust was created. In October 1991, Lillian Demming died, and the trust became irrevocable. Defendant, as trustee, delegated the management of plaintiffs’ half of the trust to a financial planner and an accountant.

{¶ 3} In 1998, David, who is the oldest of the Demming grandchildren, turned 18, and requested from defendant an accounting of trust assets to evaluate upcoming college expenses. However, defendant did not provide David with any information regarding the trust. In November 2005, David contacted defendant again, requesting an accounting of trust assets. Defendant responded by providing plaintiffs with limited information, including a statement — rather than an accounting — of trust assets. From this information, plaintiffs questioned

defendant's administration of the trust. Over the next two years, plaintiffs repeatedly requested detailed information about the trust; however, plaintiffs remained unsatisfied with defendant's responses.

{¶ 4} On November 20, 2007, plaintiffs filed suit against defendant, alleging breach of fiduciary duty, conversion of trust assets, and breach of the trust agreement. On May 5, 2009, after a hearing on the matter, the magistrate issued a decision recommending that plaintiffs be awarded \$51,320 and finding the following:

{¶ 5} "A) Defendant improperly redeemed trust assets of \$7,950, allegedly to pay tax preparation fees for the trust; however, defendant never paid \* \* anyone but herself;

{¶ 6} "B) Defendant failed to report on the trust's 1992 to 2006 tax returns a 1% annual fiduciary fee that was paid to her as trustee and a 1.25% annual advisory fee that was paid to the financial planner, thus incurring a trust tax liability of \$15,984;

{¶ 7} "C) Defendant properly redeemed trust assets of \$6,887 as repayment of 1992 trust taxes that she advanced personally;

{¶ 8} "D) The financial planner properly redeemed trust assets of \$50,404 from 1992 to 2008 as a 1.25% advisory fee;

{¶ 9} "E) Defendant properly redeemed trust assets of \$39,086 from 1992 to 2008 as a 1% fiduciary fee;

{¶ 10} “F) Defendant properly redeemed trust assets of \$10,725 to pay for an accounting of trust activity over a 15-year period;

{¶ 11} “G) Defendant failed to maintain records regarding trust assets, thus plaintiffs’ damages properly included a \$9,805 expert witness fee to reconcile the trust expenditures since 1992;

{¶ 12} “H) Defendant improperly redeemed \$11,974, which must be repaid to the trust, because it did not fall into one of the three annual trust expense categories: taxes, tax preparation fees, and trustee fiduciary fees;

{¶ 13} “I) Proper trust expenses consisted of attorney fees if needed; however, defendant redeemed \$5,607 for undocumented litigation expenses, which must be repaid to the trust;

{¶ 14} “J) Defendant’s counterclaim alleging that plaintiffs violated the trust’s no contest clause is meritless and should be dismissed; and

{¶ 15} “K) Defendant neglected her duties and should be removed as trustee.”

{¶ 16} On June 30, 2009, a separate hearing was held regarding attorney fees. On August 4, 2009, the magistrate recommended that plaintiffs be awarded \$38,860.36 in attorney fees and defendant be awarded attorney fees of \$10,658.34.

{¶ 17} Both parties filed objections to the magistrate’s decisions regarding the amount of damages and attorney fees. On September 16, 2009, the court issued judgment entries overruling plaintiffs’ objections and granting defendant’s

objections in part. The court reduced plaintiffs' damage award to \$32,645, ruling that the \$7,950 tax preparation fees could properly be charged to the trust because the trust benefitted from the service, and the \$10,725 accounting of trust activity fees could be applied toward the \$11,974 in undocumented trust redemptions. The court adopted the remainder of the magistrate's decision including the removal of defendant as trustee and the attorney fees awarded to both parties.

{¶ 18} Plaintiffs appeal and raise nine assignments of error for our review. All assignments of error allege that the court erred in adopting and/or modifying the magistrate's decisions. Accordingly, we address plaintiffs' arguments together and out of order when necessary. Additionally, we note that defendant did not file an appellee's brief in the instant case.

{¶ 19} "I. The trial court erred in its analysis of excess redemptions.

{¶ 20} "II. The trial court erred in denying the Demmings' claim for reimbursement of Ms. Smith's fiduciary fees.

{¶ 21} "III. The trial court erred in denying the Demmings' claim for reimbursement of the tax preparation fees.

{¶ 22} "IV. The trial court erred in denying the Demmings' claim for reimbursement of Ms. Smith's litigation expenses for Matthew Lynch, Esq.

{¶ 23} "V. The trial court erred in denying the Demmings' claim for reimbursement of Ms. Smith's expenses for her expert witness fees to Company de Borkowski.

{¶ 24} “VI. The trial court erred in denying the Demmings’ claim for reimbursement of all their attorneys’ fees.

{¶ 25} “VII. The trial court erred in granting Ms. Smith reimbursement of her litigation expenses for Weston Hurd.

{¶ 26} “VIII. The trial court erred in ordering that the trust must reimburse Ms. Smith directly for her litigation expenses for Weston Hurd rather than deducting that fee from the total judgment awarded against Ms. Smith.

{¶ 27} “IX. The trial court erred in failing to include interest as an element of damages.”

{¶ 28} We review an appeal from a trial court’s order adopting or modifying a magistrate’s decision under an abuse of discretion standard. *O’Brien v. O’Brien*, 167 Ohio App.3d 584, 2006-Ohio-1729, 856 N.E.2d 274. “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 29} In reviewing whether the trial court acted within its discretion, we are mindful of Civ.R. 53(D)(4)(d), which states that when a trial court rules on objections to a magistrate’s decision, it “shall undertake an independent review as to the objected matters to ascertain that the magistrate has properly determined the factual issues and appropriately applied the law.”

{¶ 30} Plaintiffs argue that the court erred when it reduced the amount of damages by \$10,725 because these accounting fees were documented and

properly redeemed from the trust. A review of the record shows that when litigation started, defendant hired an accountant, Norman De Borkowski, to review and reconcile the records regarding the trust. De Borkowski prepared a report and testified as an expert witness on behalf of defendant. De Borkowski charged a fee of \$10,725 for his services, and he has been paid in full from the trust.

{¶ 31} The magistrate found that under Article XI, Section 16 of the trust document, defendant was authorized to “employ and compensate agents, accountants \* \* \* [and] tax specialists \* \* \* deemed by the Trustee needful for the proper administration of the Trust Estate \* \* \*.” The magistrate concluded that De Borkowski’s “fees are chargeable as a trust expense and should be approved.”

{¶ 32} Subsequently, the court found merit to defendant’s sixth objection to the magistrate’s decision and made the following modification: “The Magistrate’s Decision fails to take into account the \$10,725.00 payments to Accountant, Norman De Borkowski that were properly charged to the Trust \* \* \*. The excessive redemption portion of the damages should be reduced by the \$10,725.00 approved by the Magistrate.”

{¶ 33} We find that the court abused its discretion in modifying the damage award recommended by the magistrate. Defendant hired an accountant to reconcile trust documents and testify at trial, and defendant paid for his fee from the trust. The court found this proper under the terms of the trust. To reduce plaintiffs’ award by \$10,725 would mean, in essence, that the trust paid De Borkowski’s fee twice.

{¶ 34} Accordingly, plaintiffs' damage award of \$32,645 should be increased by \$10,725, as this amount was properly redeemed from the trust during the course of litigation. Plaintiffs' first assignment of error is sustained. Plaintiffs' fifth assignment of error is overruled.

{¶ 35} Plaintiffs next argue that the court abused its discretion when it adopted the magistrate's recommendation that defendant had a right to reasonable payment of fiduciary fees totaling \$39,086.

{¶ 36} Pursuant to Article VII of the trust document, defendant was entitled to reasonable compensation for her services as trustee. According to defendant, she was paid \$39,086 from the trust for her services through 2007, which amounts to approximately 1% of the trust assets annually. Defendant presented evidence that this fee was reasonable.

{¶ 37} Plaintiffs, on the other hand, argue that it was unreasonable for defendant to retain these fees because she delegated all of her responsibilities as trustees to others, she breached her fiduciary duties owed to the trust and plaintiffs as beneficiaries, and she "charged the Trust double" because the financial planner charged the trust a 1.25% fee to perform the work defendant delegated.

{¶ 38} According to Restatement of the Law 2d, Trusts (1959), Section 243, "[i]f the trustee commits a breach of trust, the court may in its discretion deny him all compensation or allow him a reduced compensation or allow him full compensation." Courts should take the following factors into consideration when

exercising this discretion: “(1) whether the trustee acted in good faith or not; (2) whether the breach of trust was intentional or negligent or without fault; (3) whether the breach of trust related to the management of the whole trust or related only to a part of the trust property; (4) whether or not the breach of trust occasioned any loss and whether if there has been a loss it has been made good by the trustee; (5) whether the trustee’s services were of value to the trust.” *Id.* at comment (c).

{¶ 39} The magistrate found that, although defendant did not perform her duties as trustee “perfectly,” the trust fund grew from \$151,000 in 1992 to over \$400,000 in 2007. The 1.25% advisory fee paid to the financial planner was authorized as a separate charge to the trust under Article XI, Item 16 of the trust document. Additionally, Cuyahoga County Probate Court Rule 74.1 authorized testamentary trustee compensation of 1.2%. The magistrate also found that defendant must repay the trust for various losses caused by her breaches, and there was no evidence presented that defendant was disloyal or committed fraud in performing her trust duties.

{¶ 40} In adopting the magistrate’s findings, the court ruled that because defendant “served as the fiduciary for a number of years, it is proper that she retain her fiduciary fees, as the fees are reasonable and the Magistrate found she did not commit fraud or theft.” After review, we cannot say that the court abused its discretion and plaintiffs’ second assignment of error is overruled.

{¶ 41} Plaintiffs next argue that the court abused its discretion when it ordered that defendant was not liable for \$7,950 she redeemed from the trust between 1992 and 2007, allegedly for the trust's tax preparation expenses.

{¶ 42} Defendant's accountant prepared annual tax returns for defendant's family, her family's business, her trust fund, and plaintiffs' trust fund. Defendant's accountant sent her one lump sum invoice each year for the preparation of all four tax returns. Defendant paid this bill annually from her family's business. It is undisputed that defendant's accountant received no money from the trust, and is currently due no money, for preparing the trust's tax returns from 1992 through 2007. Furthermore, there is no evidence in the record that defendant reimbursed the family business for paying the trust's tax preparation fees. Indeed, nothing in the record shows that defendant did anything with the \$7,950 other than keep it.

{¶ 43} The magistrate recommended that defendant repay \$7,950 to the trust. However, the court sustained defendant's objection on this issue and ruled that "[a]s the Trust received the benefit of the tax service, \$7,950.00 should be deducted from the damages charged to [defendant]."

{¶ 44} Pursuant to R.C. 5808.02(A), a "trustee shall administer the trust solely in the interests of the beneficiaries." As trustee, defendant owed the trust and plaintiffs a fiduciary duty "of the highest order" to act with "the utmost fidelity." *In re Trusteeship of Stone* (1941), 138 Ohio St. 293, 302, 34 N.E.2d 755. The Ohio Supreme Court additionally held that "a fiduciary must exercise the utmost care not to divert the funds entrusted to him from the purposes of the trust, and \* \*

\* is practically an insurer against any personal gain or enrichment to himself from funds entrusted to him solely for the benefit of another.” *Caswell v. Lenihan* (1955), 163 Ohio St. 331, 337-38, 126 N.E.2d 902.

{¶ 45} In the instant case, trust assets ended up in the trustee’s hands, which is a breach of the fiduciary duty that defendant owed plaintiffs. Accordingly, the trial court abused its discretion when it failed to adopt the magistrate’s finding that defendant was liable for \$7,950 in damages to plaintiffs for “fictitious tax preparation fees.” Plaintiffs’ third assignment of error is sustained.

{¶ 46} Plaintiffs’ sixth, seventh, and eighth assignments of error call into question the trial court’s adopting the magistrate’s August 4, 2009 decision regarding attorney fees. We note that this decision was separate from the May 5, 2009 decision on the merits of this case. Furthermore, the August 4, 2009 decision was based on a separate hearing, which was held on June 30, 2009. Plaintiffs argue that their attorney fee award should be increased, defendant’s attorney fee award should be decreased, and defendant’s attorney fee award, if any, should be deducted from the judgment against her.

{¶ 47} Pursuant to Civ.R. 53(B)(3)(iii), objections to a magistrate’s factual findings “shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding \* \* \*.”

{¶ 48} In its journal entry adopting the magistrate’s August 4, 2009 decision, the court noted that the transcript of the June 30, 2009 hearing regarding attorney fees was not filed with the court. Although plaintiffs filed the June 30, 2009

transcript with this Court as part of the instant appeal, that transcript is not part of the lower court record. This Court faced a similar situation in *Najjar v. Najjar*, Cuyahoga App. No. 91789, 2009-Ohio-3880 and held that the transcripts filed only on appeal were not part of the trial court record, and we were prohibited from reviewing them. See, also, App.R. 9 and App.R. 12(A)(1)(b). We find that the same conclusion applies here.

{¶ 49} Accordingly, the magistrate's findings are considered established and the trial court could not make a finding independent of the magistrate's report. See, e.g., *Levine v. Brown*, Cuyahoga App. No. 92862, 2009-Ohio-5012. As such, our review of plaintiffs' sixth through eighth assignments of error is limited to questions of law.

{¶ 50} Pursuant to *In re Trust of Papuk*, Cuyahoga App. No. 80078, 2002-Ohio-964, a court may award attorney fees to the beneficiaries of a trust "if the litigation is beneficial to the trust or if the beneficiary was reasonably justified in bringing the suit."

{¶ 51} Assuming attorney fees are properly awarded, the United States Supreme Court set forth a "degree of success" or "results obtained" formula for calculating the amount fees in *Hensley v. Eckerhart* (1983), 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40. *Hensley* directs trial courts to begin by calculating the "lodestar" amount of attorney fees "by multiplying the number of reasonable hours expended times a reasonable rate." *Id.* at 433. It is then within the court's discretion to adjust the award according to the degree of success the plaintiff

achieved. Id. at 435-36. In *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 569 N.E.2d 464, the Ohio Supreme Court followed the *Hensley* approach in awarding attorney fees under R.C. 1345.09 of the Consumer Sales Practices Act.

{¶ 52} In the instant case, the court eliminated from the equation hours that plaintiffs' attorneys spent preparing a case against other defendants who were dismissed from this action before trial. The court then reduced the hourly rate to \$150 and concluded that plaintiffs were successful on five of the nine claims they alleged. The court awarded plaintiffs 5/9 of their reasonable attorney fees or \$38,860.36. Accordingly, we hold that the court acted within its discretion when awarding plaintiffs a reduced amount of attorney fees based on the degree of their success. Plaintiffs' sixth assignment of error is overruled.

{¶ 53} Pursuant to R.C. 5807.09(A), a trustee may recover expenses such as attorney fees "that were properly incurred in the administration of the trust."

{¶ 54} In the instant case, the court found that "[t]he legal representation provided to the trustee, was not \* \* \* 'needful for the proper administration of the trust,' as set forth in Article XI of the trust agreement. The vast majority of [defendant's] attorney services were rendered for her own benefit and clearly not for the benefit of the trust or \* \* \* Plaintiffs." Therefore, defendant is not entitled to have her attorney fees paid for under the terms of the trust or under R.C. 5807.09.

{¶ 55} Nonetheless, the court held that defendant was "entitled to retain counsel to defend her fiduciary actions when attacked [and] was successful in

overcoming four of the nine allegations set forth” by plaintiffs. The court awarded defendant 4/9 of her attorney fees or \$10,658.34.

{¶ 56} In *Goff v. Key Trust Co. of Ohio* (Dec. 18, 1997), Cuyahoga App. No. 71636, this Court held that “[g]enerally, in order to warrant attorney fees, the attorney’s action must benefit the estate. \* \* \* It is not an abuse of discretion, therefore, to reimburse an executor for successfully defending allegations of misconduct.” See, also, *Diemert v. Diemert*, Cuyahoga App. No. 82597, 2003-Ohio-6496.

{¶ 57} The instant case is not the type of case contemplated by *Goff*. To the extent that defendant was “successful,” she limited her liability to the trust. Her attorney’s actions did not benefit the trust as her defense was not based on protecting trust assets. Accord *Hensley*, 461 U.S. at fn. 2 (noting that “[a] prevailing defendant may recover an attorney’s fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant”).

{¶ 58} Accordingly, the trial court abused its discretion in awarding defendant attorney fees and plaintiffs’ seventh assignment of error is sustained. Plaintiffs’ eighth assignment of error is overruled. See App. R. 12(A)(1).

{¶ 59} In addition to the court awarding defendant the attorney fees discussed above, the court ruled that defendant properly redeemed \$14,050 to pay attorney fees during the course of this litigation. Given our conclusion that defendant was not entitled to attorney fees, we hold that the court abused its discretion in allowing defendant to be reimbursed for attorney fees she already

redeemed from the trust. Plaintiffs' fourth assignment of error is sustained and plaintiffs' damage award should be increased by \$14,050.

{¶ 60} Plaintiffs' final argument is that the court erred when it failed to award interest as an element of damages. Although plaintiffs raise this issue in their objections to the magistrate's decision, they fail to identify where in the record their request for interest can be found. It is clear from review that the court did not address the interest issue in either the magistrate's decisions or the court's judgment entries.

{¶ 61} In *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342, 695 N.E.2d 1140, the Ohio Supreme Court held the following:

{¶ 62} "Whether the prejudgment interest in this case should be calculated from the date coverage was demanded or denied, from the date of the accident, from the date at which arbitration of damages would have ended if Grange had not denied benefits, or some other time based on when Grange should have paid Landis is for the trial court to determine. Upon reaching that determination, the court should calculate, pursuant to R.C. 1343.03(A), the amount of prejudgment interest due Landis and enter an appropriate order."

{¶ 63} We review prejudgment interest determinations under an abuse of discretion standard. *Walworth v. BP Oil Co.* (1996), 112 Ohio App.3d 340, 678 N.E.2d 959. As the record on appeal is not sufficient for this Court to review the interest issue, this Court does not reach the question of whether the trial court erred in failing to include interest as an element of damages. We sustain

plaintiffs' ninth assignment of error and remand this case for further development of this issue.

{¶ 64} In conclusion, plaintiffs' second, fifth, sixth, and eighth assignments of error are overruled. Plaintiffs' first assignment of error is sustained and \$10,725 is added to the damage award. Plaintiffs' third assignment of error is sustained and \$7,950 is added to the damage award. Plaintiffs' fourth assignment of error is sustained and \$14,050 is added to the damage award. Plaintiffs' seventh assignment of error is sustained and the court's judgment awarding defendant \$10,658.34 in attorney fees is reversed. Plaintiffs' ninth assignment of error is sustained and this case is remanded for further development of the issue of awarding interest on the damages.

Judgment affirmed in part and reversed and remanded in part.

It is ordered that appellants recover from appellee their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas, Probate Division to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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**JAMES J. SWEENEY, JUDGE**

**SEAN C. GALLAGHER, A.J., and  
KENNETH A. ROCCO, J., CONCUR**