

Complex Cobb County Tax and Pension Case Nets \$400K

After a weeklong trial involving complex claims related to pension and tax law, a Cobb County jury awarded an Atlanta businessman, his wife and his company more than \$735,000 in damages. But the award was trimmed to just over \$400,000 after the jury apportioned 40 percent of the damages to two defendants who had already settled out of the case and 5 percent to the plaintiffs themselves.

"There was not a huge amount of money involved, but it was a real challenge," said **Richard Robbins**, who represented the plaintiffs with colleagues **Jeremy Littlefield and Kimberly Anderson from Robbins Ross Alloy Belinfante Littlefield**.

"The trial was a high level of difficulty in that it required us to educate the jury on an arcane area of pension benefit tax law, then explain what the pension services company we were suing did negligently," Robbins said.

Defense attorney William Davis of Bovis, Kyle, Burch & Medlin said he did not have permission from his client to comment. Robbins praised his opposing counsel for doing "a very good job with very bad facts."

According to Robbins and court filings, the case began in 2002 when Stewart Weinhoff, the owner of Atlanta residential construction company Dar-Court Builders, set up what was described as a "highly tax-advantaged pension plan" for his company. He was assisted by New Jersey-based Firmani Pension Services, a financial planner and insurance broker.

Known as a 412(i), such a plan, according to Investopedia, is a "tax-qualified benefit plan, so any amount that the owner contributes to the plan becomes available immediately as a tax deduction to the company. The plan must be funded solely by guaranteed annuities, or a combination of annuities and life insurance."

Weinhoff paid into the plan for five years, "thinking he had this great tax-advantage retirement pension for small businesses," said Robbins. But in 2007 the Internal Revenue Service audited the plan, and Weinhoff got hit with an assessment for about \$1.9 million, Robbins said.

"That started a three or four year odyssey where he had to hire tax accountants and lawyers," said Robbins. Weinhoff was ultimately able to negotiate the liability down to about \$460,000, he said.

In 2013, Dar-Court, Weinhoff and his wife, Marcia Weinhoff, sued Firmani and its principal, Dominic Firmani, along with financial adviser William Baer and Baer Wealth Management, and insurance broker Stephen Toth and his company, National Pension Associates, in Cobb County Superior Court. Among the allegations in the negligence suit were that a "scrivener's error" mistakenly limited the amount of premiums that could be contributed to the plan, and that Stewart Weinhoff—the plan's trustee—had been advised to backdate

deductions to take advantage of the 2001 tax year, even though the plan was established in 2002.

In addition to the \$460,000 Weinhoff paid the IRS, the suit said he had spent another \$350,000 appealing that assessment. After a mediation, Baer's company and Toth's National Pension Associates settled for confidential sums. They did not participate in the trial, and their attorneys did not comment.

Trial began Sept. 14 before Judge Robert Flournoy III against Firmani and his company.

Although his clients asked for punitive damages and attorney fees—which the jury did not award—Robbins said the case was tried "as a straight negligence case. They just made a mistake." According to the defense portion of the pretrial order, Firmani was simply the "sponsor" of the plan, and had had no substantive communication with Weinhoff regarding its design, objectives or risk. Even though he was the plan's trustee, it said, Weinhoff "took no action to review the plan's documents or obtain other professional advice, instead relying on Toth and Baer's representations."

Firmani denied responsibility for the drafting error, saying that Toth had designed the document. Firmani was "a mere order-taker," the defense account said.

The defense "really pushed on the apportionment issue" at trial, Robbins said. "That was a tricky issue. They spent a lot of time on why our client had sued other defendants; we had to argue that it was the remaining defendants who were at fault."

He said he was also worried that the panel might place blame on the plaintiffs.

"I thought that was a weak spot," he said. "They argued that our client was the trustee, that he should have paid more attention to the reports over the years. Fair point, but we said, 'He hired an expert, why should he spend time trying to find out if they were wrong?'"

Robbins said he was aided greatly in presenting his case by the testimony of Weinhoff's chief tax attorney, E. Philip Bush of Locke Lord's Dallas office, who is also an adjunct professor at Southern Methodist University's Dedman School of Law.

Bush, he said, was able to walk jurors through the intricacies of benefits tax law in terms they could understand.

"The judge was in awe, I was in awe," Robbins said. "The other side didn't even attempt to disagree with him."

But Firmani himself also helped Robbins' case, he said. During a deposition, he said, Firmani had acknowledged making a mistake in drafting the plan, saying "the buck stops with me."

But when he was called to the stand as the plaintiffs' first witness, Robbins said, "he disavowed his earlier testimony and said was mistaken when he said he made a mistake. I don't think it went over very well."

Robbins said the jury went out at about 4:30 p.m. on Friday, Sept. 18, and deliberated until about 9:30 p.m. before returning with a verdict awarding total damages of \$735,650. But only 55 percent of the award, or \$404,607, was levied against Firmani and his company; Baer Wealth Management and National Pension Associates were assessed 25 percent and 15 percent, respectively, and the plaintiffs were deemed liable for 5 percent of their damages.

Robbins said he will be filing a motion seeking another \$74,000 in prejudgment interest.

"This was one of those satisfying cases," Robbins said. "Our client came out very well."

Robbins hailed defense lawyer Davis as "very professional and good to work with, something which seems rarer and rarer in our business."

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