

JOHNSON & WARD

VERDICT: SECURITIES FRAUD; RICO VIOLATIONS; FIDUCIARY RELATIONSHIP; UNREASONABLE RELIANCE; FAILURE TO MITIGATE DAMAGES

James Tigner, Jr. vs. Shearson-Lehman Hutton, Inc., The Robinson-Humphrey Company, Inc., and Oscar Ayala

Superior Court of Fulton County, Civil Action File No. D-80681, jury verdict, February 12, 1993, subsequent settlement

Jury verdict after four week trial and three days of jury deliberation in favor of plaintiff and against defendants Shearson-Lehman Hutton, Inc., The Robinson-Humphrey Company, Inc., and their employee, defendant Oscar Ayala, in the amount of \$1,394,000.00, and a finding of a violation of the Georgia RICO Act by defendant Ayala, with the assessment of RICO damages in the amount of \$338,000.00, trebled under the RICO Act for total RICO damages of \$1,014,000.00, and a further finding on special interrogatory that defendant Ayala was acting within the course and scope of his employment at the time of the tortious activities that resulted in securities fraud. This jury also found that punitive damages under O.C.G.A. §51-12-5.1, and attorneys' fees and expenses of litigation under O.C.G.A. §13-6-11 and the Georgia RICO Act, should be assessed against all defendants. The case was subsequently settled for a confidential sum immediately prior to it being submitted to the jury for the assessment of the amount of punitive damages, in which plaintiff sought \$25,000,000.00, against all defendants.

In July of 1982, plaintiff, a 45-year old musician who had returned to Atlanta and taken temporary employment at the Atlanta Airport as a ramp service attendant, was severely injured when he drove his motorcycle into the path of an automobile at an inadequately designed intersection in the Atlanta airlines employee parking lot. Suit was filed for negligent roadway design, and in 1985, a jury returned a verdict in his favor, this verdict being ultimately upheld on appeal. Robert & Company Associates vs. Tigner, 180 Ga. App. 836, 351 SE2d 82 (1986) (en banc). The appeal of this case was finally concluded in plaintiff's favor when the Writ of Certiorari, granted by the Supreme Court of Georgia, was subsequently vacated in December of 1987. Tigner vs. Robert & Company Associates, 184 Ga. App. 912 (1987). Plaintiff thereafter deposited some of the settlement proceeds, amounting to \$1,380,000.00, with Oscar Ayala, Vice President of Sales, and a financial consultant for the Robinson-Humphrey Company, Inc., a wholly owned subsidiary of Shearson-Lehman Hutton, Inc., for investment and handling.

Plaintiff, a tenth grade dropout who could neither read nor write, and was functionally illiterate, and who had never previously had a bank account and was unsophisticated in financial matters, had earned his living for over 30 years as an itinerant musician playing and arranging music with various musical groups for which he had been paid in cash, his last such employment being with the comedian, Redd Fox, with whom he had

been associated for almost three years prior to his motorcycle/automobile collision. Due to his lack of sophistication in matters of finance, his illiteracy, and the fact that he had been permanently disabled as a result of the injuries received in his collision, it was necessary that the proceeds he received from his litigation be carefully managed so as to provide income for he and his family for the remainder of their lives. Accordingly, he and others on his behalf had made inquiries as to the best manner in which to invest his funds. These inquiries had led them to Robinson-Humphrey, where Mr. Ayala assured him that he had the expertise and experience to properly invest and husband his funds so as to insure that his investment goals would be met.

Thereafter, Ayala became plaintiff's closest friend, financial advisor and confidant. Plaintiff contended he made no financial move of any kind without Ayala's advice and consultation. Neither plaintiff's wife, who could read and write, nor plaintiff himself, however, ever read the monthly statements or other information received from Robinson-Humphrey pertaining to plaintiff's accounts, as they were continually advised by Ayala that he was watching out for them. Ayala advised plaintiff that he was earning sums beyond his wildest dreams, and plaintiff contended he was encouraged by Ayala to go on a spending spree of incredible proportions. Within one week of plaintiff opening his Robinson-Humphrey account, he spent over \$500,000.00 to purchase what turned into a fleet of luxury cars, RV vehicles and other expensive items. These included two Mercedes automobiles, a BMW, a Cadillac, a Porsche, a Corvette, a \$75,000.00 recreational vehicle, an Excalibur automobile, jewelry, clothing and a boat. Within five months, plaintiff had spent all of the funds originally invested, though he was unaware, due to Ayala's continuing misrepresentations, that he was essentially "broke" by the Summer of 1988. Plaintiff signed a contract in 1988 to purchase a \$975,000.00 home, the financing of which would involve his borrowing approximately \$700,000.00. The mortgage company agreed to loan plaintiff this money on the basis of a "Verification of Deposit" form it submitted to Robinson-Humphrey which was returned, signed by Ayala as Vice-President, incorrectly stating that plaintiff had \$2.3 million dollars on deposit with them as of March 31, 1988, approximately 60 days after plaintiff had made his initial deposit, despite plaintiff's massive spending spree in the meantime. Plaintiff contended that Ayala had introduced him to a new world of expensive stores, luxury goods and exotic items such as \$9,000.00 watches, designer suits, and exclusive shops, all the while advising that as he was earning so much money, he "owed it to himself and his family" to elevate their standard of living.

Plaintiff also met Ayala's other clients, a large majority of whom were professional athletes who, like plaintiff, were relatively unsophisticated in money management and had substantial sums of money to invest. They were all constantly assured by Ayala that their best interests were being observed

and that they were earning large returns on their invested funds, which statements were also later learned to be untrue. In May of 1990, this rosy scenario came to an abrupt and shattering end when Donnell Thompson, a football player with the Indianapolis Colts, could not understand why \$153,000.00 worth of bonds he had supposedly purchased from plaintiff did not show up on his written account. Ayala had showed him the bonds on the computer screen at his desk (a strategy he employed with all his clients), but when he was unable to provide a written confirmation of the sale, Mr. Thompson complained to Robinson-Humphrey. Thereafter, subsequent to lengthy interrogations, Ayala admitted that he had been operating a giant "ponzi" scheme, unknown to his superiors, wherein he had stolen money from some clients, and then had to continually steal from others in order to cover up his initial thefts. For example, it was revealed that plaintiff's invested funds had been dissipated within five months of the opening of the account, and that thereafter, everytime plaintiff wrote a check or obtained funds from Robinson-Humphrey, Ayala had simply stolen money from others of his clients to place in plaintiff's account so as to keep plaintiff unaware of the fact that his money was gone. Ayala eventually pled guilty in U.S. District Court to defrauding approximately 30 individuals (but not plaintiff) out of in excess of \$2,000,000.00, for which Robinson-Humphrey made restitution, and was sentenced to a lengthy jail term. However, Robinson-Humphrey refused to make any offer of restitution to plaintiff, based on the fact that over the two and one-half year pendency of the scheme, plaintiff had received and spent in excess of \$2,000,000.00 from Robinson-Humphrey, or more than a half million dollars more than his initial deposit, and he had therefore "gotten all of his money back", and "then some", and had made his own decisions to spend it wildly, which not even Ayala could control.

None of the other victims of Ayala's treachery were able to institute litigation due to the arbitration clause contained in all brokerage agreements providing that disputes arising out of the brokerage account could only be resolved through binding arbitration under New York Stock Exchange rules, which tend to liberally favor the brokerage houses. Plaintiff contended that none of Ayala's former clients were fully compensated under arbitration, while defendants asserted that all of the clients had been fully compensated for any funds lost (as opposed to those voluntarily spent). Of four cases that proceeded to arbitration, defendants won one case, lost one and settled two during arbitration. However, in none of the arbitrated cases were any substantial funds assessed against the brokerage houses. In fact, in the one case in which an award was rendered against all defendants, the arbitrators chose to assess almost all of the damages against only Ayala, who, of course, was virtually penniless, and then in prison.

When plaintiff initiated his action, Robinson-Humphrey and Shearson immediately moved for dismissal on the grounds of the binding arbitration clause contained in the agreements he and his

wife had signed when they initially opened their accounts. The trial court agreed, and dismissed the Complaint. However, the Georgia Court of Appeals reversed, holding that because of plaintiff's disabilities, a fiduciary relationship was created between the parties, and accordingly, the arbitration clause was not binding and a jury should make a determination of the contested issues. Tigner vs. Shearson-Lehman Hutton, Inc., 201 Ga. App. 713, 411 SE2d 800 (1991). Accordingly, of all of the victims defrauded by Ayala, plaintiff was the only one able to seek reimbursement through the judicial system.

During the ensuing one month trial, Robinson-Humphrey and Shearson contended that plaintiff could actually read better than he would admit, showing that few of the people surrounding plaintiff, and with whom he dealt during the relevant time period, were aware of this disability. Defendants further contended that plaintiff was simply a spendthrift who had gone on a spending binge which he would have pursued whether Ayala had assisted him or not. Moreover, it was contended that plaintiff was the architect of his own misfortune in that he and his wife (whom it was undisputed could read and write) had failed to review any of the brokerage statements and other documents regularly received by them which reflected the true state of affairs in their account, and that any reliance on Ayala was clearly unjustified under the circumstances wherein their bank accounts were in constant disarray, their checks continually bounced, and they were advised on more than one occasion that they were spending too much money. Finally, defendants pointed out that plaintiff had actually been a "beneficiary" of Ayala's scheme, rather than a "victim", in that he had received back over \$500,000.00 more than he had initially deposited with Robinson-Humphrey, spending in excess of \$2,000,000.00 in less than two years. Accordingly, defendants had filed a counterclaim, seeking a return of the additional funds paid, and contended that Ayala had taken money from other client's accounts and deposited it directly in plaintiff's accounts, and that plaintiff had endorsed some of these checks, and therefore knew or should have known of the thefts, but allowed them to continue so that he could close on his house in 1989, and continue to otherwise fund his extravagant lifestyle. Robinson-Humphrey accordingly contended that it had had to make such checks good to others, and that plaintiff therefore was obligated to repay these funds based on assignments it had received from the other defrauded customers upon resolution of their claims against defendants.

Defendants made no offer of settlement prior to trial. However, after the jury returned its verdict, the case was settled for a confidential amount prior to the jury returning a verdict as to the amount of punitive damages to be assessed, along with assessment of attorneys' fees and expenses of litigation.

[Plaintiff was represented by ATLA and GTLA members William C. Lanham and Clark H. McGehee, Lanham & McGehee, P.C., of Atlanta, Georgia, and Marion Smith, II, John A. Howard and Claude P. Czaja, of Fortson & White, Atlanta, Georgia.]