

RENDERED: AUGUST 4, 2006; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**  
**Court of Appeals**

NO. 2005-CA-001940-MR

GENEVA F. PARRIS, TRUSTEE FOR THE  
BANKRUPTCY ESTATE OF SIMON J.  
MICHELSON; LOUIS M. MICHELSON; LINDA  
MICHELSON; and BREMEN BANK & TRUST  
COMPANY

APPELLANTS

v. APPEAL FROM MCCRACKEN CIRCUIT COURT  
HONORABLE BILL CUNNINGHAM, SPECIAL JUDGE  
ACTION NO. 02-CI-00670

THE PADUCAH BANK AND TRUST  
COMPANY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: VANMETER, JUDGE; BUCKINGHAM,<sup>1</sup> SENIOR JUDGE; MILLER,<sup>2</sup>  
SPECIAL JUDGE.

VANMETER, JUDGE: Simon Michelson (Michelson),<sup>3</sup> as the grantor  
and income beneficiary of an Individual Retirement Account

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<sup>1</sup> Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

<sup>2</sup> Retired Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

<sup>3</sup> By order entered February 6, 2006, this Court substituted Geneva F. Parris, Chapter 7 Trustee for the bankruptcy estate of Simon Michelson, as appellant in place of Simon J. Michelson.

(IRA) Trust, remainder beneficiaries Louis Michelson (Louis) and Linda Michelson (Linda), and successor trustee Bremen Bank & Trust Company, appeal from a judgment entered by the McCracken Circuit Court dismissing their complaint against the appellee, Paducah Bank and Trust Company. For the reasons stated hereafter, we affirm as to all issues.

In November 1990, Michelson established for himself an IRA trust at Citizens Bank & Trust Company. The trust, which originally was created with nearly \$292,000, grew to approximately \$690,000 by early 2000. The trust document included a provision that the trust was "non-forfeitable," as well as a spendthrift provision that the trust would not be "liable for the debts of any beneficiary." The document also stated that Michelson "irrevocably divest[ed] himself of any and all power to amend, alter, change or revoke" the trust, and the trust was structured so as to restrict Michelson's access to trust funds until his retirement.<sup>4</sup> However, the document allowed Michelson to withdraw up to \$20,000 per month if he failed to receive payments from a separate irrevocable trust. This withdrawal power was cumulative so long as Michelson did not receive funds from the separate trust. Finally, the document provided that in the event of Michelson's death, any remaining

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<sup>4</sup> Upon reaching age 70½, Michelson was required to withdraw the minimum annual amounts dictated by Internal Revenue Code § 408. The record indicates that Michelson was born October 6, 1941.

trust funds would pass to his named beneficiaries, Louis and Linda.

In 1999, Michelson received a loan of approximately \$220,000 plus a \$25,000 line of credit from Paducah Bank and Trust Company in order to finance the creation of a self-storage business. The terms of the loan required Michelson to pay only interest until December 1999, with monthly principal and interest payments, beginning in January 2000 and continuing for five years. Michelson then transferred the IRA trust to a new trustee, Paducah Bank, with the result that Paducah Bank became simultaneously a creditor of, and a fiduciary to, Michelson.

Michelson's new business immediately ran into financial difficulties. In an attempt to salvage the business, Michelson secured a loan from another bank in January 2000, agreeing to use proceeds from the IRA trust if necessary to pay off the loan. Further, at the end of March 2000, Michelson began requesting and receiving distributions from the IRA trust after misrepresenting to Paducah Bank that he had not received funds from his other irrevocable trust. The record indicates and the jury found that all distributions were directed by Michelson. The distributions began in March 2000, were spread out over a period of nine months, and totaled approximately \$657,000, including a July 2000 loan payoff of \$220,000. As the distributions occurred before Michelson achieved the age of 59½,

they were subject to additional tax penalties. Further, the record contains a memorandum from Michelson's accountant indicating that Michelson rejected the accountant's advice to consider liquidating the business rather than continuing to pump retirement and trust assets into the business.

Michelson filed for bankruptcy in 2002. Shortly thereafter, Paducah Bank, which had not sought court approval of the business loan payoff or of any of the distributions, resigned as trustee of the IRA trust. Eventually Bremen Bank & Trust Company took over as trustee.

This action was brought by Michelson, as income beneficiary, and by Louis and Linda as remainder beneficiaries. Bremen Bank, as successor trustee, intervened in the action. The plaintiffs sought compensatory and punitive damages from Paducah Bank for breach of fiduciary duties, fraud, violation of the Racketeer Influenced and Corrupt Organization Act,<sup>5</sup> breach of contract, breach of implied covenant of good faith and fair dealing, and negligence. Eventually, the case went to trial, and a jury found that Paducah Bank had violated its fiduciary duty to Michelson, but that Michelson had consented to or

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<sup>5</sup> 18 U.S.C. § 1962(a) ["RICO"]. Paducah Bank removed the action to the United States District Court for the Western District of Kentucky. By Memorandum Opinion and Order entered July 27, 2004 in Civil Action No. 5:02CV-186-M, that court granted Paducah Bank's motion for summary judgment on the RICO claim, and it remanded the action to the McCracken Circuit Court for disposition of the state law claims.

knowingly directed Paducah Bank to make the disbursement to pay off the loan, and to make the other disbursements. The trial court therefore entered a judgment in favor of Paducah Bank. This appeal followed.

Appellants first assert that the trial court should have granted a directed verdict in favor of the remainder beneficiaries. They maintain that the remainder beneficiaries possessed an independent claim against Paducah Bank, that a directed verdict is appropriate because they did not consent to any of the distributions, and that damages should be calculated according to the *Restatement (Second) of Trusts* § 216. We disagree.

Generally, "remote, uncertain, and speculative damages are not recoverable."<sup>6</sup> The primary purpose of an IRA trust is to provide for an individual during his/her retirement years. Here, the trust document and the Internal Revenue Code required Michelson to begin to withdraw the trust funds as soon as he reached the age of 70½.<sup>7</sup> The remainder beneficiaries' interest in the trust was contingent on there being anything left in the account at Michelson's death. The speculative nature of this interest was acknowledged by both remainder beneficiaries, who

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<sup>6</sup> *Schorck v. Huber*, 648 S.W.2d 861, 863 (Ky. 1983).

<sup>7</sup> In fact, one of the withdrawal options was "[a] single sum payment."

testified in their depositions that they did not expect to inherit any money from Michelson's IRA trust.

The remainder beneficiaries' claims are made even more speculative by the terms of the trust document itself. Despite attempts made in the document to limit Michelson's access to funds, the trust allowed cumulative withdrawal rights, up to \$20,000 per month, less any funds received by Michelson from a separate trust. However, the document did not require the trustee to verify whether Michelson had received funds from the separate trust, and Michelson's initial request for distribution included his misrepresentation to Paducah Bank that he had never received any such funds. Such evidence supports the trial court's conclusion that the remainder beneficiary claims are remote and speculative and thus unrecoverable.

Appellants next assert that the trial court should have granted a directed verdict in their favor regarding the trust distribution used to pay off the business loan. They maintain that by accepting funds directly from the IRA trust for loan repayment, without prior court approval, Paducah Bank incurred a conflict of interest in its exercise of trust powers without prior court approval in violation of KRS 386.820. We disagree.

KRS 386.820 (2) states that "if the duty of the trustee and his individual interest or his interest as trustee

of another trust conflict in the exercise of a trust power, the power may be exercised only by court authorization. . . ."

Appellant relies on *Wiggins v. PNC Bank, Kentucky, Inc.*<sup>8</sup> in which we held that summary judgment should have been granted against PNC for failing to get court approval before acting in a conflict of interest situation.<sup>9</sup> This reliance is misplaced.

Paducah Bank, as trustee of the IRA trust, made distributions at Michelson's direction, based on his misrepresentation that he had not received distributions from the other trust. Moreover, the jury specifically found that Michelson consented or knowingly directed Paducah Bank "to make the disbursement for the payoff of the loan." Although Michelson asserted that Paducah Bank "called" the loan and essentially took assets from the trust to pay the loan, other evidence at trial showed Michelson made an independent business decision to reduce the cash flow payable to Paducah Bank as principal and interest in order to promote the viability of the storage unit business. Case law has well established that it is within the province of the jury, as fact finder, to judge the credibility of the witnesses,<sup>10</sup> to determine the quality, character and substance of all the evidence, to weigh and draw

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<sup>8</sup> 988 S.W.2d 498 (Ky.App. 1998).

<sup>9</sup> *Id.* at 502.

<sup>10</sup> *Dunn v. Commonwealth*, 286 Ky. 695, 697, 151 S.W.2d 763, 764-65 (1926).

inferences from the evidence, and to choose whom and what to believe if the evidence is conflicting.<sup>11</sup> Additionally, the jury may choose to believe part of the evidence and disbelieve other parts.<sup>12</sup>

The cases cited by appellants do not compel a different result, as each involved a bank which took, or attempted to take, unilateral actions to use trust funds to reduce a debt owed to the bank.<sup>13</sup> Likewise, the matter before us is distinguishable from *Wiggins*, wherein a panel of this court found that a conflict of interest existed where PNC, as trustee of two trusts, chose to remove money from one trust to the detriment of the remainder beneficiaries of that trust.<sup>14</sup>

Here, Paducah Bank did not take unilateral actions to remove trust funds in order to pay off debt owed to it. As found by the jury, Michelson directed or knowingly consented to each trust withdrawal and distribution, including that which was

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<sup>11</sup> *Commonwealth, Dept of Highways v. Dehart*, 465 S.W.2d 720, 722 (Ky. 1971).

<sup>12</sup> *Gillispie v. Commonwealth*, 212 Ky. 472, 474, 279 S.W. 671, 672 (1926).

<sup>13</sup> *Masi v. Ford City Bank and Trust Company*, 779 F.2d 397, 399 (7th Cir. 1985) (the Bank unilaterally withdrew funds in Masi's IRA to pay off a guaranty obligation); *In re Todd*, 37 B.R. 836, 837 (Bkrtcy. W.D. La. 1984) (bank claiming right of set off against IRA which debtor had established with the bank); *In re Mastroeni*, 57 B.R. 191 (Bkrtcy. S.D.N.Y. 1986) (money deposited in IRA account was not subject to bank claim of offset in bankruptcy proceeding); *In re Sopkin*, 57 B.R. 43, 44 (Bkrtcy. D.S.C. 1985) (bank held not entitled to right of set off of funds held in debtor's IRA); *First Nat. Bank of Blue Island v. Estate of Philp*, 436 N.E.2d 15,16 (Ill. App. 1982) (bank contending it was entitled to set off the proceeds of the IRA against depositor's general indebtedness).

<sup>14</sup> 988 S.W.2d at 501.



used to pay off his business loan. Once those funds were removed from the trust, they were no longer subject to the trust restrictions and Michelson was free to use them to pay off his business loan. Any argument that the funds passed directly from the Bank as trustee to the Bank as creditor, without the intermediary step of passing to Michelson, must fail since the jury found that Michelson "directed or knowingly consented to" the transaction. As no actions of Paducah Bank "in the exercise of a trust power"<sup>15</sup> are at issue, no conflict of interest existed and KRS 386.820 is not implicated.

Finally, appellants argue in the alternative for a new trial, claiming that the jury instructions were faulty in several aspects. We disagree.

Appellants argue that the jury should have been instructed concerning the remainder beneficiaries' claim. However, as previously discussed, this argument lacks merit since the remainder beneficiaries' damages were too speculative to justify a claim.

Appellants also claim that the jury should have been instructed that Paducah Bank owed Michelson a fiduciary duty of "utmost fidelity" rather than that of a "prudent man" as instructed, and that the instruction under the lesser "prudent

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<sup>15</sup> KRS 386.820.

man" standard prejudiced the jury's decision on the subsequent consent instruction. However, we conclude that any error in this regard was harmless since the jury's finding, that Paducah Bank violated the lesser standard, necessarily leads to the conclusion that Paducah Bank also failed to meet the higher standard of acting with the utmost fidelity. We fail to see how the alleged error could have had a negative impact on the appellants in the other instructions, or how the trial court erred by failing to grant a new trial on this ground.

Appellants further argue that the jury should have been instructed that Michelson must have given informed consent to the trust distribution. Although we agree with appellants that informed consent required Michelson to have been aware of all relevant facts, we do not see how the jury instructions failed in this regard. Instruction No. 3 required that

. . . Michelson, *with full knowledge of the relevant facts*, did the following:

(a) directed the Paducah Bank and Trust Company to make the disbursement or disbursements; or

(b) voluntarily and knowingly consented to the disbursement or disbursements; and

(c) that the Plaintiff, Simon J. Michelson, was not induced by an improper conduct on the part of the Defendant . . .

(Emphasis added). The use of the phrase "with full knowledge of the relevant facts" clearly required the

jury to find that Michelson had made an informed decision and provided the objective standard sought by appellants. Although Michelson was required to know all of the relevant facts, Paducah Bank was not required to disclose facts already known by Michelson. Thus, appellants are not entitled to relief.

Finally, appellants argue that the jury should have been instructed concerning Paducah Bank's duty under KRS 386.820. Since, as previously noted, we agree with the lower court that this particular statute did not apply herein, the trial court did not err by failing to instruct on this statute.

The judgment of the McCracken Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Kerry D. Smith  
Paducah, Kentucky

BRIEF FOR APPELLEE:

David L. Kelly  
Paducah, Kentucky