RICHARD SHOFER

VS

STUART HACK ET AL.

CASE #: 88102069B/CL79993

VOL. 5 OF 6

209-98

12 of 1 Large Box

# Court of Special Appeals

No. 209, September Term, 1998

Richard Shofer
vs.
The Stuart Hack Company et al.

DISPOSITION OF APPEAL IN COURT OF SPECIAL APPEALS:
January 27, 1999: Opinion by Strausberg, J.
Judgment affirmed. Costs to be paid by appellant.

February 26, 1999: Mandate issued.

RECORD RETURNED TO CLERK OF CIRCUIT COURT FOR:
BALTIMORE CITY
BALTIMORE, MD 21202 DATE: 2/26/99

BY: FIRST CLASS MAIL

**REMARKS:**

Leslie D. Gradet

# MANDATE

## Court of Special Appeals

No. 209, September Term, 1998

Richard Shofer
vs.
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JUDGMENT: January 27, 1999: Opinion by Strausberg, J.
Judgment affirmed. Costs to be paid by appellant.

February 26, 1999: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for BALTIMORE CITY
88102069B , CL79993

| | |
|---|---|
| Record................................. | 60.00 |
| Stenographer Costs...................... | 2260.00 |
| * Total * | 2320.00 * |

In Court of Special Appeals:

| | |
|---|---|
| Filing Record on Appeal................. | 50.00 |
| Printing Brief for Appellant............ | 144.00 |
| Reply Brief............................. | 93.60 |
| Portion of Record Extract--Appellant.... | 7833.60 |
| * Total * | 8121.20 * |
| Printing Brief for Appellee............. | 169.20 |
| * Total * | 169.20 * |

*STATE OF MARYLAND, Sct:*

*I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this* twenty-sixth *day of* February *A.D. 19*99

*Clerk of the Court of Special Appeals*

**COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.**

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 209

September Term, 1998

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RICHARD SHOFER

V.

THE STUART HACK COMPANY, ET AL.

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Salmon,
Kenney,
Strausberg, Gary I.
(Specially Assigned),

JJ.

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Opinion by Strausberg, J.

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Filed: January 27, 1999

#88102069B

## INTRODUCTION

This case concerns a professional malpractice claim against a pension plan administrator. The appellant, plaintiff below, Richard Shofer ("Shofer"), was president of a used car dealership, Catalina Enterprises, Inc. ("Catalina"), trading as Crown Motors. Catalina had a pension plan, which was administered by appellee, defendant below, The Stuart Hack Company. Shofer sued The Stuart Hack Company and Stuart Hack, individually, (together, "Hack") complaining that Hack was negligent in failing to give Shofer advice about the tax consequences of borrowing money from the pension fund. This Court has previously described the dispute between the parties as a "never ending litigational odyssey," on a continuous, "long, torturous trip." *Shofer v. Hack* Co., 107 Md. App. 585, at 589, 597, 669 A.2d 201 (1996). This is the third appellate opinion along that bumpy journey.[1]

## PROCEDURAL HISTORY

### I.

### A. Shofer I

Shofer's initial Complaint, in the Circuit Court for Baltimore City, charged Stuart Hack with (I) negligence; (II)

[1] The first reported appellate opinion, 324 Md. 92 (1991), *cert. denied,* 502 U.S. 1096 (1992), has been referred to as *Shofer I.* The second reported appellate opinion, 107 Md. App. 585 (1996), has been referred to as *Shofer II.* Presumably, this Opinion will be referred to as "*Shofer III.*"

breach of contract; and (III) common law breach of fiduciary duty. The Complaint was amended and a fourth count was added for (IV) breach of fiduciary duty under the Employees Retirement Income Security Act of 1974 ("ERISA"), as codified in 29 U.S.C. §§ 1001 *et seq.* Hack moved to dismiss count IV for lack of subject matter jurisdiction, which was later granted with leave to amend. Shofer then amended his Complaint to include the original three claims and five other claims for damages due to Hack's failure to provide competent advice under ERISA, specifically, 29 U.S.C. § 1132 (a)(1)(B). Hack moved for a dismissal of the Second Amended Complaint on the ground that ERISA claims fall under the exclusive jurisdiction of the federal courts. On October 12, 1990, the trial court dismissed the Second Amended Complaint on the ground that the claims were preempted by the federal ERISA statute.

Shofer appealed to the Court of Special Appeals, and before the case was heard, the Court of Appeals issued a writ of certiorari, upon its own motion. On September 17, 1991, the Court of Appeals (Rodowsky, J.), reversed in part and vacated in part, holding that the Maryland state law claims survived the ERISA claims because ERISA does not preempt traditional common law causes of action. *Shofer v. Stuart Hack Company*, 324 Md. 92, 595 A.2d 1078 (1991), *cert. denied*, 502 U.S. 1096, 112 S.Ct. 1174, 117 L.Ed.2d 419 (1992)("Shofer I"). The Court of Appeals

also held that Shofer could recover damages based on income tax penalties; however, the Court barred recovery of other claimed consequential damages, specifically, all pension-related damages including excise taxes, prohibited transaction penalties, and possible plan disqualification. The case was remanded for further proceedings on the remaining claims.

**B. *Shofer II***

Shofer filed a Third Amended Complaint for negligence and breach of contract seeking damages for future additional income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, loss of income, prohibited transaction penalties and possible disqualification of the pension. Hack moved for dismissal citing *Shofer I*, arguing that the Court of Appeals specifically held these damages non-recoverable for negligence and breach of contract actions. *Shofer I*, 324 Md. at 111. The trial court, applying *Shofer I*, dismissed the damage claims for excise taxes, prohibited transactions, and plan disqualification under counts I and II of the Third Amended Complaint. The punitive damages and attorney's fees claims were also dismissed.

Shofer amended his Complaint and claimed damages from penalties arising out of his failure to follow proper procedures in borrowing from his pension, damages due to his inability to refinance his Virgin Islands property, lost salary, and lost

business profits. *Shofer v. Stuart Hack Company*, 107 Md. App. 585, 590, 669 A.2d 201 (1996) ("*Shofer II*"). Hack moved for summary judgment arguing preemption by ERISA, or, in the alternative, partial summary judgment as to damages. Partial summary judgment was granted as to certain damages claimed.

Subsequently, the trial court dismissed the damage claim for loss of sheltered earnings because it was too speculative and unforeseeable, but denied a motion to dismiss the tax penalties and interest damages. Shofer announced his intent to appeal the previous orders disallowing the damage claims regardless of the outcome of the trial. Pursuant to Maryland Rule 2-602(b),[2] the trial court entered a judgment as to all the rulings on damages, thereby giving its permission to Shofer to appeal the damage issues to this Court before the start of the trial on the merits. *Shofer II,* 107 Md. App. at 591. This Court dismissed that appeal, holding that "the Circuit Court erred in certifying for appeal these interlocutory orders that were neither final judgments nor exceptions to the final judgment rule." *Id.* at 586.

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[2] Rule 2-602. Judgments Not Disposing of Entire Action
(b) When Allowed - If the court expressly determines in a written order that there is no just reason for delay, it may direct it in the entry of a final judgment:

* * *

(2) pursuant to Rule 2-501 (e)(3), for some but less than all of the amount requested in a claim seeking money relief only.

We remanded the case for "trial on the remaining damage items." *Id.* at 597.

**II.**

Shofer's Fourth Amended Complaint was filed after the *Shofer II* decision. Shofer requested a jury trial for the first time and, pursuant to his interpretation of the Court of Appeals decision in *Shofer I*, reasserted all the previously dismissed damage claims to the original breach of contract and negligence counts. He also filed a Motion for Revision seeking a reversal of each of the prior damage rulings. Hack filed a Motion to Strike the Fourth Amended Complaint on the grounds that Shofer was not entitled to a jury because the amended Complaint simply reformulated the original.

Shofer amended his Complaint a fifth time, alleging negligence, breach of contract, and a new count for fraud and deceit. Hack filed a Motion to Strike the Complaint claiming the new count was time barred.

Shofer then filed a new lawsuit alleging negligence, breach of contract, and fraud, asserting that the new case was viable because it requested damages for "excise taxes" that the IRS had recently assessed. Hack moved for summary judgment as to the new suit on the grounds that *Shofer I* found these damages unrecoverable. Hack also filed a Motion for Sanctions on the ground that the new lawsuit was filed in bad faith.

The circuit court denied Shofer's Motion for Revision of the prior damages rulings. The court granted Hack's Motion to Strike the Fourth and Fifth Amended Complaint and granted Hack's Motion for Summary Judgment with respect to the newly filed case. The Motion for Sanctions against Shofer was denied.

Finally, on June 26, 1997, a bench trial began on the remaining negligence and breach of contract claims. After a lengthy bench trial (Matricciani, J.), the lower court found in favor of Hack. The trial court concluded that Hack did not deviate from the acceptable standard of care, in large part based on the duty Hack owed Shofer under the particular circumstances of this case; that Hack did not cause Shofer's damages; and that, in any event, Shofer was contributorily negligent. Shofer appeals all of the pretrial rulings as well as the findings of fact and conclusions of law set forth in the Memorandum and Order dated September 5, 1997.

**FACTUAL BACKGROUND**

Catalina, through Shofer, as president, established a pension plan ("Plan") in the late 1960's for its employees. The Hack Company, a pension consulting and administration firm, was hired by Catalina to administer the Plan. Stuart Hack was the owner and an employee of the Hack Company.

In the mid 1970's, Shofer's personal and business accounting firm, Grabush, Newman and Company ("Grabush"), suggested that

Shofer contact Hack for revisions to the Plan in order to bring it into compliance with the newly-enacted federal legislation, ERISA. Hack performed these duties and continued as Catalina's Plan administrator until 1986. During this time, Hack renewed its contract with Catalina by letter addressed solely to "Catalina Enterprises, Inc."

In 1982, Shofer was under increased pressure from Maryland National Bank to improve the balance sheet of Catalina t/a Crown. Shofer began to contact Hack more frequently, and inquired about using the Plan to finance Catalina's accounts receivable. Shofer, in fact, did finance Catalina's accounts receivable with Plan funds.

On August 3, 1984, Shofer called Hack, and in a brief telephone conversation inquired about three items: (1) whether the funds in the Catalina Enterprises Plan could be used as collateral for loans; (2) whether Shofer could borrow money from the Plan; and (3) whether Shofer's voluntary account could be given special treatment for purposes of these loans. Shofer did not indicate the amount he intended to borrow, the number of loans, the reasons for obtaining the loans, or whether he intended to follow through with the inquiry. Hack informed Shofer that he could borrow up to 100% of his voluntary account. Soon after, Hack contacted Barry Berman, a pension attorney at the law firm of Weinberg & Green, who confirmed that Shofer could

borrow up to 100% of his voluntary account.

Shofer called Hack again on August 7, 1984, and stated that he needed a letter confirming the advice Hack had provided in the previous telephone conversation, namely that: (1) Shofer could borrow up to 100% of his voluntary account, and (2) the voluntary account could be used as collateral for a bank loan. On August 9, 1984, before Shofer received Hack's confirmation letter, he borrowed $60,000 from the Plan to repay part of the debt he owed to Catalina t/a Crown, which could then, in turn, repay Maryland National Bank and receive a line of credit to purchase additional inventory. To process the loan, Shofer wrote himself a check from the pension, issued a pay-on-demand promissory note to the Plan, and set the interest rate himself. At this point, he did not secure the loan nor did he inquire of Hack how much he could borrow. Shofer later repaid this initial loan.

On August 9, 1984, Hack prepared the requested letter, which stated:

> You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.
>
> First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans up to a maximum of five years (For a

longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account itself can stand as collateral for a loan from a bank to another source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissipate the collateral however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account.

The gravamen of Shofer's complaint is that the letter fails to provide advice about the tax consequences of borrowing money from the pension fund.

At the time the letter was written, Shofer's voluntary account consisted of $76,000. According to Hack's letter, Shofer could borrow $50,000 from the employer account and $76,000 or 100% of his voluntary account, for a total loan of $126,000.

Shofer took the following loans from the Plan between 1984

and 1986, totaling $315,000 (excluding the initial $60,000, which was repaid):

1. $150,000 on August 23, 1984, to repay his debt to Catalina t/a Crown.

2. $50,000 on September 5, 1984, to repay his debt to Catalina t/a Crown.

3. $35,000 on February 21, 1985, as a down payment on two investment properties in the Virgin Islands.

4. $3,000 on February 25, 1985, also for the Virgin Islands properties.

5. $12,000 on July 30, 1985, to furnish the Virgin Islands properties.

6. $25,000 on August 13, 1985, to refurbish the Virgin Islands properties.

7. $5,000 on August 21, 1985, again to refurbish the Virgin Islands properties.

8. $35,000 on September 30, 1986, to purchase a condominium at Harbor Court in Baltimore.

Shofer did not inform Hack or Grabush about the loans he had taken from the Plan. Throughout, Grabush was the accounting firm for Shofer, individually, Catalina, and Catalina's pension plan.

In the fall of 1986, Grabush prepared Shofer's 1985 personal income tax returns and did not list the 1985 loans from the Plan as taxable income. On June 17, 1985, Kenneth Larash ("Larash"),

who prepared Shofer's personal and income tax returns, was reviewing the general ledger of the pension plan and he learned of the loans taken in 1984 that were not reported as income. He did not recommend that any action be taken nor did he advise Shofer that the loans should have been reported as income. This failure to report the loans was not discovered until 1986 when another Grabush accountant, Alan Marvel ("Marvel"), was reviewing Shofer's file and noticed the omission. Larash, Shofer, and Marvel met. The two accountants suggested Shofer contact a pension attorney, Nicholas Giampetro. Shofer complied and also wrote to Hack requesting his assistance.

At this point, Hack learned of Shofer's loans for the first time. Another meeting was held in May 1987, between Shofer, Hack, Marvel, and Larash, in which Hack reaffirmed his position that the loans were not taxable. Hack's advice to Shofer was to refrain from amending his 1984 and 1985 tax returns, as the loans might not be detected by the IRS and the statute of limitations had almost run. Marvel and Larash disagreed, advising Shofer to file amended returns reporting the loans as income. Shofer amended his 1984 and 1985 tax returns and reported the loans as income on his 1986 tax return. These actions resulted in additional federal and state taxes, penalties, and interest charges.

The question presented in this appeal for our review is

whether the trial court was clearly erroneous in concluding (1) Hack did not breach the standard of care in not advising Shofer about the tax consequences of his borrowings from the Catalina pension fund; (2) if there were a breach, it was not the proximate cause of Shofer's losses; and (3) Shofer was contributorily negligent in failing to inform Hack about the extent of the pension fund loans he was taking, and in failing to inform his accountants about his borrowings.

**DISCUSSION**

On an appeal from a bench trial, Maryland Rule 8-131© provides that, "[w]hen an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous . . . ." "Therefore, if 'competent material evidence' supports the trial court's findings, we must uphold them and cannot set them aside as 'clearly erroneous.'" *State v. Johnson*, 108 Md. App. 54, 71 (quoting *Nixon v. State*, 96 Md. App. 485, 491-92, 625 A.2d 404, *cert. denied*, 332 Md. 454, 632 A.2d 151 (1993)) (internal quotations omitted). With respect to the lower court's application of the law to the facts, we apply the abuse of discretion standard. *Oliver v. Hays*, 121 Md. App. 292, 307, 708 A.2d 1140 (1998); *Pierce v. Montgomery County*, 116 Md. App. 522, 529, 698 A.2d 1127 (1997).

I

**Standard of Care**

To establish a cause of action for negligence, the following must be proven: (1) that the defendant owed a duty to the plaintiff or to a class of which the plaintiff was a member; (2) that the defendant breached the duty; (3) that the plaintiff suffered actual injury or loss; and (4) that the loss or injury proximately resulted from the defendant's breach of the duty. These four elements have been long established as the factors necessary to create a cause of action in negligence. *See* W. Page Keeton et al., *Prosser and Keeton on The Law of Torts*, § 30, at 164-165 (5th ed. 1984); *Rosenblatt v. Exxon*, 335 Md. 58, 642 A.2d 180 (1994).

In *Jacques v. First National Bank*, 307 Md. 527 (1986), which imposed upon a bank a duty to exercise reasonable care in processing and determining a loan application, the Court of Appeals set forth additional criteria applicable to a negligence economic injury claim:

> In determining whether a tort duty should be recognized in a particular context, two major considerations are: the nature of the harm likely to result from a failure to exercise due care, and the relationship that exists between the parties. Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. The intimate nexus is satisfied

by contractual privity or its equivalent. *Jacques*, 307 Md. at 534-35; *Noble v. Bruce*, 349 Md. 730, 739, 709 A.2d 1264 (1998). Catalina, and not Shofer, was Hack's client. There was no contractual privity between Shofer and Hack.

As a Plan participant, Shofer was a third-party beneficiary of the Hack-Catalina contractual arrangement. When two parties enter into an agreement with the intent to confer a direct benefit on a third party, a duty is created that allows the third party to sue on the contract despite the lack of privity. *Flaherty v. Weinberg*, 303 Md. 116, 125 (1985). For a third party beneficiary claim to succeed, the plaintiff must be a part of the class of persons specifically intended to be . . . beneficiar[ies] of the defendant's undertaking. *Id.* at 131 (citing *Clagett v. Dacy*, 47 Md. App. 23, 420 A.2d 1285 (1980)).

Professional malpractice is one genre of negligence. Once it is established that defendant owed plaintiff a duty, plaintiff must prove that defendant, whether a physician, lawyer, architect, accountant, or pension administrator, breached the standard of care applicable to other like professionals similarly situated. Furthermore, plaintiff must prove defendant's breach of the standard of care caused the damages sustained by plaintiff. *Reed v. Campagnolo*, 332 Md. 226, 232, 630 A.2d 1145 (1993) ("the burden of proof in a malpractice case is on the plaintiff to show a lack of the requisite skill or care on the

part of the physician and that such want of skill or care was a direct cause of the injury." *Suburban Hosp. Ass'n v. Mewhinney*, 230 Md. 480, 484-485, 187 A.2d 671 (1963)). *Flaherty*, 303 Md. 116, 128, 492 A.2d 618 (1985) (In order to state a cause of action for legal malpractice, a plaintiff must allege three elements: (1) the attorney's employment, (2) his neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of loss to the client).

Shofer was a participant in the Pension Plan administered by Hack. The standard of care owed to a third party beneficiary must be based on the contract of the primary relationship. Here, that relationship was based on an agreement for the administration of pension benefits, *not* tax advice.

Both parties presented expert witnesses who testified as to the standard of care required of a pension plan administrator. Shofer's expert, Edward Kabala ("Kabala"), an attorney practicing in the State of Pennsylvania, testified that the standard of care applicable to a pension attorney is also applicable to a pension consultant. In the same testimony, however, Kabala testified that to be a plan administrator, one need not be an attorney. Kabala testified that Hack's advice fell below the acceptable standard of care because he failed to provide tax advice.

Hack presented the expert testimony of Edward Burrows, past president of the American Society of Pension Actuaries, who has

made a career of performing pension consulting and administrative services. Burrows testified that in light of the brief telephone inquiry, Hack did not owe a duty to provide advice concerning tax consequences of the loans. Hack also presented Richard Itner, a Baltimore accountant, as an expert who testified that Grabush was negligent in preparing Shofer's 1984 and 1985 tax returns and also negligent in failing to advise Shofer of his option not to file an amended tax return. The trial judge, who was able to observe these experts and assess their credibility, found the testimony of Hack's experts credible, as he adopted much of their testimony in his Findings of Fact.

Although Shofer may sue as a third party beneficiary, his claim fails because Hack *did* in fact provide the appropriate services and met the standard of care required of a pension plan administrator. To require a pension plan administrator to provide tax advice, as if he were a tax attorney or accountant, would be to require pension plan administrators to perform dual roles as administrator and tax advisor. *Selden v. Burnett*, 754 P.2d 256 (Alaska 1988), is instructive, to a limited degree. In that case, the Court refused to hold an accountant liable for recommending a particular investment in the course of giving tax advice. There, the Court addressed an accountant's duty of care to a third party who received the accountant's recommendation through a client. The recipient of the investment advice who

sustained losses sued the accountant for negligent advice. The Court was not prepared to expand unduly the accountant's duty, and hold that a pension plan administrator should be held to the same standard applicable to an attorney or accountant unless he represents himself as an attorney who provides legal advice or an accountant who provides tax advice.

Shofer regularly conferred with his accountants at Grabush for personal and business-related tax matters. Shofer could not be expected to rely solely on Hack for tax advice. Shofer did not specifically retain Hack to provide consultation on the advisability of borrowing substantial sums of money from the pension funds for the purpose of personal purchases or investments. Hack was the Plan administrator. The Restatement (Second) of Torts, Section 552, provides, in part:

> (1) one who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their *justifiable reliance* upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(Emphasis added).

Shofer could not have been expected justifiably to rely on Hack's advice to borrow the pension funds he did. Hack complied with the standard of care required of a pension plan administrator.

## II
## Proximate Cause

Even if a duty existed, which Hack breached, any damage sustained by Shofer must be directly attributable to Hack's actions. The plaintiff must prove that the negligent actions of the defendant actually caused the plaintiff to be injured. *Peterson v. Underwood*, 258 Md. 9, 17 (1970). In order to establish proximate cause, the injury must also be a foreseeable one.

Shofer had the burden of "introducing] evidence establishing a reasonable probability or likelihood that the defendant's act caused the plaintiff's injury or damage." *Id.* at 17. He did not do so. Shofer failed to provide evidence supporting the claim that "but for" Hack's actions, Shofer would not have incurred damages. As the trial court recognized, Shofer borrowed from his pension at a time when he was in debt to Catalina and was under

pressure from Maryland National Bank to make progress on Catalina's balance sheet.

At the time of Shofer's telephone inquiry, the losses that were later sustained could not have been foreseen by Hack. Shofer did not inform Hack: (1) that he actually intended to borrow from the pension; (2) the reasons for borrowing; (3) the amount he would borrow; and (4) when and if Shofer intended to repay the loan. Hack was justified in treating the telephone conversation as an inquiry and providing the advice memorialized in the letter dated August 9, 1984. Shofer's subsequent losses were not reasonably foreseeable by Hack. The trial court characterized Shofer's inquiry to Hack as "hypothetical," which appears to be an apt characterization, certainly not one which this Court would conclude was clearly erroneous -- the governing standard on appeal.

Shofer acted on Hack's advice, without disclosing to him the extent of his pension fund borrowing. This Court cannot conclude that the trial court was clearly erroneous in finding that the amount of the borrowing "went beyond the scope of the advice sought or given," that the losses were not foreseeable, and, in inferring "that Shofer was attempting to conceal the existence of his transaction with the pension plan." We affirm the trial court's findings that Shofer did not "sustain his burden of proving that Hack's negligence was the proximate cause of

Shofer's injuries."

III

**Contributory Negligence**

A plaintiff is contributorily negligent when he fails to exercise ordinary and reasonable care for his own protection. *Menish v. Polinger Co.*, 277 Md. 553 (1976).

The trial court found that Shofer was a "sophisticated businessman who was aware of the complicated interplay between the tax code and pension law." Shofer borrowed $315,000 from the pension funds based upon a brief conversation with a pension administrator, without checking with his accountant. Much of Shofer's argument on appeal is directed at the trial judge's conclusion that Shofer must have known that his loans from the pension were taxable events. In our analysis, we disregard that particular finding of the trial judge and assume that Shofer did not actually know that the loans were taxable. Nevertheless, Shofer failed to act reasonably. He did not inform Hack of his intent to follow through with the inquiry, if at all. He did not inform Hack of the extent to which he intended to borrow from the pension. A reasonable person would have provided such vital information if the advice was later to be acted upon.

Shofer had accountants, with whom he had an ongoing relationship. Before taking $315,000 of loans from a pension, a reasonable person standing in Shofer's shoes would have

ascertained the tax consequences with his accountant and would not have acted as he did based solely on a brief conversation with a pension administrator. By taking such large loans and not informing Hack more specifically or consulting his own accountants at all, Shofer contributed to the losses he later sustained.[3]

Shofer criticizes the trial judge for stating that Shofer seemed deceitful in concealing the extent and reasons for his borrowing from the pension. Given the continuous removal of pension funds without further disclosure to the appellee, the trial judge's characterization was not unreasonable or unsupported.

## CONCLUSION

Appellant also assigns errors to several pretrial rulings, by different judges, which disallowed numerous items of claimed

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[3] The trial judge seemed to confuse the doctrines of contributory negligence and assumption of risk. They are distinct. The former focuses on whether the plaintiff failed to exercise ordinary care, determined by what a reasonable person in the plaintiff's position would do under similar circumstances. The latter focuses on whether the plaintiff knew of a danger and voluntarily did what he did despite knowing it was dangerous, thus assuming the risk of injury. By not revealing the extent of his loans, by borrowing way in excess of $126,000, by not consulting with his accountants as to tax consequences of the loans, Shofer was negligent, contributorily so. *Compare Baltimore Gas & Elec. Co. v. Flippo*, 348 Md. 680, 703, 705 A.2d 1144 (1998) *with Liscombe v. Potomac Edison Co.*, 303 Md. 619, 630, 495 A.2d 838 (1985).

damages.[4] Given this Court's affirmance of the trial court's resolution against appellant of the liability issue, there is no need to discuss damages.[5]

**JUDGMENT AFFIRMED.**
**COSTS TO BE PAID BY APPELLANT**

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[4] Judge Ward's February 17, 1993, ruling applied *Shofer I* and dismissed the damage claims for excise taxes, prohibited transactions, plan disqualification, punitive damages, and the request for attorney's fees; Judge Hollander's July 11, 1994, ruling granted partial summary judgment as to damages arising from appellant's failure to follow proper procedures in borrowing from the pension, damages due to his inability to refinance his Virgin Islands property, lost salary, and lost business profits; and Judge Davis' January 31, 1995, ruling dismissed the damage claim for loss of sheltered earnings.

[5] The protracted nature of this litigation is evidenced by the number of trial judges who are no longer on the bench whose rulings are now appealed. Judges Ross and Ward have retired; Judge Davis is a federal district court judge; Judge Hollander is a member of this Court.

Civil breach of K

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, 3 envelopes
in 1 lg Box

No. 209 (LEAVE BLANK), SEPTEMBER TERM, 1998

# TRANSCRIPT OF RECORD

## FROM THE

(FF)

CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

Judge: HONORABLE ALBERT J. MATRICCIANI, JR.

## IN THE CASE OF

RICHARD SHOFER

*Appellant*

## VS.

The STUART HACK ~~ET AL~~ Company et al.

*Appellee*

## TO THE

## COURT OF SPECIAL APPEALS

DOUGLAS R. TAYLOR, ESQUIRE
P.O. BOX 4566
ROCKVILLE, MARYLAND 20850 (301) 565-0209

FOR APPELLANT

R = $60.00
S = $2260.00

JANET TRUHE, ESQUIRE
JANOFSKY & TRUHE, P.A.
COURT TOWERS, SUITE 505
210 W. PENNSYLVANIA AVE.
TOWSON, MARYLAND 21204
(410) 321-4890

DEBORAH M. WHELIHAN, ESQUIRE
JORDON, COYNE & SAVITS
SUITE 600
1100 CONNECTICUIT AVE, N.W.
WASHINGTON, D.C. 20036
(301) 424-4161

FOR APPELLEE

C# Z-227248702
4-2-98

Filed 4-6-98 (LEAVE BLANK)

5/18

10/98

CC# 88/02069

PHC# 932/97-NC

Dates

start: 2-1-96

judgment: 9-5-97

appeal: 10-3-97

RICHARD SHOFER

VS.

STUART HACK ET AL.

CIRCUIT COURT FOR BALTIMORE CITY
CASE NO: 88102069B/CL79993
COURT OF SPECIAL APPEALS OF MARYLAND
PHC NO: 932, SEPTEMBER TERM, 1997
IN THE
CIRCUIT COURT FOR
BALTIMORE CITY

PATRICIA M. BERTORELLI,
CHIEF DEPUTY CLERK,

CERTIFICATE BY CLERK OF THE COURT, TO TRANSCRIPT OF RECORD.

STATE OF MARYLAND, BALTIMORE CITY, SET.:

I, PATRICIA M. BERTORELLI, CHIEF DEPUTY CLERK OF THE CIRCUIT COURT FOR BALTIMORE CITY, HEREBY CERTIFY THAT THE FOREGOING IS A TRUE TRANSCRIPT, TAKEN FROM THE RECORD AND PROCEEDINGS OF THE SAID COURT, IN THE THEREIN ENTITLED CAUSE.

I FURTHER CERTIFY THAT ALL COUNSEL OF RECORD, HERETOFORE, HAVE BEEN NOTIFIED TO INSPECT THE FOREGOING TRANSCRIPT OF RECORD, PRIOR TO ITS TRANSMISSION, AND THAT SAID COUNSEL HAVE HAD AMPLE OPPORTUNITY FOR SUCH INSPECTION.

IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND AND AFFIX THE SEAL OF THE CIRCUIT COURT FOR BALTIMORE CITY AFORESAID, ON THIS DAY

4TH OF FEBRUARY, 19 98

COST TO BE PAID IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | | |
|---|---|---|
| COURT OF SPECIAL APPPEALS | --- | $50.00 |
| TRANSCRIPT OF RECORD | --- | $60.00 |
| OPEN COURT COST | --- | |
| TOTAL COST | --- | $110.00 |

SEAL OF
THE COURT

PATRICIA M. BERTORELLI
CHIEF DEPUTY CLERK OF THE CIRCUIT COURT FOR BALTIMORE CIT

CC-192

STENOGRAPHIC TESTIMONY --- YES
COURT REPORTER --- DEPOSITION SERVICE COST $2,260.00
EXHIBITS --- 2 ENVELOPES

RICHARD SHOFER VS STUART HACK ET AL.

88102069B/CL79993

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| Notice of Service | 1405 |
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| Defendant's Opposition to Plaintiff's Motion to Compel | 1409 - 1417 |
| Plaintiff's Motion for Leave to Depose Defendant | 1418 - 1427 |
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| Defendant's Opposition to Plaintiff's Motion for Leave | 1438 - 1442 |
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| Memorandum in Support of Plaintiff's Jury Demand | 1452 - 1455 |
| Order of Court for Consolidation, J. Matricciani (96135027) | 1456 |
| Defendant's and Third-Party Defendant's Motion to Strike Plaintiff's Fifth Amended Complaint and Demand for Jury Trial | 1457 - 1466 |
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| Motion for Judgment Regarding Damages of the 3RD-Party | 1611 - 1621 |
| Copy of Closing Argument of 3RD-Party Defendant | 1622 - 1630 |
| Plaintiff's Opposition to defendants Motion for Judgment and Memorandum | 1631 - 1641 |
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| Order of C.O.S.A. to Proceed, J. Eyler | 1672 |
| Appellant's Motion for Extension of Time to Transmit Record | 1673 & 1674 |
| Order of C.O.S.A. to Extended Time, Clerk Leslie D. Gradet | 1675 |
| Official Transcript for 6/26, & 6/27/97, 6/30 - 7/2/97 & 8/8/97. **** SEE ENVELOPE **** | |
| Original papers fwd to C.O.S.A. via certfied mail Z 227 248 702 4/2/98 | |

CIRCUIT COURT FOR BALTIMORE CITY
MSV523 CASE INQUIRY

DATE: 04/02/98
TIME: 14:44
TERMINAL: Y806

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993
CATEGORY: CONTR
ORIG COURT: CL
DATE FILED: 04/11/88
STATUS: P
STATUS CODE: 10/03/97

AMOUNT OF SUIT :$ 1,000,00
TRANSCRIPT PAGES :
CONSOLIDATED CASE:
PROTRACTED: MATRICCIANI

LAST PLEA DATE : 03/04/98
TERMINATION DATE: 03/04/99
BOOK NUMBER :
PAGE NUMBER :
WHO PAYS COSTS :
LAST MODIFIED ON: 04/02/98

| DATE | CODE | AMOUNT | BAD CK/ RECPT # | BANK NUMBER | CHECK NUMBER |
|---|---|---|---|---|---|
| 04/11/88 | CLERK | $ 80.00 | | | |
| 04/11/88 | LIBRA | $ 5.00 | | | |
| 04/11/88 | PAYMT | $ 85.00 | 8355 | | |
| 10/16/90 | CLERK | $ 10.00 | | | |
| 10/16/90 | LIBRA | $ 5.00 | | | |
| 10/16/90 | RECOR | $ 50.00 | | | |
| 10/16/90 | PAYMT | $ 65.00 | 6753 | | |
| 12/26/90 | COPYS | $ 7.00 | | | |

NEXT PAGE **P/N**

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12/26/90 PAYMT $    7.00  4266
03/24/95 RECOR $   60.00
03/24/95 PAYMT $   60.00  2655
09/12/95 COPYS $   18.25
10/03/97 COSAP $   50.00
10/03/97 RECOR $   60.00
10/03/97 PAYMT $  110.00  79184

 DATE    CODE TIME  PART ROOM SCHED ACTUAL DISP  REAS  JUDGE    ID  FUT CAL
01/01/80      ########### PROTRACTED TO JUDGE MATRICCIANI  ###############
01/01/88 MEMO ----------------------UPDATE PAGE 33------------------------------
04/11/88 FILE COMPLAINT.   ($1,000,000.00)  (1)
04/11/88 PROC DEF STUART HACK COPRIVATE     CREATED: 04/11/88 SERVED:   /  /  .
04/11/88 PROC DEF HACK, STUART  PRIVATE     CREATED: 04/11/88 SERVED:   /  /  .
05/09/88 PLEA AFFIDAVIT OF SERVICE AS TO DEFTS (THE STUART HACK CO 4/25/88 AND
05/09/88      MR STUART HACK 4/30/88) (2)
05/17/88 PLEA PLTFF'S AMENDED COMPLAINT (3)
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CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

05/27/88 REAC APP OF DANIEL W WHITNEY ATTY FOR DEFTS SAME DAY ANSWER (4)
06/15/88 PLEA ENTER TRIAL SCHEDULE (5)
06/17/88 PLEA PLTFF'S REQUEST FOR PRODUCTION OF DOCUMENTS (6)
06/27/88 PLEA DEFT'S ANS. TO PLTFF'S REQUEST FOR PRODUCTION OF DOCUMENTS. (7)
06/29/88 PLEA DEFT., STUART HACK, REQUEST FOR PRODUCTION OF DOCUMENTS (8)
06/29/88 PLEA DEFT., HACK, INTERROG. FD. (9)
11/09/88 MOTN DEFT. MOTION FOR ORDER COMPELLING DISCOVERY FD. (10)
11/14/88 PLEA PLTFFS. ANSWERS TO INTERROGATORIES FD. (11)
11/22/88 PLEA PLTTF'S RESPONSE TO REQUEST FOR PRODUCTION OF DOCUMENTS (12)
11/25/88 PLEA PLTFFS RESPONSE TO MOTION FOR ORDER COMPELLING DISCOVERY (13)
11/30/88 PLEA DEFTS NOTICE TO WITHDRAW THEIR MOTION TO COMPEL (14)
02/02/89 PLEA NOTICE OF DEPOSITION FD (15)
03/07/89 PLEA PLTFF'S SECOND REQUEST FOR PRODUCTION OF DOCUMENTS (16)
04/05/89 PLEA ENTER TRIAL SCHEDULE (17)
04/08/89 PLEA DEFDT (THE STUART HACK COM) & STUART HOCK. THIRD PARTY COMPLAINT
04/08/89 FILED. (18)
04/19/89 PLEA WRIT ISSUED ON THIRD PARTY COMPLAINT

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CIRCUIT COURT FOR BALTIMORE CITY                                    DATE: 04/02/98
        MSV523              C A S E   I N Q U I R Y                 TIME:    14:44
CASE NUMBER: 88102069   SHOFER V STUART HACK COMPANY      CL79993

04/19/89 PROC DEF GRABUSH NEWMANPRIVATE     CREATED: 04/19/89 SERVED:   /  /  .
05/18/89 ANSW APP. OF ATTYS (LINDA M. SCHUETT & JOHN J. RYAN) FOR THIRD PARTY
05/18/89      DEFTS. SAME DAY ANSWER TO 3RD PARTY CLAIM (19)
08/22/89 PLEA PLTFFS. FIRST REQUEST FOR ADMISSION  (20)
09/29/89 ANSW DEFTS (S. HACKS CO. & S. HACKS) ANSWER TO REQUEST FOR ADMISSION
09/29/89      OF FACTS & GENUINENESS OF DOCUMENTS (21)
11/17/89 CAL      09:30 219W CT   CANC CANC CAN  ROSS, D         8817
12/18/89 CAL      09:30 219W CT   CANC CANC CAN  ROSS, D         8817
02/12/90 PLEA DEFT GRABUSH NEWMAN & CO P.A. FIRST REQUST FOR PRODUCTION OF DOCU
02/12/90      MENTS FD. (22)
02/14/90 PLEA DEFT.(NEWMAN) INTERROGATORIES  (23)
02/14/90 PLEA DEFT.(NEWMAN) FIRST REQUEST FOR PRODUCTION OF DOCUMENTS  (24)
02/20/90 ANSW DEFTS THE STUART HACK CO & SUART HACK ANSWER TO THIRD PARTY
02/20/90      DEFTS FIRST REQUEST FOR PRODUCTION OF DOCUMENTS (25)
02/23/90 PLEA DEFTS AMENDED ANSWERS TO PLTFFS AMENDED COMPLAINT (26)
03/06/90 MOTN DEFTS.(STUART HACK CO. & STUART HACK) MOTION TO DISMISS FOR LACK
03/06/90      OF SUBJECT MATTER JURISDICTION, REQUEST FOR HEARING (27)

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03/12/90 PLEA THIRD PARTY DEFTS INTERROGATORIES AS TO PLTFF (28)
03/15/90 APPR ENTER THE APP. OF (LEE B. ZABEN) AS COUNSEL FOR DEFTS'  (29)
03/16/90 PLEA DEFT (STUART HACK) REQUEST FOR PRODUCTION OF DOCUMENTS AN
03/16/90      TO DEFT (GARBUSH, NEWMAN CO) (30)
03/20/90 PLEA THIRD PARTY DEFTS RESPONSE TO THIRD PARTY PLTFF REQUEST FOR
03/20/90      PRODUCTION OF DOCUMENTS FD (31)
03/23/90 PLEA PLTFFS RESPONSE TO MOTION TO DISMISS & AFFDT. (32)
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06/07/90      OF DOCUMENTS (36)
07/02/90 CAL  P19 03:30 561  MOT  MOT  HRD       ROSS, D         8817
07/02/90 ORDR ORDER OF COURT THAT THE DEFTS MOTION TO DISMISSD COUNT 4 OF COM-
07/02/90      PLAINT IS "GRANTED" & COUNT 4 IS DISMISSED WITH LEAVE TO AMEND
07/02/90      FD. (ROSS, J) (37)
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07/30/90 PLEA THIRD PARTY PLTF'S ANSWERS TO THIRD PARTY DEFDT'S INTERROGATORIES
07/30/90      AND AFFIRMATION.                                         (38)
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07/30/90      TORIES AND AFFIRMATION.                (39)
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08/09/90 PLEA PLTFF'S SECOND AMENDED COMPLAINT.                        (41)
08/24/90 MOTN DEFTS.(STUART HACK CO. & STUART HACK) MOTION TO DISMISS THE
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08/27/90 MOTN PLTFFS. MOTION FOR ORDER COMPELLING DISCOVERY  (43)
09/04/90 MOTN PLTFFS MOTION FOR RECONSIDERATION WITH RESPECT TO CONTINUANCE
09/04/90      OF TRIAL, AFFDT AND PROPOSED ORDER FD (44)
09/05/90 PLEA DEFT. STUART HACK CO. RESPONSE TO PLTFF'S. MOTION FOR ORDER
09/05/90      COMPELLING DISCOVERY, FD.(45)
09/10/90 TOP  JUDGE WARD
09/12/90 PLEA DEFT (STUART HACK) INTERROGATORIES FD (45A)
09/13/90 ORDR ORDER OF COURT THAT PLTFFS MOTIONFOR ORDER COMPELLING DISCOVERY
09/13/90      IS "DENIED IN PART" AND "GRANTED IN PART" FD (WARD) (46)
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09/13/90 APPR APPR OF ANTHONY P. PALAIGOS FOR PLTFFS (47)
09/20/90 PLEA PLTFFS RESPONSE IN OPPOSITION TO DEFTS MOTION TO DISMISS THE
09/20/90      SECOND AMENDED COMPLAINT (48)
09/20/90 PLEA DEFT.(STUART HACK CO.0 SUPPLEMENTAL ANSWER TO INTERROGATORIES
09/20/90      NO. 27  (49)
09/20/90 PLEA DEFT (STUART HACK CO) SUPPLEMENTAL ANSWER TO INTERRS #3 (49A)
09/21/90 MOTN THIRD PARTY DEFTS. MOTION FOR SUMMARY JUDGMENT, REQUEST FOR
09/21/90      HEARING, FD. (50)
09/27/90      JUDGE FRIEDMAN
10/05/90 PLEA DEFDT'S REPLY TO PLTFF'S OPPOSITION TO DEFENDANTS' MOTION TO
10/05/90      DISMISS, DEPOSITION EXHIBIT LARASH #5 AND EXHIBITS.(53)
10/09/90 PLEA DEFDT'S AND THIRD-PARTY PLTFF'S OPPOSITION TO THIRD PARTY
10/09/90      DEFENANT'S MOTION FOR SUMMARY JUDGMENT AND CARBON COPY OF
10/09/90      TRANSCRIPT. (54)
10/11/90 MEMO REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
10/11/90      ON THIRD PARTY CLAIM.(55)
10/12/90 CAL  P19 11:40 561  MOT  MOT  HRD       ROSS, D         8817
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CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

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10/12/90 ORDR ORDER OF COURT THAT DEFTS (HACK) MOTION TO DISMISS IS "GRANTED"
10/12/90      AND THE SECOND AMENDED COMPLAINT IS DISMISSED, WITHOUT LEAVE TO
10/12/90      AMEND FD. (ROSS, J) (51)
10/16/90 APPL NOTICE OF APPEAL TO THE CT.OF SPECIAL APPEALS OF MARYLAND BEHALF
10/16/90      PLAINTIFF,FROM THE ORDER OF OCT.12,1990.FD (52)
10/22/90 CAL      09:30 219W CT   CANC CANC CAN  ADMINISTRATIVE  8800
10/24/90 PLEA DIRECTIVE FOR TRANSCRIPT OF THE MOTIONS HEARING TO M'S TAGGART,
10/24/90      COURT REPORTER, DTD. OCT. 23, 1990, FM. THOMAS A. BOWDEN,ESQ.,
10/24/90      FD. (56)
10/31/90 ORDR ORDER TO PROCEED WITHOUT A PREHEARING CONFERENCE /S/ J. KARWACKI,
10/31/90      COURT OF SPECIAL APPEALS, FD. (57).
12/19/90 MEMO STENO. TEST., DTD. OCT. 12, 1990, PGS. 1-33, COURT REPORTER,
12/19/90      RITA M.E. TAGGART, FD. (57A)
12/27/90 MEMO ORIGINAL PAPERS FORWARDED TO THE COURT OF SPECIAL APPEALS VIA
12/27/90      CERTIFIED MAIL #P 724 023 200, FD.
12/27/90 ORDR ORDER OF COURT DATED 12-27-90 FROM COURT OF SPECIAL APPEALS THAT
12/27/90      APPELLANT'S MOTION IS "GRANTED"/S/LESLIE D. GRADET, CLERK (58)
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10/21/91 MEMO ORIGINAL PAPERS RETURNED FROM THE COURT OF SPECIAL APPEALS.
10/21/91 PLEA 2/4/91, APPELLEE'S MOTION TO CORRECT AND SUPPLEMENT RECORD,
10/21/91 & ORDER, DTD. 2/5/91, GRANTED AND THIS ORDER SHALL CONSTITURE THE
10/21/91 AMENNDMENT OF THE DOCKET ENTRIES TO REFLECT THE TRANSCRIPT OF
10/21/91 PROCEEDINGS OF JULY 2, 1990. IT IS FURTHER ORDERED THAT THE
10/21/91 RECORD IS SUPPLEMENTED TO INCLUDE THE TRANSCRIPT OF PROCEEDINGS
10/21/91 OF JULY 2, 1990, /S/ GARRITY, J., FD. (59).
10/21/91 ORDR 2/26/91, WRIT OF CERTIORARI, COURT OF APPEALS OF MARYLAND,
10/21/91 DTD. 2/26/91, /S/ ALEXANDER L. CUMMINGS, CLERK, & ORDER,
10/21/91 2/26/91, ORDERED THAT COUNSEL SHALL FILE BRIEFS AND PRINTED
10/21/91 EXTRACT IN ACCORDANCE WITH RULES 8-501 AND 8-502, APPELLEE'S
10/21/91 BRIED TO BE FILED ON OR BEFORE MARCH 11, 1991, /S/ ROBERT C.
10/21/91 MURPHY, CHIEF JUDGE, FILED, (60).
10/21/91 ORDR OPINION BY RODOWSKY, DATED SEPT. 17, 1991, COURT OF APPEALS OF
10/21/91 MARYLAND, FD. (61).
10/21/91 ORDR MANDATE: COURT OF APPEALS OF MARYLAND:
10/21/91 APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY PURSUANT TO

10/21/91 CERTIORARI TO COURT OF SPECIAL APPEALS.
10/21/91 MARCH 7, 1991: NOTICE OF AMITTED PAGES IN JOINT RECORD EXTRACT
10/21/91 FILED.
10/21/91 SEPT. 17, 1991: JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY
10/21/91 AFFIRMED IN PART AND VACATED IN PART. CASE REMANDED TO THAT
10/21/91 COURT FOR FURTHER PROCEEDINGS, CONSISTENT WITH THIS OPINION, ON
10/21/91 COMPLAINT. COSTS TO BE PAIF ONE-HALF BY THE PETITIONER AND ONE-
10/21/91 HALF BY THE RESPONDENTS.
10/21/91 ISSU OPINION BY RODOWSKY, J., FILED, (62).
03/05/92 APPR NOTICE STRIKING J.J. KENNY AND ENTER ALLAN P. HILLMAN AND MARK T.
03/05/92 HOLTSCHNEIDER AS ATTY FOR THIRD PARTY DEFT FD. (63)
04/06/92 PLEA THIRD PARTY DEFT GARBUSH NEWMAN & CO. DISCOVERY NOTICE FD. (64)
05/08/92 PLEA REQUEST FOR HEARING (65)
05/20/92 MOTN MOTION TO STRIKE THE APPEARANCE OF SEMMES, BOWEN AND SEMMES
05/20/92 AND ENTER THE APPEARANCE OF JANET M. TRUHE AND BERNSTEIN,
05/20/92 SAKELLARIS AND WARD FOR DEFDTS. (65-A)
06/24/92 APPR WITHDRAWAL OF APP. OF LINDA M. SCHUETH AND JOHN J. RYAN AS COUN-

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06/24/92      SEL FOR 3RD PARTY DEFT FILED. (66)
06/24/92 ORDR HEARING HELD BEFORE THE HON. ROBERT H. HAMMERMAN IN OPEN COURT
06/24/92 ORDR MOTION FOR SUMMARY JUDGMENT FILED BY 3RD PARTY DEFT (GRABUSH
06/24/92      NEWMAN & CO P.A.) WAS HEARD AND "DENIED". (HAMMERMAN, J) (67)
09/01/92 APPR ENTER THE APP. OF ATTY MARK A. GILDAY FOR THIRD PARTY DEFT
09/01/92      STRIKE A.P.HILLMAN,M.T.HOLTSCHNEIDER (68)
09/23/92 APPR ENTER THE APP. OF ATTY (THOMAS H. BORNHORST) AND STRIKE THE APP.
09/23/92      THOMAS A. BOWDEN, LLOYD MAILMAN AND ANTHONY PALAIGOS (69)
12/10/92 PLEA PLTFFS THIRD AMENDED COMPLAINT FD. (70)
12/10/92 PLEA ENTER TRIAL SCHEDULE FD. (71)
12/15/92 ANSW DEFT (STUART HACK) ANSWER TO PLTFFS THIRD AMENDED COMPLAINT FD.
12/15/92      (72)
12/31/92 ORDR CIVIL POSTPONEMENT "DENIED". (J. FRIEDMAN) FD. (73)
01/05/93 MOTN DEFTS., STUART HACK CO. AND STUART HACK, PARTIAL MOT. TO DISMISS
01/05/93      PLTFF'S 3RD AMENDED COMPLAINT FOR FAILURE TO STATE A CLAIM, MEMO,
01/05/93      AND REQUEST FOR HEARING (74)
01/25/93 APPR MOTION TO STRIKE THE APP. OF ATTY (LEE B. ZABEN & DANIEL W.
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01/25/93      WHITNEY) FD. (75)
02/10/93 CAL  P22 10:00 528  MOT  MOT  HRD      WARD, T          8836
02/17/93 ORDR ORDERED THAT IN ACCORDANCE WITH THE COURT OF APPEALS OPINION
02/17/93      THE PLA MAY NOT RECOVER DAMAGES FOR EXCISE TAXES, PROHIBITED
02/17/93      TRANSACTIONS OR PLAN DISQUALIFICATION UNDER COUNTS I AND II OF
02/17/93      THE THIRD AMENDED COMPLAINT, AND BE IT FURTHER ORDERED, THAT PLAS
02/17/93      CLAIMS FOR PUNITIVE DAMAGES UNDER COUNTS I AND II ARE DISMISSED
02/17/93      AND BE IT FURTHER ORDERED THAT PLA'S REQUEST FOR ATTYS FEES IN
02/17/93      PROSECUTING THE INSTANT ACTION IS DISMISSED, ETC (J,WARD) (76)
03/09/93 CAL  P03 08:30 428W PTC  PTC  CANC CAN  ADMINISTRATIVE  8800
03/29/93 PLEA CIVIL TRIAL POSTPONEMENT DENIED' (J HELLER) (77)
04/01/93 MOTN MOT. FOR SPECIAL ADMISSION OF OUT-OF-STATE ATTY. UNDER RULE 14
04/01/93      OF THE RULES GOVERNING ADMISSION (78)
04/01/93 ORDR CIVIL POSTPONEMENT "APPROVED" (JUDGE DAVIS) (79)
04/02/93 MEMO CASE SENT TO J., MCCURDY
04/07/93 ORDR ORDERED THAT JOHN TREMAIN MAY IS ADMITTED SPECIALLY FOR THE
04/07/93      LIMITED PURPOSE OF APPEARING, ETC (J,MCCURDY) (80)
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CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

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04/09/93 CAL       09:30 219W CT   CONF POST PJ   DAVIS, A.M.     8851
07/13/93 PLEA CIVIL POSTPONEMENT APPROVED( J BYRNES) (81)
07/20/93 ORDR CIVIL POSTPONEMENT "APPROVED". NEW TRIAL DATE 5-23-94. (BYRNES,
07/20/93      J) FD. (82)
08/26/93 CAL  P33 09:30 508  PTC   CONF POST PJ   HELLER, ELLEN   8848
09/27/93 CAL      09:30 219W CT    CONF POST PJ   BYRNES, J C     8835
01/24/94 CAL      09:30 219W CT    CONF POST PJ   BYRNES, J C     8835
02/28/94 MOTN DEFTS., STUART HACK CO. AND STUART HACK, MOT. FOR SUM. JUDG. OR,
02/28/94      IN THE ALTERNATIVE, PARTIAL SUM. JUDG. AS TO PLTFF'S DAMAGES,
02/28/94      MEMO, EXHIBITS, REQUEST FOR HEARING AND PROPOSED ORDER FD. (83)
03/10/94 MOTN PLTFF AND THE PARTIES CONSENT MOTION FOR ENLARGEMENT OF TIME AND
03/10/94      LEAVE TO FILE PLTFF'S RESPONSE TO DEFT'S MOTION FOR SUMMARY JUD-
03/10/94      GMENT (OR PARTIAL SUMMARY JUDGMENT AS TO PLTFF'S DAMAGES FD.(84)
03/16/94 MEMO CASE SENT TO JUDGE CAPLAN ON ENTRY 84
03/16/94 PLEA PLTFFS OPPOSITION TO DEFTS MOTION FOR SUMMARY JUDGMENT OR PARTIAL
03/16/94      SUMMARY JUDGMENT AS TO PLTFFS DAMAGES, WITH ATTACHED EXHIBITS (85
03/18/94 PLEA CIVIL TRIAL POSTPONEMENT FD.(86)
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CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

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03/24/94 ORDR ORDER DATED 3-22-94.  ORDERED, THAT THE CONSENT MOTION FOR EN-
03/24/94      LARGMENT OF TIME IS HEREBY GRANTED THE PLTFF'S RESPONSE SHALL BE
03/24/94      DUE ON OR BEFORE MARCH 16, 1994.  JUDGE CAPLAN (87)
03/25/94 APPR ENTER THE APPEARANCE OF ATTY JAYSON L. SPIEGEL FOR DEFT (GRABUSH
03/25/94      NEWMAN & CO) AND WITHDRAW THE APP. OF MARK A.GILDAY AS COUNSEL
03/25/94      FD.(88)
04/13/94 PLEA DEFTS REPLY TO PLTFFS OPPOSITION TO DEFTS MOTION FOR SUMMARY JUDG
04/13/94      MENT OR IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT AS TO PLTFFS
04/13/94      DAMAGES FD. (89)
04/21/94 MOTN DEFTS MOTION TO CONSOLIDATE CASES FD.(90)
04/22/94 CAL  P15 02:30 330B MOT  POSTPONED J.BYRNES              8835
04/22/94 CAL  P33 09:30 508  PTC  CANC POST PJ   KAPLAN, J H H    8825
05/04/94 CAL  P15 12:00 330B MOT  CANC POST PJ   KAPLAN, J H H    8825
05/06/94 PLEA  DEFT./COUNTER-PLTFF.(BLUM YUMKAS) OPPOSITION TO MOTION TO
05/06/94      CONSOLIDATE CASES, FD. (90A)
05/06/94 APPR  NOTICE WITHDRAWING THE APPEARANCE OF (LAURIE A. LYTE, ESQ) AND
05/06/94      ENTER THE APPEARANCE OF (MARK ANTHONY KOZLOWSKI,ESQ.) AS CO-
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05/06/94      COUNSEL FOR THE DEFT./COUNTER-PLTFF., FD. (90B)
05/23/94 CAL      09:30 219W CT   CT   POST PJ   KAPLAN, J H H    8825
05/31/94 CAL  P20 09:30 406W MOT  CANC CANC CAN  ADMINISTRATIVE  8800
07/06/94 CAL  P20 09:15 406W PTC  CANC CANC CAN  ADMINISTRATIVE  8800
07/12/94 PLEA AFFDVT OF SERVICE DATED 5-18-94 AS TO ANDREA JACKSON FD.(91)
07/12/94 ORDR ORDER DATED 7-11-94 DEFT'S MOTION FOR SUMMARY JUDGMENT"DENIED"
07/12/94      AND IT IS FURTHER ORDERED THAT DEFT'S MOTION FOR PARTIAL
07/12/94      SUMMARY JUDGMENT "GRANTED" (HOLLANDER J)(92)
09/26/94 APPR NOTICE WITHDRAWING THE APP. OF JAYSON L. SPIEGEL AND ENTERING THE
09/26/94      APP. OF DEBORAH M. WHELIHAN AS COUNSEL FOR DEFT., STUART HACK
09/26/94      CO. (93)
10/31/94 PLEA THIRD PARTY DEFT CERTIFICATE REGARDING DISCOVERY (94)
12/16/94 MOTN DEFTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PLTFF'S DAMAGES,
12/16/94      MEMORANDUM AND REQUEST FOR HEARING (95)
01/01/95      ########### PROTRACTED TO JUDGE MATRICCIANI ###############
01/11/95 PLEA PLTFF'S RESPONSE AND OPPOSITION TO DEFT'S MOTIN FOR PARTIAL
01/11/95      SUMMARY JUDGMENT TO PLTFF'S. DAMAGES & REQUEST FOR HEARING(96)
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01/20/95 PLEA DEFTS' REPLY TO PLTFF'S RESPONSE AND OPPOSITION TO DEFTS' MOT.
01/20/95      FOR PARTIAL SUM. JUDG. AS TO PLTFF'S DAMAGES (97)
01/30/95 CAL  P02 09:30 636W MOT  MOT  OTBS      DAVIS, A.M.      8851
02/03/95 ORDR ORDER OF COURT DATED 1/31/95, DENYING DEFTS MOTION WITHOUT
02/03/95      PREJUDICE. DEFTS MOTION IS GRANTED AS TO PLAINTIFFS CLAIM FOR
02/03/95      LOST EARNINGS (DAVIS) (98)
02/22/95 MOTN CONSENT MOTION FOR REVISION OF PRIOR ORDER.  (98A)
03/06/95 ORDR ORDER DATED 2-23-95 DEFT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
03/06/95      "DENIED W/O PREJUDICE" AS TO TAX PENALTIES & INTEREST AND
03/06/95      "GRANTED" AS TO PLTFF'S CLAIM FOR LOST EARNINGS (DAVIS J)(99)
03/06/95 CLOS ORDER DATED 2-23-95 FINAL JUDGMENT BE ENTERED AS TO THE RULINGS
03/06/95      CONTAINED IN THE ORDERS DATED 2-17-93, 7-11-94, 1-31-95 AS
03/06/95      REVISED ON 2-23-95 (DAVIS J)  (100)
03/20/95 PLEA NOTICE OF INTERLOCUTORY APPEAL FD. (101)
03/24/95 APPL NOTICE OF CROSS APPEAL, FD. (102)
04/07/95 APPR LINE/NOTICE OF THE APPEARANCE OF THOMAS H. BORNHURST, ESQ.
04/07/95      NOT BE ENTERED IN THE APPEAL NOW PENDING IN THE COURT OF
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| Date | Type | Entry |
|---|---|---|
| 04/07/95 | | SPECIAL APPEALS OF MARYLAND AND/OR TO THE COURT OF APPEALS OF |
| 04/07/95 | | MARYLAND ON BEHALD OF PLTFF./APPELLANT, RICHARD SHOFER (103) |
| 04/07/95 | ORDR | ORDER OF COURT: ORDERS AND DIRECTS THE APPEAL PROCEED WITHOUT A |
| 04/07/95 | | PREHEARING CONFERENCE/S/ WILNER (104) |
| 04/20/95 | MEMO | STENO. TEST., DTD 7/2/90, PGS. 1-20, COURT REPORTER, |
| 04/20/95 | MEMO | ROBERT GAVIN ODDO, FD. |
| 06/01/95 | MEMO | STENO. TEST. DTD 6/01/94, PGS 1-60, OFFICIAL COURT REPORTER, |
| 06/01/95 | | JOHN T. TROWBRIDGE, FD. |
| 06/01/95 | MEMO | STENO. TEST. DATED 1/30/95, PAGES 1-60, OFFICIAL COURT REPORTER, |
| 06/01/95 | | JOHN T. TROWBRIDGE, FD. |
| 06/02/95 | APPR | LINE/NOTICE OF THE APPEARANCE OF DOUGLAS R. TAYLOR, ESQ. AS ATTY. |
| 06/02/95 | | FOR PLTFF/APPELLANT, FD. (105) |
| 06/05/95 | MEMO | ORIGINAL PAPERS FORWARDED TO THE COURT OF SPECIAL APPEALS VIA |
| 06/05/95 | | CERTIFIED MAIL #Z 011 724 140 |
| 10/19/95 | PLEA | RECEIPT OF PETITION FOR WRIT OF CERTIORARI, FD./S/CUMMINGS (106) |
| 11/28/95 | ORDR | ORDER DATED 11-22-95 FROM COURT OF APPEALS PETITION FOR WRIT OF |
| 11/28/95 | | CERTIORARI IS "DENIED". <CHIEF JUDGE ROERT C. MURPHY) (107) |

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

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02/09/96 MEMO CASE RETURNED BACK FROM C.O.S.A., PHC NO. 523, SEPT.TERM, 1995
02/09/96 ORDR DISPOSITION OF APPEAL IN C.O.S.A.:JAN. 2, 1996: OPINION BY
02/09/96      FISCHER, J.. APPEAL DISMISSED, APPELLANT TO PAY COSTS.
02/09/96      FEBRUARY 1, 1996:MANDATE ISSUED
02/09/96 REAC C.O.S.A. DESCISION TO REMAND CASE FOR A TRIAL ON THE
02/09/96      REMAINING DAMAGE ITEMS. J. FISCHER, J. CATHELL & J. MURPHY
02/09/96      OPINION BY J. FISCHER.
02/21/96 MEMO CSET EEC
03/01/96 PLEA PLTFF RICHARD SHOFER BY HIS ATTY FILES FOURTH AMENDED
03/01/96      COMPLAINT. (108)
03/05/96 PLEA PLTFF'S (RICHARD SHOFER) PARTIAL OPPOSITION TO DEFENDANT'S MOTION
03/05/96      FOR MODIFICATION AND REQUEST FOR HEARING FD.  (109)
03/05/96 MOTN PLTFF'S (RICHARD SHOFER) MOTION FOR REVISION OF THIS COURT'S
03/05/96      PRIOR ORDERS OF FEBRUARY 17, 1993, JULY 11, 1994, JANUARY 31,
03/05/96      1995 AND FEBRUARY 23, 1995 FD. (110)
03/11/96 MOTN THIRD PARTY DEFT (GRABUSH NEWMAN & CO) MOTION FOR MODIFICATION &
03/11/96      MOTION FOR SPECIAL ASSIGNMENT FD. (111)
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03/18/96 MOTN MOTION BY DEFT AND THIRD-PARTY DEFT TO STRIKE PLTFF'S FOURTH
03/18/96 AMENDED COMPLAINT AND MEMORANDUM (112)
03/19/96 PLEA DISCOVERY NOTICE FD.
03/19/96 MOTN PLTFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY
03/19/96 FD. (113)
03/26/96 MEMO PRE-TRIAL CONFERENCE REMINDER NOTICES GENERATED FOR 05/24/96
04/01/96 PLEA PLTFF'S. RESPONSE TO THIRD-PARTY DEFT'S. MOTION FOR MODIFICATION
04/01/96 AND MOTION FOR SPECIAL ASSIGNMENT, FD. (114)
04/11/96 PLEA DISCOVERY NOTICE FD.
04/11/96 PLEA PLTFF'S OPPOSITION TO MOTION BY DEFENDANT AND THIRD PARTY DEFEN-
04/11/96 DANT TO STRIKE PLAINTIFF'S FOURTH AMENDED COMPLAINT FD. (115)
04/11/96 PLEA PLTFF, (R SHOFER) FIFTH AMENDED COMPLAINT (116)
04/11/96 PLEA NOTICE OF SERVICE
04/12/96 ANSW DEFT (STUART HACK CO & STUART HACK) ANSWER TO PLTFFS FOURTH
04/12/96 AMENDED COMPLAINT FD. (117)
04/17/96 PLEA DEFTS STUART HACK & THE STUART HACK COMPANY BY THEIR ATTY
04/17/96 JANET TRUHE FILES OPPOSITION TO PLTFFS MOTION FOR REVISION OF

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04/17/96      THIS COURT'S PRIOR ORDERS OF FEBRUARY 17, 1993, JULY 11 1994,
04/17/96      JANUARY 31, 1995 & FEBRUARY 23, 1995,EXH.PROPOSED ORDER.(118)
04/18/96 PLEA DEFTS, STUART HACK AND STUART HACK COMPANY, OPPOSITION TO
04/18/96      PLTFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIA-
04/18/96      BILITY AND REQUEST FOR HEARING (119)
05/03/96 ANSW DEFTS' ANSWER TO PLTFF'S FIFTH AMENDED COMPLAINT FD. (120)
05/10/96 PLEA NOTICE OF SERVICE FD.
05/24/96 CAL  P33 11:00 508  PTC  CANC CANC CAN  KAPLAN, J H     8825
06/10/96 PLEA AFFDT OF SERV
06/18/96 CAL  P20 09:30 438W JT        POST PJ   MATRICCIANI,    88A4
06/21/96 PLEA NOTICE OF SERVICE
06/25/96 MOTN PLTFF RICHARD SHOFER BY HIS ATTY FILES MOTION TO COMPEL. (120A)
06/27/96 CAL  P20 04:30 438W PTC  CANC CANC CAN  MATRICCIANI,    88A4
06/28/96 PLEA DEFTS OPPOSITION TO PLTFFS MOTION TO COMPEL FD. (121)
07/08/96 MOTN PLTFFS MOTION FOR LEAVE TO DEPOSE DEFT (STUART HACK) FD. (122)
07/08/96 PLEA PLTFFS REQUEST TO DEFTS OPPOSITION TO PLTFFS MOTION TO COMPEL FD.
07/08/96      (123)
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11/08/96      AS TO SANCTIONS, GRANTED AS TO SUMMARY JUDGMENT.  MEMORANDUM
11/08/96      OPINION AND ORDER FILED. (129) MATRICCIANI J
11/08/96 CLOS JUDGMENT ENTERED IN FAVOR OF THE DEFTS FOR COSTS.  MATRICCIANI
11/08/96 ORDR MEMO. OPINION AND ORDER FD ON 110796. MATRICCIANI J
11/08/96 PLEA PLTFFS MOTION FOR REVISION OF THIS COUNTS PRIOR ORDER OF 2-17-93,
11/08/96      7-11-94, 1-31-95 AND 2-23-95 HEARD AND DENIED. MATRICCIANI J
11/08/96 PLEA PLTFFS MOTION FOR SUMMARY JUDGMENT ON THE ISSSUED OF LIABILITY
11/08/96      HEARD AND DENIED. MATRICCIANI J
11/08/96 PLEA PLTFFS MOTION TO COMPLE THE DEPOSITION OF DEFT STUART HACK HEARD
11/08/96      GRANTED. MATRICCIANI J
11/08/96 PLEA DEFTS MOTION TO STRIKE THE FOURTH AND AMENDED COMPLAINT HEARD AND
11/08/96      GRANTED. MATRICCIANI J
11/08/96 PLEA DEFTS MOTION TO STRIKE THE FIFTH AMENDED COMPLAINT HEARD AND
11/08/96      GRANTED. MATRICCIANI J
11/08/96 PLEA NEW TRIAL DATE SET FOR 6-26-97. MATRICCIANI J
12/03/96 PLEA PLTFF'S OPPOSITION TO THIRD PARTY DEFT'S MOTION FOR PROTECTIVE
12/03/96      ORDER FD. (130)
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CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

12/03/96 MOTN PLTFF'S MOTION FOR LEAVE TO DEPOSE KENNETH LARASH FD. (131)
03/03/97 ORDR ORDER OF COURT OF SPECIAL APPEALS OF MD. DATED FEB.28,1997,
03/03/97 GRANTING IN PART APPELLANT'S MOTION TO STAY PROCEEDINGS IN THE
03/03/97 CAPTIONED APPEAL. MURPHY,C.J.,LETTER DATED 28,1997.GRADET,CLERK.
03/03/97 (132)
05/05/97 CAL P20 09:30 438W JT CANC CANC CAN ADMINISTRATI 8800
05/29/97 PLEA CERTIFICATE REGARDING DISCOVERY.
06/13/97 MOTN DEFTS MOTION FOR SANCTIONS AND MOTION IN LIMINE TO EXCLUDE PLTFFS
06/13/97 INTRODUCTION OF EVIDENCE NOT TIMELY PRODUCED IN DISCOVERY & EXHI-
06/13/97 BITS FD. (133)
06/13/97 PLEA PLTFFS OPPOSITION TO MOTION FOR SANCTIONS AND MOTION IN LIMINE TO
06/13/97 EXDLUDE PLTFFS INTRODUCTION OF EVIDENCE NOT TIMELY PRODUCED IN
06/13/97 DISCOVERY & EXHIBITS FD. (134)
06/25/97 MEMO FILE SENT TO J. MATRRICIANI
06/25/97 ORDR ORDER OF COURT THAT EXPERT WITNESSES IDENTIFIED PURSUANT TO THE
06/25/97 DISCOVERY SCHEDULE ARE PERMITTED TO TESTIFY TO ANY & ALL OPINIONS
06/25/97 WHICH ARE NOT CUMULATIVE OF OTHER EXPERT TESTIMONY & PROHIBIT

06/25/97 THE INTRODUCTION INTO EVIDENCE OF ANY EXPERT OPINIONS OR
06/25/97 LIABILITY THEORIES WHICH WERE NOT DISCLOSED TO THE DEFTS PRIOR
06/25/97 TO THE 5/16/97 DISCOVERY DEADLINE/, J. MATRICCIANI, JR. (134B)
06/26/97 PLEA CASE SUBMITTED TO THE COURT FOR DETERMINATION W/O THE AID OF JURY
06/26/97 MATRICCIANI J
06/26/97 CAL P20 09:30 438W CT CANC CANC CAN ADMINISTRATI 8800
07/01/97 PLEA AT THE CLOSE OF THE PLTFF'S CASE, DEFTS MOTION FOR JUDGMENT HEARD
07/01/97 AND DENIED. MATRICCIANI J
07/02/97 PLEA AT THE CLOSE OF DEFTS CASE, 3RD PARTY DEFT MOTION FOR JUDGMENT
07/02/97 HEARD AND DENIED. MATRICCIANI J
07/02/97 PLEA CASE HELD SUB CURIA PENDING MEMO AND ORDER. MATRICCIANI J
07/09/97 MOTN MOTION FOR JUDGMENT REGARDING DAMAGES OF THE THIRD PARTY DEFT FD
07/09/97 (134A)
09/05/97 CLOS MEMORANDUM AND ORDER THAT JUDGMENT IS ENTERED IN FAVOR OF THE
09/05/97 DEFTS FOR COSTS AND FURTHER ORDER THAT DEFT 3RD PARTY CLAIM FOR
09/05/97 CONTRIBUTION IS DISMISSED. MATRICCIANI J
09/25/97 MEMO FILE RETURNED FROM COURTROOM CLERKS, ORDER SIGNED AND DELIVERED

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

09/25/97 TO ORDER'S CLERK --MN--
10/03/97 SEPT. 5, 1997, FD. (139)
10/03/97 APPL NOTICE OF APPEAL ON BEHALF OF PLTFF FROM JUDGMENT ENTERED ON
10/16/97 MEMO ---TRIAL EXHIBITS---2 ENVELOPES---ON SHELF BY RADIATOR-----
12/17/97 ORDR ORDER OF C.O.S.A,12/16/97,DIRECTS THAT THE ABOVE CAPTIONED APPEAL
12/17/97 PROCEED WITHOUT A PHC., J. EYLER (140) DUE BY 2/14/98, D.GILLIS
02/13/98 MOTN APPELLANT'S COPY OF MOTION FOR EXTENSION OF TIME TO TRANSMIT
02/13/98 RECORD FD. BY DOUGLAS R. TAYLOR. ORIGINAL IN C.O.S.A. (141)
03/04/98 ORDR ORDER OF C.O.S.A., DATED 2/25/98, COURT EXTENDED THE TIME TO
03/04/98 TRANSMIT THE RECORD TO 4/2/98., CLERK, LESLIE D. GRADET (142).
04/02/98 MEMO OFFICIAL TRANSCRIPT OF PROCEEDINGS FD. HEARD ON 6/26/97 PGS1-209,
04/02/98 6/27/97 PGS 1-81, 6/30/97 PGS 1-137, 7/1/97, PGS 1-197, 7/2/97
04/02/98 PGS 1-218 & 8/8/97 PGS 1-55, DEPOSITION SERVICE COST $2,260.00
04/02/98 MEMO ORIGINAL PAPERS FWD TO C.O.S.A. VIA CERTIFIED MAIL Z 227 248 702.
12/31/99 MEMO ************* CASE PROTACTED TO JUDGE MATRICCIANI ***************

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

CONN NAME

DEF *GRABUSH NEWMAN AND COMPANY P A IDENT N17657
S/O BARRY BONDROFF PRESIDENT
515 FAIRMOUNT AVENUE SUITE 400
BALTIMORE MD 21204

DEF *STUART HACK COMPANY IDENT K00251
S/O STUART HACK
4623 FALLS RD
BALTIMORE MD 21209

ADS GILDAY, MARK A IDENT 914532
NO ADDRESS EXISTS

DEF HACK, STUART IDENT Q87295
11 PEMBERLY LANE
REISTERTOW MD 21136

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

ADS HILLMAN, ALLAN IDENT 500054
NO ADDRESS EXISTS

ADS RYAN, JOHN J IDENT 914138
NO ADDRESS EXISTS

ADS SPIEGEL, JAYSON IDENT 911340
NO ADDRESS EXISTS

ADS SCHUETT, LINDA M IDENT 914001
NO ADDRESS EXISTS

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

ADS WHITNEY, DANIEL IDENT 384106
NO ADDRESS EXISTS

ADS BORNHORST, THOMAS IDENT 001191
2236 SOUTHLAND RD. PHONE 410 298-2265
BALTIMORE MD 21207

ADF TRUHE, JANET M IDENT 910934
210 W. PENNSYLVANIA AVENUE PHONE 410 321-4890
SUITE 505
TOWSON MD 21204

ADF WHELIHAN, DEBORAH M IDENT 912756
1100 CONNECTICUT AVE, N.W. PHONE 202 296-4747
SUITE 600 SSN 000-00-000'
WASHINGTON DC 20036

CASE NUMBER: 88102069 SHOFER V STUART HACK COMPANY CL79993

ADF MAY, JOHN TREMAIN IDENT 918248
1100 CONNECTICUT AVE., N.W. PHONE 202 296-4747
SUITE 600
WASHINGTON DC 20036

APS BOWDEN, THOMAS A IDENT 913152
NO ADDRESS EXISTS 202

APS MAILMAN, LLOYD IDENT 262499
NO ADDRESS EXISTS 202

APS PALAIGOS, ANTHONY IDENT 482587
NO ADDRESS EXISTS 202

CIRCUIT COURT FOR BALTIMORE CITY | | DATE: 04/02/98
MSV523 | C A S E   I N Q U I R Y | TIME: 14:44

CASE NUMBER: 88102069   SHOFER V STUART HACK COMPANY   CL79993

PLA SHOFER, RICHARD   IDENT K01815
NO ADDRESS ON RECORD   202

APL TAYLOR, DOUGLAS R   IDENT N84292
P.O. BOX 4566   PHONE 301 565-0209
ROCKVILLE MD 20850

END OF DISPLAY P/1

GINA

(106)

APP 3-24-95

# Court of Appeals of Maryland

## PETITION DOCKET

No. 501 September Term, 19 95 88102069/CL-79993

| | |
|---|---|
| RICHARD SHOFER | Douglas R. Taylor, Esq. |
| | Attorney for petitioner |
| v. | |
| THE STUART HACK COMPANY et al. | Janet M. Truhe, Esq.<br>John May, Esq.<br>Deborah Whelihan, Esq. |
| | Attorney for respondent |

FILED
CIRCUIT CO[illegible]
BALTIMOR[illegible]

Date: October 10, 1995

STATE OF MARYLAND, SS:

Receipt is hereby acknowledged of a petition for writ of certiorari filed in the above entitled case.

Alexander L. Cummings
Clerk
Court of Appeals of Maryland

# Court of Appeals of Maryland

Annapolis, Maryland 21401

*Memorandum* Clerk

The attached Order(s) should be incorporated as part of the original record in the above entitled case.

ALEXANDER L. CUMMINGS
Clerk

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APP 3-24-95

| | | |
|---|---|---|
| RICHARD SHOFER | * | In the 88102069/CL-79993 |
| | * | Court of Appeals |
| v. | * | of Maryland |
| | * | Petition Docket No. 501, Sept. Term 1995 |
| THE STUART HACK COMPANY et al. | * | (No. 523, Sept. Term 1995, Court of Special Appeals) |

# ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY
Chief Judge

Date: November 22, 1995

RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
96 MAR -1 PM 3:57
CIVIL DIVISION

IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

## FOURTH AMENDED COMPLAINT

The Plaintiff, Richard Shofer (hereinafter referred to as "Shofer"), by his attorney, Douglas R. Taylor, files this FOURTH AMENDED COMPLAINT, and for reasons stated as follows:

### Facts Common To All Counts

1. That Richard Shofer, a resident and domiciliary of the State of Maryland, is the president and sole stockholder of Catalina Enterprises, Inc., a Maryland Corporation which does business as Crown Motors in the City of Baltimore. Additionally, Shofer is a participant in the Catalina Enterprises, Inc. Pension Plan.

2. That the Catalina Enterprises, Inc. Pension Plan (hereinafter referred to as "the Plan"), is a qualified pension which was established in 1971 for the employees of Catalina Enterprises, Inc.

3. That the Defendant, The Stuart Hack Company ("hereinafter referred to as "the Hack Company"), is a Maryland Corporation established by the Defendant, Stuart Hack and which provides professional pension plan consulting services.

4. That the Defendant, Stuart Hack (hereinafter referred to as "Hack"), is a licensed attorney, a member of the Maryland Bar, who is a professional actuary and who designs, creates and administers pension plans. That he is also an employee of the Defendant Hack Company.

5. That at all relevant times herein, Plaintiff, Shofer was the sole trustee of the Catalina Enterprises, Inc. Pension Plan and also beneficiary of such Plan. That at all relevant times, Hack and the Hack Company were actively and regularly involved in the administration and maintenance of said Plan.

6. That in approximately 1971, the professional relationship between the Plaintiff and the Defendants Hack and the Hack Company commenced when the Plaintiff hired the Defendants to administer a pension plan for Shofer's corporation and its employees, and further to act as a pension consultant.

7. That in approximately 1971, the Defendants Hack and the Hack Company did in fact prepare the Catalina Enterprises, Inc. Pension Plan. That between 1971 and 1988, the Defendants Hack and the Hack Company acted as pension consultants to the Plan and became intimately acquainted with the workings of Plaintiff's business and routinely and regularly rendered advice with respect to the maintenance and operation of such Plan. That said work and consulting services included the preparation of certain Plan's annual federal returns as well as its statements to participants as well as changes in the Plan as necessitated by changes in the tax laws.

8. That at all times during the course of their relationship with the Plaintiff, Defendants Hack and the Hack Company held themselves out to Plaintiff as experts on pension laws and in the tax aspects of pension planning and frequently rendered advice to Plaintiff in these areas.

9. Based on his course of dealings with Defendants Hack and the Hack Company, Plaintiff reasonably relied on the representations of Defendants Hack and the Hack Company with respect to their knowledge and expertise in the areas of pension law and taxation.

That said reliance and expectation reasonably extended to Defendants Hack and the Hack Company's duty and obligation to warn, advise and bring to Plaintiff's attention any adverse tax consequences which might result from any advice given or actions taken by Defendants Hack and the Hack Company.

10. That at some time shortly prior to August 9, 1984, Shofer sought advice from Defendants Hack and the Hack Company as to whether or not it would be advisable and in his interests to borrow money from the Pension Plan, or to use the assets in the Pension Plan as collateral for a loan or loans.

11. That following a telephone conversation between Shofer and Defendant Hack, the Defendants Hack and the Hack Company responded with an opinion letter dated August 9, 1984, wherein Defendants Hack and the Hack Company advised and assured Shofer that he could borrow up to 100% of his voluntary account. That said letter failed to mention the tax consequences of such transactions, although the sole purpose of Hack's business is to shelter money from taxes. That a copy of said letter is attached hereto, marked Exhibit "A", and is incorporated herein.

12. That at the date and time aforesaid as described in Paragraph 11, the Defendants Hack and the Hack Company owed a duty to Shofer to provide accurate and correct information pertaining to such loan transactions involving the Pension Plan, and especially to provide advice and counsel as to the adverse tax consequences of such loan or loans.

13. That notwithstanding such duty and obligation, the Defendants Hack and the Hack Company failed to warn and appraise Shofer of the actual and potential catastrophic tax consequences from borrowing monies from the Pension Plan.

14. That acting in reliance on the counsel and advice given to him, Plaintiff proceeded to borrow monies from the Pension Plan. That at the time the loans were made, Plaintiff had no knowledge, not even an inkling or a clue, that such loans could generate liabilities for income taxes, excise taxes, penalties, interest or could be construed as an income distribution or constitute a "prohibited transaction", which would expose himself personally to enormous monetary losses.

15. That acting on the advice and counsel of the Defendants Hack and the Hack Company, Shofer proceeded to borrow from his voluntary account in the Plan in 1984, 1985 and 1986, the total aggregate of such loans being in excess of $300,000.

16. That, in truth and in fact, such loan transactions in excess of $50,000 constituted taxable personal income to Shofer, and separately constituted prohibited transactions by a disqualified person, and also represented premature distributions, all to the effect that Shofer incurred and continues to incur substantial federal and state tax liabilities, excise taxes, liability for

penalties and interest, professional expenses for accountants, pension consultants and attorneys, all necessary to correct and rectify his tax filings and bring him into compliance with federal and state tax laws and regulations.

17. That in addition to the direct costs he has incurred as set forth in Paragraph 16, Shofer has suffered the loss of personal income from his business and his business has lost income from the loss of credit directly attributable to the increased tax liabilities and actions taken by taxing authorities. Furthermore, Shofer was forced to withdraw his own funds from a tax sheltered account in order to pay his additional taxes, penalties and interest and to restore the Pension Plan to its position prior to his making the aforesaid loans, all at great financial loss to himself.

18. That had Shofer received accurate and competent advice from the Defendants Hack and the Hack Company with respect to the clear and foreseeable consequences of such loan transactions, none of the aforesaid damages, expenses and losses would have been incurred by him.

19. That not only were the Defendants guilty of the acts of primary negligence in rendering Shofer negligent advice orally and in writing, they persisted rendering incorrect and improper advice concerning the loan transactions even as late as December 16, 1986, when Defendant Hack Company issued a memorandum attempting to persuade Shofer's accountants that the risk of tax liability for these loan transactions was very low.

20. That in 1987, Defendant Hack compounded his original negligence by counseling Shofer to do nothing about the erroneous tax returns which Shofer had filed in the tax years 1984 and 1985. Such advice is contrary to law and, in effect, advised and counseled Shofer to commit criminal acts, e.g., tax evasion and willful failure to file amended returns.

21. That Defendant Hack's actions were taken to protect himself and to avoid civil liability for his negligent advice in this matter. That such conduct by Defendant Hack represents conduct characterized by an evil motive and a conscious, deliberate and reckless disregard for the welfare of his client, designed solely to protect himself.

## Count I

**(Negligence)**

22. Plaintiff incorporates Paragraphs 1 through 20 in this Count.

23. That at all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in particular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent attorney and consultant in such business in Maryland in 1984.

24. That Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the taxes, penalties, and other consequences of trustee and participant borrowing from his voluntary account in the Plan.

25. That Defendants breached their duty to Shofer, *inter alia*, by failing to advise concerning such personal loans against his voluntary account in the Plan that Shofer was a disqualified person as a trustee, that any such transactions constitute prohibited transactions; that the proceeds of such participant loans in excess of $50,000.00 were taxable as ordinary income to Shofer; that such loans threatened the qualification of the Catalina Pension Plan under E.R.I.S.A.; that such loans would expose Shofer to additional tax liability for excise taxes and penalties and interest; by deliberately rendering professional advice without research, without regard to the issues raised, and without regard for the truth or falsity of the information provided, omitted, or implied, when a reasonably competent consultant and professional in this area would not have so acted, failed to act, or so advised.

26. That as a direct and proximate consequence of the acts and omissions of the Defendants set forth herein, Shofer has incurred, and will in the future incur, losses and expenses in the form of additional income taxes, interest, penalties, excise taxes, attorneys' fees, accountants' fees, loss of income, loss of profits, loss of income from tax sheltered earnings, and other expenses and damages which would not have been incurred but for the negligence of the Defendants.

27. That in addition to the acts of negligence and omissions described herein, Defendant Hack engaged in a pattern of acts of deceit and deception and deliberately and willfully advised and counseled Shofer to violate the law in order to protect himself from the consequences of his own negligence. That such conduct was willful, deliberate, intentional and made with full

knowledge that, if acted upon, Shofer's personal and business welfare would be seriously jeopardized and endangered.

WHEREFORE, Plaintiff, Richard Shofer demands judgment jointly and severally against the Defendants, Stuart Hack and The Stuart Hack Company in the sum of Five Million Dollars ($5,000,000.00) Compensatory Damages and Three Million Dollars ($3,000,000.00) Punitive Damages, plus costs of this action and interest from the date of judgment.

## Count II

**(Breach of Contract)**

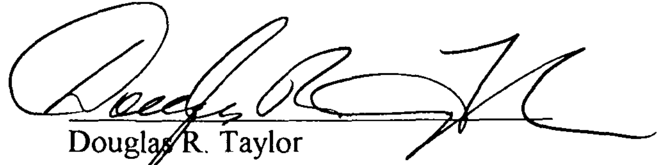
28. Plaintiff incorporates Paragraphs 1 through 21 in this Count.

29. Shofer entered into a contract with Defendants Hack and the Hack Company to provide him with reasonably expert and professional advice concerning his inquiry regarding loans to be made against his account in the Pension Plan, including the tax consequences of such loans.

30. That notwithstanding their duty owed to Plaintiff as aforesaid, the Defendants Hack and the Hack Company breached said duty by rendering to Plaintiff incomplete, incorrect and inaccurate advice with respect to the tax consequences of loans made from the Pension Plan. That, specifically, Defendants Hack and the Hack Company failed to inform Plaintiff that borrowing against his voluntary account would cause him to incur substantial tax liabilities, penalties and other charges and expenses directly related to such loans.

31. That as a direct and proximate result of such acts and omissions of the Defendants Hack and the Hack Company, Plaintiff has incurred, and will in the future incur, liabilities for additional income taxes, interest, penalties, excise taxes, attorneys' fees, accountants' fees, loss of income, lost profits, loss of earnings on investments and other expenses and damages which would not have been incurred but for the breach of contract which Defendants Hack and the Hack Company had made with Plaintiff.

WHEREFORE, Plaintiff, Richard Shofer demands judgment jointly and severally against the Defendants, Stuart Hack and The Stuart Hack Company in the sum of Five Million Dollars ($5,000,000.00) compensatory damages and Three Million Dollars ($3,000,000.00) in punitive damages, plus costs of this action and interest from the date of judgment.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

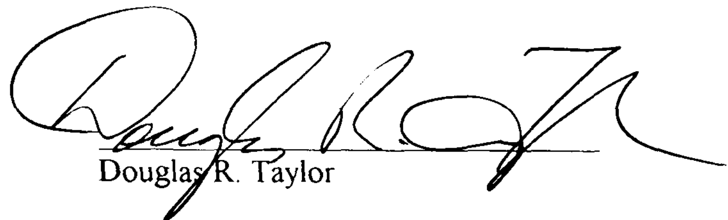
**PLAINTIFF HEREWITH DEMANDS A TRIAL BY JURY ON ALL ISSUES RAISED HEREIN.**

## Certificate of Service

I hereby certify that on this 1st day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Fourth Amended Complaint to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

(109)

IN THE CIRCUIT COURT FOR BALTIMORE CITY

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CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

---

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

# PLAINTIFF'S PARTIAL OPPOSITION TO DEFENDANTS' MOTION FOR MODIFICATION

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, for partial opposition of Defendants' Motion For Modification respectfully states as follows:

1. That Plaintiff has no objection to Defendants' request for a continuance of the present trial date which is presently set for June 18, 1996 for the reasons stated in Defendants' Motion.

2. However, Plaintiff has filed a Fourth Amended Complaint in this matter, and has requested that all issues in this case be tried to a jury. Plaintiff desires a jury trial.

3. That since Plaintiff's Fourth Amended Complaint elects a trial by jury, such mode of trial should occur. It is true that neither party had previously requested a trial by jury in this matter, but the nature of the case has now changed. When suit was initially brought, references were made to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.*, ("ERISA"). The suit has now been amended four times and contains no reference to ERISA



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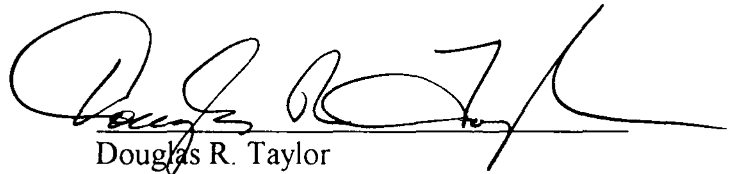
nor relies in any way on that statute as a basis for the underlying cause of action. The case is presently a malpractice action based on tort and contract law, easily understood and comprehended by a jury. Because ERISA was involved in the earlier complaints, it was thought that a judge should act as the fact finder since ERISA is a very complex statute. The only reason for a bench trial from Plaintiff's standpoint was the existence of ERISA-based on related causes of action. The case no longer involves ERISA and should proceed before a jury.

WHEREFORE, Plaintiff prays that this Honorable Court shall retain this matter as a trial by jury.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Points and Authorities

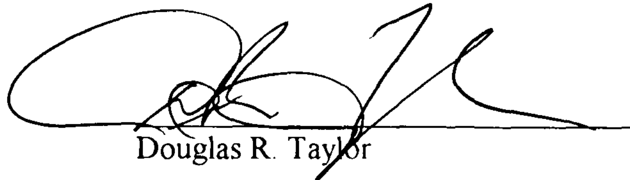
1. As stated above.
2. Maryland Rule 2-325.
3. *Hawes v. Liberty Homes, Inc.*, 100 Md. App. 222, 640 A 2d 743, *cert den.* 648 A 2d 203 (1994).

## Certificate of Service

I hereby certify that on this 5th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Partial Opposition To Defendants' Motion For Modification to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

## IN THE CIRCUIT COURT FOR BALTIMORE CITY

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CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

## REQUEST FOR HEARING

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, respectfully represents unto this Honorable Court as follows:

1. That Plaintiff has filed a Fourth Amended Complaint in this matter following remand of this cause of action by the Maryland Court of Special Appeals.

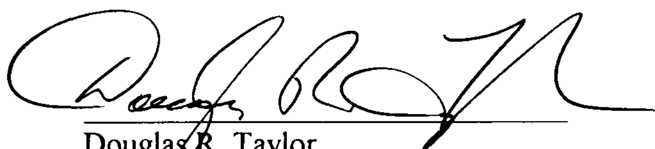
2. That coincidentally with the filing of the Fourth Amended Complaint, Plaintiff has also filed a "Motion For Revision of This Court's Prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995."

3. That there are three separate orders which deal with the issue of damages which constitute significant issues in this case. That Plaintiff wishes to argue the points raised in the Motion and to offer testimonial and documentary evidence in support of this Motion.

4. That because of the nature of the relief sought, and the evidence to be presented, Plaintiff respectfully requests that the Court grant Plaintiff's request for a hearing, and that this

matter be specially set as a "long motion" or on a docket which would allow Plaintiff at least one hour for his presentation.

WHEREFORE, Plaintiff requests that the Motion For Revision of This Court's Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 be set for a hearing with sufficient allotted time for the presentation of testimony and documentary evidence in support of this Motion.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

**POINTS OF AUTHORITY**

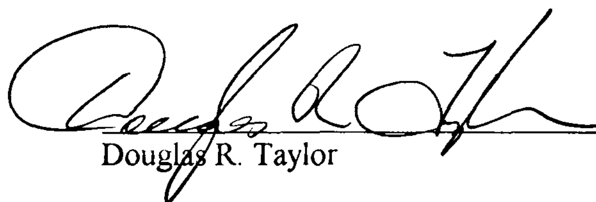
1. As stated above.
2. Md. Rule 2-311(f)

**Certificate of Service**

I hereby certify that on this 5th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Request For Hearing to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036



Douglas R. Taylor

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IN THE CIRCUIT COURT FOR BALTIMORE CITY

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|---|---|
| RICHARD SHOFER<br>Plaintiff<br>v.<br>THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Defendants | CASE NO. 88102069/CL79993 |
| THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Third Party Plaintiffs<br>v.<br>GRABUSH, NEWMAN & CO., P.A.<br>Third Party Defendant | |

**PLAINTIFF'S MOTION FOR REVISION OF THIS COURT'S PRIOR ORDERS OF FEBRUARY 17, 1993, JULY 11, 1994, JANUARY 31, 1995 AND FEBRUARY 23, 1995**

The Plaintiff, Richard Shofer (hereinafter referred to as "Shofer"), by his attorney, Douglas R. Taylor, respectfully moves this Honorable Court for revision of its orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 insofar as such orders relate to the issue of damages which Plaintiff seeks in this action.

## A. Factual and Procedural History of the Case

1. That this case commenced its odyssey in this court on April 11, 1988 when the Plaintiff filed suit against the original Defendants, Stuart Hack and The Stuart Hack Company. The original suit contained three counts, one sounding in tort, one in contract and the third alleging a common law breach of a fiduciary duty.



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On May 17, 1988, the Plaintiff filed an Amended Complaint which added a fourth count, alleging a breach of fiduciary duty as set forth in the Employees Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. Section 1001, *et seq*.

2. On March 6, 1990, the Defendants moved to dismiss the Complaint on the basis that the cause of action was preempted by the ERISA statute, and that jurisdiction lay in the federal courts, since ERISA was the controlling statute.

3. On July 2, 1990, this Court granted the Defendants' motion to dismiss. On August 9, 1990, the Plaintiff filed a Second Amended Complaint which restated the original three counts and added five additional counts based on the ERISA statute.

4. The Defendants again filed a motion to dismiss which was granted by this Court. On October 16, 1990, the Plaintiff filed a timely Notice of Appeal to the Maryland Court of Special Appeals. On its own motion, the Maryland Court of Appeals issued a Writ of Certiorari.

5. The Court of Appeals determined that Counts I and II of the Second Amended Complaint, sounding in tort and breach of contract were not preempted by ERISA. Count III alleged a breach of common law relationship based on a fiduciary duty owed by Hack to Shofer, and Counts IV through VIII were expressly based on duties arising from the ERISA statute. The Court concluded, for the purposes of its decision, that Hack was not a fiduciary, and that any allegations expressly based on ERISA were preempted by that statute. Shofer v. The Stuart Hack Company, et al, 324 Md. 92, 595 A 2d 1978 (1991) (hereinafter referred to as Shofer I).

6. In Shofer I, the Court of Appeals rejected Hack's argument that all of the counts in the Second Amended Complaint should be dismissed because of the preemptive effect of ERISA. In determining that Counts I and II of the Second Amended Complaint were not preempted by ERISA, the Court of Appeals concluded that Hack was not a fiduciary, and the state law claims set forth in Counts I and II did not turn on the "construction, interpretation or application of ERISA or of a plan, but rather those liabilities depend on duties arising from the nonfiduciary relationships." (Shofer I, at page 1983).

7. The question of whether or not a nonfiduciary could be sued in a federal court for knowing breach of fiduciary duty under ERISA had not been answered uniformly by the federal circuits at the time Shofer I was before the Court of Appeals.

The Court of Appeals, following reasoning adopted by a majority of courts, held that nonfiduciaries were not subject to suit in federal courts under ERISA. The next question which

the Court of Appeals had to decide was this: If nonfiduciaries are not subject to suit in federal courts, are claims against them preempted by the ERISA statute so that nonfiduciaries cannot be sued in state court? Relying on the rationale of *Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Warehouse*, 879 F 2d 1146 (3rd Cir. 1989), the Court concluded state malpractice actions were not generally preempted by the ERISA statute.

8. The Court of Appeals remanded this case for trial in this Court as to Counts I and II. Upon remand, Plaintiff filed a Third Amended Declaration containing those two counts, one count alleging negligence and the second alleging a breach of contract. The cause of action centers on advice given by Defendants to Plaintiff which was reduced to writing and set forth in a letter dated August 9, 1984 and attached hereto as Exhibit "A". The damages sought by Plaintiff included additional taxes, excise taxes, interest, penalties, attorneys' fees, accountants' fees, loss of income, and other expenses and damages proximately caused by the negligence and breach of contract on the part of Defendants. The principals in this lawsuit addressed the issues of proximate cause and foreseeability as to those damages in letters exchanged prior to the filing of the lawsuit. Those letters are marked Exhibits "B" and "C" and are attached hereto.

9. Defendants filed an Answer to the Third Amended Declaration and then proceeded to file a series of motions aimed at "gutting" the damage claims asserted by Plaintiff.

10. Defendants first motion was styled "Defendants' Partial Motion To Dismiss Plaintiff's Third Amended Declaration For Failure To State a Claim." In that Motion, Defendants specifically sought to dismiss claims for damages arising out of excise taxes, prohibited transactions and disqualification as well as for punitive damages and attorneys' fees.

11. On February 17, 1993, Judge Thomas Ward of this Court entered an order denying Plaintiff the right to damages arising out of excise taxes, prohibited transactions or plan disqualification and also dismissing Plaintiff's claim for punitive damages. The Court's order limited Plaintiff's claim for attorneys' fees to those fees incurred consequential to his tax obligation. In dismissing damages for excise taxes, prohibited transactions or plan disqualification, the Court cited *Shofer I* as authority for such action particularly referencing pages 110-111 of that opinion.

12. Next, Defendants filed a "Motion For Summary Judgment, Or, In The Alternative, Partial Summary Judgment As To Plaintiff's Damages." Defendants argued that Plaintiff's entire



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Third Amended Complaint was preempted, or, in the alternative, certain categories of Plaintiff's damages were not recoverable.

13. In this Motion, Defendants relied on Mertens v. Hewitt Associates, ____ U.S. ____, 113 S. Ct. 2063, 207, (1993) for support of their theory that all of Plaintiff's claims were preempted by the ERISA statute. Defendants argued that, had Mertens been decided prior to the decision in Shofer I, the Court of Appeals would have decided the case differently. That as an alternative to the entry of a summary judgment in favor of Defendants on the reasoning of Mertens, Defendants moved that Plaintiff's damages arising out of excise taxes, prohibited transactions, failure to follow proper procedures in borrowing from the pension, Plaintiff's inability to refinance his second home property, lost salary and lost business profits all be dismissed from the lawsuit. Plaintiff filed an opposition to the Motion and to the actions requested by the Defendants. That said opposition contained five separate exhibits in support of Plaintiff's opposition to the Motion. Defendants submitted a Reply to the opposition and exhibits submitted by Plaintiff.

14. By way of a Memorandum Opinion and Order, this Court (Judge Ellen L. Hollander) ruled that the dicta relied on by Defendants as a basis for their argument that the Mertens decision preempted Plaintiff's cause of action was insufficient to achieve the result they sought. Specifically, Defendants had argued that the Court of Appeals would have decided Shofer I differently had it had the benefit of the decision in Mertens before it undertook the Shofer case. This Court characterized Defendants arguments as stretching "the limits of logic" and specifically declined to hold that Mertens overruled Shofer I or that the decision in Shofer I would have been different had the Court of Appeals had the benefit of the ruling in Mertens. (See Exhibit "D", attached hereto.)

15. As to damages, the Court divided Plaintiff's damages into six different types. There were income taxes, excise taxes, tax penalties, lost opportunity to refinance the second home property, fees from professional advisors and lost salary and profits. The trial court concluded that the so-called "contingent liabilities" which included claims for disqualification of plan, cost of undoing "prohibited transactions" and excise taxes on prohibited transactions were not recoverable because they were preempted by ERISA. This Court actually relied on the Court of Appeals decision in Shofer I for this conclusion, despite the fact that the judge could not understand why additional income taxes were proper damages to be recovered but excise taxes

were not. But notwithstanding this confusion, this Court was not prepared to alter the decision made by the Court of Appeals and these damages were stricken.

16. In the same order, the Court also eliminated Plaintiff's claims for damages based on tax penalties assessed against him for failure to borrow money from the plan according to correct procedure; fees from professional advisors; and lost salary and profits. Citing Stone v. Chicago Title Ins. Co., 330 Md. 329 (1993), the Court concluded that these categories of damages were too "unforeseeable" to be recoverable. The Court concluded by stating in its order that the Plaintiff's state law claims were "not preempted", but that his damages were limited to those allowed by the Court of Appeals in Shofer I, and as limited by Judge Ward's prior order.

17. Defendant's last motion, a Motion For Partial Summary Judgment, was filed on December 16, 1994. This Motion requested that the Court dismiss all of Plaintiff's claims for damages arising out of lost earnings on the sum of $76,600.00 that he had withdrawn from his voluntary pension account. Plaintiff filed a response to the Motion, objecting to the relief requested. An affidavit executed by the Plaintiff was filed as an exhibit, which affidavit contained facts which summarized the Plaintiff's dealings with the Defendants in connection with the issues which are the subject of the lawsuit. On this issue, Plaintiff set forth the fact that his voluntary pension account was the only source of funds available to him whereby he could obtain funds to repay loans made by the pension plan. Had he not paid off these loans to his voluntary pension account, the pension plan faced disqualification, and additional excise and income taxes and attendant penalties. In short, the Plaintiff had no choice but to take a premature distribution from his voluntary account in order to mitigate the damages and prevent the possible loss of his business altogether as his affidavit attached hereto attests (Exhibit "E").

18. After a hearing, the Court entered an order on January 31, 1995 wherein the Court dismissed Plaintiff's claim for damages based on the loss of tax sheltered earnings which occurred when he withdrew $76,600.00 from his voluntary account to satisfy the tax and other obligations generated by the loans made following the Defendants' advice. The Court held that such claim for damages was barred by assumption of risk, lack of foreseeability and preemption pursuant to the Employee Retirement Income Security Act as the statute was interpreted by the Maryland Court of Appeals in Shofer I. This order was revised by consent and an additional order entered on February 23, 1995, but the substantive ruling of the Court did not change.

Court of Appeals in *Shofer I*. This order was revised by consent and an additional order entered on February 23, 1995, but the substantive ruling of the Court did not change.

19. However, the order of February 23, 1995 also included a memorandum issued by the Court. The Court, reacting to the Plaintiff's announced intention to appeal any judgment entered in this case following trial because of the rulings on damages, approved an interlocutory appeal in this matter. The Court agreed with the Plaintiff the "the viability of the ERISA related damage claims, in particular, will impact and dictate this Court's evidentiary rulings on both liability and damage issues." (See Memorandum attached hereto and marked Exhibit "F"). It seems clear that this Memorandum and Order reflects the fact that the rulings on the issue of damages were largely controlled by this Court's perception of the decision in *Shofer I* (and what the Court of Appeals intended by such ruling) rather than an independent examination of the damages claimed by Plaintiff in his Third Amended Complaint. It also appears clear that the trial court was looking for additional guidance as to how the Court should rule on the damage and evidentiary issues presented for determination.

## B. Argument

20. The interlocutory appeal has now been briefed and argued, and the Court of Special Appeals has rendered its decision in a published opinion. Plaintiff believes that the Court of Special Appeals has set forth a prescription for the proper trial of the issues in this case, and that the decision supports the purpose and objectives of this Motion. That prescription is in essence to allow parties to present their cases in the form of the evidence they have to the trier of fact. Plaintiff believes the appellate court's language on this point is instructive and should be followed in this case. The Court specifically stated:

> This case illustrates the practical problem that can occur when trial judges remove, prior to trial, damage requests from claimants' causes of action. Where appropriate, trial judges can avoid this problem by presenting damage claims to the fact finder. After a decision on liability and damages, upon proper motion, the trial court can modify an award that is believed to be inconsistent with Maryland law. On appeal, if this Court disagrees with the trial judge's decision, then we can reinstate all or part of an award. This approach avoids the disjunctive yo-yo effect of multiple trials and multiple appeals, and might have alleviated some of the problems associated with this case.
>
> This is not to say the trial judges should routinely submit all damage claims, regardless of their validity, to the fact finder. When appropriate, trial judges should strike invalid claims that might tend

to confuse the fact finder (in the event the fact finder is a jury) or for which substantial evidence might need to be introduced that otherwise would be irrelevant or prejudicial. In those cases, however, where a reasonable possibility exists that the claims have validity, a verdict should be obtained. Slip opinion, p. 11, filed, January 2, 1996. (Emphasis Supplied).

21. By seriously considering and then granting significant portions of Defendants' Motions to limit damages, the Court has hampered Plaintiff's ability to try his case and has created, with sure-fire certainty, the necessity of a further trial of these damages if Plaintiff is successful with its appeal on the merits of this case as to his alleged damages. The interests of judicial economy, and the guarantee of a fair trial, clearly dictate that the previous orders entered herein should be stricken and the Plaintiff be permitted to present evidence which establishes his damage claims. The Court of Special Appeals advises that post verdict or post judgment motions are a superior method to correct decisions or determinations which the trial court believes are inconsistent with Maryland law.

22. Plaintiff desires the opportunity to have a fair trial and the opportunity to present the evidence as to the damages he has sustained (and continues to sustain) as a direct and proximate result of Defendants' negligence. It is now eight years after the negligence and breach of contract action was filed. Not a single witness has testified. Plaintiff desires to proceed with his case so that he can have the opportunity to be made whole again, and for justice to be done in this case.

23. The order of February 17, 1993 dismissed Plaintiff's claims for damages based on excise taxes and any damages from prohibited transactions or plan disqualification. Additionally, the Court dismissed Plaintiff's claims for punitive damages.

24. The Fourth Amended Complaint filed herein seeks damages by way of losses sustained by Plaintiff as a result of the negligence and breach of contract by Defendants. At the time the Court of Appeals decided *Shofer I*, damages which included excise taxes, prohibited transactions and plan disqualification were denominated "contingent liabilities" because the extent of any such damages was not known at the time the lawsuit was filed, or even at the time the Appeal was argued. However, it appears that, because of actions taken by Plaintiff, the pension plan has been saved and there are no damages related to any disqualification of the plan. But there are excise taxes which finally have been assessed, and damages and expenses relating to saving the plan and these damages should be recoverable. The Court of Appeals in *Shofer I* did not specifically rule that these damages were "preempted". Rather, the Court relied on counsel's



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statement that they were not in the case. But a review of the Second Amended Complaint (the Complaint which was the subject of the appeal) clearly reveals that damages such as excise taxes were "in the case".

25. These excise taxes should not be viewed as preempted by ERISA because these damages do not involve the pension plan. These damages are personal to Plaintiff, and arise by virtue of the loans he made. It was the Plaintiff personally who borrowed the funds which triggered the adverse tax consequences and required him to expend funds to repair any potential damage which was done.

26. The Order of February 17, 1993 was entered on the erroneous assumption that the Court of Appeals had determined that damages for excise taxes were not in the case. Clearly they were and are. Furthermore, the Court of Appeals did not rule that such damages are preempted by ERISA. These damages are personal to the Plaintiff and flow proximately and naturally from Defendants' negligence.

27. The Fourth Amended Complaint also again seeks punitive damages. Plaintiff concedes that the Court of Appeals decision in Owens-Illinois Inc. v. Zenobia, 325 Md. 420, 601 A 2d 633 (1992) changed the law of punitive damages in Maryland. Plaintiff also concedes that the allegations set forth in the Third Amended Declaration, filed before the Zenobia decision, do not meet the requirements of this recent Court of Appeals decision. However, the Plaintiff has alleged specific facts in the Fourth Amended Declaration which meet the test for punitive damages in Maryland. In Zenobia, the Court of Appeals held that punitive damages should be awarded in an attempt to punish a defendant "whose conduct is characterized by evil motive, intent to injure or fraud, and to warn others contemplating similar conduct of the serious risk of monetary loss". The Defendants' conduct, when viewed in its totality, particularly its conduct following discovery of the primary negligence, is so highly unprofessional, outrageous and fraudulent that it meets the test of Zenobia. For these reasons, the Court should strike the order of February 17, 1993, and allow Plaintiff to present his evidence as to the damages he has sustained.

28. Additional damages sustained by Plaintiff were dismissed by the Court in its Order of July 11, 1994. Defendants had sought to have the Court determine that Plaintiff's entire cause of action was preempted by virtue of the Supreme Court's decision in Mertens, supra. The Court rejected that argument.



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29. In an order entered on July 11, 1994, this Court again reaffirmed that excise taxes could not be awarded to the Plaintiff because such damages were determined to be "preempted" by the Court of Appeals in *Shofer I*. In its memorandum, the Court noted that there was no logical reason why excise taxes should not be recoverable, on the one hand, and income tax damages be permitted on the other. The same event gives rise to both liabilities. For the reasons previously advanced, Plaintiff suggests that all taxes should be treated alike, and that all are recoverable as a part of the damages suffered by Plaintiff in this lawsuit. Furthermore, the Court of Appeals in *Shofer I* did not hold that the claim for excise tax damages was preempted.

30. In the same order, the Court dismissed damages arising from tax penalties based on the failure to follow proper procedures in borrowing funds from the plan, fees for professional advisors and lost salary and profits. The Defendants argued that the case of *Stone v. Chicago Title Ins. Co.*, 330 Md. 329 was sufficiently analogous to be dispositive of these damage claims, and the Court was persuaded to do so. However, Plaintiff suggests that the *Stone* case is not analogous to the case at bar, and it was error for the Court to have dismissed these damages from the suit. In *Stone*, the chain of events which led to the damages was clearly not foreseeable. The *Stone* case was correctly decided on the facts. In the instant case, all of the damages claimed by Plaintiff flow proximately and naturally as a direct consequence of the negligence of the Defendants. It is unclear whether the Court, when it entered its order, considered the Plaintiff's letter of March 12, 1987 to Defendant, Stuart Hack, wherein the Plaintiff spelled out in great detail the specific damages he would suffer from Defendants' negligence, including the damages which were the subject of this Court's order. (See Exhibit "B" attached hereto) Indeed, the Defendants also understood that "costly" damages would follow if there was a problem with the advice Defendants rendered to Plaintiff in this matter. (See Exhibit "C" attached hereto).

31. The evidence in the record clearly establishes that both the Plaintiff and the Defendant "foresaw" the damages which Plaintiff would suffer as a result of the negligent advice. Indeed, the damages which Plaintiff feared he would suffer (and wrote to Defendants about) came true. Those damages are alleged in this lawsuit, and Plaintiff should be permitted to prove his case in court.

32. Finally, the Court determined that Plaintiff could not recover lost earnings on the $76,600 he had to withdraw from his voluntary pension trust account in order to prevent forfeiture of the pension trust and potential loss of his business. The Court, in its order of January

31, 1995, held that this claim was barred by assumption of risk, lack of foreseeability and preemption by ERISA. Plaintiff respectfully suggests that the doctrine of assumption of risk is inapplicable, and further that the claim really has nothing to do with ERISA. Rather, this should be a question of fact to be determined by the trier of fact. The question is whether or not the Plaintiff, when faced with the potential disqualification of the pension trust and potential loss of his business acted reasonably and prudently in using his pension savings which was the only source of funds available to him, his voluntary pension account, in order to prevent greater losses. The only reason Plaintiff withdrew $76,600 from his voluntary account was to save his pension plan. Later, on July 31, 1994, he was forced, in the same manner, to withdraw an additional $197,295.70, in order to preserve the pension plan. These acts were made necessary as a direct and proximate result of Defendants' negligence. Plaintiff has set forth the specific facts and circumstances in an affidavit attached hereto, marked Exhibit "E" and incorporated herein. These are not issues to be decided by way of summary judgment, but rather should be left to the trier of fact for decision after presentation of the evidence in the case.

WHEREFORE, Plaintiff moves that this Court's orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 be stricken, and that this matter proceed to trial on the Fourth Amended Complaint and Answer filed thereto.

Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209



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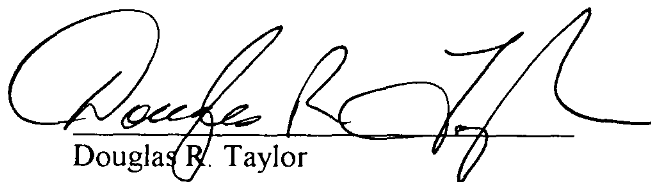
## Certificate of Service

I hereby certify that on this 5th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Motion For Revision of This Court's Prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

Consultants & Actuaries
4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington DC 621-4064

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

**EXHIBIT A**

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

SH:mn

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E.

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# CATALINA ENTERPRISES, INC.

5000 LIBERTY HEIGHTS AVENUE
BALTIMORE, MARYLAND 21207

RICHARD SHOFER
PRESIDENT

TELEPHONE:
AREA CODE (301) 466-333

March 12, 1987

PERSONAL AND CONFIDENTIAL

EXHIBIT B

Stuart Hack
The Stuart Hack Co.
4623 Falls Rd.
Baltimore, Md. 21209

Dear Stuart:

My accountants, Grabush, Newman & Co., have recently informed me that I am subject to income tax on a considerable amount of money that I have borrowed from my pension fund voluntary contribution account. They have informed me that loans in excess of fifty thousand dollars are taxable according to I.R.S. regulations.

Needless to say,this came as quite a disturbing revelation. I presented Grabush Newman with the letter you had written me on August 9, 1984, a copy of which I am enclosing. Despite what your letter states, they say I may owe a lot of money to Uncle Sam.

This news disturbed me to the extent that I sought advise from an independent pension attorney, Nicholas Giampetro. He only confirmed that tax is due.

At this time I envision among other things:
1.Federal and state income tax on approximately $200,000 resulting from loans from the voluntary account in excess of the allowable fifty thousand dollars - all at the maximum personal tax rate.
2.Penalties and interest on these taxes going back to 1984 when the first loan was made.
3.Amended personal income tax returns going back to 1984.
4.Additional penalties and interest for underestimating income tax due based on the new amended returns.
5.A general I.R.S. audit of my personal, corporate, and pension returns for several years, triggered by the amending of my personal returns.
6.An unthinkable amount of time expended relating to this matter and possible audits.
7. An even more unthinkable amount of money for accountants, and lawyers related to the consequences of this matter and any audits that may occur.
8.A devastating loss to the future value of my voluntary pension

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accou[illegible] as a result of these loans.
9.A general weakening of the soundness of the Pension Plan effecting not only me but, perhaps, other participants.
10.The appearance of a significant six figure personal tax liability on my personal balance sheet, which would undoubtedl undermine my auto business credit line and relationship with bank as well as others.
11.Possible Federal and State liens against both myself personally and my business as a result of not being able to pa this large and unexpected tax and penalty burden.

I was entitled to rely on your advice. I did, and now I am in jam. Relying on your advice I borrowed $200,000 in 84 more in and still more in 86.

Although there could be even other, as yet unforseen consequences, you can well imagine that the nightmarish possibilities above have moved me to seek additional legal advice.

It is my understanding from the advice that I have received tha I should be able to look to the Stuart Hack Co. for relief.

I am writing you now that the present situation is clear to me enlist your aid in resolving this mess in a friendly way if possible.

Our relationship has spanned about fourteen years without a negative word between us. I desire to keep it that way as much possible.

There is no doubt that based on the legal advice that I have be forced to seek, that this matter will soon be brought to the attention of your insurers.

The question is - Can we communicate openly, attack this unfortunate issue together, and resolve it with a minimum of expense and discomfort to us all (including your insurers) or - are the lawyers going to be the only winners.

At this time I desire that you present this matter to your insurers quickly. Please give this matter your urgent attention. Assess the situation as soon as possible and likewise have your insurers do the same.

Many of the potentially damaging events mentioned earlier in thi letter may be avoided if we work together to resolve this.

I have not got much time. Based on what I have now learned I mus file an amended return soon for 84 and perhaps 85. I do not have cash to pay with those amended returns.

Please write me, and have your insurers write, stating (as I hav done) your willingness and desire to expedite this matter in a

pleas[illegible] manner.

As soon as you clarify you position to me regarding this matte and as soon as your insurers state their position to me I will know how to proceed.

On the other hand, a lack of timely communication from you tha you desire to work this out, as you must realize, will both fracture our relationship and force me into the arms of attorn to seek relief. Please do not allow this to happen. Because of relationship with you, I want to do everything possible to avo the agonies of litigation.

Cordially,

Richard Shofer

RS/ca

... COMPANY
Co[illegible]ants & Actuaries
462[illegible] [illegible]ails Road
Baltimore, Maryland 21209
(301) 366-8700
Washington D.C. [illegible]

E. [illegible]00182

Writer's Direct Dial No.

April 8, 1987

**EXHIBIT C**

PERSONAL AND CONFIDENTIAL

Richard Shofer, President
Catalina Enterprises, Inc.
5000 Liberty Heights Avenue
Baltimore, Maryland 21207

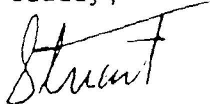
Dear Dick:

This is in response to your letter dated March 12, 1987, regarding loans you made from the retirement plan.

Your accountants raised the issue on the loans some time ago. We did some research and concluded there was not a problem. I have suggested to Ken Larash that he arrange a meeting with you, him, the attorney you have hired and me to go over the facts together. The best possible resolution is to be able to conclude you do not have a problem. To conclude otherwise could be very costly to all of the parties involved.

I recommend we meet with this positive goal in mind.

Cordially,



Stuart Hack

SH/rbp

CC: Harvey Newman, CPA
Kenneth Larash, CPA
Alan Vandendriessche

EXHIBIT D

| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| THE STUART HACK CO. ET AL. | * | BALTIMORE CITY |
| Defendant | * | |
| * * * * * * | * | CASE NO. 88102069/CL79993 |
| THE STUART HACK CO. ET AL. | * | |
| Third-Party Plaintiff | * | |
| v. | * | |
| GRABUSH, NEWMAN & CO., P.A. | * | |
| Third-Party Defendant | * | |

* * * * * * * * * * * * *

## MEMORANDUM OPINION AND ORDER

### Introduction

Defendants Stuart Hack ("Hack") and The Stuart Hack Company (together, "Defendants") have filed a "Motion for Summary Judgment Or, In The Alternative, Partial Summary Judgment As To Plaintiff's Damages" (the " Motion"). Defendants argue that the causes of action asserted by Plaintiff Richard Shofer ("Plaintiff" or "Shofer") in his Third Amended Complaint are wholly preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-461 (1988 & Supp. 1994) ("ERISA"), and, alternatively, that Plaintiff is not entitled to certain categories of damages which he claims.

Factual Background

The long history of this case has been thoroughly chronicled elsewhere,[1] and will only be repeated here to the extent relevant to the present issues. While there are many material facts which remain in dispute, the material facts pertinent to the legal issues presented by Defendants' Motion are largely undisputed.

Shofer is the sole shareholder and president of Catalina Enterprises, Inc. ("Catalina"), trading as Crown Motors. He is also the sole trustee of Catalina's qualified pension plan. The Stuart Hack Company ("Hack Co."),[2] a pension plan consulting firm, was hired by Shofer to prepare and administer Catalina's pension plan. Sometime prior to August 9, 1984, Shofer had a telephone conversation with Hack concerning the use of funds in Shofer's accounts in the Catalina pension plan, either as a loan from the plan or as security for a loan. Hack replied in a letter of August 9, 1984, stating that "you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period." Defendants' Memorandum In Support of the Motion, Exhibit C (letter from Hack to Shofer).

In nine transactions between August 9, 1984 and September 30, 1986, Shofer borrowed $375,000 from the Catalina pension plan. Shofer used these proceeds to repay loans from Catalina, and to purchase and refurbish property in the Virgin Islands. Grabush, Newman & Co., P.A. ("Grabush"), the accountants for Catalina and Shofer, had prepared

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[1]In particular, this court relies on the case history recounted by the Court of Appeals in Shofer v. The Stuart Hack Co., 324 Md. 92, 95-98 (1991) (hereinafter referenced as "Shofer I").

[2]Stuart Hack is the president of Hack Co.



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Catalina's tax returns for the tax years 1984, 1985, and 1986, without including the funds Shofer had borrowed from the plan as income. Eventually, Grabush discovered that such use of pension funds constituted a distribution for income tax purposes and advised Shofer of his tax liabilities for those loans. Subsequently, Shofer was required to pay additional income taxes, penalties, and interest, amounting to more than $120,000. In addition, tax liens were placed on Shofer's Virgin Islands property, which he claims prevented him from refinancing the loans for that property at a lower interest rate.

In April of 1988, Shofer sued Defendants in the Circuit Court for Baltimore City; Shofer complained inter alia, that Defendants failed to advise Shofer of the tax consequences attendant to use of the pension funds. Shofer asserted various grounds for relief, including several state law claims (contract, tort, and breach of fiduciary duty) and several ERISA-based theories. Defendants impleaded Grabush as a third-party defendant. Defendants also moved to dismiss Plaintiff's complaint on the ground that the Maryland common law claims were preempted by ERISA, and that the ERISA claims could only be heard in federal court. Judge David Ross dismissed all claims against Hack, with prejudice, and Shofer appealed.[3] The Court of Appeals issued a writ of certiorari upon its own motion before the Court of

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[3]At that time, Shofer was represented by the law firm of, Blum, Yumkas, Mailman, Gutman & Denick, P.A. On October 19, 1990, following the dismissal by Judge Ross, Shofer's counsel instituted suit in federal district court on the ERISA claims. Shofer v. Stuart Hack Co., 753 F.Supp. 587 (D.Md. 1991). However, the suit was dismissed on statute of limitations grounds. The dismissal was affirmed by the Fourth Circuit. Shofer v. Stuart Hack Co., 970 F.2d 1316 (4th Cir. 1992). Shofer has since sued his original attorneys in the Circuit Court for Baltimore City (Case No. 93285087-CL171133).

Special Appeals heard the matter.[4]

The Court of Appeals reversed in part, and vacated in part. After surveying the cases addressing ERISA preemption, the Court held that ERISA does not preempt Shofer's state law malpractice claims against nonfiduciaries. Shofer I.[5] But only the Maryland law claims (Counts I and II) which survived; all of the ERISA based claims were held to be preempted. The Court then determined that Shofer could recover, as damages, for his income tax liability. However, the Court ruled out recovery for other contingent, consequential damages which Plaintiff might suffer based on Defendants' alleged malpractice.

As to the state law claims, Hack had argued for preemption because Shofer sought to preserve contingent damages, including additional taxes which might flow from a decision of the Internal Revenue Service that the loans constituted "prohibited transactions," damages for ultimate disqualification of the plan, and for excise taxes on prohibited transactions. Id. at 110-111. The Court did not squarely address whether pursuit of such contingent damages would require ERISA preemption.[6] Instead, the Court said: "We consider Shofer's counsel's statement [at oral argument] to be a concession limiting the scope of the damages claimed . . . so as to exclude the three above-described 'contingent liabilities.' As so limited, potential plan disqualification as a basis for [Hack's] argument is not in the case."

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[4]Hack's claims against Grabush were never adjudicated, but the Court of Appeals entered a final judgment under Maryland Rule 2-602(e)(1)(C).

[5]The Court of Appeals acknowledged a factual dispute as to whether Hack was a fiduciary under the plan, Shofer I, at 100-01, but, for purposes of the appeal, determined Hack was not a fiduciary. Id., at 98. The parties agree that Defendants are not "fiduciaries" as defined in ERISA. See also Shofer I, 324 Md. at 98-101.

[6]The Court also did not discuss whether its decision would have been different if the damages in question were not merely contingent.



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Id., 324 Md. at 111.

On December 10, 1992, Shofer filed his Third Amended Complaint, in which he raised claims for damages based on "income tax, excise tax, interest, penalties, attorney's fees, accountant's fees, loss of income, and other expenses and damages" under the theories of breach of contract and negligence. See Defendants' Memorandum in Support of the Motion, Exhibit F (Shofer's itemization of damages). He also seeks punitive damages. On January 5, 1993, Defendants filed a motion to dismiss the Third Amended Complaint, relying in part on Shofer I. On February 17, 1993, Judge Thomas Ward issued an Order dismissing the punitive damages claim, and prohibiting recovery of damages for "excise taxes, prohibited transactions or plan disqualification." His Order also limited the available damages to income taxes and professional fees relating to those taxes. On February 28, 1994, Defendants filed the Motion which is the subject of this opinion.

## Discussion

### I. Preemption of State Law Malpractice Claims

Defendants argue that, in light of dicta in the recent Supreme Court case of Mertens v. Hewitt Assoc., ___ U.S. ___, 113 S.Ct. 2063, 2071 (1993), all of Plaintiff's theories are preempted by ERISA, whether those theories are based upon Maryland law or upon ERISA itself. This court disagrees.

In Shofer I, the Court of Appeals had relied primarily on Mackey v. Lanier Collection Agency & Serv., 486 U.S. 825 (1988), and Painters of Philadelphia Dist. Council No. 21 Welfare Fund v. Price Waterhouse, 879 F.2d 1146 (3d Cir. 1989), to find that



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Shofer's state law claims are not preempted by ERISA. In analyzing ERISA preemption, the Court in Shofer I focused on the fact that the Mackey and Painters cases were significantly similar to the present case. Shofer I, 324 Md. at 101-09. Mackey concerned the validity of a special Georgia statute expressly exempting ERISA-plan benefits from common law garnishment. The Supreme Court first held that ERISA preempted the statute, 486 U.S. at 830, and then went on to reason that Congress necessarily contemplated that benefits from an ERISA plan would be subject to garnishment under state law. Id. at 831-33. The Court said:

> ERISA plans may be sued in a second type of civil action, as well. These cases--lawsuits against ERISA plans for run-of-the-mill state-law claims such as unpaid rent, failure to pay creditors, or even torts committed by an ERISA plan--are relatively commonplace. Petitioners . . . concede that *these suits, although obviously affecting and involving ERISA plans and their trustees, are not preempted by ERISA.*

Id. at 833 (footnote omitted; emphasis added).

More relevant to the present facts, Painters concerned a malpractice suit by ERISA-plan trustees against an accounting firm performing yearly audits of the plan, for failure to uncover fraud by the plan administrator. In rejecting the defendant's preemption argument, the Painters court relied on Mackey to hold that ERISA does not generally preempt state professional malpractice actions. 879 F.2d at 1153 n.7. Accord, Pappas v. Buck Consultants, Inc., 923 F.2d 531, 540 & n.1 (7th Cir. 1991) (dicta, apparently agreeing that ERISA does not preempt certain state law malpractice claims).

Defendants now urge that the Court of Appeals would have decided Shofer I differently if it had been able to consider Mertens. On the surface, Mertens appears to have



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significant similarities to the instant case. Upon closer examination, however, it does not apply here. In Mertens, the plan participants sued the actuary that had performed the actuarial work for the plan, along with all fiduciaries of the plan, on the theories of breach of duty based on ERISA and malpractice based on California law. The federal district court dismissed the malpractice claims on the ground that they were barred by the applicable statute of limitations, and plaintiffs appealed. Mertens, 948 F.2d at 609. After discussing the "discovery rule" under California law, the Ninth Circuit reversed and remanded the malpractice claims, expressly authorizing the district court to allow the claim to continue if, in its discretion, it wished to exercise pendent jurisdiction. Id., 948 F.2d at 613-14.

The Supreme Court granted certiorari as to the limited question of "whether ERISA authorizes suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty." Mertens, 113 S.Ct. at 2066. Among other arguments, the petitioners relied on ERISA § 502(a)(3), which allows for "appropriate equitable relief," as a basis for claiming what the Supreme Court characterized as "nothing other than compensatory damages." Mertens, 113 S.Ct. at 2068. Petitioners warned that if the scope of remedies available under ERISA § 502(a)(3) were not extended to cover all relief available under common law for breach of trust, a prospective plaintiff would not be able to recover damages--either under ERISA or under corresponding state law claims, which petitioners asserted were preempted. Id. at 2066-71. In other words, if the Court interpreted narrowly the scope of available remedies under ERISA § 502(a), it would create a "gap" of injury for which there would be no recovery; that, according to petitioners, would be inconsistent with the purpose of ERISA. The Court stated:

> In the last analysis, the petitioners . . . ask us to give a strained interpretation to § 502(a)(3) in order to achieve the "purpose of ERISA to protect plan participants and beneficiaries." . . . They note, as we have, that before ERISA nonfiduciaries were generally liable under state trust law for damages resulting from knowing participation in a trustee's breach of duty, and they assert that such actions are now pre-empted by ERISA's broad pre-emption clause. . . . Thus, they contend, our construction of § 502(a)(3) leaves beneficiaries like petitioners with *less* protection than existed before ERISA, contradicting ERISA's basic goal of "promot[ing] the interests of employees and their beneficiaries in employee benefit plans."
>
> Even assuming (without deciding) that petitioners are correct about the pre-emption of previously available state-court actions, vague notions of a statute's "basic purpose" are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA, an enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests--not all in favor of potential plaintiffs.

Id. at 2071-72 (citations omitted; emphasis in original).[7]

In the instant case, Defendants argue that the second paragraph of the above passage, quoted from Mertens, necessarily implies that the petitioners in that case were "correct about the pre-emption of previously available state-court actions," Id., even though the Court refused to extend its holding to that effect. Such an argument stretches the limits of logic. The only issue then before the Court was whether ERISA § 502(a)(3) authorized recovery of money damages from nonfiduciaries for breaches of duties imposed by ERISA upon fiduciaries. Id., 113 S.Ct. at 2067-68 & n.5. In this context, the passage merely indicates that the holding was correct ***even if*** state common-law actions would be preempted, and that petitioners' reference to ERISA's underlying purpose did not avail them.

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[7]The dissent in Mertens, citing Ingersoll-Rand Co. v. McClendon, 111 S.Ct. 478 (1990), wondered whether any state law action could survive the implications of the Mertens decision. Mertens. 113 S.Ct. at 2074 n.2. In McClendon, the Court struck down a Texas statute that expressly permitted suit for abusive discharge when the employer's motive was to defeat the employee's ERISA-protected pension rights, based on the fact that the statute was premised on the existence of an ERISA pension plan. 111 S.Ct. at 483.



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> All that ERISA has eliminated, *on these assumptions* [that money damages are available under 29 U.S.C. § 502(a)(3)], is the common law's joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves. There is, in other words, a "tension between the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.

Id., 113 S.Ct. at 2072 (first emphasis added; second emphasis in original).

Other remedies for other tortious conduct are apparently not affected by Mertens. Accordingly, this court cannot conclude, as Defendants argue, that had the Court of Appeals had the benefit of Mertens, its ruling would have been different. Nor is this court prepared to rely on Mertens as a basis to overrule Shofer I.[8] Accordingly, this court concludes that Plaintiff's malpractice claims are not preempted.

## II. Damages

In the Third Amended Complaint, Shofer claims six distinct types of damages: income taxes, excise taxes, tax penalties, lost opportunity to refinance his St. Thomas property,[9] fees from professional advisors, and lost salary and profits. Third Amended Complaint, ¶¶ 12, 18, 19, 23; see also, Defendants' Memorandum in Support of the Motion,

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[8]It is hardly appropriate for the trial judge to overrule the appellate court.

[9]At the hearing before this court, Shofer conceded that a lost opportunity to take advantage of favorable mortgage rates, coming some four to six years after the allegedly negligent advice, was too speculative; he has therefore dropped his claim for this type of damage.



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Exhibit F.[10] Defendants argue that Shofer I and Judge Ward's Order of February 7, 1993 both limited Plaintiff's potential recovery to income taxes and professional fees. Defendants maintain that all other damages, such as recovery for excise taxes, are preempted. Apart from the costs of professional advice, Defendants also claim that all other forms of damage were so unforeseeable as to preclude recovery.

A. Preempted Damages

At the appellate argument, counsel for Shofer "submitted that 'if the Court reads [the State law claims in] Counts I and II there is no mention of prohibited transactions. There is no mention of excise taxes for prohibited transactions.'" Shofer I, 324 Md. at 111. The Court then determined that Plaintiff's counsel conceded Shofer could not recover for so-called, "'[c]ontingent liabilities,' which included [damages for] 'disqualification of plan'; 'cost of "undoing" prohibited transactions'; and 'excise tax on prohibited transactions.'" Id. (quoting Shofer's answers to interrogatories). Accordingly, the Court said that a claim for malpractice that excludes the three "contingent liabilities" is not preempted by ERISA. It further determined that damages arising from plan disqualification are "not in the case." Id. Indeed. Shofer has received the benefit of a ruling by the Court that he may pursue his malpractice claim. Had the Court considered the claim as including the specified damages, the Court may well have ruled that it was preempted.

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[10]At the hearing before this court, the parties explained that borrowing from the plan constituted a distribution to Shofer, generating income tax liability, as well as a prohibited transaction by an interested party to the pension plan, generating excise tax liability. Shofer also suffered the tax penalties because he did not timely and correctly file his tax returns following the plan transactions.



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Hack now argues that this court is bound by the decision in Shofer I. Hack also claims that the reason excise taxes are preempted is because, in order to determine whether a party is "interested" and a transaction regarding an ERISA plan is "prohibited," one must refer to the plan and interpret ERISA itself. Shofer responds, inter alia, that there is no substantive difference between income and excise taxes, vis-a-vis the plan or otherwise. Thus, if Defendants' argument were correct, income taxes would be equally preempted, but the Court of Appeals ruled they were not. Shofer also asserts that the issue of the contingent damages really was not addressed by the Court of Appeals, based upon the "concession" of prior counsel, and because the damages then were contingent only.

In response to this court's questions, counsel for Defendants could not fully explain why income taxes, on the one hand, are compensable while excise taxes, on the other hand, are not. Nevertheless, this court finds itself between the proverbial "rock and a hard place:" the Court of Appeals seems to have spoken as to the status of Plaintiff's claims for damages, and this court is bound by that ruling.[11] Kline v. Kline, 93 Md. App. 696, 700 (1992) (under the doctrine of the "law of the case," a ruling by an appellate court upon an issue becomes binding on the courts and litigants in further proceedings in the same matter). Moreover, by an Order dated February 17, 1993, Judge Ward also ruled that Plaintiff cannot pursue these damages, based on Shofer I. Therefore, this court will treat these categories of damages as excluded from Plaintiff's claims.

[11]The Court said it "vacate[d the] judgment as to Counts I and II, on which the damages sought are limited as aforesaid...." 324 Md. at 113 (emphasis added).

B. Unforeseeable Damages

Plaintiff seeks three additional types of damages which Defendants maintain are too unforeseeable to permit recovery. Specifically, Shofer seeks recovery for tax penalties arising from the failure to borrow funds from the plan according to the correct procedure, fees from professional advisors, and lost salary and profits. Defendants' Motion, ¶¶ 9, 14, 16; Plaintiff's Opposition to Defendant's [sic] Motion for or Partial as to Plaintiff's Damages, at 7-12.

It is well settled that negligence is not actionable unless it is a proximate cause of the injury alleged. Atlantic Mut. Ins. Co. v. Kenney, 323 Md. 116, 127 (1991). It is also axiomatic that the harm for which recovery is sought must be foreseeable. "The actor's conduct may be held not to be a legal cause of harm to another where[,] after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm." Stone v. Chicago Title Ins. Co., 330 Md. 329, 337 (1993) (quoting Restatement (2d) of Torts, § 435(2) (1965)). Cf. Id., 330 Md. at 339 (quoting at length from Hadley v. Baxendale, 9 Exch. 341 (1954) (Eng.)).

The case of Stone v. Chicago Title Ins. Co. is particularly instructive. There, Stone, a stock speculator, hired an attorney to help finance the purchase of property. Stone did not tell the attorney that Stone intended to have the property readily available as collateral for loans. The attorney failed to record the release deed of trust in a timely manner. As a consequence, when Stone's broker imposed a margin call, the financing bank refused to advance loan proceeds to Stone until that release had been recorded, and because Stone had no other ready source of cash, he was forced to sell stock at a loss to cover his stock debts.

Ruling that Stone could not recover from the attorney for the stock loss, the Court stated:

> . . . Stone would have us hold that his loss arising from the . . . collapse in the market in certain stocks in which he was speculating was proximately caused by his sale of those stocks, which was caused by his lack of funds to pay off other loans, which was caused by his inability to secure a second mortgage before [the margin call], which in turn was caused by [the attorney]'s failure to record timely the release of the extinguished lien on his home. He argues that but for [the attorney]'s negligence he would have secured a home equity loan and used the proceeds to meet his broker's margin call, thus avoiding the sale of stock to raise capital in a falling market. We disagree. . . .
>
> There was no allegation . . . that [the attorney] or his firm had knowledge at any time that Stone was buying stock on margin. No reasonable person would have foreseen that almost a year after the settlement which [the attorney] conducted Stone would have an emergency need for cash, would attempt to borrow against his home to satisfy that need, and unable to do so would have to sell stock in a depressed market to raise it. Furthermore, there is no allegation that [the attorney] was notified of Stone's financial crisis at the time the problem was brought to his attention.

Id., 330 Md. at 340-41.

In the instant case, Shofer is claiming that Hack should have foreseen, at the time he wrote his letter to Shofer, that the possible consequences of Hack's negligent advice included tax penalties incurred by Shofer's own failure to file his tax returns properly and on time, as well as Catalina's lost revenues and decrease in inventory (and, consequently, Shofer's lost income) due to an extensive tax burden, and lost income and revenue flowing from the time Shofer has had to devote to this litigation.[12] Applying Stone here, it is clear that Shofer's

[12]Shofer makes these claims even though he admitted that during the period in which he borrowed from the fund he never asked anyone about the procedure to borrow money and never told Hack that he was in fact borrowing money from the pension fund. Defendants' Memorandum in Support of Defendants' Motion, at 7-8, 18-19 (citing the Deposition of Shofer, February 2, 1990, attached as Exhibit B, and the Deposition of Hack, March 16, 1989, attached as Exhibit D). Further, Shofer makes these allegations even though Grabush, the tax-preparer for two critical years, may have made omissions constituting professional negligence, which may constitute a superseding cause.



1206

claims demand too much of the concept of foreseeability. As a consequence, these damages cannot be recovered.

Conclusion

Plaintiff's state law malpractice claims are not preempted. However, Plaintiff can only seek recovery of damages in accordance with the limitations set forth in Shofer I and Judge Ward's Order of February 7, 1993. Based on the foregoing, it is, this 11th day of July, 1994, by the Circuit Court for Baltimore City, ORDERED that Defendant's Motion for Summary Judgment be, and the same hereby is, DENIED. It is further ORDERED that Defendant's Motion for Partial Summary Judgment as to the Plaintiff's Damages be, and the same hereby is, GRANTED.

/s/ Hollander, J.
Judge Ellen L. Hollander

cc: Thomas H. Bornhorst, Esq.
Janet M. Truhe, Esq.
Mark A. Kozolowski, Esq.
Jayson L. Spiegel, Esq.

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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | |
|---|---|
| RICHARD SHOFER<br>Plaintiff<br>v.<br>THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Defendants | CASE NO. 88102069/CL79993<br><br>EXHIBIT E |
| THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Third Party Plaintiffs<br>v.<br>GRABUSH, NEWMAN & CO., P.A.<br>Third Party Defendant | |

## AFFIDAVIT OF RICHARD SHOFER

Richard Shofer, after being sworn upon oath according to law, deposes and states as follows:

That I am the Plaintiff in the above entitled action, have personal knowledge of the matters and facts set forth herein, and am competent to testify hereto.

That I am the sole owner of Catalina Enterprises, Inc. a Maryland corporation which does business as Crown Motors and is located at 5000 Liberty Heights Avenue, Baltimore, Maryland. I am president of Catalina Enterprises, Inc., and am the Trustee of the Catalina Enterprises, Inc. Pension Trust.

Acting on the advice of my pension attorney and plan consultant, Stuart Hack and The Stuart Hack Company, I obtained loans from my voluntary pension account which is a part of the Catalina Enterprises, Inc. Pension Trust. Based on the advice given me by the Defendants, I



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never considered that such loans would generate taxable events or had the potential to qualify as pension distributions and personal income to me, or would be clarified as "prohibited transactions".

In February of 1993, and thereafter, the Department of Labor indicated to me that I would be subject to 100% excise tax surcharges in excess of $300,000.00 if my prohibited transaction loans were not extinguished by repayment.

Under the circumstances, I had no other source of funds available to me except for funds in my pension account. Consequently, in order to avoid excise tax surcharges and possible forfeiture of the entire pension trust, I entered into an agreement with the Department of Labor to make distributions from my pension account as of July 31, 1994 in order to repay these loans. Had other sources of funds been available, I would have utilized those sources. While I knew that the use of these funds would result in the loss of tax sheltered earnings, I believed that the alternative of not repaying the loans and the 100% excise tax surcharge would have resulted in greater damages.

In preventing the assessment of the excise tax surcharge and other penalties, I reclassified $76,600.00 of personal contributions to my account as a part of the reduction of the loan burden and then on July 31, 1994, withdrew an additional $197,295.70 to make further loan repayments in order to preserve the pension plan. I would never had made the loans in question nor incurred the loss of my tax sheltered earnings but for the advice rendered to me by Defendants.

I do solemnly affirm and declare under the penalties of perjury that the matters and facts set forth herein are true and correct, to the best of my information and belief.

3/5/96
DATE

RICHARD SHOFER



1209

EXHIBIT F

| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| **AND** | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL7993 |
| | * | |

* * * * * * *

| | |
|---|---|
| THE STUART HACK CO., et al. | * |
| Third Party Plaintiff | * |
| | * |
| v. | |
| | * |
| GRABUSH, NEWMAN & CO., P.A. | |
| | * |
| Third Party Defendant | * |

* * * * * * * * * * * *

MEMORANDUM AND ORDER

The parties appeared before this Court on February 13, 1995 for a Pretrial Conference. At that time, Plaintiff advised this Court that, no matter what the result of the upcoming non-jury trial in this case (scheduled to begin on February 27, 1995), he will appeal all of the rulings on damages previously rendered by this Court since this case was remanded for trial. See Shofer v. The Stuart Hack Co., 324 Md. 92, 595 A.2d 1078 (1991) which substantially

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| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL7993 |
| | * | |
| * * * * * * | * | |
| THE STUART HACK CO., et al. | * | |
| Third Party Plaintiff | * | |
| | * | |
| v. | | |
| | * | |
| GRABUSH, NEWMAN & CO., P.A. | | |
| | * | |
| Third Party Defendant | * | |

* * * * * * * * * * * *

MEMORANDUM AND ORDER

The parties appeared before this Court on February 13, 1995 for a Pretrial Conference. At that time, Plaintiff advised this Court that, no matter what the result of the upcoming non-jury trial in this case (scheduled to begin on February 27, 1995), he will appeal all of the rulings on damages previously rendered by this Court since this case was remanded for trial. See Shofer v. The Stuart Hack Co., 324 Md. 92, 595 A.2d 1078 (1991) which substantially

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restricted the damages the Plaintiff may recover in this case on his state law claims for negligence and breach of contract in view of the broad pre-emptive effect of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq..

Specifically, on February 17, 1993, this Court (J. Ward) entered judgment in favor of the Defendants on their Partial Motion to Dismiss Plaintiff's Third Amended Complaint for Failure to State a Claim, and held, in accordance with the decision of the Court of Appeals in Shofer v. The Stuart Hack Co., that Plaintiff may not recover damages for excise taxes, prohibited transactions or plan disqualification. This Court also dismissed Plaintiff's claims for punitive damages and attorney's fees.

In addition, on July 11, 1994, this Court (J. Hollander) entered judgment in favor of Defendants on their Motion for Partial Summary Judgment as to Plaintiff's Damages, and held that Plaintiff may not recover damages arising out of excise taxes, prohibited transactions, his failure to follow proper procedures in borrowing from his pension, his inability to refinance his Virgin Islands property, lost salary and lost business profits. This Court denied Defendants' Motion to the extent it requested

dismissal of the Plaintiff's Third Amended Complaint in its entirety.[1]

Lastly, on January 31, 1995, this Court (J. Davis) entered judgment in favor of the Defendants on their Motion for Partial Summary Judgment as to Plaintiff's claim for loss of sheltered earnings within his pension account due to reclassification of personal contributions in the amount of $76,600.00 and subsequent distributions used to extinguish Plaintiff's pension loans.[2]

The Plaintiff claims, and this Court agrees, that the viability of the ERISA-related damage claims, in particular, will impact and dictate this Court's evidentiary rulings on both liability and damage issues. Therefore, this Court, with the consent of all parties and with the recognition that certification should be reserved for the very infrequent case, believes that this matter involves such a situation and that interlocutory appellate review is necessary and appropriate at this time. Accordingly, based on the foregoing, it is this 23rd day of

---

[1] Defendants sought dismissal of Plaintiff's Third Amended Complaint on the ground of pre-emption in view of the recent Supreme Court case of Mertens v. Hewitt Associates, ____ U.S. _____, 113 S.Ct. 2063 (1993).

[2] This Court denied Defendants' Motion without prejudice as to tax penalties and interest.

February, 1995 by the Circuit Court of Baltimore City, Maryland, hereby

ORDERED, pursuant to Maryland Rule 2-602(b), there being no just reason for delay, this Court directs the entry of a final judgment as to its rulings contained in the Order dated February 17, 1993, the Order dated July 11, 1994, and the Order dated January 31, 1995, as revised on February 23, 1995.

ANDRE' M. DAVIS
JUDGE
The Judge's signature appears on the original document

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|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| THE STUART HACK CO., et al. | * | BALTIMORE CITY |
| Defendants | * | |
| * * * * * | * | Case No. 88102069 / CL 79993 |
| THE STEWART HACK CO., et al., | * | Judge Andre M. Davis |
| Third-Party Plaintiff | * | |
| v. | * | |
| GRABUSH, NEWMAN & CO., P.A. | * | |
| Third Party Defendant | | |

* * * * * * * * * * *

ORDER

Plaintiff's (Consent) Motion for revision of the January 31, 1995 Order of this Court having been considered, it is this 23rd day of February, 1995,

ORDERED that the prior ruling of this Court under Order of January 31, 1995, as to Defendants' Motion for Partial Summary Judgment regarding certain categories of Plaintiff's damages, shall be revised as follows:

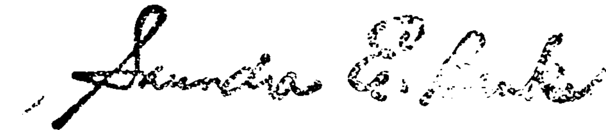
ORDERED that Defendants' Motion is DENIED without prejudice as to tax penalties and interest.

It is further ORDERED that Defendants' Motion is GRANTED as to Plaintiff's claim for lost earnings on the $76,600.00 in personal contributions which he made to his pension and in regard to other lost sheltered earnings on distributions used to extinguish Plaintiff's pension loans. These claims are barred by assumption of the risk, lack of forseeability and pre-emption under the Employee Retirement Income Security Act as that

statute was interpreted by the Court of Appeals in Shofer v. The Stuart Hack Company, et al., 324 Md. 92, 595 A.2d 1978 (1991).

ANDRE' M. DAVIS
JUDGE
The Judge's signature appears
on the original document

MAR 6 1995



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CIVIL DIVISION

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v.

STUART HACK COMPANY, et al.,

Defendants.

THE STUART HACK COMPANY, et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

Case No. 88102069/CL79993

THIRD-PARTY DEFENDANT'S MOTION FOR
MODIFICATION AND MOTION FOR SPECIAL ASSIGNMENT

The Third-Party Defendant, Grabush Newman & Co., P.A. (hereinafter "Grabush"), by its counsel, hereby joins in the request of the Defendants to modify the trial notice in the above-captioned case and moves for special assignment. In addition to the grounds set forth in Defendants' Motion, the Third-Party Defendant Grabush states as follows:

1. The Third-Party Defendant Grabush never received notice of the trial and was unaware that a new pre-trial conference and a new trial date had been scheduled until it received the Defendants' Motion for Modification.

2. Moreover, counsel for the Third-Party Defendant Grabush is unavailable for the June 18, 1996 trial because of a previously scheduled trial in Michael Milan, et al., plaintiffs, v. Marlo Furniture, et al., defendants, Case No.: CAL 94-01146, in the Circuit Court for Prince George's County, Maryland, which trial begins June 10, 1996, and which is expected to last three (3) weeks.

3. Prior to the appeal, there were remaining pre-trial issues and discovery issues to be discussed with this Honorable Court. Therefore, the Third-Party Defendant Grabush respectfully requests that this Honorable Court specially assign this matter pursuant to Maryland Rule 2-504.

Wherefore, the Third-Party Defendant Grabush respectfully requests that the trial date in the above-captioned case be postponed, that this Honorable Court specially assign this matter to one judge, and that this Honorable Court schedule this matter for a court trial as it is non-jury.

Respectfully submitted,

JORDAN COYNE & SAVITS

By Deborah M Whelihan /esd

Deborah M. Whelihan
1100 Connecticut Ave.
Suite 600
Washington, D.C. 20036
(202) 296-4747

Attorneys for Defendant
Grabush, Newman & Co., P.A.

GROUNDS AND AUTHORITIES

1. Md. R. Civ. P. 2-504.

2. Md. R. Civ. P. 2-508.

Deborah M Whelihan (signed)
Deborah M. Whelihan

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Third-Party Defendant's Motion for Modification and Motion for Special Assignment, was mailed, postage prepaid, this 8th day of March, 1996, to:

Janet Truhe, Esquire
Ward, Janofsky & Truhe, P.C.
Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, MD 21204

Douglas Taylor, Esquire
P.O. Box 4556
Rockville, MD 20850

Deborah M Whelihan (signed)
Deborah M. Whelihan

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v.

STUART HACK COMPANY, et al.,

Defendants.

Case No. 88101069/CL79993

THE STUART HACK COMPANY, et al.,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

ORDER

Upon consideration of the Defendants' Motion for Modification, and the Third-party Defendant's Motion for Modification and Motion for Special Assignment, any Opposition of the plaintiff thereto, and the entire record herein, it is this _____ day of ___________, 1996, by the Circuit Court for Baltimore City, Maryland,

ORDERED, that the above-captioned matter be specially assigned; and it is further,

ORDERED, that the trial date of June 18, 1996 is postponed and that the new trial date be scheduled non-jury before this Honorable Court on ____________________, 1996.

______________________________
Circuit Court Judge

copies to:

Deborah M. Whelihan
Jordan Coyne & Savits
1100 Connecticut Ave., Suite 600
Washington, D.C. 20036

Janet Truhe, Esquire
Ward, Janofsky & Truhe, P.C.
Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, MD 21204

Douglas Taylor, Esquire
P.O. Box 4556
Rockville, MD 20850

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IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

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CIVIL DIVISION

| | |
|---|---|
| RICHARD SHOFER,<br><br>Plaintiff,<br><br>v.<br><br>STUART HACK COMPANY, et al.,<br><br>Defendants. | |
| THE STUART HACK COMPANY, et al.,<br><br>Third-Party Plaintiff,<br><br>v.<br><br>GRABUSH, NEWMAN & CO., P.A.,<br><br>Third-Party Defendants. | Case No. 88102069/CL79993 |

MOTION BY DEFENDANT AND THIRD-PARTY DEFENDANT
TO STRIKE PLAINTIFF'S FOURTH AMENDED COMPLAINT

Defendant and Third-Party Defendant, by their respective undersigned counsel, move to strike the plaintiff's Fourth Amended Complaint pursuant to Md. Rule 2-341(a). As grounds therefor, the parties respectfully invite the Court's attention to the attached Memorandum in Support, which is attached hereto and incorporated herein by reference.

WHEREFORE, the Defendant and Third-Party Defendant request

that the plaintiff's Fourth Amended Complaint be stricken.

Respectfully submitted,

JANOFSKY & TRUHE, P.C.

By Permission

Janet M. Truhe

Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, Maryland 21294
(410) 321-4890

JORDAN COYNE & SAVITS

By

John Tremain May
Deborah M. Whelihan
33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036

Attorneys for Defendant
Grabush, Newman & Co., P.A.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion by Defendant and Third-Party Defendant to Strike Plaintiff's Fourth Amended Complaint, was mailed, postage prepaid, this 18th day of March, 1996, to:

Janet Truhe, Esquire
Ward, Janofsky & Truhe, P.C.
Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, MD 21204

Douglas Taylor, Esquire
P.O. Box 4556
Rockville, MD 20850

John Tremain May

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

| | |
|---|---|
| RICHARD SHOFER,<br>Plaintiff,<br>v.<br>STUART HACK COMPANY, et al.,<br>Defendants. | |
| THE STUART HACK COMPANY, et al.,<br>Third-Party Plaintiff,<br>v.<br>GRABUSH, NEWMAN & CO., P.A.,<br>Third-Party Defendants. | Case No. 88101069/CL79993 |

MEMORANDUM IN SUPPORT OF
MOTION BY DEFENDANT AND THIRD-PARTY DEFENDANT
TO STRIKE PLAINTIFF'S FOURTH AMENDED COMPLAINT

Defendant and Third-Party Defendant, by their respective undersigned counsel, have moved to strike the plaintiff's Fourth Amended Complaint pursuant to Md. Rule 2-341(a). As grounds therefor, the parties state as follows:

1. The Plaintiff filed his lawsuit on or about April 11, 1988.

2. Trial in this matter was previously scheduled for February 27, 1995 when the plaintiff requested that this Court allow him to appeal certain Court Orders regarding his damages.

3. Now, nearly eight years later, the plaintiff has filed a Fourth Amended Complaint which merely raises the ad damnum and demands a jury trial.

4. Under Maryland Rule 2-341(b), the plaintiff cannot file his Fourth Amended Complaint without leave of Court. Upon remand, this matter returns to its earlier status. See, Maryland Rule 8-604(d); see also, Schneider v. Davis, 194 Md. 316, 71 A.2d 32 (1950); Dennis v. Dennis, 15 Md. 73 (1960). When the plaintiff stated his intention to appeal, trial was to take place in fourteen (14) days. Plaintiff should not be allowed to take advantage of the filing of an interlocutory appeal within fourteen days of trial. In so doing, the mere filing of the appeal notice necessarily postpones the trial date. Once the appeal is denied, the court cannot possibly reschedule the trial within 15 days. Thus, by noticing an interlocutory appeal any party could avoid the more stringent requirements of Rule 2-341(b). Clearly, plaintiff's attempt to avoid the requirements of Rule 2-341(b) violates the spirit of that Rule.

Consequently, the plaintiff is not permitted to amend his Complaint without leave of court upon remand.

5. In addition, plaintiff waived his right to any jury demand nearly eight years ago. See, Maryland Rule 2-325. The Fourth Amended Complaint merely restates the facts and causes of action originally pleaded in a different form, but does not raise

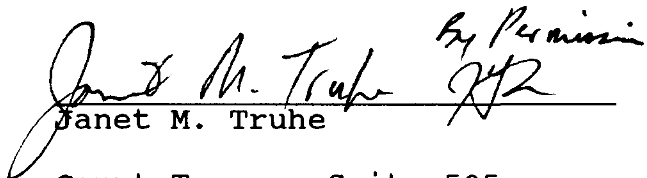
any new substantive issues.[1] See, Luppino v. Gray, 336 Md. 194, 647 A.2d 429 (1994) (if an Amended Complaint simply reformulates or restates a count contained in the original Complaint, a jury trial will not be granted when demanded for the first time in connection with the Amended Complaint).

6. Thus, the plaintiff is not entitled to a jury trial, his jury demand should be stricken, and his increased ad damnum should be stricken as well.

For the reasons set forth herein, the Defendant and Third-Party Defendant request that the plaintiff's Fourth Amended Complaint be stricken.

Respectfully submitted,

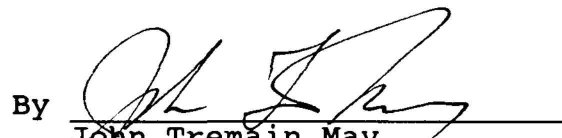
JANOFSKY & TRUHE, P.C.



Janet M. Truhe

Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, Maryland 21294
(410) 321-4890

JORDAN COYNE & SAVITS

By 
John Tremain May
Deborah M. Whelihan

33 Wood Lane
Rockville, Maryland 20850
(301) 424-4161

Mailing Address:

1100 Connecticut Ave., N.W.
Suite 600
Washington, D.C. 20036

Attorneys for Defendant
Grabush, Newman & Co., P.A.

---

[1] In comparing the Fourth Amended Complaint with the Third Amended Complaint, the only changes appear to be increased ad damnum clauses and the belated jury demand.

IN THE CIRCUIT COURT FOR BALTIMORE CITY, MARYLAND

RICHARD SHOFER,

Plaintiff,

v.

STUART HACK COMPANY, *et al.*,

Defendants.

Case No. 88101069/CL79993

THE STUART HACK COMPANY, *et al.*,

Third-Party Plaintiff,

v.

GRABUSH, NEWMAN & CO., P.A.,

Third-Party Defendants.

ORDER

Upon consideration of the Plaintiff's Fourth Amended Complaint, and Motion by Defendant and Third-Party Defendant to Strike Plaintiff's Fourth Amended Complaint, any Opposition of the plaintiff thereto, and the entire record herein, it is this _____ day of __________, 1996, by the Circuit Court for Baltimore City, Maryland,

ORDERED, that the plaintiff's Fourth Amended Complaint be stricken.

______________________________
Judge

copies to:

Deborah M. Whelihan
Jordan Coyne & Savits
1100 Connecticut Ave.
Suite 600
Washington, D.C. 20036

Janet Truhe, Esquire
Ward, Janofsky & Truhe, P.C.
Court Towers, Suite 505
210 W. Pennsylvania Ave.
Towson, MD 21204

Douglas Taylor, Esquire
P.O. Box 4556
Rockville, MD 20850

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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

## NOTICE OF SERVICE OF DISCOVERY MATERIALS

Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, hereby gives notice that on this 12th day of March, 1996, he has served, by postage-paid first class mail, a copy of the First Request For Production of Documents on each of the following counsel of record:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



1230

Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Certificate of Service

I hereby certify that on this 12th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Notice of Service of Discovery Materials to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Douglas R. Taylor

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**IN THE CIRCUIT COURT FOR BALTIMORE CITY**

RICHARD SHOFER
Plaintiff

v.

THE STUART HACK COMPANY

**and**

STUART HACK
Defendants

---

THE STUART HACK COMPANY

**and**

STUART HACK
Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.
Third Party Defendant

CASE NO. 88102069/CL79993

## MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, moves this Honorable Court as follows:

1. That the gravamen of the Fourth Amended Complaint filed herein involves erroneous and negligent professional advice given orally and in writing to Plaintiff by the Defendants Stuart Hack and The Stuart Hack Company. That the factual predicate for the establishment of the primary acts of negligence are found in excerpts from the depositions of both the Plaintiff and of the Defendant Stuart Hack, and in the letter of August 9, 1984 written by the Defendant Stuart Hack on behalf of the Defendant The Stuart Hack Company. The letter contains a summary of oral advice rendered by the Defendants to the Plaintiff in an earlier telephone call. That the letter of August 9, 1984, a copy of which is attached hereto, is erroneous on its face and constitutes professional malpractice as a matter of law. As set forth herein, after eight years of litigation,

Defendants have offered no proof or evidence that such a letter is not negligence per se, and that Defendants are not liable for breach of contract or negligence.

2. That these acts constitute a breach of the ordinary care and skill required of an attorney and pension law professional, and therefore, represent professional malpractice. The fact that these acts constitute professional malpractice is established by way of the affidavit of plaintiff's expert witness, Edward Kabala, Esquire, of Pittsburgh, Pennsylvania, which is attached hereto, along with Mr. Kabala's curriculum vitae, and prayed to be incorporated herein.

3. That the Defendants have offered no evidence to contradict or rebut the evidence in the record which clearly establishes the liability of the Defendants in this case. The entire focus of the Defendants' case has been to attempt to have the complaints filed by Plaintiff dismissed on the grounds of preemption, or to limit the scope of the damages which Plaintiff may recover. At no time have they offered any evidence to prove, or suggest that they can prove, that Defendants have not been negligent as alleged in this matter.

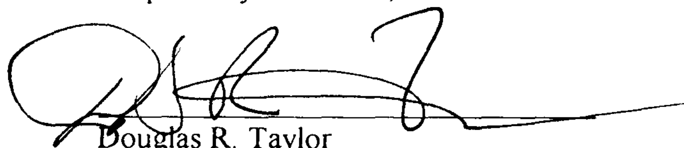
4. Plaintiff suggests that, in the interest of judicial economy, this Court enter an order determining that both Defendants have breached the duties which they owed Plaintiff, and that liability be found in favor of the Plaintiff. Once the issue of liability has been resolved, the case may then proceed to determine the exact amount and the type of damages which Plaintiff may recover.

5. Plaintiff further suggests that this matter be set for trial before a jury so that both parties may present their respective cases on the sole issue of Plaintiff's damages.

6. That there is no material fact in dispute as to Defendants' negligence and breach of contract in this matter, and Plaintiff is entitled to judgment as a matter of law.

WHEREFORE, Plaintiff moves that this Honorable Court enter an order granting Plaintiff summary judgment as to liability, and that the matter proceed to trial for the sole purpose of determining the damages due from Defendants to Plaintiff.

Respectfully submitted,



Douglas R. Taylor
Attorney For Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Points of Authorities In Support of Motion For Summary Judgment On The Issue of Liability

1. The Plaintiff moves for summary judgment on the issue of liability pursuant to Maryland Rule 2-501.

2. The purpose of the summary judgment procedure is to determine whether or not there is an issue in the controversy that is sufficiently material to be tried. *Commercial Union Insurance Co. v. Porter Hayden Co.*, 96 Md. App. 626 A 2d. 979 (1993).

3. As to liability, there is no dispute as to any material facts and Plaintiff is entitled to a judgment as a matter of law as to this issue. Summary judgment procedure is appropriate as a means of determining liability while leaving the assessment of damages open for resolution by way of trial or hearing. *J. C. Penny Co., Inc. v. Harker*, 23 Md. App. 121, 326 A 2d 228 (1974).

4. Plaintiff's affidavit sets forth a summary of his testimony on this issue, and is based on his personal knowledge and incorporates by reference relevant portions of his and Stuart Hack's depositions. That none of the pleadings submitted by Defendants controvert the undisputed facts set forth by Plaintiff, or alleged by him as to the Defendants' liability in this matter.

5. As stated in his Motion, Plaintiff has also attached an affidavit from his expert witness, Edward Kabala, which clearly establishes Defendants' liability in this case.

## Certificate of Service

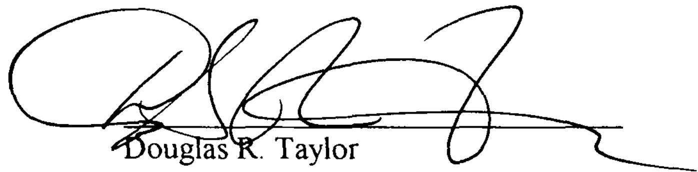
I hereby certify that on this 19th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion For Summary Judgment On The Issue of Liability to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company



1721

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

4623 Falls Road
Baltimore, Maryland 21209
(301) 366-6700
Washington DC 621-4064

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

**EXHIBIT A**

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

SH:mn

1236

IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | |
|---|---|
| RICHARD SHOFER<br>Plaintiff<br><br>v.<br><br>THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Defendants | CASE NO. 88102069/CL79993 |
| THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Third Party Plaintiffs<br>v.<br>GRABUSH, NEWMAN & CO., P.A.<br>Third Party Plaintiffs | |

AFFIDAVIT OF EDWARD J. KABALA

EDWARD J. KABALA, after being sworn upon oath according to law, deposes and states as follows:

1. That he is an attorney admitted to practice law in the Commonwealth of Pennsylvania and has offices at 200 First Avenue, Pittsburgh, Pennsylvania. That he is a shareholder in the firm of Kabala & Geeseman, and his practice is primarily in the area of professional corporations' employee benefits, taxes and pension law.

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2. That he has previously testified in court proceedings as an expert witness in the area of pension law and he is submitted as an expert witness in this case. That his curriculum vitae is attached hereto and prayed to be incorporated herein. That specifically he has rendered opinions on the issue of the standard of care required of an attorney advising clients with respect to modifications of pension plans and the client's financial dealings with such plans.

3. That he has reviewed the deposition of Defendant Stuart Hack given in the course of these proceedings and also reviewed the letter which Defendant Hack wrote, dated August 9, 1984, and sent to Plaintiff. That based on an analysis of these documents, it is the opinion of the undersigned that the Defendants performed functions for the Plaintiff which were below the standard of care expected of an attorney or plan administrator or service provider and that such level of performance constitutes professional malpractice.

4. Specifically, the letter of August 9, 1984 written by Defendant Hack is wrong on its face in several areas. First, it is blatantly incorrect when it asserts that there was, at the time, or is no limit on the amount which can be borrowed against the voluntary account of a participant or the length of time the loan can be outstanding. There is a limit of time for which any loan from a plan can be outstanding as set forth in Section 72(p) of the Code. Loans must also meet the standards of ERISA, which is a separate requirement from compliance with 72(p). ERISA Section 408(b)(1) requires that the loan must be in accordance

with the terms of the plan, must be a reasonable rate of interest, must be adequately secured and cannot be made available to highly compensated employees in amounts greater than to other employees. These requirements are also set out in Section 4975(d)(1) of the Code. The advice supplied and the plan, as it was or as amended by the Defendants, did not permit loans without limits on voluntary accounts.

5. Furthermore, Defendant Hack's statement that the account by and of itself can stand as collateral for a loan from a bank or other source is erroneous. The use of an account balance for such purpose is subject to the limitations set out in Section 72(p). Violation of this section creates a taxable event, and results in a prohibited transaction.

6. The statement in the aforesaid letter that TEFRA provisions on the limits of loans apply only to employer accounts and specifically do not apply to employee voluntary account is wrong. TEFRA provisions do apply and make no distinction between voluntary or employer contribution accounts.

7. The last sentence in the aforesaid letter states that the terms of the loan must be reasonable as to interest rate and pay-back period, but that advice is misleading and inadequate. The pay-back period must be five (5) years or less and the terms of the loan must provide for adequate security which must be reasonable in the judgment of either the Department of Labor or the Internal Revenue Service. The advice rendered is not in accordance with ERISA Section 408(b)(1), Section 4975 of

the Internal Revenue Code and Section 72(p) of the Internal Revenue Code and is incorrect.

8. The plan administrator had a duty to either review the terms of the plan and provide advice as to how the plan would have to be amended before any loans were made or, at the least, advise the employer that the loan provisions must be reviewed and, perhaps, amended.

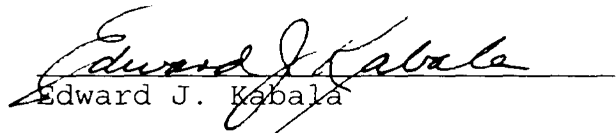
9. The plan administrator also had a duty in doing annual reconciliations and financial reviews and preparing forms 5500 and 5500C to determine whether any loans were made and to determine if any such loans were prohibited transactions and whether or not any such loans complied with 72(p). In particular, when data supplied by an employer to the administrator preparing form 5500 or 5500C shows large receivables and participant receivables the administrator must, within the standards of care, inquire into the circumstances surrounding such receivables to establish their nature and their legitimacy under the terms of the plan.

10. The letter of August 9, 1984 does not address the issue of the taxability of loans and it was negligence not to have done so.

11. The amendment to the plan in 1985, retroactive to 1984, constituted negligence in that it fell below the standard expected of an attorney advising clients in the area of pension laws. The standard 72(p) type "employer account only loan" provisions were inserted in the plan without determining whether, in fact, there were already loans outstanding and whether one

was, in fact, retroactively making something which may have been all right at the time into a prohibited transaction.

12. In summary, Defendants had held themselves out to be plan administrators and experts in plan administration. They charge Two Hundred Dollars ($200.00) per hour for their expertise. When questioned about the feasibility of obtaining loans from the plan, they have a duty to give a full and complete answer. If they did not know the answer, there is a duty to read the plan document and to ensure that the advice they gave was accurate. The Defendants had a duty to prepare checklists for proper review of plan information and a duty to train Defendants' employees to find and highlight unusual items, such as Four Hundred Thousand Dollars ($400,000.00) receivables. Defendants also had a duty to ensure that the Plaintiff did not file incomplete or inaccurate tax forms.

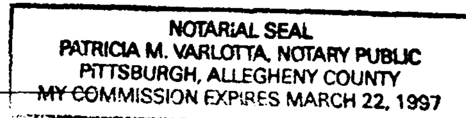


Edward J. Kabala

SUBSCRIBED AND SWORN before me, a Notary Public for the County of Allegheny, State of Pennsylvania, this 12th day of March, 1996.

Notary Public

My Commission Expires: 3-22-97




EJK/map 3/11/96
DIR:WORKING
KABALA.AFF

# EDWARD J. KABALA

## EDUCATION
Pennsylvania State University, B.S. 1964
Duquesne University School of Law, J.D. 1970

## EXPERIENCE
1964-1969 Allegheny Ludlum Steel Company
Titanium Metals Corporation of America
Employed as an Industrial Engineer at AL and its subsidiary TMCA; progressed to Senior Industrial Engineer

1969-1971 United States Steel Corporation
Employed as a Patent Engineer at U.S.S. Research Laboratory and later as an Attorney in the Commercial section of the U.S.S. Law Department

1971-Present Private practice of law with firms specializing in healthcare law, business and estate planning, professional and business corporations, pensions and financial planning. Currently President of Kabala and Geeseman, a law firm professional corporation whose clients include over 3,000 physicians, the Allegheny County Medical Society as well as businesses and professional corporations maintaining over 1,000 pension and profit sharing plans.

Author and lecturer on subjects relating to professional corporations including healthcare mergers, joint ventures and third party reimbursement law, qualified plans, estate planning, fringe benefits, financial and tax planning.

## MEMBERSHIPS
American Bar Association
American Bar Association Committee on Taxation, Employee Benefits Committee; Professional Service Organizations Committee
American Bar Association Committee on Corporate, Business and Banking Law, Charter Member of Employee Benefits Subcommittee
American Society of Hospital Attorneys
Hospital Association of Pennsylvania
Pennsylvania Society of Healthcare Attorneys
Pennsylvania Bar Association
Allegheny County Bar Association
Oxford Who's Who
Marquis Who's Who in American Law
Sterling Who's Who, U.S. Registry Who's Who
1993 Recipient of Cancer Support Network's Crystal Award for Leadership and Community Service
1994 Chairman, Board of Trustees, Cancer Support Network
1995 Editorial Board, Today's Health Care Magazine

1242

IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | |
|---|---|
| RICHARD SHOFER<br>Plaintiff<br>v.<br>THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Defendants | CASE NO. 88102069/CL79993 |
| THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Third Party Plaintiffs<br>v.<br>GRABUSH, NEWMAN & CO., P.A.<br>Third Party Defendant | |

## AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY

Richard Shofer, after being sworn upon oath according to law, deposes and states as follows:

1. That he is the Plaintiff in the above entitled action, has personal knowledge of the matters and facts set forth herein, and is competent to testify hereto.

2. That he is the sole owner of Catalina Enterprises, Inc. which does business as Crown Motors and is located at 5000 Liberty Heights Avenue, Baltimore, Maryland. That additionally, he is president of Catalina Enterprises, Inc., and is the Trustee of the Catalina Enterprises Pension Trust.

3. That in approximately 1971 or 1972, Catalina Enterprises Pension Trust had been established and Grabush Newman, who acted both as accountants for me personally and my

business, suggested that I contact the Defendants for the purpose of reviewing and revising the pension plan.

4. That the Defendant, Stuart Hack and the Defendant, The Stuart Hack Company were hired as pension consultants. The Defendants rewrote the pension plan and corrected mistakes in the prior plan.

5. That the Defendants held themselves out to be experts in the area of pension law and pension taxation. At the time the Defendants were hired by me, they were the second largest pension consulting firm in the State of Maryland. With respect to any pension law or tax matter, Defendants stated to me: "We are consultants. You can consult us or your accountant." I believed that they knew as much or more about pension law and pension taxation than my accountants. On pension matters, I consulted them rather than my accountant.

6. As a part of the consulting agreement, financial data and accounting information was sent to Defendants after the end of each calendar year. Defendants prepared the 5500 forms for submission to the Internal Revenue Service. Additionally, Defendants were supplied with a balance sheet and a P & L Statements for each year as well as information as to which employees would qualify for pension benefits.

7. At about the time the consulting agreement was made with Defendants or shortly thereafter, the Defendants assigned an employee, Pam Sommers, to do the pension work on my account. Ms. Sommers obtained all the needed information from me and my business and made that information available to Defendant, Stuart Hack. Specifically, my contact person at the Defendants' offices was Pam Sommers and all information needed was given to her each year.

8. Sometime later in our relationship, Ms. Sommers and Defendants terminated her employment. Subsequently, I hired Pam Sommers and she worked out of my office, gathering and maintaining business records and data and producing balance sheets which were then provided to Defendants.

9. All the information pertaining to loans which I personally made from the pension trust account following Defendants' advice on August 9, 1984 was recorded on information supplied to Defendants. It is clear that the Defendants misread the balance sheet information sent to them, or they never read the balance sheets at all. It is clear from the balance sheet information that the loans reflected thereon were personal loans made by me. The parent company also owed money

to the pension trust for repossessions, but not for any loans. The Defendants negligently misread, or failed to read the balance sheets, and mishandled the information provided to them.

10. At the time of the Defendants negligent acts as set forth in the Fourth Amended Complaint, they were engaged by me and my company as pension consultants and had been for more than ten years prior thereto.

I do solemnly affirm and declare under the penalties of perjury that the matters and facts set forth herein are true and correct, to the best of my information and belief.

3/15/96
DATE

RICHARD SHOFER

114G.

# IN THE CIRCUIT COURT FOR BALTIMORE CITY

1996 APR -1 A 7:20

CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

and

STUART HACK

Defendants

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

## PLAINTIFF'S RESPONSE TO THIRD-PARTY DEFENDANT'S MOTION FOR MODIFICATION AND MOTION FOR SPECIAL ASSIGNMENT

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, for response to Third-Party Defendant's Motion for Modification and Motion for Special Assignment respectfully states as follows:

1. That Plaintiff has no objection to a continuance of the present trial date of June 18, 1996 for the reasons stated in the Third Party Defendant's Motion. Additionally, Plaintiff has no objection to having this case specially assigned to one judge, since the factual and legal history of the case has now become extensive. In light of the present posture of the case, certain judicial economics will obviously be realized by having one judge preside over pre-trial motions and the trial of the case itself.

2. Plaintiff has filed a Fourth Amended Complaint in this matter, and has requested that the case be tried to a jury. When the case was originally filed, there were allegations which



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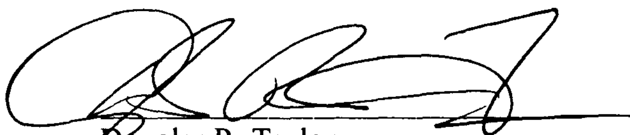
involved the Employee Retirement Income Security Act ("ERISA"), a complex federal statute which the parties believed would best be resolved by a judge. The nature of the allegations of the Fourth Amended Complaint sound in tort and contract, and the case is now a professional malpractice case involving issues easily understood by a jury. Since the nature of the case has changed, Plaintiff believes that he is entitled to a jury trial.

WHEREFORE, Plaintiff concurs in Third Party Defendant's Motion that the present trial date be postponed and that the case be specially assigned, but requests that it be retained on the trial docket as a jury trial.



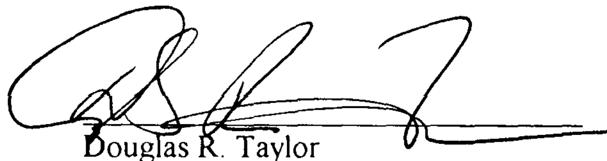
Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

**Certificate of Service**

I hereby certify that on this 19th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Response to Third-Party Defendant's Motion for Modification and Motion for Special Assignment to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

# IN THE CIRCUIT COURT FOR BALTIMORE CITY

RICHARD SHOFER

Plaintiff

v.

THE STUART HACK COMPANY

**and**

STUART HACK

Defendants

---

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

CASE NO. 88102069/CL79993

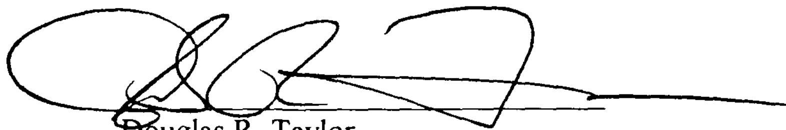
RECEIVED
CIRCUIT COURT FOR
BALTIMORE CITY
1996 APR 11 P 2:58
CIVIL DIVISION

## NOTICE OF SERVICE OF DISCOVERY MATERIALS

Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, hereby gives notice that on this 27th day of March, 1996, he has served, by postage-paid first class mail, a copy of Interrogatories on each of the following counsel of record:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



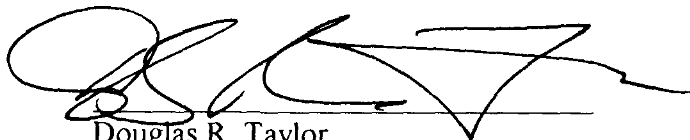
Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

**Certificate of Service**

I hereby certify that on this 27th day of March, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of Interrogatories to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor



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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | |
|---|---|
| RICHARD SHOFER<br>Plaintiff<br>v.<br>THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Defendants | CASE NO. 88102069/CL79993 |
| THE STUART HACK COMPANY<br>and<br>STUART HACK<br>Third Party Plaintiffs<br>v.<br>GRABUSH, NEWMAN & CO., P.A.<br>Third Party Defendant | |

RECEIVED
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BALTIMORE CITY
1996 APR 11 P 2:57
CIVIL DIVISION

## PLAINTIFF'S OPPOSITION TO MOTION BY DEFENDANT AND THIRD PARTY DEFENDANT TO STRIKE PLAINTIFF'S FOURTH AMENDED COMPLAINT

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, in opposition to the Motion To Strike Plaintiff's Fourth Amended Complaint jointly filed by the Defendants and Third Party Plaintiffs and Third Party Defendant respectfully states as follows:

1. That Defendants, Third Party Plaintiffs and Third Party Defendant cite Maryland Rule 2-341 as authority for their Motion To Strike Plaintiff's Fourth Amended Complaint which was filed in this Court on March 1, 1996. The Motion recites the fact that this case had been set to go to a trial on the merits on February 27, 1995 when the trial judge certified three orders of the court as final judgments pursuant to Maryland Rule 2-602(b) so that those orders could be appealed directly to the Maryland Court of Special Appeals. Indeed the movants herein concurred in that procedure and the Defendants and Third Party Plaintiffs noted a cross appeal.



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The Maryland Court of Special Appeals determined that the three orders entered herein were not final, appealable orders and remanded this case for trial.

2. Following remand, this Court established a new trial date, which is presently set for June 18, 1996, although both movants have filed motions to continue that trial date. In any event, Maryland Rule 2-341 provides full authority for the filing by the Plaintiff of an amended complaint without the necessity of obtaining leave of court to do so, where such amendment is made more than 15 days prior to the trial date. [See Maryland Rule 2-341(a)].

3. In their Motion and Memorandum in support thereof, movants have adopted the rather inventive argument that Maryland Rule 2-341(b) applies to Plaintiff's effort to file a Fourth Amended Complaint because the Fourth Amended Complaint was filed within fourteen days of the original trial date. That conclusion is reached by applying (or misapplying) Rule 8-604(d) which sets forth the effects of a remanded case. Movants contend that the case returns to the court, its status unchanged, as if no appeal had been taken when an appeal is dismissed.

4. Movants argue that the unchanged status of the case also applies to its posture vis a' vis the trial date. This is a preposterous and egregious misapplication of the rule. The rule obviously refers to the legal status of the case, not its status with regard to the trial date. Indeed, the rule itself contains no such language that even hints that the case is remanded in a posture where amendments may only be made with leave of court. Indeed, there is no authority for such a position and all the authority is contrary to the position asserted by movants.

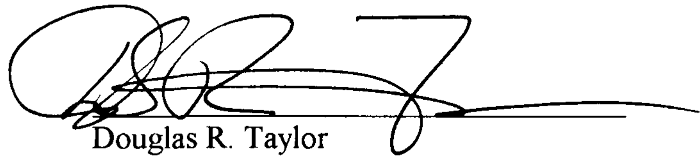
5. It should be noted that Plaintiff had also filed a Third Amended Complaint following reversal of this Court's order dismissing Plaintiff's Second Amended Complaint. The Third Amended Complaint was filed in 1992, and was filed without the necessity of obtaining leave of court to do so. Indeed, the Third Amended Complaint was filed without objection from movants.

6. Movants also complain that the Fourth Amended Complaint introduces no new allegations and only seeks an increase in the ad damnum provisions. If movants find little or no change between the Third Amended Complaint and the Fourth Amended Complaint except for the damages sought, there really should be no objection on their part with respect to the filing of this amended complaint. However, Plaintiff has expanded the allegations of the Defendants past negligent conduct to provide a factual basis for the consideration of an award of punitive damages in this case. Plaintiff believes that the nature and extent of Defendants' conduct, even considered

in light of the more stringent requirements now in effect for an award of punitive damages, justifies the award of punitive damages.

7. Plaintiff has requested a trial by jury in the Fourth Amended Complaint, and this Court has docketed this trial as a jury trial. As suggested in other pleadings, Plaintiff believes that the nature of the case has changed, and that it is a straight forward professional malpractice case which requires no particular expertise on the part of a jury to hear and decide. There are no direct elements of the ERISA statute involved in the underlying negligence and breach of contract, and Plaintiff should be entitled to have a jury hear the case.

WHEREFORE, Plaintiff requests that this Honorable Court enter an order dismissing Movants' Motion To Strike Plaintiff's Fourth Amended Complaint and that this case continue to be docketed as a trial by jury.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Points and Authorities

1. Maryland Rule 2-341(a) specifically states that a party may file an amendment to any pleading at any time, without leave of court, prior to 15 days before a scheduled trial date. The Fourth Amended Complaint was filed on March 1, 1996. Trial in this matter is presently scheduled for June 18, 1996.
2. "At any time prior to fifteen days of a scheduled trial date, a party may amend a pleading simply by filing an amendment or the amended pleading desired, and the amendment is effective when filed." Niemeyer and Schuett, Maryland Rules Commentary, 2nd Edition, p. 228.
3. "Unquestionably, the most significant portion of the Maryland Rule pertaining to amendment of pleadings, Rule 2-341, is its penultimate sentence. This embodies the rule's spirit, the remainder of the rule sets forth the means by which this spirit is effected. The rule is remarkable for its lack of mandatory terms." Lynch & Bourne, Modern Maryland Civil Procedure. 1993, p. 417.

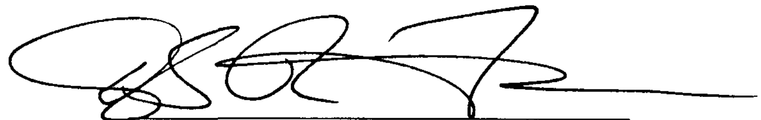
4. _Hawes v. Liberty Homes, Inc._, 100 Md. App. 222, 640 A 2d 743, cert. denied, 336 Md. 300, 648 A 2d 203 (1994).

**Certificate of Service**

I hereby certify that on this 11th day of April, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Plaintiff's Opposition To Motion By Defendant And Third Party Defendant To Strike Plaintiff's Fourth Amended Complaint to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

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DIVISION

RICHARD SHOFER

Plaintiff

v. CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

---

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

## FIFTH AMENDED COMPLAINT

The Plaintiff, Richard Shofer (hereinafter referred to as "Shofer"), by his attorney, Douglas R. Taylor, files this FIFTH AMENDED COMPLAINT, and for reasons stated as follows:

### Facts Common To All Counts

1. That Richard Shofer, a resident and domiciliary of the State of Maryland, is the president and sole stockholder of Catalina Enterprises, Inc., a Maryland Corporation which does business as Crown Motors in the City of Baltimore. Additionally, Shofer is a participant in the Catalina Enterprises, Inc. Pension Plan.

2. That the Catalina Enterprises, Inc. Pension Plan (hereinafter referred to as "the Plan"), is a qualified pension which was established in 1971 for the employees of Catalina Enterprises, Inc.



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3. That the Defendant, The Stuart Hack Company ("hereinafter referred to as "the Hack Company"), is a Maryland Corporation established by the Defendant, Stuart Hack and which provides professional pension plan consulting services.

4. That the Defendant, Stuart Hack (hereinafter referred to as "Hack"), is a licensed attorney, a member of the Maryland Bar, who is a professional actuary and who designs, creates and administers pension plans. That he is also an employee of the Defendant Hack Company.

5. That at all relevant times herein, Plaintiff, Shofer was the sole trustee of the Catalina Enterprises, Inc. Pension Plan and also beneficiary of such Plan. That at all relevant times, Hack and the Hack Company were actively and regularly involved in the administration and maintenance of said Plan.

6. That in approximately 1971, the professional relationship between the Plaintiff and the Defendants Hack and the Hack Company commenced when the Plaintiff hired the Defendants to administer a pension plan for Shofer's corporation and its employees, and further to act as a pension consultant.

7. That in approximately 1971, the Defendants Hack and the Hack Company did in fact prepare the Catalina Enterprises, Inc. Pension Plan. That between 1971 and 1988, the Defendants Hack and the Hack Company acted as pension consultants to the Plan and became intimately acquainted with the workings of Plaintiff's business and routinely and regularly rendered advice with respect to the maintenance and operation of such Plan. That said work and consulting services included the preparation of certain Plan's annual federal returns as well as its statements to participants as well as changes in the Plan as necessitated by changes in the tax laws.

8. That at all times during the course of their relationship with the Plaintiff, Defendants Hack and the Hack Company held themselves out to Plaintiff as experts on pension laws and in the tax aspects of pension planning and frequently rendered advice to Plaintiff in these areas.

9. Based on his course of dealings with Defendants Hack and the Hack Company, Plaintiff reasonably relied on the representations of Defendants Hack and the Hack Company with respect to their knowledge and expertise in the areas of pension law and taxation.

That said reliance and expectation reasonably extended to Defendants Hack and the Hack Company's duty and obligation to warn, advise and bring to Plaintiff's attention any adverse tax consequences which might result from any advice given or actions taken by Defendants Hack and the Hack Company.

10. That at some time shortly prior to August 9, 1984, Shofer sought advice from Defendants Hack and the Hack Company as to whether or not it would be advisable and in his interests to borrow money from the Pension Plan, or to use the assets in the Pension Plan as collateral for a loan or loans.

11. That following a telephone conversation between Shofer and Defendant Hack, the Defendants Hack and the Hack Company responded with an opinion letter dated August 9, 1984, wherein Defendants Hack and the Hack Company advised and assured Shofer that he could borrow up to 100% of his voluntary account. That said letter failed to mention the tax consequences of such transactions, although the sole purpose of Hack's business is to shelter money from taxes. That a copy of said letter is attached hereto, marked Exhibit "A", and is incorporated herein.

12. That at the date and time aforesaid as described in Paragraph 11, the Defendants Hack and the Hack Company owed a duty to Shofer to provide accurate and correct information pertaining to such loan transactions involving the Pension Plan, and especially to provide advice and counsel as to the adverse tax consequences of such loan or loans.

13. That notwithstanding such duty and obligation, the Defendants Hack and the Hack Company failed to warn and appraise Shofer of the actual and potential catastrophic tax consequences from borrowing monies from the Pension Plan.

14. That acting in reliance on the counsel and advice given to him, Plaintiff proceeded to borrow monies from the Pension Plan. That at the time the loans were made, Plaintiff had no knowledge, not even an inkling or a clue, that such loans could generate liabilities for income taxes, excise taxes, penalties, interest or could be construed as an income distribution or constitute a "prohibited transaction", which would expose himself personally to enormous monetary losses.

15. That acting on the advice and counsel of the Defendants Hack and the Hack Company, Shofer proceeded to borrow from his voluntary account in the Plan in 1984, 1985 and 1986, the total aggregate of such loans being in excess of $300,000.

16. That, in truth and in fact, such loan transactions in excess of $50,000 constituted taxable personal income to Shofer, and separately constituted prohibited transactions by a disqualified person, and also represented premature distributions, all to the effect that Shofer incurred and continues to incur substantial federal and state tax liabilities, excise taxes, liability for

penalties and interest, professional expenses for accountants, pension consultants and attorneys, all necessary to correct and rectify his tax filings and bring him into compliance with federal and state tax laws and regulations.

17. That in addition to the direct costs he has incurred as set forth in Paragraph 16, Shofer has suffered the loss of personal income from his business and his business has lost income from the loss of credit directly attributable to the increased tax liabilities and actions taken by taxing authorities. Furthermore, Shofer was forced to withdraw his own funds from a tax sheltered account in order to pay his additional taxes, penalties and interest and to restore the Pension Plan to its position prior to his making the aforesaid loans, all at great financial loss to himself.

18. That had Shofer received accurate and competent advice from the Defendants Hack and the Hack Company with respect to the clear and foreseeable consequences of such loan transactions, none of the aforesaid damages, expenses and losses would have been incurred by him.

19. That not only were the Defendants guilty of the acts of primary negligence in rendering Shofer negligent advice orally and in writing, they persisted rendering incorrect and improper advice concerning the loan transactions even as late as December 16, 1986, when Defendant Hack Company issued a memorandum attempting to persuade Shofer's accountants that the risk of tax liability for these loan transactions was very low.

20. That in 1987, Defendant Hack compounded his original negligence by counseling Shofer to do nothing about the erroneous tax returns which Shofer had filed in the tax years 1984 and 1985. Such advice is contrary to law and, in effect, advised and counseled Shofer to commit criminal acts, e.g., tax evasion and willful failure to file amended returns.

21. That Defendant Hack's actions were taken to protect himself and to avoid civil liability for his negligent advice in this matter. That such conduct by Defendant Hack represents conduct characterized by an evil motive and a conscious, deliberate and reckless disregard for the welfare of his client, designed solely to protect himself.

## Count I

**(Negligence)**

22. Plaintiff incorporates Paragraphs 1 through 21 in this Count.

23. That at all times relevant to the allegations of this Complaint, Defendants held themselves out to the public in general, and represented themselves to Shofer in particular, as possessing that degree of knowledge, experience, skill, and judgment in the area of advising as to the tax consequences of transactions involving voluntary accounts in pension funds that was to be expected of a reasonably competent attorney and consultant in such business in Maryland in 1984.

24. That Defendants owed a duty of reasonable care to Shofer to provide him with reasonably competent advice as to the taxes, penalties, and other consequences of trustees and participant borrowing from his voluntary account in the Plan.

25. That Defendants breached their duty to Shofer, _inter_ _alia_, by failing to advise concerning such personal loans against his voluntary account in the Plan that Shofer was a disqualified person as a trustee, that any such transactions constitute prohibited transactions; that the proceeds of such participant loans in excess of $50,000.00 were taxable as ordinary income to Shofer; that such loans threatened the qualification of the Catalina Pension Plan; that such loans would expose Shofer to additional tax liability for excise taxes and penalties and interest; by deliberately rendering professional advice without research, without regard to the issues raised, and without regard for the truth or falsity of the information provided, omitted, or implied, when a reasonably competent consultant and professional in this area would not have so acted, failed to act, or so advised.

26. That as a direct and proximate consequence of the acts and omissions of the Defendants set forth herein, Shofer has incurred, and will in the future incur, losses and expenses in the form of additional income taxes, interest, penalties, excise taxes, attorneys' fees, accountants' fees, loss of income, loss of profits, loss of income from tax sheltered earnings, and other expenses and damages which would not have been incurred but for the negligence of the Defendants.

27. That in addition to the acts of negligence and omissions described herein, Defendant Hack engaged in a pattern of acts of deceit and deception and deliberately and willfully advised and counseled Shofer to violate the law in order to protect himself from the consequences of his own negligence. That such conduct was willful, deliberate, intentional and made with full



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knowledge that, if acted upon, Shofer's personal and business welfare would be seriously jeopardized and endangered.

WHEREFORE, Plaintiff, Richard Shofer demands judgment jointly and severally against the Defendants, Stuart Hack and The Stuart Hack Company in the sum of Five Million Dollars ($5,000,000.00) Compensatory Damages and Three Million Dollars ($3,000,000.00) Punitive Damages, plus costs of this action and interest from the date of judgment.

## **Count II**

**(Breach of Contract)**

28. Plaintiff incorporates Paragraphs 1 through 21 in this Count.

29. Shofer entered into a contract with Defendants Hack and the Hack Company to provide him with accurate and legally correct expert and professional advice concerning his inquiry regarding loans to be made against his account in the Pension Plan, including the tax consequences of such loans.

30. That notwithstanding their duty owed to Plaintiff as aforesaid, the Defendants Hack and the Hack Company breached said duty by rendering to Plaintiff incomplete, incorrect and inaccurate advice with respect to the tax consequences of loans made from the Pension Plan. That, specifically, Defendants Hack and the Hack Company failed to inform Plaintiff that borrowing against his voluntary account would cause him to incur substantial tax liabilities, penalties and other charges and expenses directly related to such loans.

31. That as a direct and proximate result of such acts and omissions of the Defendants Hack and the Hack Company, Plaintiff has incurred, and will in the future incur, liabilities for additional income taxes, interest, penalties, excise taxes, attorneys' fees, accountants' fees, loss of income, lost profits, loss of earnings on investments and other expenses and damages which would not have been incurred but for the breach of contract which Defendants Hack and the Hack Company had made with Plaintiff.

WHEREFORE, Plaintiff, Richard Shofer demands judgment jointly and severally against the Defendants, Stuart Hack and The Stuart Hack Company in the sum of Five Million Dollars ($5,000,000.00) compensatory damages and Three Million Dollars ($3,000,000.00) in punitive damages, plus costs of this action and interest from the date of judgment.

## Count III

**(Fraud and Deceit)**

32. Plaintiff incorporates Paragraphs 1 through 21 in this Count.

33. That at or about the time the Defendants transmitted their opinion letter of August 9, 1984 to Plaintiff, Defendants also issued an "invoice" to Plaintiff for "research" done in connection with the advice rendered in said letter.

34. That the "invoice" for "research" had the effect on Plaintiff of reinforcing the accuracy of the legal opinions expressed by the Defendants in their letter of August 9, 1984.

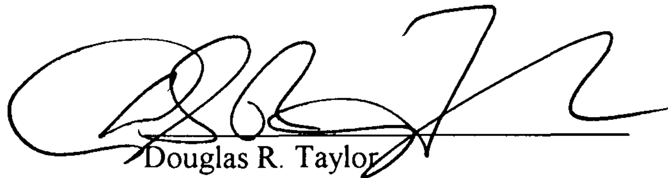
35. That, in fact, the representation that Defendants had performed research in this matter was false, and was known to be false by Defendants when they issued the "invoice".

36. That the "invoice" issued by Defendants to Plaintiff sought to obtain money from Plaintiff for work not performed by Defendants and was made for the purpose of defrauding Plaintiff.

37. That the Plaintiff not only relied on the Defendants' misrepresentation that they had "researched" the issues covered in their letter of August 4, 1987, but the Plaintiff had the right to rely on it with confidence of its truth and accuracy. Further, Plaintiff would not have undertaken to make the loans he did make, and from which his damages occurred, had the representations of the Defendants not been made.

38. That as a direct and proximate consequence of the acts and omissions of the Defendants set forth herein, Plaintiff has incurred, and will in the future incur, losses and expenses in the form of additional income taxes, interest, penalties, excise taxes, attorneys' fees, accountants' fees, loss of income, loss of profits, loss of income from tax sheltered earnings and other expenses and damages which would not have been incurred but for the fraud and deceit of the Defendants.

WHEREFORE, Plaintiff, Richard Shofer demands judgment jointly and severally against the Defendants, Stuart Hack and The Stuart Hack Company in the sum of Five Million Dollars ($5,000,000.00) compensatory damages and Three Million Dollars ($3,000,000.00) in punitive damages, plus costs of this action and interest from the date of judgment.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

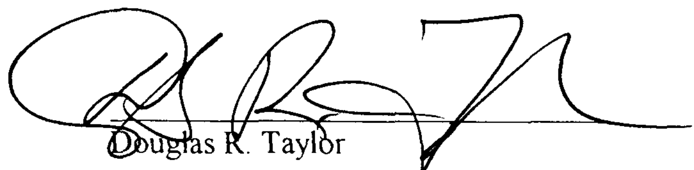
**PLAINTIFF HEREWITH DEMANDS A TRIAL BY JURY ON ALL ISSUES RAISED HEREIN.**

## Certificate of Service

I hereby certify that on this 11th day of April, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Fifth Amended Complaint to the following:

Ms. Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

4623 Falls Road
Baltimore, Maryland 21209
(301) 366-8700
Washington DC 621-4064

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

**EXHIBIT A**

Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employer accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.

Cordially,

Stuart Hack

SH:mn

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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

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CITY
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CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v. : CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

## NOTICE OF SERVICE OF DISCOVERY MATERIALS

Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, hereby gives notice that on this 11th day of April, 1996, he has served, by postage-paid first class mail, a copy of the Request For Admission of Facts on each of the following counsel of record:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



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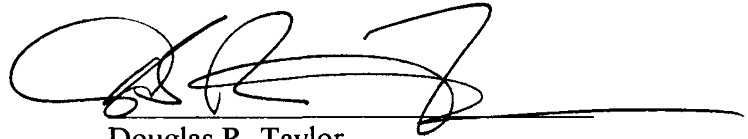

Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Certificate of Service

I hereby certify that on this 11th day of April, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the Request For Admission of Facts to the following:

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Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Douglas R. Taylor



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(9/17/90)

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|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
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|---|---|
| THE STUART HACK CO., et al. | * |
| Third Party Plaintiff | * |
| | * |
| v. | |
| | * |
| GRABUSH, NEWMAN & CO., P.A. | |
| | * |
| Third Party Defendant | * |

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**DEFENDANTS' ANSWER TO**
**PLAINTIFF'S FOURTH AMENDED COMPLAINT**

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Janofsky & Truhe, P.A., answer Counts I and II of Plaintiff's Fourth Amended Complaint as follows:

**FIRST DEFENSE**

They generally deny liability as to each allegation of the Fourth Amended Complaint in accordance with Rule 2-323(d).

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**SECOND DEFENSE**

The Fourth Amended Complaint fails to state a claim upon which relief can be granted.

**THIRD DEFENSE**

That if Plaintiff suffered damages as alleged, such damages were caused by the Plaintiff's own sole or contributory negligence.

**FOURTH DEFENSE**

That if Plaintiff suffered damages as alleged, such damages were caused because the Plaintiff assumed the risk thereof.

**FIFTH DEFENSE**

That Plaintiff is estopped to complain about any advice rendered by Defendants pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

**SIXTH DEFENSE**

That Plaintiff has waived any claim arising out of advice rendered by Defendants pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

**SEVENTH DEFENSE**

That Plaintiff's reliance on advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan was unjustified when he

proceeded to borrow from the Plan in 1984, 1985 and 1986 without informing the Defendants.

**EIGHTH DEFENSE**

That Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and owed no legal duty to Plaintiff, personally.

**NINTH DEFENSE**

That Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and had no contractual relationship with Plaintiff, personally.

**TENTH DEFENSE**

That Defendant, Stuart Hack, did not hold himself out as an attorney and did not provide any legal services to Plaintiff at any time relevant to the events referenced in the Fourth Amended Complaint.

**ELEVENTH DEFENSE**

That several members of the accounting firm of Grabush, Newman & Co., P.A. were the Plaintiff's personal tax advisors and prepared his personal and corporate income tax returns during all times relevant to this action.

**TWELFTH DEFENSE**

That Defendants did not play any role in the preparation of the income tax returns at issue in this case.

THIRTEENTH DEFENSE

That Plaintiff is not entitled to recover any damages arising out of excise taxes or prohibited transactions or plan disqualification because these are pre-empted and governed exclusively by federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., as held in Shofer v. The Stuart Hack Company, 324 Md. 92, 110-11, 595 A.2d 1078 (1991).

FOURTEENTH DEFENSE

That Plaintiff is not entitled to recover damages for additional income taxes imposed solely because Plaintiff failed to follow the proper procedure for borrowing money from his pension because such damages are pre-empted and governed exclusively by federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., as held by the Hon. Ellen Hollander on July 11, 1994.

FIFTEENTH DEFENSE

That Plaintiff is not entitled to recover damages for lost income and lost profits because such damages were clearly not foreseeable to Defendants when they rendered advice to Plaintiff in August of 1994, as held by the Hon. Ellen Hollander on July 11, 1994.

**SIXTEENTH DEFENSE**

That Plaintiff is not entitled to recover damages for loss of sheltered earnings on the grounds of assumption of risk, lack of foreseeability and pre-emption, as held by the Hon. Andre M. Davis on January 31, 1995.

**SEVENTEENTH DEFENSE**

That Plaintiff is not entitled to punitive damages arising out of any advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan, as held by the Hon. Thomas Ward on February 17, 1993 and the Hon. Ellen Hollander on July 11, 1994.

**EIGHTEENTH DEFENSE**

That Plaintiff is not entitled to attorney's fees arising out of any advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan, as held by the Hon. Thomas Ward on February 17, 1993 and the Hon. Ellen Hollander on July 11, 1994.

**NINETEENTH DEFENSE**

The Plaintiff is not entitled to a jury trial on any of his claims for the reasons more fully set forth in the Motion by Defendants and Third-Party Plaintiff to Strike Plaintiff's Third-Party Complaint.

Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of April, 1996, copies of the foregoing Defendants' Answer to Plaintiff's Fourth Amended Complaint were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire
P.O. Box 4566
Rockville, Maryland 20850; and to

John T. May, Esquire
Jordan Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036.

Janet M. Truhe

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| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

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|---|---|---|
| THE STUART HACK CO., et al. | * | |
| Third Party Plaintiff | * | |
| | * | |
| v. | | |
| | * | |
| GRABUSH, NEWMAN & CO., P.A. | | |
| | * | |
| Third Party Defendant | * | |

* * * * * * * * * * * *

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR REVISION OF THIS COURT'S PRIOR ORDERS OF FEBRUARY 17, 1993, JULY 11, 1994, JANUARY 31, 1995 AND FEBRUARY 23, 1995**

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Janofsky & Truhe, P.A. oppose in the strongest possible terms Plaintiff's Motion for Revision of this Court's Prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995. This Motion for Revision is in reality a

motion for reconsideration of each and every one of those previous orders. As such, the Plaintiff's Motion ought to be filed with and considered by each judge whose order is being challenged.

In addition, Plaintiff's Motion for Revision is yet another example of how this Plaintiff has refused to accept and respect previous appellate and trial court rulings on various issues in this case. As a result, this Court's time will again be wasted, and Defendants put to the expense of having to file an opposition. Accordingly, Defendants believe the time has come for this Court to impose sanctions on the Plaintiff, for this may be the only way to deter him from filing seemingly endless motions on the same issues. Defendants urge this Court to deny Plaintiff's Motion for Revision, and to award them their attorney's fees for having to respond to it.

**Factual And Procedural Background**

Unfortunately, it is necessary to review the complete background of the instant case so that this Court can put Plaintiff's Motion for Revision into the proper context and perspective.

This case originated on April 11, 1988, when Shofer filed suit in the Circuit Court for Baltimore City against Hack for negligence (Count I), breach of contract (Count II) and common law breach of fiduciary duty

(Count III). The gist of each of these claims was that Hack failed to advise Shofer about potential tax consequences which might occur if Shofer borrowed money from his pension plan over a certain amount. Shortly thereafter, on May 17, 1988, Shofer filed an Amended Complaint which added a fourth count for breach of fiduciary duty under the Employee Retirement Income Security Act of 1974 ("ERISA"). This count was based upon exactly the same conduct complained of in the original three counts, but also sought attorney's fees pursuant to the federal statute.

On March 6, 1990, Hack moved for dismissal of Count IV of the Amended Complaint on the ground that the state court lacked subject matter jurisdiction over an ERISA claim for breach of fiduciary duty which, under 29 U.S.C. § 1132(e)(1), falls within the exclusive jurisdiction of the federal courts. On July 2, 1990, the lower court granted Hack's Motion to Dismiss.

On August 9, 1990, Shofer filed a Second Amended Complaint which contained the original three counts for negligence, breach of contract and common law breach of fiduciary duty, and added five new counts for enforcement of Shofer's right to competent advice from Hack under 29 U.S.C. § 1132(a)(1)(B). State courts have limited concurrent jurisdiction with respect to certain types of claims under ERISA, and Shofer was attempting to recast his claims to

fall within the scope of that jurisdiction (thereby preserving his request for "attorney's fees"). The factual predicate of each of the new ERISA counts was, however, the same as alleged in the state law causes of action, namely that Hack failed to advise Shofer about tax consequences which could occur if he borrowed money from his pension plan.

Thereafter, Hack filed a motion to dismiss the entire Second Amended Complaint on the grounds that: (1) the common law negligence, breach of contract and breach of fiduciary duty claims (Counts I-III) were pre-empted under ERISA, and (2) the remaining ERISA counts (IV-VIII) were in fact still breach of fiduciary duty claims subject to the exclusive jurisdiction of the federal courts. After hearing, the Hon. David Ross dismissed the five ERISA counts. He also dismissed the state law negligence and breach of contract claims because "under the broad language of the ERISA statute as interpreted by the Supreme Court, these claims necessarily relate to ERISA, relate to the pension plan and, therefore, are pre-empted." See Transcript of Proceedings at p. 32 (October 12, 1990).

On October 16, 1990, Shofer filed a timely notice of appeal and, on its own motion, the Maryland Court of

Appeals issued a writ of certiorari.[1] On September 17, 1991, the Maryland Court of Appeals affirmed in part and reversed in part the lower court's dismissal of Shofer's Second Amended Complaint. It affirmed the dismissal of Counts IV-VIII agreeing with Hack's argument that these were in actuality still breach of fiduciary duty claims over which there is exclusive federal jurisdiction. See Shofer v. Stuart Hack Co., 324 Md. 92, 111-113, 595 A.2d 1078 (1991) ("Shofer I").

With respect to the two state law claims for negligence and breach of contract, however, the Court reversed. This was despite ERISA's broad pre-emption clause, 29 U.S.C. § 1144(a), which even the Court recognized as "the most expansive pre-emption clause found in any federal statute." Id. at 94. But it held that Shofer's state law claims nevertheless survived ERISA pre-emption, in large part, because a finding of pre-emption would leave Shofer without any remedy, now that limitations had run in federal court. Id. at 105. Clearly troubled by the fact

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[1] Following dismissal of Shofer's state court action, Shofer then filed suit in federal court, notwithstanding the fact that limitations had run on all of his claims. Hack filed a motion for summary judgment which was granted by Judge Frederick Smalkin. See Shofer v. Stuart Hack Co., 753 F. Supp. 587 (D. Md. 1991). Shofer noted an appeal to the Fourth Circuit, which affirmed the ruling below. See Shofer v. Hack Co., 970 F.2d 1316 (4th Cir. 1992).

that certain damage issues were so related to the pension that pre-emption of the entire case was appropriate, however, the Court dismissed all <u>pension-related</u> damages, <u>i.e</u>., excise taxes, prohibited transaction penalties, and possible plan disqualification. <u>Id</u>. at 110-11, 113.

Thus, on remand, the Court of Appeals held that Shofer could potentially recover <u>only</u> (1) the additional taxes, interest and penalties assessed because a portion of the pension loans constituted taxable income and (2) consequential damages in the form of fees paid to various professionals who have assisted Shofer in straightening out his tax situation. <u>Id</u>. at 105, 113.

After this case was remanded for trial in 1991, Richard Shofer filed a <u>Third</u> Amended Complaint against Stuart Hack and The Stuart Hack Company for negligence (Count I) and breach of contract (Count II), contending as he had before, that Mr. Hack, who was a pension consultant to Shofer's business only, should have advised him about potential tax consequences which might occur if Shofer borrowed money from his pension. Among other things, Shofer again sought recovery of damages arising out of excise taxes, prohibited transactions and possible disqualification of the pension plan at issue. In <u>Shofer I</u>, however, the Court of Appeals specifically held that these three types of damages were <u>not</u> recoverable in a state law case for



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negligence and breach of contract. Shofer v. Stuart Hack Co., 324 Md. at 110-111, 113. Thus, Hack moved for their dismissal from the Third Amended Complaint.[2]

On February 17, 1993, the Hon. Thomas Ward granted Hack's motion and held, in accordance with Shofer I, that Shofer may not recover damages for excise taxes, prohibited transactions or plan disqualification. Judge Ward also dismissed Shofer's claims for punitive damages and attorney's fees. See Order (February 17, 1993).

As discovery in this case progressed, Shofer revealed that he was still seeking damages for excise taxes and prohibited transactions, as well as damages for tax penalties arising out of his failure to follow proper procedures in borrowing from his pension, damages due to his inability to refinance his Virgin Islands property, lost salary and lost business profits. These latter categories of damage were all new. Hack subsequently moved for partial summary judgment as to these categories of damage on the grounds that they were either unforeseeable, too speculative or otherwise not recoverable under Maryland law given the decision in Shofer I. Hack also moved for summary judgment as to the entire Third Amended Complaint on the ground of

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[2] Shofer also requested punitive damages and attorney's fees. Hack moved for dismissal of these damages as well.

pre-emption under Mertens v. Hewitt Assocs., ____ U.S. ___, 113 S. Ct. 2063 (1993), a Supreme Court case decided after Shofer I.

On July 11, 1994, the Hon. Ellen Hollander entered judgment in favor of Hack on the Motion for Partial Summary, Judgment, and dismissed the foregoing damages from this case. See Memorandum Opinion and Order (July 11, 1994). Believing in part that the issue of pre-emption in light of Mertens was more appropriately addressed to an appellate court, however, Judge Hollander denied Hack's motion to dismiss the Third Amended Complaint altogether.

As this case neared trial, Hack moved to dismiss another new Shofer damage claim for loss of sheltered earnings. Hack also moved for dismissal of all tax penalties and interest. On January 31, 1995, the Hon. Andre M. Davis dismissed Shofer's claim for loss of sheltered earnings, but denied Hack's motion, without prejudice, as to tax penalties and interest. See Order (January 31, 1995).

At a Pretrial Conference on February 13, 1995, Shofer advised Judge Davis that, "no matter what the result of the upcoming non-jury trial" (scheduled to begin on February 27, 1995), he would appeal "all of the rulings on damages previously rendered" by the trial court since remand. See Memorandum and Order at p. 1 (February 23, 1995). Under the circumstances, Judge Davis then ordered,

pursuant to Maryland Rule 2-602(b), the entry of a final judgment as to the rulings contained in the Order dated February 17, 1993 (J. Ward), the Order dated July 11, 1994 (J. Hollander) and the Order dated January 31, 1994 (as revised on February 23, 1995) (J. Davis).

Mr. Shofer's appeal was, however, premature because it related only to rulings on "damages" (the same rulings which are also the subject of the instant Motion for Revision). As noted by the Court of Special Appeals, Shofer was simply trying to protest "three orders [regarding damages], entered by three different circuit judges during three separate hearings over the course of four years. . . ." Shofer v. The Stuart Hack Co., 107 Md. App. 585, 588, 669 A.2d 201 (1996) ("Shofer II"). Because these orders did not constitute final judgments, the Court of Special Appeals therefore did not render any decision on the merits, and instead remanded this case "for a trial on the remaining damage items." Id. at 597 (emphasis added).

Upon remand, however, Mr. Shofer filed a Fourth Amended Complaint which added back in all of the categories of damage which had been previously dismissed from this case, including excise taxes, prohibited transaction penalties, plan disqualification, additional taxes for failure to follow proper borrowing procedures, lost income, lost profits, loss of income from tax sheltered earnings,

punitive damages and attorney's fees. Completely undaunted by this Court's prior rulings, the decision in Shofer I and the directive in Shofer II that this case be "remand[ed]. . .for a trial on the remaining damage items," the Plaintiff is proceeding as though the last four years of judicial decisions in this case had never occurred. He has filed a Fourth Amended Complaint which disregards all of these prior rulings, and a Motion for Revision seeking their reversal. For the reasons set forth more fully herein, the decisions on damages which are the subject of the Plaintiff's latest attack, were well-grounded in Maryland law and should not be revised, let alone reversed.[3]

The facts underlying Shofer's current negligence and breach of contract claims against Mr. Hack may be summarized briefly. As stated previously, Shofer filed suit in the Circuit Court for Baltimore City seeking damages from Hack as a result of his alleged failure to advise Shofer about tax consequences which could occur if he borrowed money from his pension. The Catalina Enterprises, Inc.

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[3] Quite frankly, the Plaintiff should be careful for what he wishes. As noted by one of the judges whose rulings are being challenged, if some of the damages, i.e., excise taxes, prohibited transaction penalties and plan disqualification, had remained in the case, the Court of Appeals in Shofer I might have well have pre-empted Mr. Shofer's entire case and none of his claims against these Defendants would have gone forward. See Memorandum Opinion and Order at p. 10 (July 11, 1994).

Pension Plan ("the Plan") was a qualified pension plan established for employees of Catalina Enterprises, Inc. t/a Crown Motors, a used-car dealership owned and operated by Shofer. See Fourth Amended Complaint at ¶¶'s 1 and 2. In 1971, The Stuart Hack Company and Stuart Hack were hired by Catalina Enterprises, Inc. to administer the Plan. Id. at ¶ 6 (although Plaintiff now claims he did the hiring, the contract was between Hack and Shofer's business). Hack's functions were administrative and consisted primarily of record-keeping with respect to participant benefits. Shofer is a participant in the Plan, and is also named in the Plan as Trustee. Id. at ¶¶'s 1 and 5.

A few days before August 9, 1984, Shofer contacted Hack by telephone, and inquired whether he could borrow money from the Plan or use the Plan's assets as collateral for a loan. Id. at ¶ 10. Shofer's inquiry of Hack was brief, general and lasted no more than 20 minutes. See Deposition of Richard Shofer at p. 103 (attached hereto as **Exhibit A**). It is undisputed that at the time Shofer made this inquiry in August of 1984, he did not tell Hack: (1) how much he was intending to borrow from the Plan;[4] (2) how

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[4] Only loans in excess of $50,000.00 plus Shofer's voluntary contributions to the Plan (which were $76,600.00) would have been taxable as income. Thus, Shofer could have borrowed up to $126,600.00 without any adverse tax consequences.

often he was intending to borrow from the Plan;[5] (3) the purpose(s) for which he wanted to borrow from the Plan;[6] or whether he was even going to borrow from the Plan at all. Id. at pp. 86-87, 104 and 109.

Hack responded to Shofer's inquiry in a letter dated August 9, 1984 advising that "you can borrow up to 100% of your voluntary account". See Larash Deposition Ex. No. 5 (attached hereto as **Exhibit B**). The letter made no mention of tax consequences. However, it is undisputed that Shofer never asked Hack about tax consequences on any loans from the Plan. See Exhibit A at p. 105.

After advising Shofer in August of 1984 merely that it was permissible to borrow money from his pension, Hack heard nothing further from Shofer in this regard until sometime in the Fall of 1986. Id. at pp. 129-30. At that time, it was learned that Shofer had borrowed $375,000.00 from the Plan on nine different occasions between August 9, 1984 and September 30, 1986. See Shofer v. Stuart Hack Co., 324 Md. at 96.

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[5] Shofer eventually borrowed from the Plan on nine separate occasions in 1984, 1985 and 1986 for a total of $375,000.00.

[6] The loans were used by Shofer to (1) pay back personal debts to his company, (2) purchase and refurnish two properties in the Virgin Islands and (3) purchase a condominium at the Inner Harbor.



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When Hack rendered his advice in 1984, the Baltimore accounting firm of Grabush, Newman & Co., P.A. ("Grabush"), was providing personal and business accounting services to Shofer and his car dealership. See Exhibit A at p. 88. Since 1970, this firm had prepared Shofer's personal and corporate income tax returns, the Form 990T for the Catalina pension (which is filed whenever a pension plan has taxable income) and rendered tax advice to Shofer generally. See Deposition of Kenneth Larash at p. 14 (attached hereto as **Exhibit C**). Shofer previously testified in this case that he consulted with Kenneth Larash and Phil Matz at Grabush whenever he had a personal tax question; however, in August of 1984, Shofer chose not to consult with anyone at Grabush at all. See Exhibit A at pp. 88-89. Hack was aware that Grabush performed personal tax services for Shofer at the time he wrote the August 9, 1984 letter.

Although Grabush knew that Shofer had borrowed from his pension at the time they prepared his 1984 and 1985 tax returns, a portion of the monies Shofer had taken from the Plan was not reported as taxable income on those returns. See Exhibit C at pp. 39-43. It was not until the Fall of 1986 that Grabush determined that some of these loans were in fact taxable to Shofer as income. Id. at p. 68. Grabush then advised Shofer to amend his tax returns for 1984 and 1985 to reflect a portion of the loans from the

Plan as taxable income in these years.[7] It is undisputed that Hack was not Shofer's tax advisor during any of the pertinent events in this case, and did not play any role in the preparation of his income tax returns. Hack's <u>sole</u> legal relationship was with Shofer's business. Hack was not Shofer's attorney, nor was he Shofer's accountant or tax preparer. Shofer, individually, was not a client of Hack's firm, and Shofer has never alleged or contented that Hack was.[8]

## Argument

As stated above, the Plaintiff has filed a Fourth Amended Complaint requesting all of the same damages which have been previously dismissed from this case. He has also filed a Motion to Revise all of the court decisions which dismissed those damages. The Plaintiff's Motion is wholly without merit, and should be denied.

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7 On April 18, 1989, Hack filed a Third Party Complaint against Grabush for its negligent preparation of Shofer's income tax returns. Shofer never amended his suit to bring a direct claim against Grabush.

8 That is until he filed an affidavit attached to the Motion for Revision where Shofer contends <u>for the first time in this case</u> that Mr. Hack was <u>his</u> "pension attorney and plan consultant." <u>See</u> Exhibit E attached to the Motion for Revision.

### A. Excise Taxes, Prohibited Transaction Penalties and Plan Disqualification

Among his requests for damages in the Third Amended Complaint, which was filed after Shofer I was decided, Shofer sought recovery of "excise taxes, "prohibited transaction penalties" and a declaration that Hack should also be responsible for any damages arising out of possible "disqualification of the pension" at issue.[9] However, the Court of Appeals in Shofer I held that these three types of damages were not recoverable in this state law case. See Shofer v. Stuart Hack Co., 324 Md. at 110-11, 113.

By way of background, Hack had argued in Shofer I that one of the reasons this entire case should be pre-empted was because the foregoing damages clearly "relate to" the pension plan.[10] As the Court in Shofer I recognized:

> [t]he respondents have argued that certain features of this case make

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[9] Mr. Shofer seeks these same damages in his Fourth Amended Complaint as well.

[10] State law claims are pre-empted under ERISA if they "relate to" an employee benefit plan. 29 U.S.C. § 1144(a). A state law "relates to" an employee benefit plan "if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96-97 (1983). "Excise taxes" and "prohibited transaction penalties" were imposed upon Shofer because he violated the terms of the Plan and several provisions of ERISA, when he borrowed money from his pension in the manner that he did. Thus, these damages "related to" the Plan.

> Shofer's claim, based on Maryland malpractice law, related to the [P]lan. Our holding in Part IV, supra, that the malpractice claims in Counts I and II are not preempted, denies preemptive effect to those features, with one exception to be discussed in Part V(B), infra.

Id. at 109 (emphasis added). In Part V(B), the Court of Appeals noted that Hack "urge[s] pre-emption of the [state law] malpractice claims because they attempt to include, or preserve, contingent damages by way of additional taxes that might be imposed by 26 U.S.C. § 4975 (1988), if the Internal Revenue Service were to rule that the loans to Shofer were 'prohibited transactions' as therein defined." Id. at 110. The Court went on to note that "[i]n answers to interrogatories requesting that the damages be specified, Shofer included in his answer a category headed "Contingent liabilities" which included: "[d]isqualification of [P]lan"; "[c]osts of 'undoing' prohibited transactions"; and "[e]xcise tax on prohibited transactions." Id. at 111 (emphasis added). The Court stated that when confronted with these three specific categories of damage and their obvious relation to the Plan so as to warrant pre-emption, Shofer's counsel backed away from these claims and said they were no longer being pursued. Id. (emphasis added). The Court of Appeals then held: "We consider Shofer's counsel's statement to be a concession limiting the scope of the

damages claimed in Counts I and II so as to exclude the three above-described "contingent liabilities." Id. (emphasis added).[11]

Nevertheless, when Shofer filed his Third Amended Complaint, he sought, among other things, the same three damages. Hack filed a motion to dismiss, citing Shofer I. The Hon. Thomas Ward agreed with Hack's interpretation of Shofer I on this issue, and granted the motion.

Despite Judge Ward's Order dismissing these damages from the case, however, Shofer continued to pursue them. Hack moved again for their dismissal, and the Hon. Ellen Hollander reaffirmed their dismissal from the case. As noted by Judge Hollander in her written opinion, the Court's decision in Shofer I on these categories of damage was the law of this case, and a lower court is bound thereby; see also Kline v. Kline, 93 Md. App. 696, 700, 614 A.2d 984 (1992) ("a ruling by an appellate court upon a question becomes the law of the case and is binding on the courts and litigants in further proceedings in the same matter"). Judge Hollander also noted that in Shofer I, "Shofer has received the benefit of a ruling by the Court

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[11] On remand, the Court therefore held that Shofer's damages would be limited to income taxes, penalties and interest on the loans which were deemed taxable, and consequential damages in the form of professional fees incurred during Shofer's tax audit. See Shofer v. Stuart Hack Co., 324 Md. at 105, 110-11, 113.

[of Appeals] that he may pursue his malpractice claim. Had the Court considered the claim as including the specified damages, the Court may have well ruled that it [the entire case] was pre-empted" (emphasis added).

Two judges of the lower court have interpreted Shofer I as excluding excise taxes, prohibited transaction penalties and possible Plan disqualification. Indeed, Shofer was fortunate that the Court of Appeals carved these damages out of the case. Otherwise, as recognized by Judge Hollander, Shofer's entire case might well have been pre-empted. In filing his Fourth Amended Complaint and Motion for Revision, Shofer again seeks to have his "cake and eat it too." He claims that his previous counsel should not have conceded these damages out of the case, and he should now be allowed to pursue them. Shofer cannot have it both ways. If this Court considers putting these damages back in this case, then the issue of pre-emption must truly be revisited. If not, the decisions by Judges Ward and Hollander on these categories of damage should not be reversed, and these damages should be stricken from the Fourth Amended Complaint as well.

**B. Punitive Damages and Attorney's Fees**

In the Fourth Amended Complaint, Shofer is again seeking recovery of "punitive damages" and "attorney's fees." Under Maryland law, however, Judge Ward was clearly

correct in dismissing these damages from the Third Amended Complaint, and his rulings should not be reversed.

In the Fourth Amended Complaint for negligence and breach of contract, Shofer is requesting $5 million in punitive damages. The Maryland Court of Appeals recently revised the law on punitive damages to substantially restrict their availability in non-intentional tort cases. In Owens-Illinois, Inc. v. Zenobia, 325 Md. 420, 601 A.2d 633 (1992), the Court heightened the standard for punitive damage claims from proof of implied malice and/or gross negligence to an actual malice standard. A plaintiff in a non-intentional tort case must now prove that the defendant's conduct was characterized "by evil motive, intent to injure, ill-will or fraud, i.e., 'actual malice'." Id. at 460.

Shofer's Fourth Amended Complaint fails, however, to meet this stringent standard. He repeatedly refers to Hack's duty of "reasonable care" and that such duty was breached when a "reasonably competent consultant and professional" would not have so acted. These were the same allegations Shofer made in his Third Amended Complaint, and Judge Ward was clearly correct in dismissing Shofer's punitive damage claim from that complaint. His ruling on this item of damage should not be reversed, and Plaintiff

should not be permitted to pursue a punitive damage claim in the Fourth Amended Complaint, either.

In his Fourth Amended Complaint, Shofer is also seeking recovery of his attorney's fees, just as he had requested in his Third Amended Complaint. Judge Ward was correct in dismissing Shofer's claim for attorney' fees from the Third Amended Complaint, and his ruling should not be reversed. It is well-settled under Maryland law that attorney's fees are not recoverable in the absence of special circumstances such as a contract between the parties for such payment, or statutory provision therefor. See Empire Realty Co. v. Fleisher, 269 Md. 278, 305 A.2d 144 (1973). Nevertheless, in his current negligence and breach of contract claims, Shofer is again requesting reimbursement of his attorney's fees. But Shofer has still not cited any legal authority in support of this request. Accordingly, his claim for attorney's fees was properly dismissed before, and it should remain out of this case.

**C. Additional Taxes for Failure to Borrow Funds from the Pension According to Correct Procedures**

In his Fourth Amended Complaint, Shofer again seeks recovery of additional income taxes of $51,831.00 imposed by the Internal Revenue Service solely because Shofer failed to follow the proper procedure for borrowing money from his pension. See Fourth Amended Complaint at

¶ 26. This damage was not claimed by Shofer at the time Shofer I was decided. Shofer requested it as an additional item of damage when he filed his Third Amended Complaint. Hack moved for dismissal of this category of damage for several reasons. First, this tax was imposed strictly because Shofer did not pay interest on the loans he took from the pension on a timely basis as required by ERISA. Because Shofer sustained this damage by failing to repay money to his pension in accordance with federal pension law, Hack argued that this damage is clearly pension-related so as to be pre-empted. This was the same basis on which the Court of Appeals dismissed the excise taxes, prohibited transaction penalties and plan disqualification damages in Shofer I. Moreover, the Court also held in Shofer I that, assuming liability, Shofer's damages in this case were limited to taxes on income (plus penalties and interest), and consequential damages in the form of reimbursement for professional fees incurred during Shofer's tax audit. See Shofer v. Stuart Hack Co., 324 Md. at 105, 110-11, 113.

Hack argued that Shofer may not recover this damage for another reason. Shofer has admitted that, at the time he borrowed from the pension in 1984, 1985 and 1986, he simply assumed he knew how to borrow money from his pension properly. See Exhibit A at pp. 94, 118-19. Despite the fact that he was also the Plan's Trustee, Shofer has

conceded that he did not consult with anyone when he took the loans and that he alone decided the applicable rate of interest, duration and other terms. Id. at pp. 118-19, 127-28, 133, 141, 143, 154, 156-57, 159. In fact, Shofer has admitted that at no time from August 9, 1984 to September 30, 1986, when he was borrowing the monies at issue, did he even have a conversation with Mr. Hack about taking the loans. Id. at pp. 129-30.

Thus, Hack could not have been negligent for failing to advise Shofer about transactions he did not even know were taking place. Moreover, Hack did not become aware of the loans until 1986 when Shofer finally furnished him with data showing all Plan transactions. See Deposition of Stuart Hack at p. 349 (attached hereto as **Exhibit** D). The evidence in this case revealed that Hack had repeatedly requested this data from Shofer who, as Plan Trustee, was the only one who would have had such information. As a factual and legal matter therefore, Hack cannot be held responsible for any penalties imposed upon Shofer arising out of his failure to follow the correct procedure in borrowing from his pension. Thus, it was properly dismissed from the Third Amended Compliant by Judge Hollander.

In her decision dismissing this category of damage, Judge Hollander also noted that its recoverability would demand "too much of the concept of foreseeability."

Judge Hollander's dismissal of this category of damage was correct on the grounds of pre-emption, assumption of the risk and lack of foreseeability. This category of damage should, therefore, be stricken from the Fourth Amended Complaint as well.

### D. Inability to Refinance Virgin Islands Property

As part of the damages sought in the Third Amended Complaint (and apparently in the Fourth Amended Complaint as well), Shofer also claimed that tax liens, imposed upon him as a result of his not being able to afford his additional tax debt, prevented him in 1988 from refinancing his second home in St. Thomas. See Letter dated October 20, 1993 to all counsel (attached hereto as **Exhibit E**). Plaintiff originally bought this home in 1985 for $225,000.00 and borrowed money from his pension for the downpayment.[12] See Exhibit A at p. 114. Shofer claimed that his inability to refinance this home from "13% to at least 9% available in 1988" has cost him $46,532.10 (the difference between Shofer's present mortgage principal of $153,411.72 and the principal at 9% which would have been $118,887.02). See

[12] Mr. Shofer put 20 percent down and financed the remainder. See Exhibit A at p. 114. Today, he still pays a $2,000.00 monthly mortgage on this home which he visits each year and refuses to rent or sell because he "like[s] it too much." Id. at p. 242. Shofer also borrowed additional money from his pension in 1985 to refurbish this property. Id. at p. 145.

**Exhibit E**. Shofer claimed this $46,532.10 as a damage from Hack.

Hack moved to dismiss this category of damage from the Third Amended Complaint, but at the hearing before Judge Hollander it was voluntarily withdrawn because of its "speculative" nature. See Memorandum Opinion and Order at p. 9. Nevertheless, when Shofer appealed all of Judge Hollander's Order of July 11, 1994, it was clear that he had not completely abandoned this claim, and it is assumed that he will be seeking it as part of his damages in the Fourth Amended Complaint as well. Therefore, it will be addressed herein.

Whether this alleged damage is viewed under a contract or negligence analysis, it is not recoverable under Maryland law for several reasons. First, it is too speculative, a fact which even Shofer's own damage expert, Theodore Rosenberg, noted when he declined Shofer's request to calculate it because there were too many unknowns, i.e., interest rate, date of refinancing, bank approval, etc. See Deposition of Theodore Rosenberg at pp. 82-83 (attached hereto as **Exhibit F**). It is well settled under Maryland law that damages must be probable, not possible and may not be based on speculation. See Automatic Retailers of America, Inc. v. Evans Cigarette Serv. Co., 269 Md. 101, 109-11, 304 A.2d 581 (1973).

This damage is also not recoverable under either a negligence or contract theory for another reason. At the time the alleged malpractice occurred in August of 1984, Shofer did not even own the Virgin Islands property at issue. Thus, any alleged damage arising out of his inability to refinance that property could hardly have been foreseeable to Hack in 1984 when he was advising Shofer about borrowing from the Plan.

An analogous professional malpractice case recently decided by the Maryland Court of Appeals illustrates Hack's argument in this regard. In Stone v. Chicago Title Ins. Co., 330 Md. 329, 624 A.2d 496 (1993), Stone, a stock speculator, hired an attorney to help finance the purchase of property. Stone did not tell the attorney that Stone intended to have the property readily available as collateral for loans. The attorney failed to get the deed of trust which was recorded against this property released in a timely manner. As a result, when Stone's broker imposed a margin call, the financing bank refused to advance loan proceeds to Stone until that release had been recorded. Because Stone had no other ready source of cash, he was forced to sell his stock at a substantial loss to cover his stock debts.

Stone subsequently sued the law firm, which handled the original settlement of his property, claiming

that as a result of its failure to record a release of the outstanding lien, he was unable to close on his loan in a timely fashion and, as a result, was forced to sell his stock to raise the money to meet the margin call. However, as the Court of Appeals pointed out in its opinion, there was no allegation in Stone's complaint that anyone at the law firm had knowledge that plaintiff was "speculating on credit in the stock market and that the Maryland National home equity loan was the only source of funds available to him in case of financial emergency." Id. at 333.

The law firm moved to dismiss Stone's complaint contending that the damages claimed for breach of contract and negligence were unforeseeable and speculative "inasmuch as a causal nexus could not be demonstrated between their negligence and the injuries suffered by Stone." Id. The law firm's motion was granted and Stone appealed. The Court of Appeals issued a writ of certiorari and, subsequently, a published opinion affirming the lower court. Ruling that Stone could not recover for the stock loss, the Court stated:

> Stone would have us hold that his loss arising from the August, 1990 collapse in the market in certain stocks in which he was speculating was proximately caused by his sale of those stocks, which was caused by his lack of funds to pay off other loans, which was caused by his inability to secure a second mortgage before August 6, 1990, which in

> turn was caused by [the law firm's] failure to record timely the release of the extinguished lien on his home. He argues that but for [the law firm's] negligence he would have secured a home equity loan and used the proceeds to meet his broker's margin call, thus avoiding the sale of stock to raise capital in a falling market. We disagree.
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> . . . .
>
> There was no allegation . . . that [the law firm] had knowledge at any time that Stone was buying stock on margin. No reasonable person would have foreseen that almost a year after the settlement which [the law firm] conducted Stone would have an emergency need for cash, would attempt to borrow against his home to satisfy that need, and unable to do so would have to sell stock in a depressed market to raise it. Furthermore, there is no allegation that [the law firm] was notified of Stone's financial crisis at the time the problem was brought to [their] attention.

Id. at 340-41.

Similarly, Shofer would have this Court hold that his inability to refinance the Virgin Islands property in 1988 was proximately caused by the tax liens, which were caused by his lack of funds to pay off his additional tax debt, which was caused by the fact that Shofer had no available source of money in 1988 when his tax debt came due, which was caused solely by Hack's failure to advise Shofer that loans from the Plan [which Hack never even knew about] over a certain amount were taxable as income, and which Shofer claims he never would have taken but for the

fact that he did not know their tax implications. Under the court's analysis of similar damages in Stone, any damage arising out of Shofer's alleged inability to refinance the mortgage on his second home is clearly not recoverable in this malpractice action. It is therefore not surprising that Shofer voluntarily withdrew this particular claim for damages at the hearing before Judge Hollander, and it ought to remain excluded from this case.

**E. Lost Salary and Business Profits**

In his Third Amended Complaint, and again in the Fourth Amended Complaint, Shofer sought recovery of "other economic damages" in the form of (1) lost salary of $400,000.00 in 1991 and 1992, which Shofer claimed he sustained as a result of having to devote time to litigation activities, and (2) lost profits of $1,929,471.00 as a result of declining sales in his used-car business over the past eight years. See Exhibit E at p. 4. Hack moved for dismissal of these two categories of damage on the grounds that they were too speculative and unforeseeable to have been proximately caused by any alleged negligence in 1984. Judge Hollander agreed relying upon Stone. See Memorandum Opinion and Order at pp. 12-14. Under Maryland law, as analyzed in Stone, the foregoing damages clearly were not foreseeable to Hack when he advised Shofer in August of 1984 that he could borrow from his pension, and are too

speculative[13] to have been proximately caused by any alleged negligence at that time.

With respect to the first category of "lost salary," Shofer has testified that he did not pay himself a salary of $200,000.00 in 1991 to make up for "my loss of services to the company" as a result of spending approximately "20% of my time to Hack litigation matters" in the past five years.[14] See Exhibit A at pp. 109-10. Shofer cannot point to any Maryland authority, however, which permits a party to recover compensation for time spent in litigation. Shofer's request for damages in this category is simply not justified as a matter of law.

With respect to the second category of economic damage, "lost business profits," Shofer calculated that he has lost $1,929,471.00 in profits from his used-car business from 1988 to 1992 solely as a result of Hack's negligence in 1984. See Exhibit E at p. 4. According to Shofer, the number of cars he has sold has dropped from an average of 450 in the mid to late 1980's to 320 in 1993. See Exhibit A

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[13] Indeed, Shofer's own damage expert, Theodore Rosenberg, refused to get involved in the calculation of these two items of damage because to do so would have involved too much "guessing." See Exhibit F at p. 87.

[14] Shofer also claims that he did not pay himself a $200,000.00 salary in 1992 because to do so would have driven his company's balance sheet "further into the minus hole." See Exhibit A at p. 112.

at p. 113. Shofer attributes this drop in sales to a decline in inventory which he in turn attributes to a loss in capital. Id. The loss of capital Shofer attributes to his loss of credit with the Maryland National Bank which Shofer claims was revoked because of his tax liens. Id. at p. 114. Shofer alleges that the decline in profits from his used-car business was proximately and completely caused by Hack's failure to advise him about potential tax implications arising out of Plan loans, although Shofer has acknowledged that there was an economic recession at one point during this time period. Id. at p. 132.

Assuming, arguendo, that Shofer's damages in this category are even genuine, at best, they are a highly extraordinary result of any negligence on the part of Hack in advising Shofer about borrowing money from the Plan in 1984. Just as in the Stone case, where the Court held there was no "acceptable nexus" between the law firm's negligent conduct and the stock market losses suffered by Stone, there is simply no reasonable relationship between any failure on the part of Hack in 1984 to advise Shofer about loans he did not even know Shofer had made and Shofer's alleged $1.9 million in lost profits from his used-car dealership over the last eight years. Judge Hollander was, therefore, correct in dismissing these two types of damages for



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demanding "too much of the concept of foreseeability," and her rulings should not be reversed.

**F. Loss of Sheltered Earnings**

On the eve of trial (regarding the Third Amended Complaint), Hack also moved for dismissal of another category of damage, loss of sheltered earnings, which had not been claimed at the time Shofer I was decided. The Hon. Andre M. Davis, to whom this case had been assigned non-jury, subsequently dismissed this damage for all the reasons cited by Hack in his motion. See Order (January 31, 1995). Nevertheless, in his Fourth Amended Complaint, Shofer is again requesting that he be awarded this category of damage. See Fourth Amended Complaint at ¶ 26.

In the motion heard by Judge Davis, Hack pointed out that as part of the total monies Shofer withdrew from his pension, $76,600.00 had originally been contributed to the pension by Shofer personally. It had been paid into the pension with after-tax dollars, thus, it could be withdrawn without any adverse tax consequences. As part of the damages Shofer sought in his Third Amended Complaint, however, Shofer claimed damages of $1,823,018.00 which he calculated he would have earned on the $76,600.00 had it remained sheltered in the pension (tax-free) until the year 2059. See Exhibit A at p. 79. Shofer previously testified in this case, however, that he understood he was losing the

benefit of the pension's tax shelter when he withdrew the $76,600.00 from it. Id. at p. 346. Thus, it was undisputed that Shofer knowingly and voluntarily risked the loss of this tax shelter when he withdrew that money.

Hack argued to Judge Davis that he should not be held liable for this category of damage for several reasons. First, Shofer clearly assumed the risk of his damages as a matter of law. Under Maryland law, three elements must be established for a plaintiff to be held to have assumed the risk of his damages: (1) he had knowledge of the risk of danger; (2) he appreciated that risk; and (3) he voluntarily exposed himself to it. See Liscombe v. Potomac Edison Co., 303 Md. 619, 630, 495 A.2d 838 (1985). In the instant case, it was undisputed that Shofer withdrew all of his personal contributions from the pension with full knowledge of the loss of his tax shelter thereon. Regardless of the tax implications of this transaction, the loss of the tax shelter was fully known to Shofer. For this reason alone, Shofer may not recover this item of alleged damage from Hack.

Second, although this category of damage was not claimed at the time Shofer I was decided, Hack argued that it should be dismissed on the same basis that other damages were dismissed by the Court of Appeals (i.e., excise taxes, prohibited transaction penalties and plan disqualification),

because it is pension-related and, thus, pre-empted under ERISA. Indeed, this category of damage would not have been a damage at all but for the fact that pension money is involved. As the Court of Appeals held in Shofer I, assuming liability, Shofer's damages on remand should be limited to taxes on income and consequential damages in the form of reimbursement for professional fees incurred during Shofer's tax audit. See Shofer v. Stuart Hack Co., 324 Md. at 105, 110-11, 113.

Lastly, Hack requested dismissal of the $1,823,018.00 in damages which Shofer sought as a result of having lost his tax shelter, because such damages could not have been reasonably foreseen by Hack when he was rendering advice to Shofer in August of 1984. It is important to note that at that time, Shofer did not even advise Hack whether he was going to borrow any money from the pension, let alone how much. The rulings of the Court of Appeals in Stone make clear that knowledge of the plaintiff's special circumstances is the touchstone of foreseeability and, therefore, liability. Without the one, damages arising out of the other are not recoverable as a matter of law. There is simply no way Hack could have reasonably foreseen in August of 1984 that Shofer would proceed to withdraw $375,000.00 over the course of the next three years, risk losing his tax shelter on his entire personal contribution

to the pension of $76,600.00, fail to repay any of the loans in accordance with ERISA guidelines, fail to pay the tax debt attendant upon the borrowing of such huge sums of money, fail to replenish his pension after borrowing the money, and do all of this without ever consulting Hack. Judge Davis was, therefore, correct in dismissing this category of damage on the grounds of "assumption of the risk, lack of foreseeability and pre-emption," and it should remain excluded from this case.

## Conclusion

For the foregoing reasons, Defendants Stuart Hack and The Stuart Hack Company respectfully request that this Court deny Plaintiff's Motion for Revision. All of the issues raised in that Motion have been extensively briefed, argued and, in some cases, considered on several occasions by three judges of this Court. The Plaintiff has demonstrated no reason why the decisions by those judges should be revisited.

Moreover, as this Court can see from a review of the chronology set forth in Defendants' Opposition to the Motion for Revision, the Plaintiff is continuing to abuse the motions process. Therefore, Defendants further request that this Court give consideration to awarding them their attorney's fees for having to respond to the Plaintiff's Motion.



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Respectfully submitted,

Janet M. Truhe 910934

Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys Defendants
Stuart Hack and
The Stuart Hack Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17th day of April, 1996, copies of the foregoing **Defendants' Opposition to Plaintiff's Motion for Revision of this Court's Prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995** and proposed **Order** were mailed, postage pre-paid, to Douglas R. Taylor, Esquire, P.O. Box 4566, Rockville, Maryland 20850 and John T. May, Esquire, Jordan Coyne & Savits, 1100 Connecticut Avenue, N.W., Suite 600, Washington, D.C. 20036.

Janet M. Truhe

Janet M. Truhe

Exhibit A

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1

2 RICHARD SHOFER : IN THE

3 Plaintiff : CIRCUIT COURT

4 v. : FOR

5 THE STUART HACK COMPANY, et al. : BALTIMORE CITY

6 Defendants : Case No. 88102069/CL79993

7 -----------

8 Baltimore, Maryland

9 February 2, 1990

10 Deposition of RICHARD SHOFER, Plaintiff, called for

11 oral examination by counsel for the Defendants, taken at the

12 law offices of Semmes, Bowen & Semmes, Conference Room 17-A,

13 250 West Pratt Street, beginning at 10:12 a.m.

14 A P P E A R A N C E S

15 THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.

16

17 JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

18 LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant, Grabush & Newman.

19

20 Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson
(301) 539-6398

21

1 volunteer account. I think you mean voluntary account, is
2 that correct?
3 A Yes.
4 Q Now, you state that these damages calculate the
5 personal loss of shelter dollars in the pension fund by the
6 need under the circumstances for Shofer to repay the loans to
7 the extent of his available cash and credit, 76,600 of those
8 funds were transferred from Shofer's own post tax
9 contributions to his voluntary plan effectively losing the
10 shelter for those funds. The loss to Shofer was calculated by
11 Rosenberg in the chart attached in the amount of $1,823,018.
12 Q Could you explain to me briefly why this $76,600 is
13 a damage? Because as I understand it, that money represents
14 your voluntary or, I'm sorry, your personal contributions to
15 the pension, isn't that correct?
16 A Yes.
17 Q So to that extent, you were not required by law to
18 pay that money back when you borrowed it out, is that correct?
19 A I was required to pay it back by law as long as it
20 stood as a note payable to the pension.
21 Q Right. But when you reclassified it as personal --

1 that I'd gotten from Mr. Hack that I could borrow up to the
2 limit of what was in my voluntary account.
3 Q No, that's not my question.
4 A Okay. I, I had intended initially on borrowing, I
5 think two hundred and fifty thousand, I'm not sure.
6 Q All right.
7 A Two hundred, two hundred fifty, somewhere in that,
8 I don't remember.
9 Q Did you tell Mr. Wilson how much money you were
10 planning to borrow?
11 A Probably. Yes, it was probably part of the plan
12 but I -- I can't remember exactly what I said to Mr. Wilson
13 or what figure that I might have said.
14 Q All right. And the reason why you would be giving
15 this money to Crown Motors is that, is because you owed Crown
16 Motors seven to eight hundred thousand dollars anyway; isn't
17 that correct?
18 A Yes.
19 Q Did you tell Mr. Hack you were planning to borrow
20 approximately two hundred and fifty thousand dollars?
21 A I don't recall that any specific amount was

1 mentioned or not.

2 Q But you think you probably, you mentioned the

3 amount to Mr. Wilson?

4 A Probably, yes, I -- I can't imagine that there was

5 any part of any major financial transaction I would have had

6 that I wouldn't have made him privy to or aware of.

7 Q Let me get back to my earlier question. Did you

8 discuss this loan from your pension plan idea with anyone

9 other than Mr. Hack and Mr. Wilson in August of 1984?

10 A Probably others at the bank. There, if there were

11 any other -- let's see, Mr. Wilson had a supervisor, I think

12 the supervisor may have been Barry Blumberg, and I'm not

13 sure, but -- by this time, see, my relationships with the

14 loan officer sort of changed from time to time and I think I

15 had such a good relationship and good working relationship

16 with Mr. Wilson that I didn't, I might not have even spoke

17 with others at Maryland National then, I, it might have just

18 been him. And other than he, Sally.

19 Q Anyone else?

20 A I don't think so.

21 Q Did you ever discuss this idea with anyone at

1 Grabush Newman?

2 A I don't think so.

3 Q With regard to personal tax questions, generally

4 who would you go to for tax advice during this period, during

5 1984?

6 A Just Grabush Newman.

7 Q So it would be your habit whenever you had a

8 personal tax question to contact Grabush Newman?

9 A Yes. Another name comes up to me now that I sort

10 of forgot before lunch.

11 Q Who is he?

12 A He's a tax man at Grabush Newman's that I have

13 great faith in. I --

14 Q You discussed --

15 A I would initially always go to Ken LaRash but

16 would suggest to Ken if it was an important issue would he

17 pass it by Phil Matz. There may have been one or two

18 occasions where some issue came up that I requested Phil Matz

19 to be involved in.

20 Q Did you consult with Mr. Matz at anytime in August

21 of '84 with regard to this idea of borrowing money from your

1 pension plan?

2 A No.

3 Q Why not?

4 A I didn't think there was a tax issue involved in

5 it.

6 Q Other than those that you have identified, Mr.

7 Wilson, perhaps Mr. Blumberg and others at Maryland National

8 Bank, Sara, and Mr. Hack, did you discuss your loan idea with

9 anyone else in August of 1984?

10 A I can't think of anyone right now.

11 Q All right.

12 MR. BOWDEN: Did you say Sara or Sally?

13 Q One in the same?

14 A Sara is her proper name.

15 MR. BOWDEN: Is that what it is?

16 MS. TRUHE: Sally is the alias.

17 MR. BOWDEN: Same woman.

18 MS. SCHUETT: That clears up a couple of

19 questions I had.

20 (Discussion off the record.)

21 MR. BOWDEN: Sara is her proper name and Sally

1 A I don't recall anything beyond that, no.

2 Q And is it fair to say that you assumed you knew how

3 to borrow money from your pension?

4 A Yes.

5 Q You assumed you knew how to do it properly?

6 A Yes.

7 Q Let's go to No. 4, the loss of opportunity to

8 refinance the St. Thomas property.

9 When did you first buy that property?

10 A 1985.

11 Q What was the purchase price?

12 A I think it was 225,000.

13 Q How much did you put down?

14 A Twenty percent.

15 Q Did you finance the rest?

16 A Yes.

17 Q What were your monthly payments?

18 A A little over 2,000. I think around 2,100.

19 Q To whom did you pay that?

20 A To the seller of the property. Mrs. Sawyer was her

21 name.

E. 000086

1 Q Over an hour or under an hour?
2 A Oh, I don't think any -- excuse me. But I don't
3 think any telephone conversation with Stuart lasted more
4 than, I can't ever remember talking more than, I think twenty
5 minutes at the most, I -- and you know, it could have been
6 five minutes or ten, but I don't -- you know, a half an hour
7 was a long, or more is a long conversation and I don't think,
8 I can't remember having that much of a conversation with
9 Stuart ever.
10 Q All right. On this particular occasion --
11 A At least on the telephone.
12 Q Okay. Generally speaking, I understand that, on
13 this particular occasion when you first mentioned this idea
14 to Mr. Hack, what did you say to him?
15 A I don't know what I said because I don't remember
16 the conversation.
17 Q All right. At all?
18 A Not really, you know, I can surmise what I must
19 have, that what the subject matter must have been but I can't
20 really specifically remember.
21 Q So you can only speculate as to what you might

1 have said?

2 A That's right. Now, I can't remember whether it

3 was morning or afternoon.

4 Q All right. Do you recall telling Mr. Hack why you

5 wanted to borrow money from your pension plan?

6 A I don't recall if I did or didn't.

7 Q Do you have any notes concerning your telephone

8 conversation with Mr. Hack this first occasion?

9 A No.

10 Q Do you have any notes concerning telephone

11 conversations with Mr. Hack on this matter at all prior to

12 the first time you borrowed money?

13 A No. I've seen memos from people and normally it's

14 not my habit to -- I don't, I don't have a memo calendar,

15 diary, and don't take notes like a lot of professionals do.

16 I -- I do sometimes scribble names on folders or something if

17 it's something that I know that I have to remember that I

18 can't commit to normal memory, that if a new person called me

19 that I didn't know him about an issue and he wanted to give

20 me a phone number, I had a file on an issue I might scratch

21 it on a piece of paper and put it in that file so I'd know

E. 000●38

1 his name and phone number. But if it's about an issue that I
2 can commit to memory and I know or I feel that I can commit
3 it satisfactorily to memory, I don't make notes.
4 Q Why did you call Stuart Hack on this matter?
5 A Because he was the logical one to call.
6 Q Well, what were you trying to get from him, what
7 type of information?
8 A I wanted to know the appropriateness and
9 feasibility of borrowing from the pension if I could.
10 Q In other words you wanted to know whether it was
11 lawful?
12 A I wanted to know anything about it that was
13 relevant to borrowing and lawful particularly.
14 Q Do you recall whether you asked him about any
15 personal tax consequences to you of borrowing money from your
16 pension plan?
17 A I don't remember whether I did or didn't, but I
18 can almost assuredly surmise that I didn't.
19 Q Why do you think you didn't?
20 A Because I didn't imagine that there would be any
21 tax consequences. I didn't think it was a tax issue or a

1 Wilson.

2 Q Other than the ones we've talked about already?

3 A No, as I repeat that I can't think of anyone.

4 Q All right. Did you advise Mr. Hack in August of

5 1984 that you were going to take one loan?

6 A I can't recall my conversations with Mr. Hack in

7 August of '84.

8 Q All right. Following your discussions with Mr.

9 Hack in August of '84, did you take any money from your

10 pension plan?

11 A Yes.

12 Q When was the first time?

13 A I don't know the date, but I think, I think it was

14 August 8th, I think, fifty thousand dollars.

15 Q All right. In your Answers to Interrogatories you

16 stated that the first time you took money was August 9th,

17 1984.

18 A Maybe it was, you know, saying --

19 Q Why did you take money on this particular date?

20 A I can only assume that because I had been assured

21 verbally by Mr. Hack of the appropriateness of it, that I

E. 000091

1 I gave the company virtually a hundred percent of
2 my active week during the normal year prior to the Hack
3 litigation.
4 Q Well, what happened in 1991 to cause that to be
5 different?
6 A Well, in every year since this litigation started,
7 I have devoted approximately 20 percent of my time to Hack
8 litigation matters. One day out of a normal workweek.
9 There were, God knows, how many meetings, not only
10 with Blum, Yumkas, but with Giampetro, with Grabush, Newman,
11 with discovery materials, depositions, and all of this
12 diverted from my effectiveness to the company.
13 So it was determined what would be fair and
14 actually I made the determination that what would be fair is
15 that if for five years I lost the company lost 20 percent of
16 my services in each calendar year, that I should forego a
17 salary in the calendar year '91 to compensate the company for
18 that loss of my physical services.
19 That has nothing to do with the loss of capital
20 that was available to the company. The loss of working
21 capital having to do as a chain of events with the loss of

E. 00009

1 Q And it is because of this percentage of time duri
2 each of the years we have talked about that you have made a
3 determination that Crown Motors should not have to pay you
4 your full salary?
5 A For the calendar year of '91 that was the
6 determination. For the calendar year '92 it was the
7 deterioration of the company's balance sheet that I didn't
8 want to drive it any further into the minus hole. I think my
9 balance sheet is, like, minus six or $700,000 net worth now
10 balance sheet. All the accumulated profits from the previous
11 years are gone and it has a minus net worth. My corporation
12 does.
13 Q Well --
14 A And a salary would just make it more of a minus net
15 worth.
16 Q How do you make any money, Mr. Shofer?
17 A How do we make money?
18 Q Yes.
19 A Well, we sell cars, and cars get a good gross
20 profit, we get a finance charge, and then up until recent
21 years we were selling, up through the mid '80s, into the late

E. 000093

1 '80s, we were selling more than four hundred cars a year. And
2 there was a good cash flow from that. And in recent years due
3 to a reduction in working capital and available inventory, we
4 turn our inventory over so many times a year, so if we have a
5 car and it is sitting at our location, either the main
6 location or Washington Boulevard, we are going to sell that
7 car in an average number of days. So the more cars we have
8 the more cars we sell in an average number of days because we
9 have a variety in inventory and somebody will like it. And as
10 we lower our inventory through necessity, if we don't have the
11 working capital for the inventory, we lower our opportunity
12 and we will sell less cars.
13 In fact, some charts I have produced and figures to
14 back this up based on history and pulled right out of my
15 computer, just something that I made up theoretically, but I
16 have computer printouts of actual sales statistics to back it
17 up.
18 As our inventory drops and our sales dropped, we
19 dropped down from 450 cars to 300 and a low of 320-some cars
20 last year. But the drop was a steady drop as my availability
21 of working capital and inventory dropped.

E. 000094

1 I had a credit line with Maryland National that was
2 a million one, approximately, up until '89 when the tax liens
3 appeared and the credit line disappeared. They turned my
4 account over to a work-out unit and they started dictating
5 that my debt would amortize at a certain rate. I was making
6 $17,000 a month payments to them on the warehouse debt. All
7 the other debt they put on hold, just interest only, as the
8 warehouse debt was amortizing. And that continued for, I
9 think, from '89 until '92. I kept amortizing it.
10 But that was a serious drain. That money would
11 have otherwise been available, if I could have even maintained
12 a credit line without having it reduced so severely and
13 quickly, I would have been able to keep supporting a certain
14 amount of inventory and produce sales from that. But as I had
15 to keep producing cash flow to pay down corporate debt, or pay
16 down pension warehouse debt, it was a drain on available funds
17 to finance cars and to replace cars that were sold.
18 So this meant lost sales. And I have been
19 borrowing money from my company, and if you say how do I live,
20 and that was your question, I owe my company a lot of money
21 that I have borrowed. I get rental income from the company,

1 pension plan the first time, did anyone assist you in taking
2 this loan?
3 A I don't know what you mean by that.
4 Q Well, did you know how to go about taking money
5 from the pension plan?
6 A Write a check, yes.
7 Q Pardon me?
8 A Yes, I just wrote a check.
9 Q Did anyone tell you that that's the way you do it?
10 A To write a check from the pension to my personal
11 account?
12 Q Right.
13 A No, didn't have to.
14 Q What do you mean they didn't have to?
15 A I mean I knew that was the only way it was going
16 to get from the pension plan to my personal account was if I
17 wrote a check from the pension to my personal account. I
18 think that's what happened.
19 Q Did you know how to take money from your plan in
20 terms of the mechanics, proper documents?
21 A Yes, I thought I did, I believe I did.

1 Q Did you ever consult with anyone on that --

2 A No.

3 Q -- on the mechanics?

4 A No, no.

5 Q You just assumed you knew how to do it properly?

6 A Yes.

7 MS. SCHUETT: Five-minute break.

8 (Thereupon, a brief recess was taken.)

9 Q (By Ms. Truhe) In connection with this first

10 loan, Mr. Shofer, what documents, if any, did you prepare?

11 A Only a note.

12 Q A note. From you to the pension plan?

13 A Yes.

14 Q In response to a request for production of

15 documents on the issue of these notes, you provided me with

16 the following two pages. Would you take a look at those and

17 identify them for me, please? For now, just generically.

18 A Yes, these are notes reflecting amounts of loans.

19 MS. TRUHE: Let's mark those as Shofer

20 Deposition Exhibits 2-A and 2-B.

21

1 of speaking, Glen Wilson assisted me by making the funds
2 available through the means of the second mortgage. To that
3 extent, he assisted me, I guess.
4 Q What documents did you prepare in connection with
5 taking the second loan?
6 A The note for a hundred and fifty thousand dollars.
7 Q All right. And is that the note that is reflected
8 on the top of Shofer Deposition Exhibit 2-A?
9 A Yes.
10 Q All right. Now, the note says due on demand, who
11 decided the terms of that note?
12 A I did.
13 Q Why did you decide it would be on demand?
14 A Well, I'm the trustee and I didn't think that I
15 was going to demand it before I had it to pay back.
16 Q So, in other words, you wanted it to be left up to
17 yourself as trustee to decide when this loan would be repaid?
18 A Well, not exactly. It was not my intention that
19 it would be forever.
20 Q But you wanted to be flexible?
21 A I think it required some flexibility because I

1 wasn't in a position of at anytime knowing where I would be
2 in six months or a year financially.
3 Q All right. And did you decide the rate of
4 interest on this second loan the same way you did on the
5 first loan?
6 A Yes.
7 Q And what was the rate of interest?
8 A Twelve percent.
9 Q Now, when you took this second loan, did you
10 consult with anyone?
11 A No.
12 Q After you took the loan, did you tell anyone about
13 it?
14 A Well, it speaks for all of the loans that I think
15 Miss Ciconne was aware, not Miss Ciconne, Miss McHale was
16 aware of all the loans because she was the bookkeeper and she
17 handled the checkbooks. I don't know that on each and, in
18 fact, I feel certain then that on -- of course, we're only
19 talking about the second loan, but --
20 Q Right.
21 A Probably the second loan, the big one, they are

1 the biggest of all of them, probably Glen Wilson was aware of
2 that transaction somehow. I don't specifically recall any
3 conversations, but I'm going to assume he was aware of it in
4 some way.
5 Q Do you recall whether you advised Mr. Hack that
6 you were taking money, this money a second time from your
7 pension plan?
8 A I don't recall having any conversations with Mr.
9 Hack after getting that letter in August.
10 Q Do you recall having any conversations with Mr.
11 Hack after getting the August 4, 1984 with reference to any
12 of the loans that you took from your pension plan through
13 1986?
14 A Through 1986?
15 Q Yes, through the last, the time of the last loan
16 you took.
17 A Okay.
18 MR. BOWDEN: What was that time, just so --
19 A September 30th, '86.
20 Q Okay. So from August 9th, 1984 to September 30th,
21 1986, do you recall having any conversation, conversation

1 with Mr. Hack about taking money from your pension plan?

2 A No.

3 Q Did you repay the second loan?

4 A A hundred and fifty thousand, I think most of that

5 has been repaid at this time. I would have to look at my own

6 statements, but I think most of it has been repaid.

7 Q Do you recall when you repaid it?

8 A 1988. Sometime during the calendar year 1988.

9 Q Where did you get the money to repay that second

10 loan?

11 A I think part of it was salary from Crown Motors.

12 Part of it was that -- I think in the beginning of '88, the

13 very beginning of '88, I repaid sixty-some thousand dollars

14 by means of permanently -- there was a portion of my

15 voluntary account that represented funds that I had put in

16 myself out of -- in other words, there's an employer

17 contribution and an employee contribution. Well, this was my

18 employee funds, the, the aggregate amount of my employee

19 funds accumulated over the years was sixty-some thousand

20 dollars.

21 Now, on that money income taxes had already been

1 Q No, in 1988 the average number of cars in inventory
2 was 35 and you sold 454 cars. But in 1989, the average number
3 of cars in inventory was with one more than that but yet you
4 sold less, 440.
5 A So it is not perfect. But it generally shows a
6 trend.
7 Q Go ahead. Continue.
8 A Nothing is, you know, nothing is perfect, but it
9 shows a trend.
10 MR. GILDAY: That is the key to this case.
11 A You see when it drops to 25, I drop again.
12 Now, of course, this is an inflation year. This is
13 not an inflation year. So I had the same inventory it is even
14 worse because there is a recession, not inflation, but any
15 way, there is the relationship. So the relationship shows
16 that it is a sensible relationship.
17 Now, we go back to here. What I did was go to my
18 actual books and pull off averages, what my average down
19 payment was. I would go to a whole year's data in my computer
20 to get what is the average cost of a car. I would get a
21 model. I will take, if I have 400 cars that I retail, I will

1 Crown Motors. I mean I'd have to look at this trail of it,
2 but I think that's where it went.
3 Q You state in Answers to Interrogatories that the
4 fifty thousand dollars was used to purchase Virgin Island
5 property; does that refresh your recollection?
6 A Not the fifty, no, that fifty wasn't.
7 Q So --
8 A Because that was, that fifty is 9/5 of '84 and the
9 Virgin Island property wasn't purchased until '85.
10 Q To that extent, your Answer to that Interrogatory
11 is in error?
12 A I'm -- if that's what I said I did with fifty
13 thousand dollars, that's an error.
14 Q All right. Did anyone assist you in taking that
15 third loan from your pension plan?
16 A The third loan is 9/5/84?
17 Q Right.
18 A No, no more than the others.
19 Q All right.
20 A In fact, probably less. I don't know that Glen
21 Wilson was even aware or that I even phoned him or anything

1 specifications of --

2 Q Did you keep --

3 A -- of the Chase.

4 Q All right. Did you keep a copy of the loan

5 application?

6 A I probably, I may have, have a copy somewhere, I

7 don't know.

8 MS. TRUHE: Mr. Bowden, would you check on

9 that?

10 MR. BOWDEN: Be happy to.

11 MS. TRUHE: Okay.

12 Q (By Ms. Truhe) Now, we're up to the fourth loan,

13 or we were talking about the fourth loan, I believe, yes. Do

14 you recall consulting with or telling anyone about the taking

15 of this fourth loan from your pension plan?

16 A I don't recall.

17 Q All right. Were you planning to repay the loan?

18 A The fourth loan?

19 Q Yes.

20 A Oh, yes.

21 Q What rate of interest?

E. 000106

1 was.

2 Q How much money did you borrow?

3 A Three thousand dollars.

4 Q All right. And could you have gotten the three

5 thousand dollars from any other source other than your

6 pension plan?

7 A Well, it's a small amount and I may have been able

8 to get it from my company, Crown Motors.

9 Q Did you make any attempt to do that?

10 A No.

11 Q Did anyone assist you in taking the fifth loan

12 from your pension plan?

13 A No more than the others.

14 Q All right.

15 A That I can recall.

16 Q All right. What documents did you prepare in

17 connection with the fifth loan?

18 A A note dated February 25th for three thousand

19 dollars.

20 Q And you prepared that note?

21 A Yes.

1 Q Sixth.

2 A Okay. Sixth time was on July 30th, 1985.

3 Q And how much money did you take at that time?

4 A Twelve thousand dollars.

5 Q Why that amount?

6 A I think that's what I needed to complete
7 personally the purchase of new furniture for one of the
8 investment properties on the Virgin Islands that needed to be
9 refurnished.

10 Q What were you doing with these Virgin Island
11 properties, were you renting them?

12 A Yes. One, the large -- the more expensive of the
13 two I put on the -- there was a management, there's a
14 management organization. This was a golf resort or is a golf
15 resort and there was a management organization in place that
16 was finding short-term vacationers for these properties and --

17 Q By the way were these two properties single homes?

18 A Sort of, they weren't -- I would almost call it
19 like a, a two-dwelling structure with an upper and under
20 unit.

21 Q All right.

1 A Well, --

2 Q -- refurnishing and refurbishing?

3 A I would say that it was predominantly for the one
4 that I was completely refurbishing, but there may have been
5 some small part of it that went to the other. There's a
6 whole raft of bills in that first year, 1985, that, there's a
7 package of bills and invoices.

8 Q All right. Did anyone assist you in taking the
9 seventh loan from your pension plan?

10 A No more than the others.

11 Q What documents did you prepare in connection with
12 the seventh loan?

13 A A note dated August 13, 1985.

14 Q That appears on Shofer Deposition Exhibit 2-B?

15 A Yes.

16 Q Did you prepare that note?

17 A Yes.

18 Q Did you consult with or tell anyone about this
19 seventh loan?

20 A Not that I can recall.

21 Q Were you planning to repay the loan?

1 don't recollect, but I'm going to make an assumption that it
2 was part of the refurbishing expenses. I'm looking at the
3 close proximity of the other loans.
4 Q Could you have gotten this money from any other
5 source other than your pension plan?
6 A No.
7 Q Why not?
8 A Well, it was available in the pension and would
9 have been a strain to Crown Motors.
10 Q Did anyone assist you in taking this eighth loan
11 from your pension plan?
12 A Not that I recall.
13 Q What documents did you prepare in connection with
14 the eighth loan?
15 A A note dated August 21st, 1985.
16 Q Does that appear on Shofer Deposition Exhibit 2-B?
17 A Yes.
18 Q Who prepared that document?
19 A I did.
20 Q Did you consult with or tell anyone about this
21 eighth loan?

E. 000111

1 A Not that I recall.

2 Q Were you planning to repay the loan?

3 A Yes.

4 Q What was the rate of interest?

5 A Twelve percent.

6 Q Did you decide the rate of interest?

7 A Yes.

8 Q Did you repay the loan?

9 A No.

10 Q Why not?

11 A It's not due yet.

12 Q When is it due?

13 A Well, my understanding now -- it's due on demand

14 according to the note, but my understanding now is according

15 to pension law it has to be repaid within five years of the

16 date that it's taken.

17 Q Did there come a time when you borrowed additional

18 money from the pension plan?

19 A Yes.

20 Q When was that?

21 A September 30th, 1986.

1 any other source?

2 A No.

3 Q Why not?

4 A Talking '86. I don't know that I had a readily

5 and practically available source as, as easy to use as the

6 pension. I think that was the most practical way to do it.

7 My recollection of my -- my recollection of my status at that

8 time would lead me to believe that was the most practical

9 way.

10 Q Did anyone assist you in taking the ninth loan

11 from your pension plan?

12 A Not that I recall.

13 Q What documents did you prepare in connection with

14 the ninth loan?

15 A A note dated September 30th, 1986.

16 Q And you prepared that note?

17 A Yes.

18 Q Did you consult with or tell anyone about this

19 loan?

20 A Not that I recall.

21 Q Were you planning to repay the loan?

1 A Not now.

2 Q Why not?

3 A Because I like it too much.

4 Q Do you rent it out?

5 A No.

6 Q Is there any equity in it?

7 A Yes.

8 Q How much?

9 A Probably sixty, seventy thousand dollars. Oh,
10 excuse me, no, there is no equity in it because there is
11 still a mortgage -- there is a second mortgage outstanding to
12 the pension for seventy-five thousand dollars. When you add
13 the first and second mortgage there is really no equity.

14 Q Mr. Shofer, do you recall receiving a request for
15 production of documents from me back in June of 1988?

16 A I don't specifically recall. I know I did receive
17 that.

18 Q No. 6 of that request asks you to produce all
19 correspondence between the plaintiff and defendants from 1980
20 to the present. To your knowledge have you produced all of
21 those documents?

1 seventy-six-six of a debt obligation to do other things wit

2 MR. GILDAY: This was paper?

3 A Pay, pay, pay income, pay income taxes that were

4 going to be coming due, pay income taxes that were going to

5 coming due, legal fees coming due, professional fees that we

6 going to be coming due. Any matter of expense that I was

7 obligated to be involved in.

8 Q Did you understand when you took the seventy-six-

9 six out of your voluntary account that you would be losing th

10 tax shelter on the growth of that money?

11 A Yes.

12 Q All right.

13 A I resisted wanting to do that because of that. And

14 it became a, a lesser of two, whatever was the lesser of two

15 evils.

16 Q How much money have you paid to Blum-Yumkas for

17 legal fees?

18 A Approximately a hundred thousand.

19 Q Do you owe them any money?

20 A Approximately sixty thousand more.

21 Q Did you agree to pay Blum-Yumkas on an hourly

Exhibit B

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

Commanants & Actu
3b... Lake Road
Baltimore Maryland 21200
(301) 366 8700
Washington DC 621-4064

E. 000375

Writer's Direct Dial No

August 9, 1984

PERSONAL AND CONFIDENTIAL

Corres. - P.S. Pension Section Catalona art

Mr. Richard Shofer
Crown Motors
5006 Liberty Heights Avenue
Baltimore, Maryland 21207

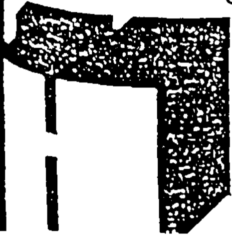
Dear Dick:

You questioned whether assets of your money purchase pension plan and profit sharing plans can be used as collateral for loans, whether you can borrow against these plans and whether there is any special treatment for your voluntary account under these plans.

First of all, let's distinguish between the voluntary account and the employer account. The employer account cannot be put up as collateral for a loan, and loans to participants against their employer account are limited to a total of $50,000 for all plans for up to a maximum of five years (for a longer period of time if used for the purchase or substantial improvement to a primary residence). Further, we would recommend that any loans against an employer account should be fully collateralized (this means collateral in addition to the value of the account itself).

There is an entirely different treatment for voluntary accounts. First, there is no limit on the amount that can be borrowed against the account or the length of time for which it can be outstanding. Also, the account, itself, can stand as collateral for the loan against the voluntary account. Further, the voluntary account can be put up as collateral for a loan from a bank or other source. The loan agreement will have to include a provision that you cannot withdraw money from your voluntary account, and thus dissapate the collateral, however.

The law is pretty clear on the inability to use employer account values as collateral for a loan. There is no law on restrictions of using voluntary account money for collateral for a loan. The TEFRA provisions on the limits on loans apply only to employee accounts and specifically do not apply to employee voluntary accounts. In my opinion, you can use your voluntary account as collateral for a loan or you can borrow up to 100% of your voluntary account. The terms of the loan must be reasonable as to the interest rate and pay back period.



Cordially,

Stuart Hack

SH:mn

DEPOSITION EXHIBIT
Larash #5
12.8

Exhibit C

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

1
2
Baltimore, Maryland
3
August 2, 1990
4
Deposition of KENNETH EUGENE LARASH, C.P.A.,
5
a Witness, called for oral examination by counsel for the
6
Defendants and Third-Party Plaintiffs, taken at the
7
law offices of Semmes, Bowen & Semmes, Conference Room
8
17-A, 250 West Pratt Street, beginning at 10:50 a.m.
9
A P P E A R A N C E S
10
THOMAS A. BOWDEN, ESQ., on behalf of the Plaintiff.
11
12
JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants and Third-Party Plaintiffs.
13
14
LINDA M. SCHUETT, ESQ., on behalf of the Third-Party Defendant.
15
16
-------------
17
18
19
20
21

1 A I don't know but somebody in our firm.

2 Q But you have no idea who?

3 A No.

4 Q Did that person give you any files or information
5 or did you just start from scratch?

6 A Well, when I start a job I always review last
7 year's files, so they would have been available.

8 Q But you have no idea who worked on this file at
9 Grabush, Newman prior to you, is that correct?

10 A No.

11 Q All right.

12 A I mean yes, that's correct.

13 Q What was your understanding as to the services
14 Grabush had been retained to perform prior to your
15 involvement if any for Mr. Shofer or his business?

16 A To prepare financial statements, tax returns for
17 the corporation, Catalina Enterprises, Inc., to prepare a tax
18 form No. 990T for the pension plan and to prepare his
19 individual Form 1040.

20 Q Now, these financial statements were for the
21 corporation?

1 Q -- prior to the preparation of this tax return?
2 A Prior to the preparation of this tax return?
3 Q Yes.
4 MS. SCHUETT: Objection to the form of the
5 question. Go ahead.
6 A Go ahead, oh. The earliest document that's dated
7 and initialed by me that I could find in the files indicated
8 that I worked on the pension plan general ledger for 1984 and
9 it's, I believe it's a page of journal entries dated June
10 17th of '85, so that appears to be the first time I became
11 aware.
12 MR. BOWDEN: What was that date again, excuse
13 me?
14 THE WITNESS: June 17th, 1985.
15 Q And you stated that was in the course of preparing
16 the ledger for the pension plan?
17 A Yes, well, the work -- it's called working trial
18 balance, yes.
19 Q That's when you first became aware that Mr. Shofer
20 had taken loans from his pension plan in 1984?
21 A Right, correct.

1 Q Had Grabush, Newman already completed its
2 preparation of Mr. Shofer's 1984 tax return when you became
3 aware that he had taken loans from his pension plan?
4 A When we prepared his individual tax return?
5 Q Yes.
6 A We -- we didn't find the transmittal sheet for
7 this, did we? --
8 Q No.
9 A Well, this date --
10 MS. SCHUETT: Referring to Larash Deposition
11 Exhibit 1.
12 A -- shows that the interview for the individual
13 return was July 29th, and as I previously said, I had worked
14 on the pension plan on June 17th, so yes, July 29th, I
15 obviously already knew that he had loans with the pension
16 plan.
17 MS. SCHUETT: That didn't exactly correspond
18 to her question but I think your answer is clear despite
19 that.
20 Q Well, just to make sure it's absolutely clear, you
21 knew at the time you sat down with Mr. Shofer to compile the

1 information on Larash Deposition Exhibit No. 1 that he had
2 taken loans from his pension plan in 1984?
3 A Yes.
4 Q Do you recall discussing these loans with Mr.
5 Shofer at anytime prior to the completion of this individual
6 tax return by Grabush?
7 MS. SCHUETT: This meaning the 1984 return?
8 Q The 1984 return.
9 A I don't specifically recall any discussions on the
10 matter other than obtaining the interest expense on the loan
11 which is noted on Exhibit 1.
12 Q Do you recall whether you asked Mr. Shofer for
13 that figure or whether that was one given to you by him?
14 A He would have given me a list of all of the
15 interest expenses that he had paid for the whole year, then I
16 would have compared that with what I knew from the prior year
17 to see if he had forgotten any loans.
18 Q How were these loans treated on the 1984 return
19 for tax purposes, how were these loans taken into account?
20 A On the original return, the interest expense was
21 deducted that he paid to the pension plan, or put into a

1 computation and a -- I forget the name of the form, but
2 investment interest expense might be listed and that's the
3 only extent to which they show up.
4 Q Can you show me where that was done on the 1984
5 return?
6 MS. SCHUETT: She's got that highlighted for
7 you but --
8 A This is a Schedule A Form 1040 and it shows up
9 there.
10 Q Whose handwriting is that?
11 A The preparer is David Lane.
12 Q Who made the decision to deduct these monies as
13 interest expenses?
14 A It would have been a combination of David Lane and
15 myself.
16 Q Can you tell me anything about how that decision
17 was made?
18 A I don't have any recollection.
19 Q Do you recall having any discussion with Mr. Lane
20 about this issue?
21 A No. Unless there's notes attached to the

1 transmittal letter I don't remember having any.

2 Q Do you know why this money was treated as an

3 interest expense?

4 A Because it was payment of interest on a loan.

5 Q And at the time you knew it was a loan from a

6 pension plan, is that correct?

7 A Yes.

8 Q Now, did you talk with anyone other than Mr. Lane

9 about the tax treatment of these monies from the pension

10 plan?

11 MS. SCHUETT: Objection to the form of the

12 question. You may answer.

13 Q Well, prior to the time this return was completed

14 by Grabush, Newman did you have any conversation with anyone --

15 and I'm assuming you spoke with Mr. Lane but if that's not

16 correct please say so -- but do you recall talking with

17 anyone about the tax treatment of these loans?

18 MS. SCHUETT: Okay, just to get this clear I

19 think he already testified that he doesn't, unless it's

20 marked on a sheet somewhere, he doesn't recall ever having

21 discussed it with the preparer. If the question --

1 Q Mr. Marvel.

2 A No doubt Richard Shofer.

3 Q Anyone else?

4 A I don't recall anyone else.

5 Q Did you do any independent, and by independent I
6 mean any research yourself into this issue prior to the
7 completion of this return?

8 A I would say no, I left it all up to Alan Marvel.

9 Q Let's get into this issue of the taxability of
10 these loans and the discovery of a problem with regard to
11 their tax treatment. When did you or anyone at Grabush learn
12 that there was any problem with regard to Grabush's tax
13 treatment of loans Mr. Shofer had taken from his pension plan
14 in 1984, 1985, or 1986?

15 MS. SCHUETT: Objection to the form of the
16 question, you can answer it.

17 A It would have been through my discussions with
18 Alan Marvel, again probably in the Fall of 1986.

19 Q When did Alan Marvel come to the firm?

20 A I think it was June 30th, '86.

21 Q How did he come to have anything to do with Mr.

Exhibit D

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

E. 000121 CARBON COPY VOL. I (Revised) 1

| | | | |
|---|---|---|---|
| 1 | RICHARD SHOFER | * | of the CIRCUIT COURT |
| 2 | Plaintiff | * | FOR |
| 3 | vs. | * | BALTIMORE CITY |
| 4 | the STUART HACK COMPANY | * | MARYLAND |
| 5 | or | * | |
| 6 | STUART HACK | * | Case No 88102069/CL7993 |
| 7 | Defendants | * | |

8 - - - - - - -

9

10

11

12 Deposition or STUART HACK, was taken on

13 Thursday, March 16, 1989, commencing at 9:00 a.m., at

14 2 Hopkins Plaza, Baltimore, Maryland, before DEBBIE

15 K. LAMBERT, Notary Public.

16 - - - - - - -

17

18

19

20 Reported By:

21 DEBBIE K. LAMBERT

1 4975.

2 Q Well, assuming that Mr. Shofer made loans

3 totaling $315,000 -- you can assume that fact --

4 MS. TRUHE: When?

5 MR. BOWDEN: -- for the purposes of this

6 question.

7 THE WITNESS: As of what date?

8 MR. BOWDEN: After your letter.

9 MS. TRUHE: When? After --

10 THE WITNESS: As of what date?

11 MR. BOWDEN: After August 9, 1984, and --

12 MS. TRUHE: When?

13 MR. BOWDEN: -- prior to the end of 1986.

14 THE WITNESS: I want you to know that I had no

15 knowledge of him taking a loan or the amount of his loan

16 until his data came in some time in 1986.

17 BY MR. BOWDEN:

18 Q I'm not asking that question right now.

19 A That's what it sounded like to me.

20 Q I'm asking you to assume that he made such

21 loans, whether --

Exhibit E

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

Thomas H. Bornhorst
Attorney at Law
2236 Southland Rd., Baltimore, Md 21207
(410) 298-2266

State and Federal Trial Practice

Maryland, District of Columbia

E. 000385

October 20, 1993

Janet M. Truhe, Esq.
BERNSTEIN, SAKELLARIS, WARD & TRUHE
Suite 1622
The World Trade Center
Baltimore, MD 21202

Mark A. Gliday, Esq.
JORDAN, COYNE, SAVITS & LOPATA
1030 15th St., N.W.
Suite 500
Washington, DC 20005

Re: Shofer v. Hack v. Grebush

Dear Counsel:

This letter and enclosures is intended to supplement Plaintiff's Answers to Interrogatories and Production of Documents, to provide a framework for our discussion concerning damages on October 21 and the continuation of Mr. Shofer's deposition on October 22. Damage figures have been revised accordingly.

a. Experts:

Plaintiff will not use William C. Martin, C.P.A in this case previously noted. Discussions with Mr. Martin did not produce any substantive work and it became apparent to Plaintiff that an actuarial consultant would be more suitable. For that purpose Plaintiff has received assistance in several areas from the following individual whose vitae is attached.

Theodore M. Rosenberg, MLR, Inc
5007 West Forest Park Ave.
Baltimore, MD 21207
(410) 448-3134

b. Additional Suit::

Suit has been filed against Blum, Yumkas et. al., copy attached. Service of process is being withheld pending a settlement, although Mr. Shofer is still evaluating his exposure under the circumstances, especially on the basis of the

information in the following section. It is certainly possible you have overlapping concerns, in at least these terms:

The prohibited transactions/excise tax effects have been ruled out of our present case, but you are aware of my feeling that even after Shofer v. Hack there will be a further attempt in federal court concerning these damages. Excise damages may not sufficiently accrue for the cause of action until actually assessed. A notice of intention to assess with prospective penalties was received in January 1993, and a final determination is still pending in the Department of Labor. On that account the IRS 1/8/93 notice has been superseded by a notice dated 9/8/93, copy attached.

I realize your opposition will be vigorous and even based on two separate appeals decisions, State and Federal, in Shofer v. Hack itself. I have necessarily adopted these views myself in the statements of cause against Blum, Yumkas. I assume that you would share my interest in the earliest possible determination of whether Hack might be exposed to further litigation and damages beyond the instant case.

If the case is pursued against Blum, Yumkas, I expect the damage issues to be particular to the excise consequences, unwarrented counsel fees, and incidentals which you convince the court belong on the shelf with prohibited transactions consequences.

c. Excise Taxes:

Excise taxes are mentioned here for whatever significance you might consider, which is more than first appears. You already have the related documents, but I have attached parts of the IRS notice dated January 8, 1993 highlighting the additional proposed excise tax of $53,420, penalties calculated through 6/93.

Also, please note the additional "100%" tax in the amount of $310,807.00 (!) if the prohibited transactions are not corrected within the taxable period, which I presently assume is the period during which they are finalized, which should be imminent. That would mean repayment of the loans in full by Shofer back to the pension in addition to payment of the taxes. Shofer has no reasonable way to comply and no defense whatever to his liability for such taxes and penalties. (The ad damnum against Blum, Yumkas was understated in the interests of settlement, which may be unlikely in view of the preceeding.)

d. Elimination of a damage category

Concerning item # 4. from my summary of 3/22/93 in the amount of $44,116.28, this claim is withdrawn. Mr. Rosenberg gave his opinion that such damages would not accrue under the circumstances.

e. Liability concerning damages:

1. Federal and State Income Taxes, Interest, Penalties:

Calculated to 12/20/93 these totals are: Federal $65,418; fed penalties $18,165; fed interest $89,868.47; State $14,135.25; st. penalties $3,533.81; st. interest $24,740.67, total:

$215,861.70
(less present value of the tax liability in the future)

a) Rosenberg's approach is direct and reasonable. The real value being calculated is the value of the pension shelter. The difference between now/later is that taxes paid later are paid with money which has been sheltered in the pension earning 12% interest, whereas taxes paid now are with after taxes and unsheltered funds. The credit back in this instance is a present value which would be the equivalent of the entire tax liability paid in the future with sheltered dollars.

b) Future tax liability depends on the interest rate. Current Federal and State totals 40%, while a future rate of at least 45% is more probable. The amount taxable in the future would would be $188,400, as follows: Loans totalled $315,000, less $76,600 repaid from volunteer account, less $50,000 excludable without penalties = $188,400. At 45% the future taxes would be $84,780, which would be reduced to present value for credit against the $215,861.70 total .

2. Loss of contributions to volunteer account

These damages calculate the personal loss of sheltered dollars in the pension fund by the need under the circumstances for Shofer to repay the loans to the extent of his available cash and credit. $76,600.00 of those funds were transferred from Shofer's own post-tax contributions to his voluntary plan, effectively losing the shelter for those funds. The loss to Shofer was calculated by Rosenberg in the chart attached in the amount of:

$1, 823,018.00

3. Income taxes due on unpaid loan interest

In the absence of adequate advice concerning procedure, interest which was allowed to accrue on loans taken was separately charged to Shofer as additional income with tax assessed in the amount of::

$51,831.00

4. Loss of opportunity to refinance St. Thomas property:

The loans were used in part to purchase this property, which became encumbered by the very nature of the loans. Tax liens against Shofer and lost credit precluded him from refinancing the 13% to at least 9% available in 1988. As of 12/20/93 the difference between the present mortgage principle ($153,411.72) and the principle at 9% ($118,887.02) is:

$46,532.10

Tax attorney Allen Schwait represents Shofer regarding this tax liability which arose from the 1988 tax audit triggered by the amended returns. Mr. Schwait's professional fees in this regard would be added to the category below.

5. Profesional fees

| | | |
|---|---|---|
| a) | Grabush | $17,596.60 |
| b) | Giampetro | $29,316.25 |
| c) | Schwait | ________ |
| d) | Hack | $1,435.00 |

6. Other Economic damages

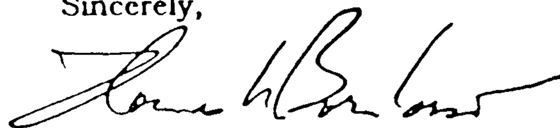
These damages fall in two categories: loss of salary and a negative net worth of Shofer's corporate stock as a result of a lost credit line and tax liens. Shofer was unable to draw salary in 1991 and 1992 and has calculated the damage to his holdings in Crown Motors based on actual sales history and a distinct decline in inventory from circumstances which accrued in 1988 and thereafter. Losses are calculated through 1992.

| | | |
|---|---|---|
| a) | Salary | $400,000.00 |
| b) | Capitol loss | $1,929,471.00 |

7. Total damages stated above:

$4,515,061.40

Sincerely,



Thomas H. Bornhorst

cc: R. Shofer

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Exhibit F

E. 000133

| | | | |
|---|---|---|---|
| 1 | RICHARD SHOFER | : | IN THE |
| 2 | Plaintiff | : | CIRCUIT COURT |
| 3 | vs. | : | FOR |
| 4 | THE STUART HACK CO., et al. | : | BALTIMORE CITY |
| 5 | Defendants | : | Case No. 88102069/CL799 |

6 Baltimore, Maryland

7 November 23, 1993

8 Deposition of THEODORE M. ROSENBERG, A Witness,
9 called for oral examination by counsel for the Defendant,
10 Stuart Hack, taken at the law offices of Bernstein,
11 Sakellaris, Ward & Truhe, Suite 1622, The World Trade Center,
12 before Henny Hunter Gerard, Notary Public, beginning at 10:40
13 o'clock a.m.

14 A P P E A R A N C E S

15 THOMAS H. BORNHORST, ESQ., on behalf of the Plaintiff.

16

17 JANET M. TRUHE, ESQ., on behalf of the Defendant, Stuart Hack.

18 MARK A. GILDAY, ESQ., on behalf of the Defendant, Grabush, Newman.

19

Reported By:
20 Henny Hunter Gerard, RPR-CM
Riggleman, Turk & Nelson
21 (410) 539-6398

1 some but you did not think you could help him on others?

2 A Yes.

3 Q At this point you do not specifically recall what

4 those others damages were?

5 A I recalled one of them, his failure to refinance a

6 mortgage on a piece of property, and I just said there is just

7 no way on earth I can quantify that to what you would have

8 had, I can't do both sides of it. I can't come up with a

9 quantity of what could have been a damage. I will agree with

10 him that in fact if in the situation with all the tax liens

11 outstanding, that is a real damage, but it is not something

12 that I can deal with and I can quantify.

13 Q Why not?

14 MS. TRUHE: Why not?

15 A I don't know what rate he could have gotten. I

16 can't match it against anything. There are all kinds of

17 damages which are real that you can't always figure out what

18 they are. And I can't do everything.

19 MS. TRUHE: What were the unknowns associated

20 with having to figure that out? You said the interest rate

21 being one?

E. 000140

1 A The interest rate, it is not even in the United
2 States. The exact date he would have refinanced, what other
3 credit situations that I can't figure, but, you know, I know
4 in fact that probably there was in fact a cost, but I can't
5 tell him how much it was.
6 Q (By Mr. Gilday) And that is because there are too
7 many unknown variables?
8 A Maybe somebody else can deal with them.
9 Q Do you know who that person would be? You are the
10 numbers guy here.
11 A I am the numbers guy. But sometimes I have to say
12 I just don't know the answer to this, and I can't, you know, I
13 can't answer everything. I have got to stick to what I think
14 I understand.
15 Q Let me take a look at some other areas of damages
16 and ask you if you recall him discussing these with you. We
17 have already discussed the taxes, penalty and interest and the
18 loss of contributions to his voluntary account.
19 Do you recall Mr. Shofer discussing with you any
20 losses that he believed or any damages that he believed he
21 suffered as a result of income taxes that were due on unpaid

E. 000141

1 A Or it simply can't be done. And in some of these
2 things it is just a matter of guessing, it is just going to be
3 more work than they are really going to want done or there is
4 something they have to handle themselves. They don't need me.
5 Q You also testified Dick Shofer provided you with
6 some numbers that he had run but you did not use them,
7 correct?
8 A Correct.
9 Q Do you recall whether those numbers were generally
10 higher or lower than the numbers you ran?
11 A Generally lower.
12 Q You also referred on several occasions that he was
13 forced to take these loans.
14 What do you mean by that?
15 A Forced to take this action. While he obviously
16 felt, and I think he made this, I guess you could get his
17 statement on it, but, I mean --
18 Q Based upon his conversations with you.
19 A Based upon conversations with me he obviously felt
20 if he didn't convert this at the time, he felt that if he
21 didn't convert this, that the IRS was going to come and shut

| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | Case No. 88102069/CL79993 |
| | * | |
| Defendants | | |
| | * | |

* * * * * * * * * * * *

# ORDER

Plaintiff's Motion for Revision of this Court's prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995 having been considered by this Court, and counsel having presented argument, it is this ______ day of ________________, 1996 hereby

ORDERED that Plaintiff's Motion for Revision is denied;

IT IS FURTHER ORDERED that Plaintiff reimburse Defendants their attorney's fees in the amount of $_______.

______________________________
Judge

SHOF4156.LIA

| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

* * * * * * *

| | |
|---|---|
| THE STUART HACK CO., et al. | * |
| Third Party Plaintiff | * |
| | * |
| v. | |
| | * |
| GRABUSH, NEWMAN & CO., P.A. | |
| | * |
| Third Party Defendant | * |

* * * * * * * * * * * *

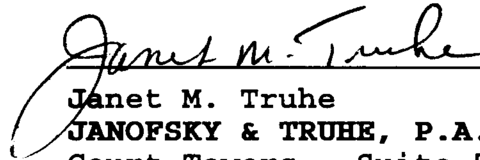
**REQUEST FOR HEARING**

Defendants, Stuart Hack and The Stuart Hack Company, respectfully request a hearing on **Plaintiff's Motion for Revision of this Court's prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and**

HACK4156.REQ

1362

February 23, 1995 in the above-captioned case.

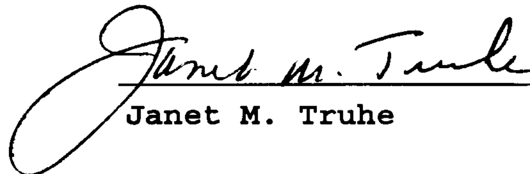


Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys Defendants
Stuart Hack and
The Stuart Hack Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 17th day of April, 1996, copies of the foregoing **Request for Hearing (on Defendants' Opposition to Plaintiff's Motion for Revision of this Court's prior Orders of February 17, 1993, July 11, 1994, January 31, 1995 and February 23, 1995)** were mailed, postage prepaid, to Douglas R. Taylor, Esquire, P.O. Box 4566, Rockville, Maryland 20850 and John T. May, Esquire, Jordan Coyne & Savits, 1100 Connecticut Avenue, N.W., Suite 600, Washington, D.C. 20036.



Janet M. Truhe

RICHARD SHOFER * IN THE

Plaintiff * CIRCUIT COURT

v. * FOR

STUART HACK * BALTIMORE CITY

AND *

THE STUART HACK CO. * Case No. 88102069/CL79993

*

Defendants

*

* * * * * * * * * * * *

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY**

Defendants, Stuart Hack and The Stuart Hack Company file the following Opposition to Plaintiff's Motion for Summary Judgment on the Issue of Liability. The Plaintiff's Motion is wholly without merit, and could have only been filed in violation of Maryland Rule 1-311(b).[1]

---

[1] Maryland Rule 1-311(b) provides:

> The signature of an attorney on a pleading or paper constitutes a certification that the attorney has read the pleading or paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for improper purpose or delay.

Where the foregoing provision has been violated, the pleading at issue should be stricken, and the action proceed "as though the pleading had not been filed." See Maryland Rule 1-311(c). For a willful violation of this Rule, the attorney who filed the pleading may be

This is because Defendants have always contested liability, and have previously named an expert who will testify on their behalf as to that issue. This expert's deposition was taken by Plaintiff on March 31, 1993.

Thus, Plaintiff's contention that "after eight years of litigation, Defendants have offered no proof or evidence. . .that Defendants are not liable for breach of contract or negligence,"[2] is false. For these reasons and the ones set forth more fully below, Plaintiff's Motion for Summary Judgment must be denied.[3]

In the interest of economy, Defendants adopt and incorporate herein by reference pages 2-14 of the Defendants' Opposition to Plaintiff's Motion for Revision (filed April 17, 1996). The "Factual and Procedural Background" of this case set forth on those pages,

---

subject to disciplinary action. Id.

[2] See Plaintiff's Motion at pp. 1-2.

[3] Moreover, an inquiry should be made into how thoroughly Plaintiff's present counsel (who is the Plaintiff's fourth attorney in this case) has familiarized himself with the file since entering his appearance on June 2, 1995. All of the information set forth in the instant Opposition is readily ascertained from a review of the file, and would have revealed that Plaintiff was clearly not entitled to summary judgment. For this reason, Defendants further request that this Court consider awarding them attorney's fees for having to respond to a motion which Plaintiff's counsel ought to have known should never have been filed in the first place.

particularly at pages 11-14, will give this Court a summary of the essential facts underlying the liability issues. Defendants will therefore not repeat them herein.

The principal liability issue to be resolved by the trier of fact is whether Mr. Hack was under a duty to give the Plaintiff unsolicited personal tax advice when Plaintiff asked Mr. Hack about the legality of borrowing from his pension in August of 1984. It is the Defendants' position that when Mr. Shofer asked Mr. Hack whether he could borrow money from his pension or use the pension's assets as collateral for a loan, Mr. Hack was under no duty to give Mr. Shofer such personal tax advice. See Deposition of Stuart Hack at p. 338 (attached hereto as Exhibit A). Mr. Hack's deposition testimony alone on this point is competent expert testimony sufficient to create a dispute of fact as to whether he breached any professional duty of care. See Turgut v. Levine, 79 Md. App. 279, 291, 556 A.2d 726 (1989). It is also undisputed in this case that Mr. Shofer never asked Mr. Hack for any advice regarding the potential income tax implications of the loans he was thinking of making. See Deposition of Richard Shofer at p. 105 (attached hereto as Exhibit B).

In addition, there has been extensive deposition testimony by defense expert, Edward E. Burrows, who is a pension consulting actuary, and whose firm performs the same

functions that Mr. Hack's firm performed for small business pension plans, like the Plaintiff's. See Deposition of Edward E. Burrows at pp. 4, 58 (attached hereto as Exhibit C).[4] Mr. Burrows has specialized in the retirement aspect of employee benefits for over twenty years (id. at p. 13), has lectured in this field and is currently writing a book on pension plan consulting and administration. Id. at p. 65. Mr. Burrows has testified that it would have been "improper" for someone in Mr. Hack's position "to counsel a client[5] on the tax implications of a certain decision." Id. at pp. 28, 54. Only an attorney or the Plaintiff's personal tax advisors (and income tax preparers), at that time, should have been giving him such

---

[4] The excerpts from Mr. Burrows' deposition testimony referenced herein are not intended to be a comprehensive discussion of all the opinions which he will express at trial on the issue of Mr. Hack's liability.

[5] It is also important to note that Mr. Shofer, personally, was not even a client of Mr. Hack's or his firm. Mr. Hack had been retained solely by Mr. Shofer's business to administer the Catalina Enterprises, Inc. pension plan which had been established for all employees of Mr. Shofer's car dealership.

advice[6]. Id. at pp. 28-29, 50-51, 54-55, 74-75. As Mr. Burrows put it:

> My opinion is that Mr. Hack was not under any obligation as a matter of professional standards to volunteer information on Mr. Shofer's personal tax situation; it wasn't asked by Mr. Shofer.

Id. at p. 56. Indeed, as Mr. Burrows further noted, "it's far more common for the pension consultant to put a lot of distance between himself and [the] tax treatment of any participant who may be receiving benefits or other rights under the [pension] plan." Id. at p. 49 (emphasis added).

With respect to the advice that Mr. Hack did give in his letter of August 9, 1984, Mr. Burrows testified that "it's my opinion that Mr. Hack's behavior adheres to a standard of care which is reasonable and to be expected in accordance with customary practice." Id. at pp. 42-43. In this regard, Mr. Burrows testified that the only questions Plaintiff posed to Mr. Hack related to the "acceptability of a participant loan," meaning "is a participant loan possible, and if so, how big a loan is possible." Id. at

---

[6] It is undisputed that at all times relevant in this case, several members of the accounting firm of Grabush & Newman were the Plaintiff's personal tax advisors. It is also undisputed that Mr. Hack played no role in the preparation of the income tax returns at issue. Those returns were prepared exclusively by the accountants at Grabush, Newman.

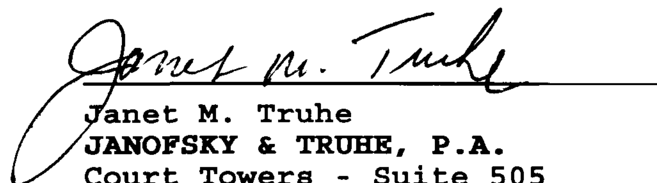
p. 44. Mr. Burrows further testified that Mr. Hack accurately addressed those issues in his August 9, 1984 letter to the Plaintiff. Id. at pp. 44.

Accordingly, regardless of what the Plaintiff's pension expert, who is a pension attorney and not a simply consultant (like Mr. Hack), may say on the issue of liability, the Defendants' expert has a different opinion. Therefore, the Plaintiff is not entitled to summary judgment.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court deny Plaintiff's Motion for Summary Judgment on the Issue of Liability, and award them their attorney's fees for having to respond to it.

Respectfully submitted,

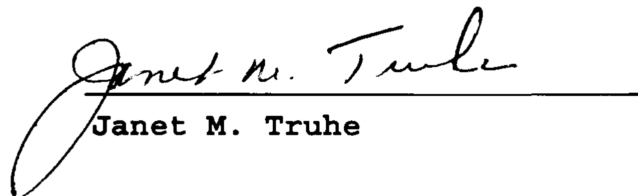


Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys Defendants
Stuart Hack and
The Stuart Hack Company

<u>**CERTIFICATE OF SERVICE**</u>

I HEREBY CERTIFY that on this 18th day of April, 1996, copies of the foregoing **Defendants' Opposition to Plaintiff's Motion for Summary Judgment on the Issue of Liability** and proposed **Order** were mailed, postage prepaid, to Douglas R. Taylor, Esquire, P.O. Box 4566, Rockville, Maryland 20850 and John T. May, Esquire, Jordan Coyne & Savits, 1100 Connecticut Avenue, N.W., Suite 600, Washington, D.C. 20036.



Janet M. Truhe

Exhibit A

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

Vol. III

IN THE CIRCUIT COURT FOR BALTIMORE CITY

| | |
|---|---|
| RICHARD SHOFER,<br>Plaintiff,<br>vs.<br>THE STUART HACK COMPANY and STUART HACK,<br>Defendant. | CASE NO. 88102069-CL79993 |

Friday, August 18, 1989

Deposition of

STUART HACK,

a Defendant, called for examination by counsel for the Plaintiff, pursuant to Notice, at the law offices of Blum, Yumkas, Mailman, Gutman & Denick, P.A., Two Hopkins Plaza, 1200 Mercantile Bank & Trust Building, Baltimore, Maryland 21201-2914, commencing at 9:26 a.m., there being present on behalf of the respective parties:

ON BEHALF OF THE PLAINTIFF:

THOMAS A. BOWDEN, ESQUIRE
Blum, Yumkas, Mailman, Gutman & Denick, P.A.
Two Hopkins Plaza
1200 Mercantile Bank & Trust Building
Baltimore, Maryland 21201-2914

Court Reporting and Litigation Support
Serving Baltimore, Washington and Annapolis
301 647-8300
800 950-DEPO

1 ON BEHALF OF THE DEFENDANT:

2 JANET M. TRUHE, ESQUIRE
Semmes, Bowen & Semmes
3 250 West Pratt Street
Baltimore, Maryland 21201

4 ON BEHALF OF THE THIRD-PARTY DEFENDANT:

5 LINDA M. SCHUETT, ESQUIRE
Frank, Bernstein, Conaway & Goldman
6 300 East Lombard Street
Baltimore, Maryland 21202

7

REPORTED BY: LINDA SIMONS, NOTARY PUBLIC

8

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1 THE WITNESS: With regard to the intent of the
2 book, it would not have been complete without it.
3 BY MR. BOWDEN:
4 Q Is it fair to say that your letter of August
5 9, 1984 was incomplete because it failed to make any
6 mention of adverse tax consequences?
7 A No, I don't think it was incomplete because it
8 failed to. It depends upon what I was asked.
9 Q Well given what you were asked, was it
10 incomplete?
11 A Well, we have a, you know, a dispute here as
12 to exactly what I was asked.
13 Q Why don't you summarize what you believe you
14 were asked and then tell me whether you think the letter
15 was incomplete for not mentioning adverse tax
16 consequences?
17 A I was asked whether a loan could be made
18 against the voluntary account, or whether a loan could
19 be made against the regular employer account, and
20 whether that was the best way to make a loan as compared
21 to putting up the account that's collateral for an

Exhibit B

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

1

2 RICHARD SHOFER : IN THE

3 Plaintiff : CIRCUIT COURT

4 v. : FOR

5 THE STUART HACK COMPANY, et al. : BALTIMORE CITY

6 Defendants : Case No. 88102069/CL79993

7 -----------

8 Baltimore, Maryland

9 February 2, 1990

10 Deposition of RICHARD SHOFER, Plaintiff, called for

11 oral examination by counsel for the Defendants, taken at the

12 law offices of Semmes, Bowen & Semmes, Conference Room 17-A,

13 250 West Pratt Street, beginning at 10:12 a.m.

14 A P P E A R A N C E S

15 THOMAS A. BOWDEN, ESQ., on behalf of

16 the Plaintiff.

17 JANET M. TRUHE, ESQ., and LEE B. ZABEN, ESQ., on behalf of the Defendants.

18 LINDA M. SCHUETT, ESQ., on behalf of the

19 Third-Party Defendant, Grabush & Newman.

20 Reported By: Dawn M. Hart, CSR
Riggleman, Turk & Nelson

21 (301) 539-6398

1 his name and phone number. But if it's about an issue that I
2 can commit to memory and I know or I feel that I can commit
3 it satisfactorily to memory, I don't make notes.
4 Q Why did you call Stuart Hack on this matter?
5 A Because he was the logical one to call.
6 Q Well, what were you trying to get from him, what
7 type of information?
8 A I wanted to know the appropriateness and
9 feasibility of borrowing from the pension if I could.
10 Q In other words you wanted to know whether it was
11 lawful?
12 A I wanted to know anything about it that was
13 relevant to borrowing and lawful particularly.
14 Q Do you recall whether you asked him about any
15 personal tax consequences to you of borrowing money from your
16 pension plan?
17 A I don't remember whether I did or didn't, but I
18 can almost assuredly surmise that I didn't.
19 Q Why do you think you didn't?
20 A Because I didn't imagine that there would be any
21 tax consequences. I didn't think it was a tax issue or a

Exhibit C

ALL-STATE® LEGAL 800-222-0510 EDR11 RECYCLED

| | | | |
|---|---|---|---|
| 1 | RICHARD SHOFER, | : | IN THE |
| 2 | Plaintiff | : | CIRCUIT COURT |
| 3 | v. | : | FOR |
| 4 | THE STUART HACK COMPANY, et al., | : | BALTIMORE CITY |
| 5 | Defendants | : | Case No.: 88102069/CL79993 |

6 Baltimore, Maryland

7 March 31, 1993

8 Deposition of EDWARD E. BURROWS, a Witness, called

9 for oral examination by counsel for the Plaintiff, taken at

10 the law offices of Bernstein, Sakellaris & Ward, Suite 2852,

11 The World Trade Center, beginning at 2:22 o'clock p.m.

12

13

14 ---

15

16

17

18 Reported By: Beatriz D. Fefel, RPR, Notary Public
Riggleman, Turk & Nelson

19 (410) 539-6398

20

21

1 is?

2 A I am a consulting actuary.

3 Q Okay. And what's your educational background?

4 A I have a Bachelor's degree from the University of

5 Michigan, and my professional study beyond that has not been

6 at formal institutions.

7 Q University of Michigan?

8 A That's correct.

9 Q Okay. And what was your undergraduate degree in?

10 A Music.

11 MR. BORNHORST: Off the record.

12 (Discussion off the record.)

13 Q (By Mr. Bornhorst) Okay. Now, do you work under a

14 business surname of some sort?

15 A Yes. The Pentad Corporation.

16 Q Pentad, P-e --

17 A P-e-n-t-a-d.

18 Q Okay. Corporation?

19 A Yes.

20 Q And when was that organized?

21 A 1975.

1 please challenge the assumption if it's relevant. But the
2 assumption is that the, that an attorney is not always a part
3 of the circle of pension consultant/accountant/attorney. To
4 what degree is that a reasonable assumption?
5 A I'm not sure it is a reasonable assumption. Much
6 of what's involved in establishing and maintaining an employee
7 benefit plan involves a knowledge of the law, and an
8 individual functioning in the role that I function in and that
9 Stuart Hack functions in out of necessity must have a good
10 understanding of the law. But we cannot as a matter of law
11 counsel our clients on law.
12 Q Unless you're an attorney?
13 A Well, unless you're an attorney practicing as an
14 attorney, unless you're in a, an attorney/client relationship,
15 it would be improper for you to counsel a client on the tax
16 implications of a certain decision.
17 Q Fine. And you're, I'm sure you're aware that
18 Stuart Hack is an attorney --
19 A Yes.
20 Q -- a licensed attorney. And I take it from your
21 comment that it would not be your opinion that Stuart Hack was

1 in the practice of law in his operations with The Stuart Hack
2 Company; would that be correct, or incorrect?
3 A That is correct.
4 Q And what are the signs and symptoms, in your
5 opinion, that lead to that conclusion?
6 MS. TRUHE: Objection. You may answer.
7 A Stuart Hack has told me that he is not practicing
8 as an attorney. By observation I conclude that his practice
9 is very similar to my practice and the practice of many other
10 likely situated individuals. In my case it would be the
11 unauthorized practice that I would be tangled up with, in his
12 case it would be the unethical practice.
13 Q In his case, in Stuart's case?
14 A He's, he is running an employee benefit consulting
15 and administration organization. He is not practicing as an
16 attorney.
17 Q All right. And because of your many years of
18 experience in the business, I gather that's why you're saying
19 that you know the distinction between the one and the other?
20 A The distinction between practicing as an
21 attorney --

1 Q Were you ever asked to provide a written report?
2 A 'I was not.
3 Q Was it ever explained to you why a written report
4 was not necessary?
5 MS. TRUHE: Objection.
6 Q Did anyone ever tell you not to provide a written
7 report or not to produce one?
8 A No.
9 Q Have your opinions changed since you talked to Mr.
10 Zaben?
11 A It's my understanding that the issues are somewhat
12 narrower now than they were then. On those remaining issues
13 my opinions have not changed.
14 Q I understand.
15 Okay. Then bringing your attention back to the
16 August 9 letter of 1984, with your understanding of the facts
17 of this case, what is your opinion concerning the standard of
18 care that is reflected in that document?
19 A With respect to the issues which I now understand
20 are relevant, it's my opinion that Mr. Hack's behavior adheres
21 to a standard of care which is reasonable and to be expected

1 in accordance with customary practice.

2 Q Okay. What, from reading the letter, what, or from

3 any other source, what is your understanding of the nature of

4 the questions that were addressed to Mr. Hack?

5 A Well, the questions that I understand are at issue

6 involves the taxability of a participant loan.

7 Q Now, that particular letter doesn't mention taxes

8 specifically, does it?

9 A It doesn't address the taxability of the

10 participant loan.

11 Q Okay. And, however, your assumption was that the

12 questions that were put to Mr. Hack concerned the taxability

13 of the loans; is that correct?

14 MS. TRUHE: Objection.

15 A No.

16 Q All right. I misunderstood your answer. Say again

17 what you believe the nature of the questions were, as you

18 understand them, that were addressed to Mr. Hack that resulted

19 in this explanation. What questions was Mr. Hack addressing

20 when he wrote that letter back to his client?

21 A Mr. Hack was addressing the question of

1 acceptability of a participant loan.

2 Q What does that mean, acceptability?

3 A That is, is a participant loan possible, and if so,

4 how big a loan is possible.

5 Q Umh-humh. And is your opinion that Mr. Hack

6 answered that question accurately?

7 MS. TRUHE: Objection. Those questions

8 accurately? Those were two questions.

9 Q Those questions accurately. Let me be more

10 specific. If I can look at this.

11 A Sure.

12 Q The first paragraph reads, you questioned whether

13 assets of your money purchased pension plans and profit

14 sharing plans that can be used as collateral for loans,

15 whether you can borrow against these plans, and whether

16 there's any special treatment for your voluntary account under

17 these plans. The answer you provided relates to those

18 questions, those issues?

19 A The portion of the answer that I characterized, or

20 that I'm characterizing now as accurate runs to the maximum

21 amount of loan.

1 MR. BORNHORST: Is there an objection on the
2 record on that question?
3 MS. TRUHE: Yes.
4 A Well, I believe there are -- we need to focus on
5 two levels of tax implications. One level is tax treatment of
6 the sponsor and the plan by virture of the existence of the
7 plan and various transactions which may occur as a result of
8 the plan tax treatment relative to the sponsor and its
9 sponsorship of the plan. I see a very clear distinction
10 between that and tax treatment of any participant covered
11 under the plan as a result of transactions related to that
12 participant. It is not uncommon. As a matter of fact, it's
13 far more common for the pension consultant to put a lot of
14 distance between himself and tax treatment of any participant
15 who may be receiving benefits or other rights under the plan.
16 Q Shouldn't Mr. Hack have directed Mr. Shofer to get
17 some specific tax advice under the circumstances?
18 MS. TRUHE: Objection. The specific
19 circumstances of this inquiry that we've been talking about?
20 MR. BORNHORST: The response to the inquiries
21 as contained in the letter of August 9, 1984. It lacks tax

1 advice and there were consequences because of taxable events.
2 MS. TRUHE: Which Mr. Hack did not know about
3 when he wrote this letter.
4 MR. BORNHORST: The transactions had taken
5 place.
6 Q (By Mr. Bornhorst) Is it your testimony that the
7 standard of care involved in this case did not include advice
8 to this particular inquiree that he go seek tax advice under
9 the circumstances?
10 A Based on the facts that have been given to me, yes,
11 it is; that is, I have concluded that Mr. Hack knew and should
12 have known that Mr. Shofer had a source of advice on tax
13 matters, that Mr. Shofer was not a neophyte on tax matters.
14 Q Do you know who that source was?
15 MS. TRUHE: Can he finish his answer before
16 you go on?
17 MR. BORNHORST: I think he did.
18 MS. TRUHE: Were you finished with your
19 answer, Mr. Burrows?
20 THE WITNESS: Umh-humh (nodding head
21 affirmatively).

1 Q Do you know who that person was?

2 A It was the firm of Grabush.

3 Q Okay. So that the way that you understand the

4 issues in this case, the accounting firm had more of a

5 responsibility for tax advice than Mr. Hack?

6 A For tax advice relative to the personal tax

7 treatment of Mr. Shofer.

8 Q Should Stuart Hack have known that certain loans by

9 the trustee would be prohibited transactions?

10 MS. TRUHE: Objection.

11 MR. BORNHORST: Just off the record.

12 (Discussion off the record.)

13 MR. BORNHORST: Let's go back on the record,

14 make this part of the record.

15 MS. TRUHE: When I say objection to that last

16 question about prohibited transactions, the basis of my

17 objection is this. The Court of Appeals has ruled that any

18 negligence on the part of the defendant which is the

19 proximate cause of any damage to Mr. Shofer in the area of a

20 prohibited transaction may not be recovered by Mr. Shofer in

21 this state case.

1 A I'm not sure now I know what the question was.

2 Q Okay.

3 A I thought I --

4 Q Your testimony -- okay. I'm referring back to your

5 testimony that there are different kinds of tax concerns and

6 that it would not be in the nature of Mr. Hack's concern

7 relative to Mr. Shofer's personal tax consequences; is that

8 correct? I'm not trying to misstate what you said.

9 A Yeah.

10 Q Please repeat it.

11 A Given the nature of the relationship between Hack

12 and Shofer and Hack's knowledge of the existence of Shofer's

13 other advisors, on this issue of personal tax treatment it is

14 my opinion that Mr. Hack was not called upon to volunteer

15 guidance to Mr. Shofer on that personal tax treatment.

16 Q Did Mr. Hack have any responsibility at all, in

17 your opinion, to direct Mr. Shofer to, or ask him whether or

18 not he was getting other, information from any other source?

19 A Given a different relationship I would answer yes.

20 But given this relationship, based on what I know, the answer

21 is no.

1 Q Well, what is different about the relationship
2 between this plan and this pension consultant and the
3 accountants in this case that stands out in your mind?
4 A Mr. Hack's knowledge that his client was a
5 sophisticated individual in tax matters and that he was being
6 guided by a sophisticated, competent accountant firm.
7 Q I don't understand what the basis of your opinion
8 is that Mr. Shofer was sophisticated in tax matters. What is
9 that basis?
10 A My reading of the deposition transcripts and the
11 summaries leads me to the conclusion that Mr. Shofer was not a
12 neophyte on matters tax-wise.
13 Q Prior to his inquiry to Mr. Hack?
14 A The transcripts all occurred after, after the
15 inquiry, but it's material that came out of those transcripts
16 that leads me to that conclusion.
17 Q Do you remember any fact that refers to the
18 relationship that Mr. Shofer had prior to this August 9, 1984
19 letter that leads you to believe that he had any special tax
20 knowledge --
21 A My --

1 Q -- concerning the issues in this case --

2 A Concerning the question of tax treatment of --

3 Q -- of loans from a pension?

4 A None, none whatsoever.

5 Q So it's your opinion that that advice should have
6 come from Grabush-Newman?

7 A My opinion is that Mr. Hack was not under any
8 obligation as a matter of professional standards to volunteer
9 information on Mr. Shofer's personal tax situation; it wasn't
10 asked by Mr. Shofer.

11 Q Is there any question in your mind whether that --
12 whether the, the events subsequent to this letter involve the
13 taxability of, of the loans over fifty thousand dollars which
14 became personal income and distributions under the
15 circumstances? Do you believe that that event was foreseen by
16 that correspondence, that letter?

17 MS. TRUHE: Objection. Foreseen by whom?

18 Q Was there any consideration at all in this, in this
19 letter for that possibility?

20 MS. TRUHE: Objection. Don't answer that
21 question. That calls for speculation, and it also calls for

1 EXAMINATION BY MR. MAY

2 Q Mr. Burrows, my name is John May. I represent

3 Grabush-Newman.

4 The plan that was -- the plan at issue in this case

5 is the the Catalina plan. That was not a defined benefit

6 pension plan, was it?

7 A No.

8 Q There was no requirement for an actuary at that

9 point, was there?

10 A No.

11 Q Does your firm perform the same functions that Mr.

12 Hack's firm performed for Catalina described in this

13 deposition?

14 A Yes, umh-humh.

15 Q In talking about the function of an actuary, you

16 indicated that an actuary deals in probability and the time

17 value of money. With respect to the time value of money, if

18 you are doing a calculation, do you choose the discount rate,

19 do you determine the discount rate, or do you look to someone

20 else to make that estimate or assumption?

21 A It depends on the purpose of the calculation.



1342

1 A No.

2 Q Do you know any of the --

3 A Only by reading the deposition.

4 Q Do you know any of the accountants at

5 Grabush-Newman?

6 A No.

7 Q Are you familiar with that firm at all?

8 A I wasn't before I started reading depositions.

9 Q Okay. Have you written anything on the subject of

10 pension plan consulting and administration?

11 A I'm currently writing a book.

12 Q What stage are you in on the book?

13 A About eighty percent through the first of two

14 volumes.

15 Q Okay. Anything else?

16 A There was a time years and years ago when I viewed

17 it as good practice development to publish articles. I have

18 since changed my attitude on that so I haven't written

19 anything for quite a number of years.

20 Q Since 1984?

21 A I have not written for magazines or the outside

1 whether or not it's acceptable for him to practice law.

2 The next of the major sections deals with concerns

3 that I've had respecting Mr. Shofer's conduct. It's pretty

4 clear to me that Mr. Shofer --

5 Q Are you actually reading?

6 A No.

7 Q I want you to actually read it into the record,

8 because my point is the handwriting is not clear and that

9 document's not going to be much help to us unless we know what

10 it says. All I really want you to do is just read precisely

11 what's written on the document so we'll know that's what it

12 says.

13 A All right.

14 MS. TRUHE: And then if Mr. May would like you

15 to elaborate any further, you may do so.

16 Q Yeah, that will save time.

17 A Should I go back to the beginning?

18 Q Yes.

19 A Hack met standard of care. Given nature of

20 relationship, given nature of inquiry, knowledge of other

21 professionals, and need to avoid being charged with the, with

1 law practice.

2 Shofer. Mechanics of borrowing. Consulting

3 with no one. Set own interest rate. Failed to involve an

4 independent fiduciary. No set payback. Could have been

5 characterized as a distribution. I'm sorry, I tried again to

6 paraphrase. No set payback, dash, could turn loan into a

7 distribution. Went beyond scope of letter. Exceeded

8 voluntary asset balance plus fifty thousand dollars in 1985.

9 No security paperwork.

10 Grabush. Should have been triggered by twelve

11 thousand dollar interest item, July 1985. No duty to amend.

12 Damages. Timing. Penalties only.

13 Q Okay. May I look at that for a moment?

14 (Witness handing).

15 Q Your opinion -- well, at least this note, went

16 beyond scope of letter, exceeded voluntary asset balance plus

17 fifty thousand dollars in 1985, do you recall specifically

18 when in 1985 the balance was exceeded?

19 A I don't recall the dates on which the loans were

20 taken out in 1985.

21 Q Okay. Do you recall which loan in '85 he took a --

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|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

* * * * * * * * * * * *

**REQUEST FOR HEARING**

Defendants, Stuart Hack and The Stuart Hack Company, respectfully request a hearing on **Plaintiff's Motion for Summary Judgment on the Issue of Liability** in the above-captioned case.

Janet M. Truhe

Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

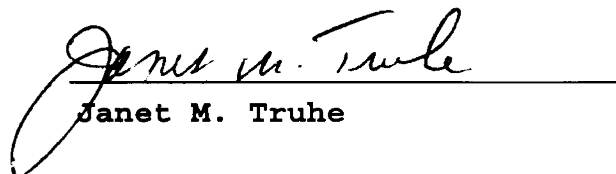
Attorneys Defendants
Stuart Hack and
The Stuart Hack Company

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 18th day of April, 1996, copies of the foregoing **Request for Hearing** (on

HACK4186.REQ

**Defendants' Opposition to Plaintiff's Motion for Summary Judgment on the Issue of Liability)** were mailed, postage prepaid, to Douglas R. Taylor, Esquire, P.O. Box 4566, Rockville, Maryland 20850 and John T. May, Esquire, Jordan Coyne & Savits, 1100 Connecticut Avenue, N.W., Suite 600, Washington, D.C. 20036.



Janet M. Truhe

| RICHARD SHOFER | * | IN THE |
|---|---|---|
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

*   *   *   *   *   *   *   *   *   *   *   *

**ORDER**

Plaintiff's Motion for Summary Judgment on the Issue of Liability having been considered by this Court, and counsel having presented argument, it is this ______ day of ________________, 1996 hereby

ORDERED that Plaintiff's Motion for Summary Judgment is denied;

IT IS FURTHER ORDERED that Plaintiff reimburse Defendants their attorney's fees in the amount of $_______.

______________________________
Judge

HACK4186.REQ

DCM

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|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

* * * * * * *

| | | |
|---|---|---|
| THE STUART HACK CO., et al. | * | |
| Third Party Plaintiff | * | |
| | * | |
| v. | | |
| | * | |
| GRABUSH, NEWMAN & CO., P.A. | | |
| | * | |
| Third Party Defendant | * | |

* * * * * * * * * * * *

**DEFENDANTS' ANSWER TO**
**PLAINTIFF'S FIFTH AMENDED COMPLAINT**

The Stuart Hack Company and Stuart Hack, Defendants, by their attorneys, Janet M. Truhe and Janofsky & Truhe, P.A., answer Counts I, II and III of Plaintiff's Fifth Amended Complaint as follows:

**FIRST DEFENSE**

They generally deny liability as to each allegation of the Fifth Amended Complaint in accordance with Rule 2-323(d).

HACK5016.ANS

**SECOND DEFENSE**

The Fifth Amended Complaint fails to state a claim upon which relief can be granted.

**THIRD DEFENSE**

That if Plaintiff suffered damages as alleged, such damages were caused by the Plaintiff's own sole or contributory negligence.

**FOURTH DEFENSE**

That if Plaintiff suffered damages as alleged, such damages were caused because the Plaintiff assumed the risk thereof.

**FIFTH DEFENSE**

That Plaintiff is estopped to complain about any advice rendered by Defendants pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

**SIXTH DEFENSE**

That Plaintiff has waived any claim arising out of advice rendered by Defendants pertaining to loans taken by the Plaintiff from the Catalina Enterprises, Inc. Pension Plan.

**SEVENTH DEFENSE**

That Plaintiff's reliance on advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan was unjustified when he



400

proceeded to borrow from the Plan in 1984, 1985 and 1986 without informing the Defendants.

**EIGHTH DEFENSE**

That Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and owed no legal duty to Plaintiff, personally.

**NINTH DEFENSE**

That Defendants were retained by Catalina Enterprises, Inc. to administer the Catalina Enterprises, Inc. Pension Plan and had no contractual relationship with Plaintiff, personally.

**TENTH DEFENSE**

That Defendant, Stuart Hack, did not hold himself out as an attorney and did not provide any legal services to Plaintiff at any time relevant to the events referenced in the Fifth Amended Complaint.

**ELEVENTH DEFENSE**

That several members of the accounting firm of Grabush, Newman & Co., P.A. were the Plaintiff's personal tax advisors and prepared his personal and corporate income tax returns during all times relevant to this action.

**TWELFTH DEFENSE**

That Defendants did not play any role in the preparation of the income tax returns at issue in this case.

THIRTEENTH DEFENSE

That Plaintiff is not entitled to recover any damages arising out of excise taxes or prohibited transactions or plan disqualification because these are pre-empted and governed exclusively by federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., as held in Shofer v. The Stuart Hack Company, 324 Md. 92, 110-11, 595 A.2d 1078 (1991).

FOURTEENTH DEFENSE

That Plaintiff is not entitled to recover damages for additional income taxes imposed solely because Plaintiff failed to follow the proper procedure for borrowing money from his pension because such damages are pre-empted and governed exclusively by federal law pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., as held by the Hon. Ellen Hollander on July 11, 1994.

FIFTEENTH DEFENSE

That Plaintiff is not entitled to recover damages for lost income and lost profits because such damages were clearly not foreseeable to Defendants when they rendered advice to Plaintiff in August of 1984, as held by the Hon. Ellen Hollander on July 11, 1994.

SIXTEENTH DEFENSE

That Plaintiff is not entitled to recover damages for loss of sheltered earnings on the grounds of assumption of risk, lack of foreseeability and pre-emption, as held by the Hon. Andre M. Davis on January 31, 1995.

SEVENTEENTH DEFENSE

That Plaintiff is not entitled to punitive damages arising out of any advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan, as held by the Hon. Thomas Ward on February 17, 1993 and the Hon. Ellen Hollander on July 11, 1994.

EIGHTEENTH DEFENSE

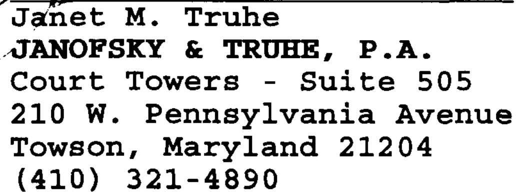
That Plaintiff is not entitled to attorney's fees arising out of any advice rendered by Defendants pertaining to loans from the Catalina Enterprises, Inc. Pension Plan, as held by the Hon. Thomas Ward on February 17, 1993 and the Hon. Ellen Hollander on July 11, 1994.

NINETEENTH DEFENSE

The Plaintiff is not entitled to a jury trial on any of his claims set forth in the Fifth Amended Complaint.

TWENTIETH DEFENSE

The Plaintiff's claims set forth in Count III are barred by limitations.



Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 1st day of May, 1996, copies of the foregoing Defendants' Answer to Plaintiff's Fifth Amended Complaint were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire
P.O. Box 4566
Rockville, Maryland 20850; and to

John T. May, Esquire
Jordan Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036.

Janet M. Truhe

**JANOFSKY & TRUHE, P.A.**
ATTORNEYS AT LAW

COURT TOWERS
SUITE 505
210 W. PENNSYLVANIA AVENUE
TOWSON, MARYLAND 21204

JULIE C. JANOFSKY
JANET M. TRUHE*
*Also admitted in D.C.

(410) 321-4890
FAX (410) 321-1948

PAUL A. MARONE+
+Also admitted in N.Y. and N.J.

May 10, 1996

**VIA HAND DELIVERY**

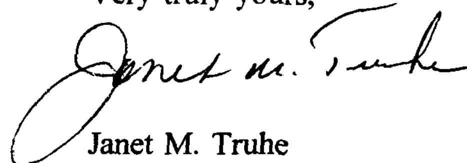
Clerk, Circuit Court for Baltimore City
111 North Calvert Street, Room 448
Baltimore, Maryland 21202

Re: Richard Shofer v. Stuart Hack, et al.
Case No.: 88102069/CL79993

Dear Madam Clerk:

Enclosed please find a Notice of Service (regarding Defendants Stuart Hack and The Stuart Hack Company's Response to Request for Admission of Facts) which I would appreciate your filing in the above case.

Very truly yours,



Janet M. Truhe

JMT/lab
Enclosure
cc: Hon. Albert J. Matricciani, Jr.
Douglas R. Taylor, Esquire
John T. May, Esquire

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| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

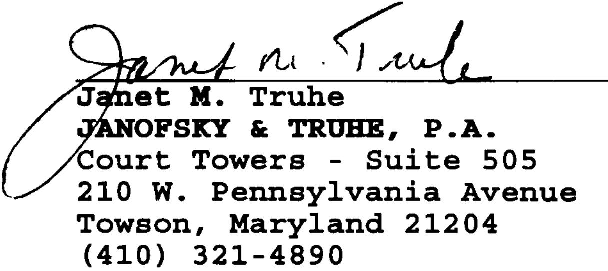
* * * * * * *

**NOTICE OF SERVICE**

I HEREBY CERTIFY that on this 10th day of May, 1996, copies of the foregoing **Defendants Stuart Hack and The Stuart Hack Company's Response to Request for Admission of Facts** along with a copy of this **Notice** were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire
P.O. Box 4566
Rockville, Maryland 20850; and to

John T. May, Esquire
Jordan Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036.



Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

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| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| and | * | |
| THE STUART HACK CO. | * | Case No. 88102069/CL79993 |
| Defendants | * | |

* * * * * * * * * * * *

**NOTICE OF SERVICE**

I HEREBY CERTIFY that on this 19th day of June, 1996, copies of **Defendant Stuart Hack's Answer to Plaintiff's First [Third] Request for Production of Documents** along with a copy of this **Notice** were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire
P.O. Box 4566
Rockville, Maryland 20850; and to

John T. May, Esquire
Jordan Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036.

Janet M. Truhe
Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

Attorneys for Defendants

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# IN THE CIRCUIT COURT FOR BALTIMORE CITY

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BALTIMORE CITY
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CIVIL DIVISION

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RICHARD SHOFER

Plaintiff

v. CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

---

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

## MOTION TO COMPEL

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, moves this Honorable Court as follows:

1. That since the above case was remanded to this Court by the Court of Special Appeals, Plaintiff has attempted without success to set dates for the depositions of the Defendant Stuart Hack. That beginning in the middle of March, and for the months of April and May, Plaintiff has made written requests for dates on which the deposition of the Defendant might be taken. Those efforts have not been rewarded with any date or dates on which Mr. Hack would be available for deposition.

2. That on May 17, 1996, all counsel participated in a conference call in which dates were agreed upon when Plaintiff would be available to depose the Defendant Stuart Hack and other potential witnesses. That the blocks of time agreed upon were August 12 - 23, 1996, September 24 - 27, 1996 and October 10 - 16, 1996. That because Defendant Hack's deposition is critical to Plaintiff's trial preparation, Plaintiff has been reluctant to schedule the deposition of other

witnesses until Mr. Hack's availability is known and he has agreed to appear for deposition. That the failure of Mr. Hack to agree to specific dates for his deposition is severely hampering Plaintiff's trial preparation on a case that requires extensive discovery well in advance of trial.

3. That a trial date has now been set in this case for May 5, 1997. Defense counsel heavy trial schedules precludes many open dates for discovery in this case, and Plaintiff must be able to utilize the time afforded by defense counsel if discovery is to be completed in a timely and efficient manner.

4. That Plaintiff desires to depose Defendant Hack during the first block of time made available by defense counsel, the August 12 through August 23, 1996 dates. That Defendant Hack has not been deposed by Plaintiff in this case since 1989, so that his involvement in this case over the past seven years has been negligible. Clearly, Defendant Hack has not been inconvenienced by Plaintiff's discovery in the recent past, and there is no reason why Defendant Hack should not comply with the rules and present himself for deposition. Plaintiff, who deals with the consequences of this litigation on a daily basis, has adjusted his schedule to be available at the times suggested by defense counsel, and Plaintiff believes that there is no reason Defendant Hack cannot be present on specified dates for his deposition.

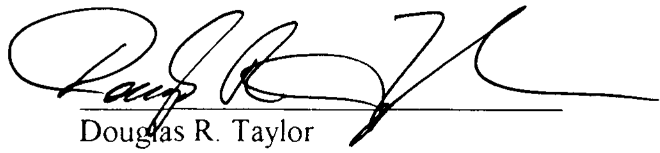
5. That it is imperative and in the interests of justice that the Court order and direct Defendant Stuart Hack appear for deposition of at least 20 hours between August 12 and August 23, 1996.

WHEREFORE, Plaintiff moves this Honorable Court as follows:

A. That this Honorable Court issue an Order directing that Defendant Stuart Hack appear for deposition on specified dates in August, and that he remain available for deposition until completed.

B. That this Honorable Court award Plaintiff reasonable attorneys fees and costs in connection with this Motion to Compel.

C. And for such other and further relief this Honorable Court may deem just and proper under the circumstances of this matter.



Douglas R. Taylor
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209



140

## Points of Authorities

1. As stated above.

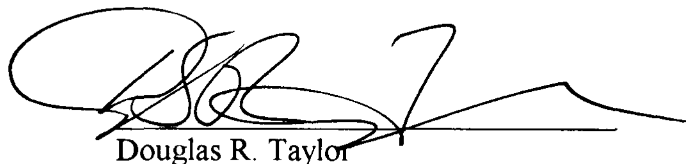
2. Maryland Rules 2-432 and 2-411.

## Certificate of Service

I hereby certify that on this 24th day of June, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion To Compel to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

John Tremain May, Esquire
Deborah M. Whelihan, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036



Douglas R. Taylor

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| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

* * * * * * * * * * * *

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

Defendants, Stuart Hack and The Stuart Hack Company, by their attorneys, Janet M. Truhe and Janofsky & Truhe, P.A., strongly oppose Plaintiff's Motion to Compel further deposition testimony from Stuart Hack in this case.

In his Motion to Compel, Plaintiff seeks an order from this Court directing Mr. Hack to "appear for deposition of at least 20 hours between August 12 and August 23, 1996." See Plaintiff's Motion to Compel at p. 2 (emphasis added). What Plaintiff fails to mention in his Motion, however, is that Mr. Hack has already appeared for deposition on five separate occasions and submitted himself to lengthy questioning by counsel for both the Plaintiff and the Third-Party Defendant.

Set forth below are the dates on which Mr. Hack has been deposed and the approximate duration of his testimony on each occasion:

| | |
|---|---|
| March 16, 1989 | 4.50 hours |
| April 21, 1989 | 3.00 hours |
| August 18, 1989 | 3.00 hours |
| August 30, 1990 | 3.50 hours |
| September 20, 1990 | 2.00 hours |
| TOTAL | 16.00 hours |

Mr. Hack's testimony fills nearly 700 pages of transcript, and 46 exhibits were marked during the course of his deposition. In addition, at the conclusion of Mr. Hack's third deposition session, Plaintiff's counsel indicated that Mr. Hack's deposition would be continued to a later day "in order for the Third-Party Defendant to ask questions." See Deposition of Stuart Hack at p. 470 (attached hereto). When counsel for the Third-Party Defendant completed her questioning at the conclusion of Mr. Hack's fifth deposition session, Plaintiff's counsel was, however, permitted to question Mr. Hack again. See, id. at p. 220. Id. at p. 200 (attached hereto). When Plaintiff's counsel finished his questioning of Mr. Hack, he indicated that he had nothing further. Id. at p. 230 (attached hereto).

Since Mr. Hack was deposed, the Plaintiff has fired two of his attorneys and retained the current one,

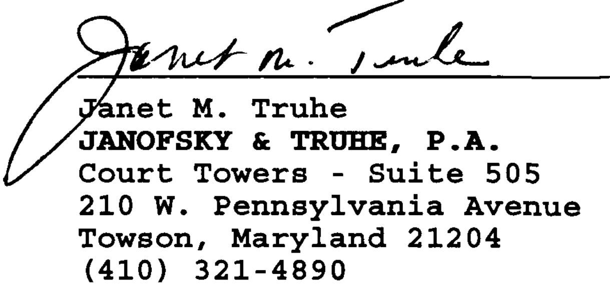
Douglas R. Taylor. In addition, Mr. Hack has sold his pension consulting firm and moved from Baltimore to Florida where he is now working for another company. While it may be difficult for Plaintiff's new attorney to enter this litigation nearly eight years after it was originally filed, that is not justification for Plaintiff's current request that Mr. Hack be ordered back to Baltimore for "at least 20 hours" of further deposition questioning. Moreover, nowhere in Plaintiff's Motion to Compel does he specify what issues he wants to question Mr. Hack about, nor does he identify in what ways the earlier questioning of Mr. Hack was inadequate, deficient, or otherwise incomplete. Mr. Hack has not had any professional dealings with the Plaintiff since this case was filed back in 1988, thus there are no new issues on which Mr. Hack could be questioned now that were not covered in 1989 and 1990 when Mr. Hack was deposed. In short, the Plaintiff has failed to advance any reason, let alone a good one, why Mr. Hack should be required to appear in Baltimore for a deposition at this time.[1]

---

[1] Repeat depositions are generally "disfavored" except in certain circumstances such as the production of new evidence, the introduction of new issues into the case, etc., none of which are present here. See Graebner v. James River Corp., 130 F.R.D. 440 (N.D.Cal. 1989). This case has been essentially dormant for a number of years while the parties pursued various motions and appeals aimed at limiting the liability and damage issues.

It is well settled that the court has broad discretion in the handling of discovery matters, and "[t]he determination by a trial court as to when discovery should cease" lies in its sound discretion as well. See Hirsch v. Yaker, 226 Md. 580, 584 (1961). Discovery in any case must have boundaries, and those boundaries have been reached in this one. To date, Defendants have responded to 30 interrogatories (soon to be 60, after Plaintiff recently filed 30 additional interrogatories directed to Mr. Hack, individually), 29 requests for production of documents and 145 requests for admission of facts. In addition, Mr. Hack has been deposed on five separate occasions. Forcing Mr. Hack to incur the burden and expense of coming to Baltimore for "at least 20 hours" of additional questioning is simply not justified under these circumstances. Moreover, the Plaintiff is not permitted under the Maryland Rules of Procedure to simply note Mr. Hack's deposition again. Maryland Rule 2-411(b) expressly states that "[l]eave of court must be obtained to take a deposition ... of an individual who has already been deposed in the same action." That has not been done in this case. (Emphasis added).

For the reasons stated above, Defendants, Stuart Hack and The Stuart Hack Company, respectfully request that Plaintiff's Motion to Compel be denied.



Janet M. Truhe
**JANOFSKY & TRUHE, P.A.**
Court Towers - Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
(410) 321-4890

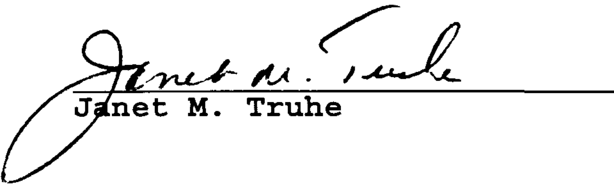
Attorneys for Defendants

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 27th day of June, 1996, copies of the foregoing Defendants' Opposition to Plaintiff's Motion to Compel were mailed by first class mail, postage prepaid, to:

Douglas R. Taylor, Esquire
P.O. Box 4566
Rockville, Maryland 20850; and to

John T. May, Esquire
Jordan Coyne & Savits
1100 Connecticut Avenue, N.W., Suite 600
Washington, D.C. 20036.



Janet M. Truhe

1 come to the conclusion there was no way out, did you
2 communicate that to the insurance company?
3 MS. TRUHE: Objection. You may answer.
4 THE WITNESS: I think I did, yes.
5 MR. BOWDEN: Nothing further.
6 MS. SCHUETT: Ms. Truhe and I have an
7 agreement that -- to continue this deposition to a later
8 day in order for the third-party defendant to ask
9 questions.
10 MS. TRUHE: I have no questions.
11 (Whereupon, at 12:30 p.m., the deposition
12 was continued.)
13 (Signature not waived.)
14 (Filing waived.)
15 (Exhibits not attached.)
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21

1 Q. So you don't know whether they have a
2 pension department today or not?
3 A. No.
4 Q. How about the firm that Mr. Kamanitz is
5 in?
6 A. I have no idea. I have not done work
7 with him in a long time.
8 Q. Walpert?
9 A. Walpert, Smullian? No, they do not
10 maintain a separate pension operation.
11 MS. SCHUETT: With the proviso about
12 any questions I may have on the actual '84 file, I
13 am finished and thank you very much, Mr. Hack.
14 MR. BOWDEN: I have just a couple of
15 things arising directly out of the questions that
16 Linda asked.
17 EXAMINATION BY MR. BOWDEN:
18 Q. Mr. Hack, I don't want to get back into
19 this any more than is absolutely necessary, but in
20 our previous deposition sessions you had testified
21 that you really had no memory of the conversations

1 elastic or can be overridden?

2 A. I have no specific memory of doing

3 that.

4 MR. BOWDEN: That is all I have.

5 MS. SCHUETT: I have just one further

6 question.

7 EXAMINARTION BY MS. SCHUETT:

8 Q. Is it your position, Mr. Hack, that Mr.

9 Shofer or the company through rules and

10 regulations could have expanded the ability to

11 give loans to participants even in a way that

12 would violate the law, for example, loans to a

13 subchapter S-corporation?

14 A. Yes. That doesn't violate the law. It

15 has consequences that may produce a cost to him

16 but he would have the ability in here.

17 I will have to rethink that one. If

18 the law specifically says you can't make a loan to

19 any shareholder of an S-corporation, I think --

20 you are asking for an expert opinion. I think I

21 will pass on that.

| | | |
|---|---|---|
| RICHARD SHOFER | * | IN THE |
| Plaintiff | * | CIRCUIT COURT |
| v. | * | FOR |
| STUART HACK | * | BALTIMORE CITY |
| AND | * | |
| THE STUART HACK CO. | * | |
| | * | |
| Defendants | | Case No. 88102069/CL79993 |
| | * | |

* * * * * * * * * * * *

**ORDER**

Plaintiff's Motion to Compel having been considered by this Court, it is this ____ day of ________, 1996, hereby

ORDERED that Plaintiff's Motion is DENIED and Defendant Stuart Hack is not required to appear for further deposition in the above-captioned case.

_______________________________
Albert J. Matricciani, Jr., Judge

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RECEIVED
CIRCUIT COURT
BALTIMORE CITY

# IN THE CIRCUIT COURT FOR BALTIMORE CITY

96 JUL -8 PM 1:20

CIVIL DIVISION

RICHARD SHOFER

Plaintiff

v.

CASE NO. 88102069/CL79993

THE STUART HACK COMPANY

and

STUART HACK

Defendants

THE STUART HACK COMPANY

and

STUART HACK

Third Party Plaintiffs

v.

GRABUSH, NEWMAN & CO., P.A.

Third Party Defendant

## MOTION FOR LEAVE TO DEPOSE DEFENDANT STUART HACK

The Plaintiff, Richard Shofer, by his attorney, Douglas R. Taylor, moves this Honorable Court as follows:

1. That in March of 1996, immediately following the remand of the above case by the Court of Special Appeals for trial in this Court, Plaintiff has been attempting to schedule a deposition of the Defendant Stuart Hack. That up until the Defendant Stuart Hack filed his Opposition To Plaintiff's Motion To Compel, Plaintiff had no knowledge or information that indicated that Defendant Stuart Hack would not voluntarily sit for additional depositions following two remands of this case, one by the Court of Appeals and the second by the Court of Special Appeals. That in accordance with both the spirit and the letter of the rules, Plaintiff has sought to work out a Discovery Plan, particularly in the area of the depositions of parties and



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witnesses. Attached hereto and incorporated herein is correspondence which reflects the efforts of Plaintiff to depose the Defendant Stuart Hack.

2. That as Plaintiff views the applicable rule, leave of court is not necessary unless a party whose deposition has been previously taken objects to further deposition in the same action. For instance, Defendant Hack has deposed Plaintiff twice already in this action and Plaintiff has not, and will not, invoke the rule which requires leave of court for permission for any additional depositions, at least with respect to the present posture of this case.

3. That the posture of this case has changed since Defendant Stuart Hack was initially deposed. The case began with a complaint consisting of several counts alleging violations of the ERISA statue. ERISA was excluded as an issue in this case by the Court of Appeals when it rendered the decision in Shofer I in 1991. Since the Court of Appeals issued its decision which permitted Plaintiff to sue on tort and contract grounds, the case has become a professional malpractice action, and the complaint filed in this case has been amended three times since the Court of Appeals decision. The present Fifth Amended Complaint has added a third count, alleging fraud and deceit as a cause of action, a count which was not in the suit when the Defendant Stuart Hack was last deposed by Plaintiff.

4. Indeed, Plaintiff has not deposed Defendant Hack for nearly seven years. The last two depositions which involved Defendant Hack were noted by the Third Party Defendant, a party added to this lawsuit by Defendant Hack. That if Plaintiff had intended to harass Defendant Hack through the discovery process, he surely would have attempted to note Hack's deposition before this period of time.

5. But Plaintiff's desire for additional deposition time with Defendant Hack is not in any way based on an intent to harass; rather it stems from Plaintiff's desire to obtain necessary and relevant information and evidence which is essential to the preparation of Plaintiff's case. Plaintiff desires to interrogate Defendant Hack in the following areas, among other topics:

a. Defendant Hack's defenses filed in this action to the Fifth Amended Complaint.

b. Defendant Hack's responses to Plaintiff's Request for Admissions of Fact.

c. Hack's knowledge, or lack thereof, as to the foreseeability of many of the damages sustained by Plaintiff.

d. Hack's position with respect to the propriety of advising clients to do any acts prohibited by law.



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e. Hack's research work and techniques in light of information recently made known to Plaintiff in a letter from Barry Berman, Esquire, a potential witness in this case.

f. Numerous statements made by Defendant Hack in previous deposition testimony that were incomplete, inconclusive, or contradictory.

g. The extent to which Defendant Hack is guided by codes of professional responsibility in the practice of his profession.

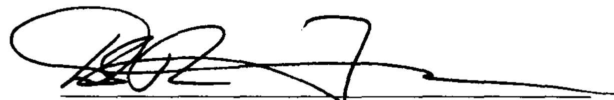
6. That the above areas are all new areas, not previously covered in prior deposition, and represent important issues in this lawsuit. Plaintiff needs the answers to specific questions in these areas to prepare his case. As an example, Defendant Hack has interposed twenty separate defenses to Plaintiff's cause of action in this lawsuit. Some of these defenses, such as laches, may require little time to explore and develop, but others, such as Mr. Hack's defense that he did absolutely nothing wrong in his dealings with Plaintiff, may require a half day to review. Another issue which surely will require an extended time in deposition would be the issue of foreseeability as the concept applies to the damages which Plaintiff has sustained. If an average of only 90 minutes of deposition time were allotted to each defense (there are 20), and only 90 minutes for the elements of Plaintiff's damages and related matters (there are approximately 10), the total deposition time to complete these issues alone would amount to 45 hours.

7. It is difficult to determine precisely how much time will be required to complete Mr. Hack's deposition. In a complex case with many issues, and particularly with many defenses being interposed, one can only estimate the time needed to cover these issues adequately. The original tax, interest and penalties involved in this matter has compounded to an amount approaching one million dollars over the twelve year span since the taxation period began. Therefore, a case of this magnitude requires thorough and careful preparation.

8. Plaintiff is, of course, aware that Defendant Hack is now a resident of Florida, and he will have to travel to Maryland for his deposition. Plaintiff has suggested that an initial block of time of twenty-five hours (three days) be set aside in which to pursue Defendant Hack's deposition. Plaintiff is willing to accommodate Mr. Hack by scheduling his deposition on three consecutive days (provided that one of the days is not Wednesday) in order to minimize travel by Mr. Hack between Maryland and Florida. If Mr. Hack will cooperate, then this process will be accelerated and completed in an efficient manner.

9. Plaintiff, however, states that he has a right to discovery in this case, and that discovery should be liberally granted. The general rule is that courts apply the rules of discovery liberally, and they are vested with broad discretion in the resolution of discovery disputes. Defendant Hack elected to sell his business and move to Florida, and his voluntary move should in no way hinder Plaintiff's efforts to build his case or to achieve justice in this lawsuit.

WHEREFORE, Plaintiff moves that this Honorable Court order Defendant Stuart Hack to appear for a deposition to be conducted by Plaintiff's counsel at a location in Baltimore City for an initial minimum period of twenty-five (25) hours.



DOUGLAS R. TAYLOR
Attorney for Plaintiff
P.O. Box 4566
Rockville, Maryland 20850
(301) 565-0209

## Points and Authorities

1. As stated above.
2. Maryland Rules 2-401, 2-402(e)(3) and 2-411.
3. Kilsheimer v. Dewberry & Davis, 665 A2nd 723, 106 Md. App. 600, reconsideration granted in part, denied in part.

## Certificate of Service

I hereby certify that on this 8th day of July, 1996, I mailed, by U.S. Mail, postage prepaid, a copy of the foregoing Motion For Leave To Depose Stuart Hack to the following:

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204
Attorney for Defendants, Hack and
The Stuart Hack Company

Deborah M. Whelihan, Esquire
John Tremain May, Esquire
Jordon, Coyne & Savits
Suite 600
1100 Connecticut Avenue, N.W.
Washington, D.C. 20036

Douglas R. Taylor



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**Douglas R. Taylor**
**Attorney at Law**
**P.O. Box 4566**
**Rockville, Maryland 20850**
**(301) 565-0209**

April 30, 1996

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: Shofer v. Hack, et al.
Cases No. 88102069/CL79993

Dear Janet:

I want to establish a schedule for commencing depositions which I believe need to be taken if I am to complete trial preparation in the above matter. I fully expect that you will want to schedule depositions of your own, and I am perfectly agreeable to work out a schedule for those depositions with you.

This letter is in accord with our telephone conversation of April 23, 1996 where we agreed that I would suggest dates for the initial depositions. I have been anxious to commence depositions, and since I had not had a response to my letter of April 12, I wanted to contact you to arrange a deposition schedule. The urgency in this matter relates to the fact that we have many depositions that we want to take, and I need information from these depositions, to incorporate into my responses to pleadings which you have recently filed. Therefore, delay in the deposition process will delay our responses to the pleadings you have filed.

I would like to begin the depositions with those of Barry Berman, Esquire and with Stuart Hack, Esquire. In reviewing my calendar, I note that I am available for depositions beginning Monday, May 6, 1996 and every day until July 30, with exception of May 8, 15, 22, 24 and 29; June 5, 12, 17, 19 and 26; and July 3, 10, 17 and 24.

Please review your calendar and let me know when we might depose Mr. Berman and Mr. Hack. Once we have cleared dates, I will issue the appropriate notices.

I would envision Mr. Hack's deposition extending for more than one day, and that he plan to be in Baltimore for several days so that this phase of the case can be completed all at one time.

I realize that our schedules need to be coordinated with other counsel and with Mr. Shofer, and I concur in your suggestion that we arrange a conference call to clear dates for these two depositions. Perhaps at the time we have such a call, I will have some other potential deponents I would like to schedule for deposition and we can develop a complete calendar for all of this discovery.

I would appreciate your letting me know if the proposed dates are acceptable to you and Mr. Hack. Then perhaps we can confer with Ms. Whelihan and Mr. May concerning their availability.

Your cooperation in this matter is appreciated.

Very truly yours,

Douglas R. Taylor

CC: John May, Esquire
Deborah Whelihan, Esquire

**Douglas R. Taylor**
**Attorney at Law**
**P.O. Box 4566**
**Rockville, Maryland 20850**
**(301) 565-0209**

June 4, 1996

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

**RE:** Shofer v. Hack

Dear Janet:

I am writing as a follow up to our telephone conversation of last week wherein you advised me that Mr. Hack was checking his vacation schedule prior to our scheduling his deposition here in Maryland. I appreciate your efforts in reminding Mr. Hack of our right to discovery under the rules, and of the importance of his cooperation if we are to complete all of the discovery necessary for an efficient and orderly disposition of this case.

However, I also note, in reviewing my own file of correspondence and memoranda, that we have been vigorously attempting to arrange depositions generally, and of Mr. Hack in particular, for the past ten weeks. Since the first available dates for depositions occur in the latter part of August, it will be almost twenty-six weeks from the time we began to arrange for depositions until we actually begin the process. I also observed that Mr. Hack has not been deposed for almost six years, and I am sure that you will agree that much has happened in this case since Mr. Hack's last deposition. Indeed, the nature and character of the case has changed, and I am sure that we will need in excess of twenty hours of deposition time with Mr. Hack in order to cover the important issues currently pending in the lawsuit. As I am sure that you will also agree, the case requires a great effort in trial preparation, and discovery is the heart of such preparation.

Mr. Shofer has expressed concern that I will not have adequate time to complete our discovery by the end of the present calendar year (it will be half over by the end of next month), and he has asked

me to obtain as quickly as possible a firm date on which we can commence Mr. Hack's deposition. As you are aware, perhaps more than anyone, it does not normally require a great effort to depose the principals in a lawsuit, and this task can normally be accomplished in a few weeks. In our case, we have now gone two and one half months and have not yet scheduled Mr. Hack's deposition. My client is the injured party, and he does not understand why the process of preparing for, and completing, this litigation cannot go forward immediately.

I hope to talk to you before the end of this week with the expectation that we will have a date on which to begin Mr. Hack's deposition.

Your cooperation in this matter, as always, is appreciated.

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire
John May, Esquire

**Douglas R. Taylor**
**Attorney at Law**
**P.O. Box 4566**
**Rockville, Maryland 20850**
**(301) 565-0209**

June 10, 1996

Janet Truhe, Esquire
Janofsky & Truhe, P.A.
Court Towers, Suite 505
210 W. Pennsylvania Avenue
Towson, Maryland 21204

RE: Shofer v. Hack, et al.
Case No. 88102069/CL79993

Dear Janet:

My client, Mr. Richard Shofer, contacted me this morning and reminded me that we still do not have a date on which to commence Mr. Hack's deposition. Mr. Shofer expressed to me his concerns that there would not be sufficient time in which to prepare this case for trial if Mr. Hack's depositions do not commence in August. Mr. Hack's deposition is quite important, and, because he is in Florida, we are reluctant to schedule any other depositions until we lock in Mr. Hack for a minimum of 20 hours of August deposition time.

Accordingly, if we do not have confirmation of his availability for that period of time in August (excluding Wednesdays) by Wednesday, June 12, I am instructed by Mr. Shofer to file immediately a Motion To Compel. Since we have much material to review in deposition with Mr. Hack, and since he is in Florida, I would ask that we set aside three days in mid August in which to complete these depositions. We certainly want to avoid requesting Mr. Hack's presence again if we can complete the discovery in August.

Your cooperation and assistance in this matter is appreciated.

Very truly yours,

Douglas R. Taylor

CC: Deborah Whelihan, Esquire
John May, Esquire

D. Lee
2-23-10
Image 331

**MSAREF.NET, MSA SC 5458**
**An Archives of Maryland Publication**



4

## MSA SC 5458-82-152

**Dates:** 2010/02/17
**Description:** Case numbers received from J. Hollander -

BALTIMORE CITY CIRCUIT COURT (Paternity Papers) Arrington v. Rodriguez, 1989, Box 169 Case No. 119070 [MSA T3351-923, CW/16/31/25]
File should be named msa_sc5458_82_152_[full case number]-####
**2010-02-22 C Baker scanned 137 pages, created pdf and uploaded pdf to msaref for folder #1.**
**2010-02-22 C Baker scanned 164 pages, created pdf and uploaded pdf to msaref for folder #2.**
**2010-02-22 C Baker scanned 292 pages, created pdf and uploaded pdf to msaref for folder #3.**

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Rolnik v. Union Labor Life Ins. Co., 1987, Case No. 87313071
Case is split between 2 boxes:
Box 387 [MSA T2691-2026, HF/8/35/8]
Box 388 [MSA T2691-2027, HF/8/35/9]
**2010-02-19 F. Leach scanned 369 pages, created pdf and uploaded pdf to msaref for folder #1.**
**2010-02-19 D. Lee scanned 271 pages, created pdf and uploaded pdf to msaref for folder #2.**
**2010-02-19 D. Lee scanned 326 pages, created pdf and uploaded pdf to msaref for folder #3.**
**2010-02-22 F. Leach scanned 432 pages, created pdf and uploaded pdf to msaref for folder #4.**
**2010-02-22 D. Lee scanned 473 pages, created pdf and uploaded pdf to msaref for folder #5.**

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v.The Stuart Hack Co., Box 128 Case No. 88102069 [MSA T2691-2232, HF/11/30/3]
See also for "brick binders":
Box 527 [MSA T2691-2631, HF/11/38/18]
Box 528 [MSA T2691-2632, HF/11/38/19]
File should be named msa_sc5458_82_152_[full case number]-####

D. Lee
2-23-10
Image 331

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Attorney Grievance Commission v. Yacono, 1992, Box 1953 Case No. 92024055 [MSA T2691-4591, OR/12/14/65] **File not in Box**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Feldmann v. Coleman, 1993, Box 391 Case No. 93203022 [MSA T2691-5466, OR/22/08/037]
**2010-02-19 F. Leach scanned 30 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Jefferson v. Ford Motor Credit Corp., 1993, Box 470 Case No. 93251040 [MSA T2691-5545, OR/22/10/20]

**2010-02-18 F. Leach scanned 289 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Shofer v. The Stuart Hack Co. and Blum, Yumkas, Mailman, 1993, Box 518 Case No. 93285087 [MSA T2691-5593, OR/22/11/20]
**2010-02-18 D. Lee scanned 125 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Booth v. Board of Appeals, 1993, Box 589 Case No. 93330026 [MSA T2691-5665, OR/22/12/45]
**2010-02-18 D. Lee scanned 124 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Scott v. Dept. of Public Safety, 1993, Box 603 Case No. 93342002 [MSA T2691-5679, OR/22/13/11]
**2010-02-19 F. Leach scanned 139 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Stubbins v. Md. Parole Comm'n., 1993, Box 616 Case No. 93354003 [MSA T2691-5692, OR/22/13/24]
**2010-02-18 C. Baker scanned 66 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Civil Papers, Equity and Law) Fitch v. DeJong, 1994, Box 109 Case No. 94077005 [MSA T2691-5817, OR/28/9/2]
**2010-02-18 C. Baker scanned 238 pages, created pdf and uploaded pdf to msaref**
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Bowden, 1987, Box 142 Case No. 18721501 [MSA T3372-984, CW/2/23/13]
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BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Redmond, 1988, Box 191 Case No. 48828071 [MSA T3372-1282, HF/11/23/43]
**2010-02-19 F. Leach scanned 50 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Parker, 1990
Box 100 Case Nos. 290213034,35 [MSA T3372-1476, OR/16/16/8]
**2010-02-19 C. Baker scanned 63 pages, created pdf and uploaded pdf to msaref**
Box 104 Case Nos. 290221060,61 [MSA T3372-1480, OR/16/16/12]
**2010-02-18 F. Leach scanned 87 pages, created pdf and uploaded pdf to msaref**
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BALTIMORE CITY CIRCUIT COURT (Criminal Transcripts) State v. Monk, 1991, Box 78 Case No. 591277019 [MSA T3657-403, OR/17/11/21]
**2010-02-19 D. Lee scanned 460 pages, created pdf and uploaded pdf to msaref**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CRIMINAL COURT (Transcripts) Eraina Pretty, 1978, Box 43 Case Nos. 57811846, 57811847, 57811848, 57811858, 57811859, 57811860 [MSA T496-3990, OR/18/22/41]
**Case 57811847 and Case 57811858 have pull slips in the record center box that indicate the files were sent back to Baltimore City Circuit Court attn: Jack Blake in 1993.**
File should be named msa_sc5458_82_152_[full case number]-####

BALTIMORE CITY CIRCUIT COURT (Criminal Papers) State v. Johnson (or Johnson-Bey),

1987, Box 11 Case No. 28701917 [MSA T3372-853, CW/2/20/26]

**Accession No.:** MSA SC 5458-82-152

**Date Entered:** 02/17/2010
**Date Completed:**
**No. Pages:** 0
**Amount paid:** $0.00
**Amount due:** $0.00
**Tracking No.:** T -0

Notes | Edit Database Entry



System design by Dr. Edward C. Papenfuse and Nancy Bramucci.
Programmed in *Microsoft SQL Server* and *Cold Fusion 7.0* by Nancy Bramucci.
Technical support provided by Wei Yang, Dan Knight, Tony Darden, and Matt Davis.
Version 2.8.1