

Davila Summary Judgment Text

(also see associated Davila Summary Judgment Table)

(from mcmRFDs-6-3-2013- Legal theories and damages sections)

Summary Judgment argument (in order to determine the “basic evidence” needed to prove the elements of the lawsuit. i.e. what evidence do we still need? What will they just stipulate is true? See Texas Lawyer’s Creed)

See attached sorted tables of evidence timeline submitted to IRS in March 2013. Do we want to include this to opposing party now or later?

Breach of Fiduciary Duty with fraudulent concealment of an embezzlement with fraudulent taxes prepared by a CPA who wrote the DPOA outlining his duties.

The 3 elements of a Breach of Fiduciary Duty claim are:

- (1) a fiduciary relationship must exist between the plaintiff and defendant;
- (2) the defendant must have breached this duty; and
- (3) the breach must result in injury to the plaintiff or benefit to the defendant.

These are satisfied with the following evidence as follows:

- (1) a fiduciary relationship must exist between the plaintiff and defendant;

(a) **Fiduciary Duty to Maurine Hamilton and her Maurine P Hamilton Estate and Trust:** A Fiduciary relationship existed between Maurine Hamilton and Defendant by virtue of the “2004 Mystery DPOA”, written by the Defendant, in which Defendant proclaims he will take over Sylvia Hamilton’s duties should she not perform them. He also owed Maurine Hamilton just as a CPA, a Personal Financial Specialist and a Certified Retirement Counselor and a Forensic Account, to have better judgment than that. As well, Anti-Money Laundering (AML) laws were not followed adequately by Defendant, as the money was apparently successfully funneled from Mutual of Omaha to Las Vegas thru Western Union without detection, until the embezzler confessed. If Defendant didn’t know what he was taking on when he wrote and signed the “2004 Mystery DPOA” papers, he did not do his due diligence prior to his “investment advice” to “Maurine Hamilton” via Sylvia Hamilton.

(b) **Fiduciary Duty to Alan Hamilton, Executor and Successor-Trustee of the Maurine P Hamilton Estate and Trust:** When Plaintiff became the Executor of the Maurine P Hamilton Estate and Trust, Defendant owed the Plaintiff a Fiduciary Duty by virtue of the Probate Court Letters Testamentary order, to disclose to the Executor what had happened, to file the Trust and Estate taxes as requested by the Executor. The evidence will show the defendant chose instead to attempt to conceal his actions in the ensuing embezzlement by Sylvia Hamilton, which left Maurine Hamilton in an unfortunate demise when she requested to move into a nursing home shortly before her suspicious death.

(c) **Fiduciary Duty to Alan Hamilton, a beneficiary of the Maurine P Hamilton Estate and Trust:**

Plaintiff is a beneficiary of the Maurine P Hamilton Estate and Trust. Defendant knew of Plaintiff's beneficiary status, as he consistently spelled Plaintiff's name wrong in the "2004 Mystery DPOA" and in his own handwriting on investment advice documents.

(2) the defendant must have breached this duty;

(a) **Breach of Fiduciary Duty to Maurine Hamilton and her Maurine P Hamilton Estate and Trust:**

The Defendant breached his Fiduciary Duty when he filed 3 tax extensions in 2005 and 2006, instead of taking over Sylvia Hamilton's Duties as promised to Maurine Hamilton, in his "2004 Mystery DPOA", and perhaps saving her life, as she died a suspicious death amidst all the criminal conduct of Sylvia Hamilton. Bank records now show that Maurine Hamilton died broke 2 years later, in October 2006, in the care of her caretaker, who Defendant had assisted in gaining control of Maurine Hamilton's entire "nest egg".

Why would Defendant not follow up on his apparently "uncompensated risk", for creating a new unrecorded DPOA with no physician's certifications needed, after helping the new "agent" obtain \$315,000 and the \$414,000 in checks? No checks on the checks he disbursed.

(b) **Breach of Fiduciary Duty to Maurine Hamilton and her Maurine P Hamilton Estate and Trust:**

Defendant's Fiduciary Duty to Maurine Hamilton as a financial planner also comes into question when one considers the predicament and danger Defendant's actions of putting all of Maurine Hamilton's "nest egg" in the hands of her caretaker in cash. Defendant knew of annuity to cash transfer as he arranged it and delivered it with a copy of the DPOA in 2004.

(c) **Breach of Fiduciary Duty to Alan Hamilton, Executor and Successor-Trustee of the Maurine P Hamilton Estate and Trust:** Defendant breached his Fiduciary Duty to the Executor from 9/10/2008 until the present, as he has refused to disclose and concealed what happened in 2004 to the Executor and the IRS.

(d) **Breach of Fiduciary Duty to Alan Hamilton, a beneficiary of the Maurine P Hamilton Estate and Trust:**

As Defendant had a Fiduciary Duty to Maurine Hamilton and her Estate and Trust, Defendant had a Fiduciary Duty to the beneficiaries of that Trust, of which Alan Hamilton was one.

(3) the breach must result in injury to the plaintiff or benefit to the defendant.

(a) **Injury and damages to Maurine Hamilton as a result of Defendant's reckless Breach of Fiduciary Duty:**

Maurine Hamilton ended up broke and dead 2 years in her embezzler caretaker's care, after the Defendant's "help", tho she had qualified physically for a life insurance policy just 4 years before she died.

(b) **Injury and damages to Maurine P Hamilton Estate and Trust as a result of Defendant's reckless Breach of Fiduciary Duty:**

Over 1 million dollars disappeared in 2 years, and has been unaccounted for by the Defendant, to the Plaintiff or the IRS. Defendant had knowledge of the \$200,000 in the bank accounts due to the 2003 1099 "Trust" statements, as well as assisted Maurine Hamilton in computing the \$315,000 in annuity death benefits from Alfred Hamilton in May 2004, and yet he told Plaintiff on 9/10/2008 that he had helped get an early withdrawal of the annuities because Maurine Hamilton was "broke". Sitting on \$500,000 cash, why did Defendant think \$414,000 more cash in the hands of the caretaker rather than safely held by a "too big to fail" insurance company. In 2000, Maurine and Alfred specifically started moving their annuities from smaller companies to Mutual of Omaha, for long term safety until the planned 2017 maturity, and the easier management of the finances in their elder years.

Annuities are also advertised as a way to keep your principal safe from theft, and Maurine Hamilton was an avid annuity investor over 2 decades and planned to live safely off the interest only for the rest of her life (\$40,000/year interest at 5% on \$800,000).

(c) **Injury and damages to Alan Hamilton as Executor and Successor-Trustee as result of Defendant's reckless Breach of Fiduciary Duty:**

As a result of the Defendant's fraudulent concealment, Alan Hamilton as Executor and Successor-Trustee has had to spend most of his time and money in the last 4 years on the investigation into what actually happened in 2004 and the following years.

(d) **Injury and damages to Alan Hamilton as a beneficiary as result of Defendant's reckless Breach of Fiduciary Duty:**

As a beneficiary, the Defendants actions have reduced Alan Hamilton's retirement to living on social security alone, below poverty level, when his retirement had been planned to be safely maturing with interest until 2017, with a "too big to fail" and well respected annuity and insurance company, Mutual of Omaha. Annuities are advertised as a way to keep your principal safe from theft, and Maurine Hamilton was an avid annuity investor over 2 decades and planned to live safely off the interest only for the rest of her life (\$40,000/year interest at 5% on \$800,000).

The 3 elements of Fraudulent concealment are:

(Shah v. Moss, 67 S.W.3d 836, 841 (Tex. 2001) (fraudulent concealment tolls limitation))

- (1) actual knowledge that a wrong occurred,
- (2) a duty to disclose the wrong
- (3) a fixed purpose to conceal the wrong

These are satisfied with the following evidence as follows:

- (1) actual knowledge that a wrong occurred,

Defendant is the one who informed Plaintiff of the missing money from the Estate of Maurine Hamilton on 9/10/2008, and presented Plaintiff not with a spreadsheet of the losses, but an adding machine "ticker tape", with a total of \$789,402.

- (2) a duty to disclose the wrong

Defendant had a Fiduciary Duty to the Probate Court and to the Executor to disclose the events surrounding the embezzlement of the entire retirement "nest egg" of Maurine Hamilton, which was to become the "nest egg" of the two children at the planned 2017 retirement date, with a safe interest-only retirement income.

- (3) a fixed purpose to conceal the wrong

Defendant never showed Plaintiff "2004 Mystery DPOA". It was received from Mutual of Omaha on 1/12/2009, after requesting the status of the annuities. Defendant also never delivered the non-fraudulent Trust taxes to Plaintiff which had been requested several times, while requesting payment for the fraudulent taxes he had prepared. Even after being told by the Plaintiff that they were fraudulent, he continued to press Plaintiff to sign and file these fraudulent taxes, and refused to prepare the non-fraudulent Trust taxes.

On 4/14/2009, Defendant refused to answer questions about events connected with documents just copied from his "Hamilton Tax Folder" and refused again to do the non-fraudulent Trust taxes with the 4684 theft-loss forms and K-1s to the beneficiaries. Defendant then exploded in a rage, threatening and screaming at us "to leave or else he would call the police because we had accused him of murder", because we had said that Maurine died broke 2 years after his "help".

The 4/15/2009 email sent to the Defendant the following day by the Plaintiff, attempted to clear up the misunderstanding and explained that saying that Defendant's "actions possibly caused a motive for murder by the caregiver", does not equate into accusing the Defendant of murder. The Defendant was the CPA, not the caregiver. The Defendant never answered the email, apparently not wanting to clear up any confusion, refusing to do any "forensic investigation and accounting", with a fixed purpose to conceal any further disclosure to us or the IRS, with his excuse now, after 8 months of concealment already, being that we had "accused him of murder".

Also per Woodbine v McReynolds, Fiduciary Duty suspends SOL.

194.2(d) the amount and method of calculating economic damages.

[\$Amount of Economic Damages] in economic damages.

Liquidated damages:

Annuities: $(\$800,000 \times .05) \times 13 \text{ years} = ?$, $(800,000 = 414,000 + \$315,000)$

Bank accts = $\$2032/0.01 = \$2032 \times 100 = \$203,200$ approximate bank balances in 2003 taxes which Davila prepared (computed at 1% approx. interest income reported on 1099s in 2003 taxes prepared by Davila in June/July 2004.

Safe deposit box?, Gold, Silver and savings bonds.

Davila knew about \$315,000, \$414,000 and 203,200 in bank accounts.

Unliquidated damages:

Exemplary damages as allowed by law for Breach of Fiduciary Duty with Fraudulent concealment. (does not have \$200,000 limit in Texas-look up)

Method of calculation:

[Method of Damage Calculation]

Liquidated damages will be computed with Annuity Contracts, bank records and other applicable documents.

Unliquidated damages will computed and proved up pursuant to an evidentiary hearing.