IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD J. SREIN and R.J. SREIN CORP., Plaintiffs, v. FRANKFORD TRUST COMPANY (NOW KNOWN AS KEY TRUST COMPANY) Defendant.	: : : : : : : : : : : : :	CIVIL ACTION NO. 99-2652

MEMORANDUM

ROBERT F. KELLY, Sr. J. NOVEMBER 27, 2001

This lawsuit involved two claims by Plaintiffs, Ronald J. Srein ("Srein"), individually, and R.J. Srein Corporation ("Srein Corp."), against the Defendant, Frankford Trust Company ("Frankford").[1] The first claim alleged negligence on the part of Frankford regarding its handling of Plaintiffs' investments in retirement plans ("Srein Plan")[2] which Frankford held as trustee. The second claim alleged violation of fiduciary duties under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq., regarding Frankford's handling of the same. Prior to the start of trial, this Court determined that Plaintiffs were entitled to a jury trial on the negligence claim, but not on the ERISA claim, however, the Court decided that it would

[1] This litigation originated from prior litigation in which both the Plaintiffs and the Defendant in this present action successfully sued third parties.

[2] The Srein Plan consists of the following documents: the Master Money Purchase Plan; the Master Profit Sharing Plan, the Trust Agreement and two Adoption Agreements.

try the ERISA claim to an advisory jury. On the negligence claim, the jury determined that the causal negligence attributable to the Plaintiffs was seventy percent, and, therefore, the Plaintiffs were precluded from recovering any damages. On the ERISA claim, the jury determined, and this Court agreed with the conclusion, that Frankford was not an ERISA fiduciary and, therefore, was not liable to Plaintiffs.

Presently before this Court are Plaintiffs' Motion to Amend the Judgment to Strike the Comparative Negligence Award, or, in the Alternative, Order a New Trial with respect to the negligence claim, and Plaintiffs' Motion to Amend the Judgment in favor of the Plaintiffs on the ERISA claim, or in the alternative, Order a New Trial. For the reasons stated within, Plaintiffs' motions will be denied.

I. BACKGROUND

Plaintiff Srein is a college graduate, successful businessman and a sophisticated investor. By profession, a commercial property and casualty insurance broker, in the mid-1980s Srein formed his own company, Srein Corp., in which he was the only employee and the sole stockholder. Around 1990, Srein was introduced to viatical investing. In viatical investing, an investor purchases the death benefit of a life insurance policy issued to an individual diagnosed with a fatal disease. These investments are made through a viatical settlement company which locates insured individuals who are interested in obtaining an immediate payment of part of the face value of their insurance policy in exchange for assigning all or part of the life insurance policy. This enables the insured to obtain money which would otherwise be unavailable until after death. Then, when the insured passes away, the viatical settlement company collects the policy proceeds, pays the investor the money he advanced under the agreement and the remaining balance is divided between the investor and the settlement company in accordance with their agreement.

In the early 1990's, Srein invested in numerous participation agreements on life insurance policies through American Life Resources Corporation ("ALRC"), a viatical settlement company. A participation agreement is a contractual document between an investor, the participant, and the viatical settlement company, the subject of which is an existing individual life insurance policy. The principals of ALRC were Steve Simon and Craig Silverman ("Silverman"), and Silverman was Srein's main contact at ALRC. At ALRC, its procedure required that payments for the investments were to be made to an escrow agent. The death benefits were to be paid by the insurance company through that escrow agent who would then distribute to the investor and the viatical settlement company the difference between the one time lump sum payment and the death benefit in accordance with the participation agreement. All of Srein's investments through ALRC matured, that is, the insured passed away, and Srein received the life insurance policy proceeds, or the contract was repurchased. Srein was satisfied with all of the investments through ALRC and the return that he received on them.

In 1992, Silverman parted ways with Steve Simon and formed his own viatical settlement company called FINDCO, Inc. ("FINDCO"). Srein decided to continue to deal with Silverman and transferred his business to the new entity FINDCO. In September and October of 1992 and April of 1993, Srein individually entered into six (6) participation agreements with FINDCO. The procedures followed by FINDCO were the same as those that had been used by ALRC, in fact, FINDCO used the same forms and the same escrow agent as ALRC.

In early 1993, Srein, on behalf of Srein Corp., wanted to invest some of the funds in its retirement plans in participation agreements with FINDCO. However, the trustee of the Srein retirement plans at the time, Eagle Retirement and Investment Planning, would not allow such investments in retirement plans for which it was trustee because such investments were not registered. Therefore, Silverman recommended that Srein contact Laraine Daly ("Daly"), a trust officer at Frankford, to find out if Frankford would act as trustee on accounts investing in participation agreements through FINDCO.[3] Frankford did not have any rules against non-registered investments, such as participation agreements in viatical settlement contracts, being held in investment plans for which it acted as trustee, therefore, Srein decided to move his retirement plans to Frankford, for the purpose of, among other things, investing in participation agreements on viatical settlement contracts. Daly understood that Srein intended to invest in participation agreements on viatical settlement contracts, so, in order to effectuate this purpose, Daly facilitated setting up qualified ERISA plans for Srein Corp. at Frankford and transferring assets from Eagle Retirement and Investment Planning to Frankford. In setting up the trusteeship for the Srein Corp. in February 1993, Frankford and the Srein Corp. entered into various agreements.[4] According to the Srein Plan, the role of Frankford was of a limited nature as Frankford was to exercise no investment discretion, and Srein was solely responsible for selecting the investments for the plans. Frankford only retained the authority to refuse to accept investments which would violate the provisions of ERISA. Other than the relationship with

[3] Neither Srein nor Srein Corp. had any business dealings with Frankford prior to January of 1993. Silverman, on the other hand, did have a relationship with Frankford Trust that dated back at least three years.

[4] The specifics of these agreements between Srein Corp. and Frankford will be discussed more fully within this opinion.

Srein Corp., Frankford had no direct contractual relationship with Srein individually, i.e. Srein maintained no personal account at Frankford.

Prior to February of 1993, when the Srein Corp. retirement plans were transferred to Frankford, Srein, on behalf of Srein Corp. anticipated entering into a participation agreement to purchase an existing life insurance policy on Errol Chamness ("Chamness Policy"). Therefore, at Srein's request, once Daly had prepared the necessary documentation and money was transferred from Eagle Retirement to Frankford, Daly wired the funds from the Srein Plan to facilitate the purchase of the Chamness Policy. No representative of Frankford played any role in the negotiations by and between Srein Corp. and FINDCO and/or between FINDCO and Mr. Chamness relating to the underlying terms of the investment. Then, two weeks after selling a one hundred percent interest in the Chamness Policy to Srein Corp., FINDCO and Silverman purported to sell the same policy, the Chamness Policy, to another investor.

On June 3, 1993, Frankford, as trustee for the Srein Plan, entered into a participation agreement with FINDCO to purchase a one hundred percent interest in an insurance policy on the life of Lloyd Madsen ("Madsen Policy"). Daly executed the participation agreement on the Madsen Policy for Frankford as trustee for the Srein Plan, and Srein executed the agreement on behalf of the Srein Corp. In order to fund the transaction, Frankford executed the checks for the purchase of the Madsen participation agreement. Again, no representative of Frankford played any role in the negotiations by and between Srein Corp. and FINDCO and/or between FINDCO and Mr. Madsen relating to the underlying terms of the investment.

On October 28, 1994, Frankford entered into a participation agreement on behalf of Stephen Matt Richards[5] ("Richards") to purchase a twenty-eight percent interest in the Madsen Policy, the same underlying Madsen Policy that was the subject of the participation agreement in the Srein Plan. Daly was a signatory on behalf of Frankford as trustee for the Richards' retirement plan. Thus, Daly was the trust officer both for the Srein Plan and the Richards retirement plan, and she signed on behalf of each to purchase two participation agreements based on the same insurance policy, the Madsen Policy. Since Srein had already purchased a one-hundred percent interest in the Madsen Policy approximately a year and a half earlier, there was obviously no percentage left in the Madsen Policy for anyone else to legitimately invest. Although Frankford had in its possession the participation agreements for the Madsen Policy on behalf of both the Srein Plan and the Richards retirement plan, due to the year and a half separation between the two purchases of the same policy, neither Daly nor anyone else at Frankford recognized the overlap in the two transactions or that both participation agreements were based on the same policy. Further, because the participation agreements were not registered investments, they did not have pre-existing numbers assigned to them. Therefore, Frankford had assigned arbitrary, random numbers to the participation agreements held in the retirement plans, including the agreements on the Madsen and Chamness Policies. Since the double sale of the Madsen Policy was not noticed by Daly or anyone else at Frankford, Srein was not notified.

On May 29, 1995, J. Lloyd Madsen died. FINDCO did not notify Srein or Srein Corp. that Mr. Madsen had died. On June 26, 1995, Silverman sent a check to Frankford in the amount of $27,499.86, identified as the Richards retirement plan's percentage of the death

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[5] Richards was also a client of FINDCO and Silverman.

benefit for the Madsen Policy. Frankford received the payment of the Madsen Policy proceeds and paid it out to Richards. Since Frankford did not recognize that these proceeds related to the same Madsen Policy in which the Srein Corp. retirement plan had taken a one hundred percent interest, Srein was not notified that Mr. Madsen had died or that Richards had received the Madsen Policy proceeds. On August 31, 1994, Mr. Chamness died. FINDCO did not notify Srein, Srein Corp. or Frankford that Mr. Chamness had died. The proceeds on the Chamness policy were paid to D.P. Partnership on December 15, 1994.

It was not until 1998 that Srein became suspicious of Silverman and FINDCO. Since Srein had not checked on the status of his investments with FINDCO for about five years and did not himself have a list of the viatical insurance contracts, Srein attempted to contact Silverman in order to obtain this information, however no response was given. Srein later found out that the Madsen Policy and Chamness Policy had been double sold. Frankford and Daly were then notified about the double sale of the policies in March of 1998 when Srein's attorney sent correspondence to Daly.

II. DISCUSSION

A. The Court Will Not Strike the Jury's Finding of Contributory Negligence on the Part of Srein as There Was Evidence of Contributory Negligence on the Part of Srein Presented to the Jury.

Pursuant to Rule 59(e), a proper motion to alter or amend judgment must rely on one of three major grounds: (1) an intervening change in controlling law; (2) the availability of new evidence not available previously; or (3) the need to correct clear error of law or prevent manifest injustice. North River Ins. Co. v. CIGNA Reinsurance Co., 52 F. 3d 1194, 1218 (3d Cir. 1995)(internal citations omitted). In the case *sub judice*, Srein alleges that the jury's finding of contributory negligence on the part of Srein must be stricken in order to "prevent manifest injustice" as he argues that "no evidence" was presented upon which the jury could find comparative fault. (Pl. Brief, 2). Based upon this conclusion, Srein contends that it was a fundamental error to charge the jury on comparative fault because "no evidence" of comparative fault was presented. (Id.)

Plaintiffs' contentions are without merit. By way of example, the jury could have concluded that Srein, who testified that he was an investor by profession and sophisticated in commercial finance matters, was negligent for never checking the status of his viatical investments with FINDCO over a five year period. In fact, in one instance, Srein sent Silverman approximately sixty-nine thousand dollars ($69,000.00) to purchase an interest in a policy which was never even effectuated. This Court finds that evidence of comparative fault on the part of Srein was presented to the jury by way of Srein's own testimony. Therefore, there was evidence presented to the jury which was sufficient to permit a finding of contributory negligence.

B. The Court Will Not Grant a New Trial as the Jury's Verdict Was Not Against the Great Weight of the Evidence.

In the alternative, Srein contends that he is entitled to a new a new trial pursuant to Federal Rule of Civil Procedure 59(a) as he claims that the jury's verdict on contributory and comparative negligence was against the great weight of the evidence. A motion for a new trial may be granted on a number of grounds:

> [a]lthough Fed. R. Civ. P. 59 does not enumerate the grounds for a new trial, the following have been recognized as general grounds for a new trial: the verdict is against the clear weight of the evidence; damages are excessive; the trial was unfair; and that substantial errors were made in the admission of rejection of evidence or the giving or refusal of instructions.

Northeast Woman's Ctr., Inc. v. McMonagle, 689 F. Supp. 465 (E.D. Pa. 1988), *aff'd in relevant part*, 868 F. 2d. 1342 (3d Cir. 1989). The granting of a new trial because the verdict is against the weight of the evidence is proper only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks our conscience. Klein v. Hollings, 992 F.2d 1285, 1290 (3d Cir. 1993). Further, the Third Circuit has warned that "such an action effects a denigration of the jury system and to the extent that new trials are granted the judge takes over, if he does not usurp, the prime function of the jury as the trier of facts." Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 211 (3d Cir. 1992) .

The Court finds that a new trial is not warranted as the jury's finding of contributory negligence on the part of Srein was not against a great weight of the evidence. This Court has already concluded above that there was sufficient evidence in the record for a reasonable jury to conclude that Srein, an investor by profession, was negligent by never checking the status of his investments with FINDCO over a five year period. Therefore, the Court finds that the jury's finding was not against the weight of the evidence and will not disturb this finding.

C. The Court Will Not Amend Its Findings Pursuant to FRCP 52 as Its Conclusion that Frankford Was Not an ERISA Fiduciary Is Proper.

Federal Rule of Civil Procedure 52 requires that "in all actions tried upon facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately the conclusions of law thereon, and judgement shall be entered pursuant to Rule 58." FED. R. CIV. P. 52(a). At trial, the advisory jury concluded, and this Court adopted the conclusion in its Findings of Fact and Conclusions of Law issued on July 23, 2001, that

Frankford was not an ERISA fiduciary. Srein argues that this Court should amend its findings pursuant to Rule 52(b) with respect to the ERISA claims and enter a judgment in favor of the Plaintiffs on those claims as Srein argues that Frankford was an ERISA fiduciary. For the reasons stated below, this Court will not disturb its findings.

After a two step inquiry, this Court reached the conclusion that Frankford was not an ERISA fiduciary. Since ERISA outlines the duties and ability of plans to allocate the same with respect to trustees, such as Frankford, it is important to determine the parties' characterization of Frankford in the Srein Plan. Therefore, the Court first examined those documents which formed the relationship between Frankford and Srein Corp. in order to determine each of their roles and contractual duties as defined by the plan documents. Second, since the definition of an ERISA fiduciary also encompasses the functions of the parties, the Court next examined whether Frankford, by its actions, actually exercised authority or control over the Srein Plan which could raise fiduciary responsibility under ERISA.

1. Frankford Was A Directed Trustee.

Srein contends that, according to several provisions of the Srein Plan, Frankford was specifically responsible for handling and managing the assets of the Srein Plan. Srein therefore concludes that these provisions empowered Frankford with discretion in excess of that given to a directed trustee establishing Frankford as an ERISA fiduciary. Daly, the trust officer on behalf of Frankford as trustee for the Srein Plan, testified that Frankford acted as a directed trustee to the Srein Plan. Thus, as a directed trustee, Frankford merely carried out the instructions given by the Srein, the plan owner. (N.T., Beckman, 136) Therefore, in order to determine the intended role of Frankford as contemplated by the Srein Plan, it is proper to first analyze the relevant provisions in all of the agreements which constitute the Srein Plan, including, the Master Money Purchase Plan, the Master Profit Sharing Plan, the Trust Agreement and the Adoption Agreements.

Srein was identified as both the "plan administrator"[6] and the "plan fiduciary"[7] in the Master Money Purchase Plan and the Master Profit Sharing Plan ("the Master Plans") . The Master Plans gave Srein, as the plan fiduciary, the authority to control and manage the operation and administration of the Master Plans as well as giving him the exclusive responsibility for furnishing the trustee with instructions regarding all contributions and withdrawals to the Trust and any other necessary information. The Master Plans were then to be "maintained according to the terms and conditions of [these] instrument[s]" and "the assets of [these] plans are held, administered and managed by the Trustee in accordance with the terms and conditions of the Trust Agreement". (Ex. D-54, Master Money Purchase Plan, 1.1). The terms of the Trust Agreement stipulated that Frankford was authorized only upon written direction by the plan administrator, Srein, to do the following: pay benefits and expenses from the Fund; make investments of assets of the Fund and allocate all contributions under the Plan to the Participants. The Trust Agreement further stated that Frankford was entitled to rely fully upon those written directions, that it had "no duty to make any inquiry or investigation with respect to [the

[6] The two plans define this role as "the individual designated by the Employer, and shall be responsible for maintaining records and filing reports with the governmental agencies and for such other duties as are specified in the Plan or delegated by the Plan Fiduciary.

[7] The two plans define this role as "the sole proprietor . . . who signs or ratifies the Adoption Agreement." Ronald Srein executed the Adoption Agreements as President of the R.J. Srein Corp.

instructions]" and that "it is especially intended . . . that the Trustee shall have no discretionary authority to determine the investment of the assets of the Fund." (Ex. D-55, Trust Agreement Art. II, Sec. 2.1).

Based upon the foregoing, this Court finds that the Srein Plan clearly established that Frankford was the directed trustee to the Srein Plan in accordance with the definition as contemplated by the ERISA statute. ERISA defines the limited role of directed trustee as follows:

> [t]he trustee. . . shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that--
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> > (1) the plan expressly provides that the trustee or trustees are subject to direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and are not contrary to this chapter.

29 U.S.C. § 1103(a)(1). The Srein Plan authorized Frankford to perform administrative and ministerial functions, leaving all discretionary authority with Srein. Srein's conclusion that Frankford was a fiduciary is primarily based upon his interpretation of the first portion of the clause from the Master Plan which states that "the assets of [these] plans are held, administered and managed by the Trustee". This conclusion is flawed as it does not recognize the larger scheme of the Srein Plan, since it extracts the first clause and ignores the second portion which conditions the trustee to act "**in accordance with the terms and conditions of the Trust Agreement**" (emphasis added). The Trust Agreement, as discussed above, placed all discretion with Srein and only authorized Frankford to act upon written instruction by Srein. However, notwithstanding Frankford's limited prescribed role as provided in the Srein Plan, a trustee's

actual exercise of authority or control could raise fiduciary responsibility under § 1002(21)(A) as the Supreme Court has noted that ERISA "defines fiduciary not in terms of formal trusteeship, but in functional terms of control and authority over the plan, thus expanding the universe of persons subject to fiduciary duties." Mertens v. Hewitt Assocs., 508 U.S. 248 (1993). Further, it is a person's "actions, not the official designation of his role, which determine whether he enjoys fiduciary status." Acosta v. Pacific Enterprises, 950 F.2d 611, 618 (9th Cir. 1991). Accordingly, this Court will examine whether Frankford exceeded the boundaries of its role as directed trustee by actually exercising authority or control over the assets of the Srein Plan so as to confer fiduciary status upon Frankford.

2. Frankford Trust Was Not an ERISA Fiduciary

Srein argues that even though Frankford did not have any investment discretion regarding the Srein Plan, nevertheless, as trustee for the Srein Plan, Frankford handled and managed money and assets for the Srein Plan conferring fiduciary status upon Frankford as defined by §1002(21)(A)(i) of ERISA. Frankford contends that it was not a fiduciary because it acted only in a ministerial capacity, exercised no discretion and merely followed the instructions of Srein on behalf of the Srein Corp. Accordingly, this Court will examine whether Frankford exceeded the boundaries of its role as directed trustee by actually exercising authority and/or control over the assets of the Srein Plan so as to confer fiduciary status upon Frankford as defined by §1002(21)(A)(i).

The relevant ERISA provision which Srein contends described Frankford as a fiduciary is as follows: "[a] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets.” 29 U.S.C. § 1002(21)(A)(i). Subsection (i) differentiates between those who manage the plan in general, and those who manage the plan assets. Regarding the criteria for fiduciary status under subsection (i), the Third Circuit has enunciated the following :

> These functions are set out in two clauses under subsection (i) separated by the conjunction "or." A significant difference between the two clauses is that discretion is specified as a prerequisite to fiduciary status for a person managing an ERISA plan, but the word "discretionary" is conspicuously absent when the text refers to assets. This distinction is not accidental--it reflects the high standard of care trust law imposes upon those who handle money or other assets on behalf of another.

Board of Trustees of Bricklayers and Allied Craftsmen Local 6 of New Jersey Welfare Fund v. Wettlin Associates, Inc., 237 F.3d 270, 272 (3d Cir. 2001). It is undisputed that Frankford had no discretionary authority to select investments on Srein’s behalf. (Srein, N.T, 64). Therefore, since Frankford had no discretion to “manage the plans”, the Court must look at the second clause of § 1002(21)(A)(i) following the “or” to determine whether the actions of Frankford amounted to that of a fiduciary.

Srein urges this Court to adopt the Sixth Circuit’s reasoning in Smith v. Provident Bank where the court held that the defendant bank, a former ERISA plan trustee, was a “fiduciary” when it wrongfully removed shares from the plaintiff’s ERISA account and transferred those shares into another client’s ERISA account. Smith v. Provident Bank, 170 F. 3d 609 (6th Cir. 1999). In Smith, Provident Bank, the ERISA trustee, had received instructions from the plaintiff, Stauter, to purchase one thousand shares of a certain stock for his ERISA account, and, on the same day, another Provident Bank client, the Catholic Diocese of Cleveland, issued an identical instruction to Provident for its ERISA account. Provident, however, only executed one of these orders, Stauter's order. When the Diocese later wanted to transfer its ERISA account to another trustee, Provident realized that the shares were missing and proceeded to "correct" this error by taking the shares out of Stauter's account, transferring them to the Diocese's account and crediting Smith's account with the original cost of stock. The Sixth Circuit found that even though Provident did not retain any discretionary authority over Stauter's ERISA plan, that Provident controlled the plan assets when it "corrected" its mistake by wrongfully removing the shares from Stauter's account, thus attaining ERISA fiduciary status under § 1002(21)(A)(i). Provident Bank, 170 F. 3d at 612.

Srein avers that Frankford controlled the Srein Plan assets by its involvement in the double sale of the Madsen Policy, thus becoming a fiduciary under the second portion of §1002(21)(A)(i). Srein contends that, like the "correction" performed by Provident Bank in Smith, the double sale of the Madsen Policy constituted activities without instruction by Srein thus exceeding Frankford's bounds as a directed trustee. The facts that predicated the Smith court's finding that Provident was an ERISA fiduciary are easily distinguished from those in the case *sub judice*. Therefore, it is important for this Court to summarize the pertinent facts which constitute Frankford's involvement in the Madsen double sale.

In early 1993, Srein, on behalf of Srein Corp., transferred his retirement plans to Frankford so that he could invest in participation agreements on viatical settlement contracts since Frankford did not have any rules against acting as trustee for an investment plan in which non-registered investments were held such as participation agreements in viatical settlement contracts. On June 3, 1993, Frankford, as trustee for the Srein Plan, entered into a participation agreement with FINDCO to purchase one hundred percent of the Madsen Policy. Daly signed the participation agreement on the Madsen Policy for Frankford as trustee for the Srein Plan, and Srein signed the participation agreement on behalf of the Srein Corp. In order to fund the transaction, Frankford executed the checks for the purchase of the Madsen Participation Agreement. No representative of Frankford Trust played any role in the negotiations by and between Srein Corp. and FINDCO and/or between FINDCO and Mr. Madsen relating to the underlying terms of the investment. Then, on October 28, 1994, nearly sixteen months later, Frankford executed a participation agreement as trustee for another FINDCO client, Stephen Matt Richards, to purchase a twenty-eight percent interest[8] in the Madsen Policy. Thus, Frankford was the trustee for both retirement plans which purchased the same policy, but due to the sixteen and a half month gap between the two purchases and the fact that the agreements did not have pre-existing numbers assigned to them since they were unregistered investments, Frankford did not recognize the two purchases of the same policy. Then, when the Madsen Policy matured, i.e., Mr. Madsen died, Silverman sent Frankford a check which was identified as the Richard Plans' proceeds of the Madsen Policy which Frankford properly paid to Richards. Silverman did not notify Srein or Frankford that the Madsen Policy matured nor did he send any checks to Frankford as Srein's compensation for the Madsen Policy. Frankford did not recognize that the proceeds received on behalf of the Richards Plan related to the same Madsen Policy purchased by Srein. Frankford did not become aware of the double sale of the Madsen Policy until 1998 when Srein's attorney contacted Frankford.

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[8] Obviously, since Srein purchased one hundred percent of the Madsen Policy, there was legitimately nothing left for Richards to purchase.

Frankford's actions were ministerial and it never exceeded its bounds as directed trustee as it merely carried out the instructions given by Srein. Srein selected the investments for the Srein Plan and then contacted Daly who then handled the ministerial duties of funding the investment . (Srein, N.T, 63-64). Unlike the bank's actions in Provident, Frankford did not remove the Madsen Policy from the Srein Plan and then resell the asset to Richards nor did Frankford misdirect funds intended for the Srein Plan as Frankford was never sent a check for the Srein Corp.'s proceeds from the Madsen Policy. Srein testified that Frankford never directed money out of the Srein Plans' accounts without consent. In sum, Frankford simply did not have any discretion or control with respect to the Madsen Policy and therefore, Frankford was not an ERISA fiduciary.[9] See, e.g., Maniace v. Commerce Bank of Kansas City, 40 F.3d 264 (8th Cir. 1994)(holding that directed trustee was not an ERISA fiduciary with respect to a stock held for the ERISA plan as the trustee did not have any discretion or control); Beddall v. State Street Bank and Trust Co., 137 F.3d 12 (1st Cir. 1998)(holding that the defendant bank, which held the plan assets in trust, but did not actively manage them nor retain any discretionary authority over the plan's real estate investments, was not an ERISA fiduciary with respect to the plan's real estate holdings).

D. Plaintiffs Did Not Object to the Court's Jury Charge

Under Federal Rule of Civil Procedure 51 "[n]o party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the

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[9] Plaintiffs also argue that a new trial should be granted because the Court's finding that Frankford was not an ERISA fiduciary was against the great weight of the evidence. For all of the reasons stated in section II. D of this opinion, this Court denies Plaintiffs' request.

objection." FED. R. CIV. P. 51. Although Plaintiffs contend that a new trial is warranted based upon the Court's charge to the jury regarding the knowledge of a corporate entity and the Court's charge on comparative negligence, Plaintiffs have waived their right to challenge the jury charge as Plaintiffs failed to object to the charge. Alexander v. Riga, 208 F. 3d 419, 426 (3d Cir. 2000). Accordingly, Plaintiffs' have waived their right and their motion for a new trial is denied.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RONALD J. SREIN and R.J. SREIN CORP., Plaintiffs, v. FRANKFORD TRUST COMPANY (NOW KNOWN AS KEY TRUST COMPANY) Defendant.	:	CIVIL ACTION NO. 99-2652

ORDER

AND NOW, this day of November, 2001, upon consideration of Plaintiffs' Motion to Amend the Judgment to Strike the Comparative Negligence Award, or, in the Alternative, Order a New Trial with respect to the negligence claim, and Plaintiffs' Motion to Amend the Judgment in favor of the Plaintiffs on the ERISA claim, or in the alternative, Order a New Trial, and any Responses thereto, it is hereby ORDERED that said motions are DENIED.

BY THE COURT:

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ROBERT F. KELLY, J.