

FILED
MAY 29 2019

OFFICE OF THE CLERK
SUPREME COURT, U.S.

19-0002

No.

IN THE
Supreme Court of the United States

JACKIE HOSANG LAWSON,

Petitioner,

v.

FMR LLC, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: June 14, 2019

BATEMAN & SLADE, INC.

STONEHAM, MASSACHUSETTS

TWO QUESTIONS PRESENTED

The district court excluded expert witness testimony. The First Circuit held that the proffered testimony “where not irrelevant” improperly impinged upon the role of the court in instructing jurors on the applicable legal standards. The district court, however, neglected to instruct the jury on the integral federal securities laws relevant to the case, as was promised. Thus, the lay jury did not receive any guidance as to what “**could constitute violation of Federal law relating to fraud;**” a pivotal component of the two deciding questions on the jury slip.

1. Is the jury verdict just and proper on the two deciding questions whether “Fidelity’s conduct **could constitute violation of Federal law relating to fraud** against Fidelity’s mutual Fund shareholders,” where the jury was not made aware of what constitutes “**violation of Federal law relating to fraud?**” (Emphasis added).

On March 04, 2014, this Court ruled in favor of the Petitioner, that the Respondents were covered entities under Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A.

2. Which party; the Petitioner or the Respondents, is liable for the attorney fees incurred for getting coverage for the Respondents under the Sarbanes-Oxley Act of 2002, on March 04, 2014, at the United States Supreme Court?

PARTIES

The petitioner is Jackie Hosang Lawson.

The respondents are FMR LLC, FMR Co. Inc., FMR Corp., Fidelity Brokerage Services, LLC, and Fidelity Management & Research Company. All of the respondents are privately-held companies.

No Fidelity mutual fund is a party to this action.

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Petitioner Jackie Hosang Lawson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on March 18, 2019.

OPINIONS BELOW

The March 18, 2019 opinion of the First Circuit is unreported, and set out at pp. 1a-5a of the Appendix. The July 12, 2018 Memorandum and Order of the District Court for the District of Massachusetts, is set out at pp. 15a-19a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions and regulations involved are set out in the Appendix.

STATEMENT OF THE CASE

This case; the offshoot of *Lawson v. FMR LLC*, 571 U.S. 429 (2014), filed under The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, number one issue on appeal: “Whether the Plaintiff is entitled to a new trial because of an abuse of discretion by the district court in allowing the Defendants’ motion *in limine* to exclude expert witness testimony and opinion.” While Lawson stated other issues on appeal, she clearly demonstrated: “The adverse impact of the district court’s error, in “ALLOWING the Defendants’ Motion to Exclude the testimony and

Opinion of Mercer Bullard” runs like a “cancerous vein” throughout the entire trial, detrimentally compromising and denying, Lawson the right to a fair trial.” In essence, Lawson strongly argued that the main issue concerning a matter of law, is the controlling factor interlaced in, and, exacerbated, the other issues on appeal. Lawson presented compelling supporting evidence marginalized by The First Circuit.

On March 18, 2019, The First Circuit affirmed the district court’s judgment, holding that no errors were found on any of the issues, and that Lawson’s claim of abuse of discretion by the district court in excluding the testimony of her expert witness “is unconvincing.” App. 1a-5a.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

Lawson’s expert witness, Professor Mercer E. Bullard; an MDLA Distinguished lecturer and Professor of Law, has impressive credentials, and fulfills all the eligibility requirements as an expert witness. Professor Bullard’s expert report passed muster for relevance and reliability, and Lawson emphasized to the district court the importance of his testimony at trial. “The principal purpose of Professor Bullard’s testimony is to assist the factfinders, here a lay jury, in their determination of the reasonableness of Ms. Lawson’s belief that she was encountering violations and regulations to protect shareholders.”

As held by the First Circuit, the district court’s aversion to Lawson’s expert witness testifying at trial was that he would “improperly

impinged upon the role of the court in instructing jurors on the applicable legal standards." Under this premise, the district court made strong, and binding, promissory statements: "I see nothing there that I can't do," "We'll work together to be sure that I bring to the attention of the jury all those matters that the parties think are in dispute here as a legal proposition," "It can be presented by me here," "That high level of generality is one that I can occupy." "I don't mean to leave the jury at sea about what a '40 Act company or is [sic] what the obligations of a '40 Act company or what the obligations of those involved with the 1940 Act companies are."

The district court reneged on its promises and the jury was not given any guidance as to what constitutes violation of federal law relating to fraud, and, to which Professor Bullard would have testified and opined on in relation to Ms. Lawson's specific claims. The lay jury answered "No" to the following two questions: Has Ms. Lawson proven by a preponderance of the evidence she had (1) an actual subjective belief, and (2) an objectively reasonable belief, that Fidelity's conduct could constitute violation of Federal law relating to fraud against Fidelity's Mutual Fund shareholders?

As a matter of law, pursuant to Fed. R. Evid. 702, Professor Bullard should have been permitted to testify. Fed. R. Evid. 702. Testimony by Expert Witnesses states that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert's scientific, technical, or other specialized knowledge

will help the trier of fact to understand the evidence or to determine a fact in issue;

- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.”

Professor Bullard’s proffered testimony satisfy all the requirements this Court held in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and, *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), on expert witness testimony admissibility.

II. THERE IS A CLEAR AND DISTINCT CONTRADICTION BETWEEN THE JUDGMENT OF THE FIRST CIRCUIT AND PRECEDENCE SET BY THE FIRST CIRCUIT REGARDING EXPERT WITNESS TESTIMONY

Professor Bullard was Lawson’s lone expert witness to testify on securities rules and regulations governing the mutual fund industry. In an exact situation regarding exclusion of a Plaintiff’s lone expert witness, the First Circuit applied a different standard as they held below in Lawson. The first Circuit in *Cruz-Vazquez v. Mennonite General Hosp., Inc.*, 613 F.3d 54, 57 (2010), ruled:

The district court excluded the testimony of the plaintiff's *lone* expert witness at trial. As a result of the court's ruling, the plaintiffs' failed to offer proof on crucial elements of their case, and the district court consequently granted judgment as a matter of law for the defendants. The plaintiffs appeal, arguing that the district court abused its discretion when it excluded the expert testimony and that its award of judgment for the defendants must be vacated. We agree.

Regarding the limitations on expert witness legal testimony, the First Circuit held that "purely legal questions and instructions to the jury on the law to be applied ... [are] exclusively the domain of the judge." *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1988). The First Circuit later revised that holding: "Nonetheless, and despite occasional judicial pronouncements to the contrary, there is no blanket prohibition on expert testimony concerning the law. See *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 115 n.6 (1st Cir. 2001).

As the court in *Adams v. New England Scaffolding, Inc.* not reported in F. Supp.3d (2015), opined on excluding expert witness testifying on the law:

Indeed it would be unwise and unworkable to impose such a prohibition. We live in a highly complex and often bureaucratic society with a multitude of legal and regulatory requirements; it is frequently the case

that the acts or omissions of the parties, or their legal or contractual obligations, can only be fully understood in the context of a particular regulatory environment. Such a regulatory environment often needs to be explained to lay persons, and therefore expert testimony may be helpful to the jury to understand the issues in the case.

(Emphasis added.)

Professor Bullard's Expert Report accordingly explained that the Securities Exchange and Commission 15(c) Process was the main topic on which he would testify. His reported stated:

This process which is known as the 15(c) Process was Ms. Lawson's primary focus during the employment period at issue in this litigation. I have extensive experience regarding the rationale and context for the 15(c) Process, the actual implementation of the Process by multiple fund complexes, including the Fidelity complex, and the procedural standards that are applied pursuant to this Process.

Professor Bullard's testimony would not have tread on the province of the Sarbanes-Oxley Act, and how this statute should be applied to Lawson's claims. His testimony would have been limited, addressing the Securities Exchange and Commission 15(c) Process, and the regulation applicability of

Rule 12b-1, in relation to Lawson's claims of securities fraud.

Lawson's counsel took great care in preparing a Proffer for acceptability by the district court to permit Professor Bullard to testify and give his opinion: "The proffer removes any statement about the law." But the district court argued that the Proffer "brings in an oracular voice and that: "It can be presented by me here." "He doesn't add anything. He's not in the position to testify with respect to Fidelity's practices." The district court, however, did not instruct the jury on the relevant federal rules and regulations that would have been presented by Professor Bullard.

In further aggravation, there was no expert rebuttal to the testimony and opinion of the Defendants' expert witness, Russell F. Peppet, who was permitted to testify. The Defendants were also able to use duplicity and capitalize on Professor Bullard's absence at trial by posing an unanswerable, influencing question to the jury during closing arguments:

Ask yourself, ask yourself as you conduct this exhaustive review, why didn't you hear from a single additional person who agrees with Ms. Lawson about her claims of fraud? Why didn't you hear from anyone else at Fidelity, inside Fidelity, outside Fidelity? You heard from a whole range of witnesses both from inside and

outside. Not one, not one of them agreed with Ms. Lawson with respect to her claims.¹

III. THE FIRST CIRCUIT IGNORED A REQUESTED DE NOVO REVIEW OF GREAT IMPORTANCE REGARDING VIOLATION OF THE CONSTITUTIONALITY OF AN ACT OF CONGRESS THAT SHOULD BE RESOLVED BY THIS COURT

Lawson's case is filed under The Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. George W. Bush, 43rd President of the United States: 2001 – 2009, Statement on Signing the Sarbanes-Oxley Act of 2002:

Today I have signed into law H.R. 3763, "An Act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes. The Act adopts tough new provisions to deter and punish corporate and accounting fraud and corruption, ensure justice for wrongdoers, and protect the interests of workers and shareholders.

¹ PricewaterhouseCoopers ("PwC"), the external auditor was scheduled to testify at trial, and based on documents produced during the discovery phase of litigation would have corroborated Ms. Lawson's reasonable belief of securities fraud. After the Plaintiff's case was closed the Defendants informed the district court that PricewaterhouseCoopers would not testify at trial.

Several provisions of the Act require careful construction by the executive branch as it faithfully executes the Act.

The legislative purpose of sections 302, 401, and 906 of the Act, relating to certification and accuracy of reports, is to strengthen the existing corporate reporting system under section 13(a) and 15(d) of the Securities Exchange Act of 1934. Accordingly, the executive branch shall construe this Act as not affecting authority relating to national security set forth in section 13(b) of the Securities Exchange Act of 1934.

To ensure that no infringement on the constitutional right to petition the Government for redress of grievances occurs in the enforcement section of 1512(c) of title 18 of the U.S. Code, enacted by section 1102 of the Act, which among other things prohibits corruptly influencing any official proceeding, the executive branch shall construe the term "corruptly" in section 1512(c)(2) as requiring proof of a criminal state of mind on the part of the defendant.

Given that the legislative purpose of section 1514A of title 18 U.S. Code, enacted by section 806 of the Act, is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority or to grant new

investigative authority, the executive branch shall construe section 1415A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.

George W. Bush

The White House, July 30, 2002.

Lawson's case originated at the Department of Labor. The reason her case is in the federal arena is because the Respondents violated Lawson's constitutional rights, pursuant to section of 1512(c)(2) of title 18 of the U.S. Code, "Whoever corruptly - otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both." The Respondents successfully influenced OSHA to put the Lawson case on hold indefinitely, cancelling a scheduled investigation, which left Lawson with no other option than to seek justice in the federal courts.

On or about September 10, 2007, almost nine months after Ms. Lawson's first complaint, OSHA notified all parties that the Defendants were covered entities under The Sarbanes-Oxley Act of 2002. On September 20, 2007, OSHA investigator Kristen Rubino officially notified outside counsel, to set up interviews "of the Fidelity management staff." On October 03, 2007, Ms. Rubino also confirmed with the Plaintiff's attorney that Ms. Rubino had scheduled an investigation into Ms. Lawson's claims,

giving a specific date in November 2007, for the commencement of the investigation.

On November 14, 2018, the Plaintiff received FOIA documents showing that external counsel, attorney Eugene Scalia, and members of the Defendants' general counsel office interfered with a government scheduled investigation. Mr. Scalia had *ex parte* communications with Nilgun Tolek in Washington D.C. starting September 14, 2007. On September 14, 2007, OSHA's regional director Carole Horowitz asked Ms. Tolek: "**Based on your conversation with Scalia, do you see any reason why Kristen should hold off on interviewing witnesses in this case?**" Ms. Tolek response: "**No. I don't think he'll be able to convince us to back off. I'm hoping instead to simply convince him that we're not nuts.**"

On September 26, 2007, attorney Scalia continued *ex parte* communications with Ms. Tolek, scheduling a time for him and his clients, to meet with Ms. Tolek; Subject: "RE: Redux: Fidelity/Lawson." On October 2, 2007, @ 3:59 PM, Ms. Tolek notified attorney Scalia, "All of us are available on the 19th, and on the 10th, it would need to be before 10 or after 3. My only concern is that the 19th is so far away, and **the investigation needs to move forward....**"

On October 2, 2007, @ 4:13 PM, attorney Scalia responded asking Ms. Tolek to reserve the 19th, further stating "—I appreciate your point about **the investigation** – but it turns out that date does not work for an important representative of the client." The "Meeting with Scalia" and the "**important representative of the client**" was scheduled for October 19, 2007 at 1:00 PM. Shortly

after attorney Scalia's October 19, 2007, meeting with Ms. Tolek, and the expected attendance of the aforementioned "**important representative of the client**," Ms. Rubino notified the Plaintiff's attorney that the Lawson case had been put on hold indefinitely, and, that the November scheduled investigation had been cancelled. The only explanation provided by Ms. Rubino was that the order to put the case on hold indefinitely, came from the highest level in Washington, D.C.

Lawson's argument to the First Circuit for a *de novo* review for attorney fees is that the Respondents are liable for the attorney fees incurred in getting coverage under Sarbanes-Oxley, since the Respondents are responsible for Lawson's case moving from one jurisdiction to another, and thus responsible for Lawson legal fees incurred over eight years pursuing coverage for the Respondents under Sarbanes-Oxley; coverage that had already been decided by the Department of Labor in 2007.

The consequences of the Respondents' action, ignored in the First Circuit's judgment, are particularly serious; it undermines the democratic process of The United States; it lessens Congress' intended protection of investors' interests; and it demonstrates a big corporation's corrupting influence adversely, and unjustly, impacting an employee's constitutional rights.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the First Circuit.

Respectfully submitted,

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Dated: June 14, 2019