

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

SIMON BERNSTEIN IRREVOCABLE )  
INSURANCE TRUST DTD 6/21/95, )

Plaintiff, )

v. )

HERITAGE UNION LIFE INSURANCE )  
COMPANY, )

Defendant, )

HERITAGE UNION LIFE INSURANCE )  
COMPANY )

Counter-Plaintiff )

v. )

SIMON BERNSTEIN IRREVOCABLE )  
INSURANCE TRUST DTD 6/21/95 )

Counter-Defendant )

and, )

FIRST ARLINGTON NATIONAL BANK )  
as Trustee of S.B. Lexington, Inc. Employee )  
Death Benefit Trust, UNITED BANK OF )  
ILLINOIS, BANK OF AMERICA, )  
Successor in interest to LaSalle National )  
Trust, N.A., SIMON BERNSTEIN TRUST, )  
N.A., TED BERNSTEIN, individually and )  
as purported Trustee of the Simon Bernstein )  
Irrevocable Insurance Trust Dtd 6/21/95, )  
and ELIOT BERNSTEIN )

Third-Party Defendants. )

**Case No. 13 cv 3643  
Honorable John Robert Blakey  
Magistrate Mary M. Rowland**

**FILERS:  
Simon Bernstein Irrevocable  
Insurance Trust Dated 6/21/95,  
Ted Bernstein, as Trustee and  
Individually,  
Pamela B. Simon, Adam M. Simon,  
David B. Simon, The Simon Law Firm,  
STP Enterprises, Inc. (“Movants”).**

\_\_\_\_\_ )

ELIOT IVAN BERNSTEIN, )  
 )  
 Cross-Plaintiff )  
 )  
 v. )  
 )  
 TED BERNSTEIN, individually and )  
 as alleged Trustee of the Simon Bernstein )  
 Irrevocable Insurance Trust Dtd, 6/21/95 )  
 )  
 Cross-Defendant )  
 and, )  
 )  
 PAMELA B. SIMON, DAVID B.SIMON, )  
 both Professionally and Personally )  
 ADAM SIMON, both Professionally and )  
 Personally, THE SIMON LAW FIRM, )  
 TESCHER & SPALLINA, P.A., )  
 DONALD TESCHER, both Professionally )  
 and Personally, ROBERT SPALLINA, )  
 both Professionally and Personally, )  
 LISA FRIEDSTEIN, JILL IANTONI )  
 S.B. LEXINGTON, INC. EMPLOYEE )  
 DEATH BENEFIT TRUST, S.T.P. )  
 ENTERPRISES, INC. S.B. LEXINGTON, )  
 INC., NATIONAL SERVICE )  
 ASSOCIATION (OF FLORIDA), )  
 NATIONAL SERVICE ASSOCIATION )  
 (OF ILLINOIS) AND JOHN AND JANE )  
 DOES )  
 )  
 Third-Party Defendants. )  
 \_\_\_\_\_ )

NOW COMES, the above-referenced, Counter-defendants, Cross-defendants, and Third-party defendants by and through their counsel Adam M. Simon, (collectively referred to as “Movants”), and respectfully submit this memorandum of law in support of their motion for summary judgment as to each and every one of Eliot Bernstein’s counterclaims, cross-claims and third-party claims (collectively referred to as “Eliot’s Claims”).

**I. INTRODUCTION**

Movants shall demonstrate that all of Eliot's Claims fail as a matter of law for several related reasons. First, Eliot has not pled a claim to the Policy Proceeds as beneficiary, because he cannot. He was never named a beneficiary of the Policy Proceeds on the records of the Insurer and neither were his children. Next, Eliot's Claims are indirect relying instead on the propositions that the Estate of Simon Bernstein (the "Estate") is the beneficiary of the Policy Proceeds by default and that Eliot is a beneficiary of the Estate or a Simon Bernstein Testamentary Trust at issue in the Probate Actions. But, as Movants will show neither proposition is true, and as a result Eliot cannot plead a viable cause of action against Movants.

After sixty-one pages of allegations – violating both the rules of civil procedure and local rules requiring concise and plain statements of fact – Eliot finally sets forth seven counts styled as fraud, civil conspiracy, negligence, legal malpractice, abuse of process, breach of fiduciary duty and conversion. But, Eliot's Claims also share a fatal flaw, and that is he has not and cannot plead damages because he merely alludes to purported beneficial interests without providing any allegation of facts, or supporting documentation that show he is a beneficiary of either the Estate of Simon Bernstein, or the Simon Bernstein testamentary trust at issue in the Probate Actions. To the contrary, Eliot has lost standing to participate in the Probate Actions on his own behalf after it was determined that the testamentary documents at issue in the Probate Actions are in fact valid, genuine and enforceable. Judge John L. Philips also determined that Simon Bernstein's grandchildren are the beneficiaries of his Estate, and none of his children are beneficiaries, including Eliot. Eliot also lacks standing to participate in the Probate Actions on behalf of his children as the court appointed a guardian ad litem to act on their behalf after finding Eliot's actions in Florida to be "adverse and destructive" to his children's interests.

A separate basis for granting third-party defendants' motion for summary judgment was articulated by Judge St. Eve in her Order dismissing former third-party defendants, Tescher & Spallina. Judge St. Eve found that since Eliot faces no potential liability in the instant action, Rule 14 did not authorize Eliot to file third-party claims against any third-party defendant. So, this same reasoning also applies to the remaining third-party defendants. And with regard to the sole issue raised by the Insurer's interpleader action in the Northern District, Eliot has failed to produce any coherent set of facts, documentation or other evidence that Eliot or his children have ever been named a beneficiary of the Policy Proceeds on the records of the Insurer.

## **II. BACKGROUND**

### **A. SIMON AND SHIRLEY BERNSTEIN AND THEIR ESTATES**

Simon Bernstein, the insured and decedent in this matter, had a long career as a life insurance agent including owning and operating several insurance brokerages. Simon Bernstein was married to his spouse, Shirley, for fifty-two years prior to Shirley's death in 2010. Simon and Shirley Bernstein had five children, whose names in order of age are as follows: Ted Bernstein, Pamela Simon, Eliot Bernstein, Jill Iantoni, and Lisa Friedstein. All five of Simon Bernstein's children are now adults with children of their own. Simon and Shirley Bernstein had ten grandchildren from their five children. (SoF ¶3, ¶6, ¶8, ¶9, ¶10). Simon Bernstein was the Insured under the Policy. On the day Simon Bernstein passed away in 2012, Heritage was the successor insurer to the insurance company that issued the Policy. (SoF ¶11, ¶26).

Initially, the Bernstein Trust filed an action for breach of contract against Heritage in the Circuit Court of Cook County. Heritage removed the action from Cook County Court to the Northern District of Illinois. Heritage then filed a counterclaim for interpleader, and named the Bernstein Trust, Eliot Bernstein, and certain banks named in the caption above as potential

competing claimants to the Policy Proceeds. With leave of court, Heritage deposited the Policy Proceeds with the Registry of the Court and was subsequently dismissed from the case. (SoF ¶11, ¶37). After being served, Eliot Bernstein appeared pro se and filed cross-claims, counter-claims, and third-party claims (“Eliot’s Claims”) naming the existing parties and many new third-parties. (SoF ¶3, ¶25). The Estate of Simon Bernstein was granted leave to intervene in August of 2014. The Estate’s intervenor complaint alleges that if no other claimant can prove up their claim, then the Estate should take the Policy Proceeds by default. (SoF ¶3, ¶25).

## B. THE PARTIES

Please see SoF ¶1-¶25 for a review of the identity and status of the parties.<sup>1</sup>

## C. THE POLICY AND POLICY PROVISIONS

The Policy was originally purchased from Capitol Bankers by the VEBA in December of 1982 to insure the life of Simon Bernstein and was issued as Policy No. 1009208. (SoF ¶26). The Policy provisions which set forth both the definitions of a beneficiary under the Policy, and the requirements for naming or changing a beneficiary of the Policy are the controlling factors in making the determination as to whom is the beneficiary of the Policy Proceeds. *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 415, 318 N.E.2d 52, 57 (1<sup>st</sup> Dist. 1974) *citing* 2 Appelman, Insurance Law and Practice §921 (1966).

The Policy includes the Insurer’s requirements for the Policy Owner to effectuate a change of beneficiary. With regard to changing the beneficiary, the Policy provides as follows:

The Owner or any Beneficiary may be changed during the Insured’s lifetime. We do not limit the number of changes that may be made. *To make a change, a written request, satisfactory to us, must be received at our Business Office.* The change will take effect as of the date the request was signed, even if the Insured dies before we receive it. Each

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<sup>1</sup> Pursuant to Local Rule 56.1, Movants are concurrently filing their Statement of Uncontested Material Facts (“SoF”) and Appendix of Exhibits thereto.

change will be subject to any payment we made or other action we took before receiving the request. (**Ex. 14 at bates #JCK00103**). (emphasis added).

#### **D. THE INSURED AND INSURER**

Simon Bernstein was the Insured under the Policy. (**SoF, ¶26**). The Insurer of the Policy changed over the life of the Policy from time to time through succession. The Insurer has been previously dismissed from this case after having deposited the Policy Proceeds with the Registry of the Court. Prior to its dismissal, the Insurer did not dispute either the existence of the Policy or its liability for the Policy Proceeds following the death of the Insured. (**SoF ¶11, ¶37**)

#### **E. THE POLICY PROCEEDS (THE “STAKE”)**

In the Insurer’s Complaint for Interpleader, the Insurer represented that the net death benefit payable under the Policy was \$1,689,070 (less an outstanding policy loan). (**Ex. 13, at ¶17**). No objections were made by any Party to this litigation regarding the amount of the Policy Proceeds that the Insurer deposited with the Registry of the Court. In short, the amount of the Policy Proceeds is undisputed. (**SoF ¶11**).

### **III. ARGUMENT**

#### **A. STANDARDS ON SUMMARY JUDGMENT**

Summary judgment is appropriate when “there is no genuine issue as to any material fact” and the movant “is entitled to judgment as a matter of law.” *Simon Bernstein Irrevocable Trust Dtd 6/21/95 v. Heritage Union Life Insurance Co., et al.* No. 13 C 3643 (**Dkt. #220**) citing *Spurling v. C & M Fine Pack, Inc.*, 739 F.3D 1055, 1060 (7<sup>TH</sup> Cir. 2014). The party seeking summary judgment has the burden of establishing that there is no genuine dispute as to any material fact. *Id* citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Only disputes “that might affect the outcome of the suit...will properly preclude the entry of summary judgment.” “When the material facts are not in dispute...the sole question is whether the moving party is

entitled to judgment as a matter of law.” *ANR Advance Transp. V. Int’l Bhd. Of Teamsters Local 710*, 153 F.3d 774, 777 (7th Cir. 1998). If full summary judgment is not warranted, the court may grant partial summary judgment. Fed R. Civ. P. 56(a). But, summary judgment is not warranted “if the evidence is such that a reasonable jury could return a verdict for the non-moving party,” and the Court must “construe all facts and reasonable inferences in the light most favorable to the non-moving party. *Simon Bernstein Irrevocable Trust Dtd 6/21/95*, No. 13 cv 3643 citing *Liberty Lobby*, 477 U.S. 242, 255 (1986), *Carter v. City of Milwaukee*, 743 F.3d 540, 543 (7th Cir. 2014).

**B. ELIOT DOES NOT PLEAD A CLAIM TO THE POLICY PROCEEDS, AND INSTEAD IS SHOPPING FOR AN ALTERNATIVE FORUM TO SEEK RELIEF HE HAS BEEN UNABLE TO OBTAIN IN THE PROBATE ACTIONS.**

This motion for summary judgment does not seek a final determination that the Bernstein Trust exists and is entitled to the Policy Proceeds as beneficiary. Instead, this motion is confined to exposing the deficiencies with Eliot’s Claims that entitle Movants to summary judgment as to those claims. Eliot’s Claims fail to set forth any facts or documents in support of his spurious allegations that either he or his children were named beneficiaries of the Policy. Eliot’s Claims relate almost exclusively to matters occurring in the Probate Actions and are devoted to seeking relief here that he was denied in Florida. Instead of pleading a claim to the Policy Proceeds at issue in the instant litigation, Eliot pleads claims sounding in fraud, negligence, breach of fiduciary duty, conversion, abuse of legal process, legal malpractice and civil conspiracy relating primarily to the Probate Actions. Eliot’s Claims and his efforts to amend those claims are nothing more than blatant -- but futile -- forum-shopping.

None of the prayers for relief made for each of Eliot’s Claims seek the Policy Proceeds. Instead, in section “(i)” of his prayer for relief, Eliot asks the court to seize all records regarding

the Policies. But, Eliot has all Parties' Rule 26 production of documents including the *Insurer's records*. And, Eliot had well over a year to conduct discovery. In short, this first prayer for relief is now moot because Eliot has had both access to the documents and records, and ample time to conduct discovery. **(Ex. 9, pg.68).**

In section "(ii)", Eliot asks for court costs to be paid by the Parties not the Policy Owners. This prayer for relief does not seek the Policy Proceeds. In section "(iii)", Eliot states that he has asked the Probate Court in Florida to remove Ted Bernstein, Pam Simon, Donald Tescher and Robert Spallina from acting in any fiduciary capacity regarding the Estates of Simon or Shirley and Eliot asks this court for the identical relief. First, Donald Tescher and Robert Spallina are no longer parties to this action as their motion to dismiss Eliot's claims was granted. **(SoF, ¶16, ¶17, and ¶22)** Second, this Court has no jurisdiction over the Estates of Simon and Shirley Bernstein as those matters are being administered and litigated in Palm Beach County, Florida. *Dragen v. Miller*, 679 F.2d 712 (7<sup>th</sup> Cir. 1982). Third, as shown herein, Eliot has no standing in the Estate matters. Fourth, Ted Bernstein was cleared of any wrongdoing and his role as Trustee was confirmed in the Probate Actions. (cite). But more to the point, once again Eliot's third prayer for relief does not seek the Policy Proceeds. **(Ex. 9, pg. 68).**

In section "(iv)" Eliot complains of parties abusing their fiduciary duty and demands that such parties be required to retain non-conflicted counsel. Although this prayer is vague, it appears to be an attempt to have counsel for Movants disqualified. This prayer for relief was previously denied by Judge Amy St. Eve when she denied Eliot's motion to disqualify counsel **(Dkt. #91)**. And again, this prayer for relief also makes no mention of the Policy Proceeds. **(Ex. 9, pg.69).**

In section “(v)” Eliot asks the court to take judicial notice of the crimes alleged in his complaint and to use its court powers to “prevent any further crimes.” This prayer for relief is so vague on its face that it would be impossible for this court to grant or enforce the relief sought. No specific redress is requested, and more to the point no demand is made for the Policy Proceeds. **(Ex. 9, pg.70)**. In section “(vi)” Eliot asks for permission to obtain ECF access. Movants have been receiving Eliot’s pleadings via ECF, and the ECF timestamps on Eliot’s pleadings indicate he has access. In section (vii) Eliot asks for leave to amend his claims. None of these prayers for relief seek the Policy Proceeds. **(Ex. 9, pg.70)**.

In section (viii), Eliot seeks \$8 million, plus punitive damages, attorneys’ fees and costs. Eliot’s Claims contains no allegations of fact regarding the damages alleged that have any reasonable relation to the \$8 million plus punitive damages award he seeks. And the amount he seeks certainly bears no relation to the amount of Policy Proceeds on deposit which is approximately \$1.7 million. So Eliot’s final prayer for relief seeking money damages does not request either a determination that Eliot or his children are beneficiaries of the Policy Proceeds, nor does it make a demand for an award of the Policy Proceeds. **(Ex. 9, ¶70)**.

Eliot’s Claims are also based in part on his erroneous assumption that the determination of the beneficiary of the Policy proceeds must be made in Florida by the Probate Court, instead of the Northern District of Illinois where the Insurer filed its Interpleader and deposited the Policy Proceeds. Eliot misapprehends the fact that the Policy Proceeds are not part of the Probate Actions because they are non-probate assets whose beneficiary is determined according to the life insurance contract, the Policy. The Policy Proceeds vested in the beneficiary of the Policy immediately upon the death of the insured. *Bank of Lyons v. Schultz*, 22 Ill.App.3d 410, 318 N.E.2d 52 (1<sup>st</sup> Dist. 1974). Further, this Court has exercised its jurisdiction from the outset

of this matter and it was left unchallenged by the Insurer or any other party. In fact, it was the Insurer that removed the action to the Northern District from the Circuit Court of Cook County, and in so doing, the Insurer alleged and invoked this court's jurisdiction over this matter pursuant to 28 U.S.C. §1335. **(SoF ¶40, and Ex. 12)**. In addition, the matters and issues raised by Eliot all involve the Probate Action in Florida, and the Federal Probate Exception precludes this court's jurisdiction over such matters. *Storm v. Storm*, 328 F.3d 941 (7<sup>th</sup> Cir. 2003). What is also conspicuously absent from Eliot's Claims is any set of facts or references to documentation in the Insurer's records that support a claim to the Policy Proceeds on Eliot's own behalf or that of his children. **(SoF ¶28-¶31)**. In short, Eliot has not pled a conflicting claim to the Policy Proceeds such that this court could find that he or his children were named beneficiaries of the Policy on the records of the Insurer.

**C. THE ESTATE OF SIMON BERNSTEIN HAS INTERVENED AND IS ADEQUATELY REPRESENTED.**

Eliot's Claims make reference to the fact that the Estate of Simon Bernstein may be entitled to the Policy Proceeds. But as determined by the Probate Court, Eliot is not a beneficiary and has no standing to act on behalf of the Estate or participate at all in the Probate litigation in Florida. **(SoF, ¶33-¶34)**. The Estate is already adequately represented in the instant litigation by its personal representative and local counsel. **(SoF, ¶25)**. Also, the interests of Eliot's children in the Estate are now being represented solely by the guardian ad litem. **(SoF, ¶33-¶34)**.

**D. THE RECENT ORDERS ENTERED IN THE PROBATE ACTIONS, BARRING ELIOT FROM THE ESTATE PROCEEDINGS AND STRIKING HIS PLEADINGS, ALSO EFFECT TO BAR ELIOT'S PRESENCE IN THE INSTANT LITIGATION ACCORDING TO THE DOCTRINE OF COLLATERAL ESTOPPEL.**

Judge John L. Phillips in the Probate Actions entered the December, 2015 Order and the April, 2016 Orders which determined that the testamentary documents at issue in Probate Actions were valid and genuine. (SoF, ¶¶33-¶34). The Probate Orders bar Eliot from the Probate Actions to represent his own interests, and appoint a guardian ad litem to represent the interests of Eliot's children in their parents' stead. Eliot has filed separate appeals of the Probate Orders. Despite Eliot's pending appeals, the doctrine of collateral estoppel applies, and acts to settle material issues in the instant litigation. The Probate Orders entered after trial include findings that (i) Eliot is not beneficiary of the Estate of Simon Bernstein; (ii) appoint a guardian ad litem for Eliot's children; and (iii) Eliot has no standing in the Probate Actions on behalf of himself, the Estate or his children.

In *Innkeepers Telemanagement v. Hummert*, the court set forth the four elements that must be satisfied before collateral estoppel may be applied: (i) the issue sought to be precluded must be the same as that involved in the prior action, (ii) the issue must have been actually litigated, (iii) the determination of the issue must have been essential to the final judgment, and (iv) the party against whom estoppel is invoked must be fully represented in the prior action. *Innkeepers Telemanagement v. Hummert Management Group*, 841 F.Supp. 241 (N.D.Ill., 1993).

Here, all four elements apply. First, the issue Movants seek resolve by the application of collateral estoppel pertains to Eliot's standing vis-à-vis the Estate of Simon Bernstein. Plaintiffs' seek to have this court declare that Eliot is collaterally estopped from (i) asserting any claims here based on his now debunked theory that Eliot is a beneficiary of the Estate or a Simon

Bernstein testamentary trust at issue in the Probate Actions; (ii) asserting claims on behalf of the Estate for the same reasons; and (iii) asserting any claims on behalf of his children as they are now represented by a guardian ad litem in the Estate matters. Both Probate Orders on their face note that the determinations were made following a trial on the issues. Eliot appeared at the trial and chose to represent himself pro se'. The trial leading to the Probate Orders is sufficient to satisfy both the "actually litigated" and "fully represented" elements required to apply the doctrine of collateral estoppel. *Id* at pg. 246.

Collateral estoppel is also appropriate in situations such as here where not all the parties asserting estoppel were parties in the previous action, so long as the party to be estopped was a party to that action. Here, Eliot is the party to be estopped and Eliot was a party and appeared pro se' in the Probate Actions including at the trial leading to the final orders. *Id* at p. 246 citing *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 349-350, 91 S.Ct. 1434, 1453, 28 L.E.2d 788 (1971). The fact that these final orders are on appeal does not prevent the application of collateral estoppel. *Innkeepers Telemanagement*, 841 F.Supp. at p.246 citing *Cohen v. Bucci*, 103 B.R. 927, (N.D.Ill. 1989), aff'd 905 F.2d 1111 (7th Cir. 1990). See also, the following string of citations from *Hazel v. Curtis-Wright Corp.*, 1992 WL 436236 (S.D. Ind., 1992):

The overwhelming majority rule in the federal courts is that a judgment may be given res judicata effect during the pendency of an appeal. See, e.g., *Erebia v. Chrysler Plastic Products Corp.*, 891 F.2d 1212, 1215 n. 1 (6th Cir.1989); *Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir.1988); *Blinder, Robinson & Co. v. Securities and Exchange Commission*, 837 F.2d 1099, 1104 n. 6 (D.C.Cir.1988), cert. denied, 488 U.S. 869 (1988); *Wagner v. Taylor*, 836 F.2d 596, 598 (D.C.Cir.1987); *Taunton Gardens Co. v. Hills*, 557 F.2d 877, 879 n. 2 (1st Cir.1977); *Lee v. Criterion Insurance Co.*, 659 F.Supp. 813, 819–20 (S.D.Ga.1987); *Cohen v. Bucci*, 103 B.R. 927, 931 (N.D.Ill.1989), aff'd, 905 F.2d 1111 (7th Cir.1990); see also 18 C. WRIGHT, A. MILLER, E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4433 AT 308 (West 1981) ("established rule in the

federal courts is that a final judgment retains all of its res judicata consequences pending decision of the appeal”).

Moreover, the Seventh Circuit has previously subscribed to the majority rule that res judicata can operate despite a pending appeal. See *Kurek v. Pleasure Driveway & Park District*, 557 F.2d 580, 595 (7th Cir.1977), vacated on other grounds, 435 U.S. 992 (1978); see also *Grantham v. McGraw–Edison Co.*, 444 F.2d 210, 217 (7th Cir.1971) (“[t]he pendency of the ... late filed appeal.... did not detract from the conclusive effect of ... judgment”). In *Kurek* the court recited that, the federal rule is that the pendency of an appeal does not suspend the operation of an otherwise final judgment as ... collateral estoppel, unless the appeal removes the entire case to the appellate court and constitutes a proceeding de novo. *Id.* at 596 (quoting 1B MOORE'S FEDERAL PRACTICE ¶ 0.416[3] at 2254 (2d ed. 1974).

**E. Movants’ motion as to all Third-Party Defendants added to this litigation by Eliot’s Claims, should also be granted for the reasons set forth by Judge St. Eve in her Order dismissing Tescher & Spallina.**

. The upshot of Judge St. Eve’s Order dismissing Eliot’s Claims as to Tescher & Spallina was that Eliot was not an original defendant to Plaintiff’s First Amended Complaint, but instead was brought into this litigation by virtue of his appearance in response to the Insurer’s interpleader action. As such, Judge St. Eve noted, Eliot faces no liability in this action. And “Rule 14 limits a defendant to joining third-parties that share or supersede the defendant’s liability to the plaintiff.” (SoF 16. Dkt. #106, at p.3, March 17, 2014 Order citing *Metlife Investors USA Ins. Co. v. Ziedman*, 734 F.Supp2d 304, 310 (E.D.N.Y. 2010).

Judge St. Eve dismissed Tescher & Spallina pursuant to Rule 14, finding Eliot was not authorized to bring his third-party claims against Tescher & Spallina in the instant litigation. The causes of action brought against Tescher & Spallina are identical to the ones brought against the remaining third-party defendants. Thus, all of the third-party defendants are in the same posture as Tescher & Spallina were prior to their dismissal, and are entitled to summary judgment for the same reasons set forth by Judge St. Eve.

**F. Eliot's Claims must fail he has failed to allege sufficient facts to prove damages, a necessary element to all of Eliot's Claims.**

Because Eliot's prayers for relief do not seek the Policy Proceeds, Eliot has pled no claim to the Policy Proceeds. It has recently been determined by the Probate Orders that Eliot has no beneficial interest in the Estate, and has no standing in the Probate Actions involving the Estate. It follows that Eliot lacks standing to pursue claims on the behalf of the Estate in the instant litigation as well. And, Eliot has no standing to represent the interests of his children in the Estate since a guardian ad litem has now been appointed to act on their behalf. Each of Eliot's seven causes of action requires proof of the element of damages. Because Eliot cannot show that he sustained damages or that he has standing to assert damages on behalf of his children or the Estate, all of Eliot's Claims fail.

Plaintiff's claims for fraud dismissed for failing to show fraud caused damages. *U.S for use of Ascher Brothers Co. v. American Home Assurance Co.*, 2013 WL 1338020 (N.D.ILL, 2003). Plaintiff's claim for legal malpractice dismissed for failing to show damages. *Northern Illinois Emergency Physicians v. Landau et. al.*, 216 Ill.2d 294, 837 N.E.2d 99, 297 Ill.Dec. 319 (Ill. 2005). Plaintiff's claim for breach of fiduciary duty dismissed for failing to show damages. *Sadler v. Retail Properties of America, Inc.*, 2014 WL 2598804 (not reported in F. Supp.2d), citing *Erica P. John Fund, Inc. v. Halliburton Co.*, — U.S. —, 131 S.Ct. 2179, 2183 (2011), *Lutkauskas v. Ricker*, 998 N.E.2d 549, 560 (1st Dist., 2013).

Plaintiff's claim for legal malpractice dismissed for failing to show damages. *Northern Illinois Emergency Physicians v. Landau et. al.*, 216 Ill.2d 294, 837 N.E.2d 99, 297 Ill.Dec. 319 (Ill. 2005). And, like legal malpractice claims, common law negligence claims require proof of breach of a duty of reasonable care, and damages caused by that breach. A complainant must have suffered an injury or damages in order to sustain a cause of action for negligence. *Browning*

*v. Eckland Consultants, Inc.*, 2004 WL 2687961 (1st Dist. 2004), *Chandler v. Illinois Central Railroad. Co.*, 207 Ill.2d 331, 798 N.E.2d 724, 278 Ill.Dec. 340 (Ill. 2003).

Eliot's cause of action for conversion fails for a similar reason in that one essential element to sustain a claim of conversion is to show an immediate unfettered right to the property allegedly converted. *Edwards v. City of Chicago*, 389 Ill. App. 3d 350, 353, 905 N.E.2d 897, 900, 329 Ill.Dec. 59, 62 (1st Dist. 2009). Eliot's conversion claim does not even contain an allegation of a specific asset or piece of property that was converted much less show an unfettered right of ownership to such property.

Eliot's Claim for abuse of process likewise fails. The Orders entered in the Probate Action have conclusively determined that Eliot had no property rights in the Estate or the testamentary trusts, and that the testamentary documents that Ted Bernstein submitted to the court were genuine, valid and binding. Unfortunately, the administration of those estates has been mired in litigation for the last three to four years. But, the elements for a claim of abuse of legal process is that (i) the allegedly abusive proceedings must have been instituted for an improper purpose, and (ii) there must have been an improper act in the prosecution of the proceedings. *Kumar v. Bornstein*, 354, Ill.App.3d, 159, 820 N.E.2d, 1167, 290 Ill.Dec. 100 (1st Dist. 1972), *Holiday Magic, Inc. v. Scott*, 4 Ill.App.3d 962, 282 N.E.2d 452 (1st Dist. 1972).

The purpose behind the Probate Actions instituted by Ted Bernstein and Teshcer & Spallina in Florida was to submit the testamentary documents of Simon and Shirley Bernstein to probate in Florida and to administer their estates and trusts. Here, the proceedings were filed by the named beneficiary of a life insurance policy to pursue a death claim against a life insurer for the Policy Proceeds. Additionally, after trial in the Probate Actions, Ted Bernstein was cleared of any wrong-doing, and none of the other remaining third-party defendants were present at the

trial or mentioned in the Probate Orders. So, Eliot's abuse of legal process claims fail for similar reasons in that Eliot has not and cannot show an improper purpose for the filing of the proceedings alleged in Eliot's Claim for abuse of process. Also, under Illinois law, elements for abuse of process are strictly construed because the tort is disfavored. *Id.*

Eliot's final cause of action for civil conspiracy fails to adequately identify what the underlying tort or wrongful act of the conspirators was exactly. Presumably, Eliot is alleging a conspiracy involving two or more persons committing one of the other counts pled by Eliot. Since Movants have shown that none of those underlying counts can survive summary judgment, the conspiracy count must likewise fail.

To sum up, Eliot's Claims set forth no direct claims on his own behalf or on behalf of his children to the Policy Proceeds. Eliot has no standing to make a claim on behalf of the Estate. It has been determined in the Probate Action that Eliot is not a beneficiary of the Estate. The allegations of loss by Eliot – as convoluted as they are – all rely on the supposition that Eliot has a beneficial interest in the Estate and that the actions of those Eliot has sued somehow deprived him of the property he would have inherited. So, the fatal problem for Eliot is that it has been determined that he is not a beneficiary of the Estate in the first place. In other words, Eliot has no viable claim against Movants because he has not and cannot show that Movants have deprived Eliot of anything.

**G. A SEPARATE AND DISTINCT REASON EXISTS FOR GRANTING SUMMARY JUDGMENT IN FAVOR OF STP ENTERPRISES, INC. AS TO ELIOT'S CLAIMS, AND THAT IS ELIOT HAS MADE NO ALLEGATIONS OF WRONGDOING, -- OR RIGHT-DOING FOR THAT MATTER – PERTAINING TO STP. STP IS SIMPLY ABSENT.**

Eliot's Claims were filed on September 22, 2013, over two and one-half years ago. Eliot had over a year to conduct discovery, and discovery has been closed for over one year. Yet, Eliot's Claims only reference STP in a preliminary identifying, and jurisdictional paragraphs.

The first 136 paragraphs of Eliot's Claims contain the allegations of fact that purportedly support his Claims which are then set out in conclusory fashion and simply lump all counterdefendants, cross-defendants, and third-party defendants together without delineating which parties are the proper party to each specific claim. For example, Eliot's Claims as written name all third-party defendants as being liable for his Legal Malpractice Claim, yet several of these same parties are not even attorneys or law firms, much less Eliot's attorney. Eliot does not allege that STP is an attorney or law firm yet it is named a third-party defendant to his legal malpractice claim. In fact, STP appears nowhere in the 136 paragraphs of factual allegations, Eliot has failed to set forth any facts at all attributable to STP. Thus, summary judgment is certainly warranted in favor of STP.

#### CONCLUSION

For all of the foregoing reasons, Movants' motion for summary judgment as to each and every one of Eliot's Claims should be granted in its entirety.

Respectfully Submitted,

/s Adam M. Simon

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