

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD., WEST PALM
BEACH, FL 33401

CASE NO.: 4D16-3314

L.T. No.:502014CP003698XXXXNB

ELIOT IVAN BERNSTEIN,
Appellant / Petitioner(s),

V.

Ted Bernstein, acting as alleged Trustee
of the Shirley Bernstein Trust,
Appellee / Respondent(s).

INITIAL BRIEF ON THE MERITS

On Appeal to the 4th District Court of Appeals from the Order of Judge Phillips dated Sept. 1, 2016 ordering payment between the Shirley Bernstein Trust and the Estate of Simon Bernstein and determining obligations between these parties, hereinafter referred to as the “even up” Order.

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PRELIMINARY STATEMENT

This is an Appeal to the 4th District Court of Appeals of the Order of Judge Phillips dated Sept. 1, 2016. Eliot Bernstein is the Appellant. Ted Bernstein, purporting to act as the Trustee of the Shirley Bernstein Trust, is the Appellee.

The Record on Appeal shall be designated as ROA, including any prior supplements. An additional supplemental Appendix is attached by Appellant.

Abuse of discretion and lack of competent, substantial evidence is the standard of review. “The standard of review for evidentiary rulings is abuse of discretion.”

Holt v. Calchas, LLC, 155 So. 3d 499, 503 (Fla. 4th DCA 2015). However, whether evidence is hearsay and whether evidence fits within an exception to the hearsay rule are questions of law reviewed de novo. Browne v. State, 132 So. 3d 312, 316 (Fla. 4th DCA 2014). Those based on findings of fact from disputed evidence are reviewed for competent, substantial evidence. Acoustic Innovations, Inc. v. Schafer, 976 So. 2d 1139, 1143 (Fla. 4th DCA 2008); In re Estate of Sterile, 902 So. 2d 915, 922 (Fla. 2d DCA 2005). DORIS RICH CORYA, as Trustee of the Sanders Trust, et al v. Roy Sanders, Nos. 4D12-3067 and 4D12-3926 (4th DCA Nov. 2014).

Because the Lower Tribunal failed to hold an Evidentiary hearing and obtain evidence to support this motion, acting in furtherance of multiple frauds upon the Court proceeding at a “UMC” (Uniform Motion Calendar) hearing, there is no

competent substantial evidence to support the Order on Appeal and the Lower Tribunal abused its discretion.

SUMMARY OF THE ARGUMENT

The Sept. 1, 2016 Order of Judge Phillips must be reversed and vacated on multiple grounds including the complete lack of competent substantial evidence. It is undisputed that there was no “evidence” received by the Lower Tribunal to support this Order as it was issued at a “UMC” (Uniform Motion Calendar Hearing) which did not involve Witnesses or the presentation of Evidence and therefore no evidence in the “Record” to support the Order. See, ROA (Pgs. 1-2836). In particular, there is specifically no evidence received in the Record to support that part of the Order which states, “*The Shirley Trust will pay the Personal Representative of Simon's Estate \$12,457 for the sold personal property, and there will be no further or outstanding obligations between those parties*”. That part of the Order that claims no further or outstanding obligations between those parties is completely lacking in a rationale basis in the Record and must be reversed and vacated and is void.

The Order was issued as the culmination of a series of continuing and ongoing “frauds on the court” including but not limited to the wrongful, false, and improper taking of “Standing” from Appellant Eliot Bernstein and denial as a Beneficiary in

both the Shirley and Simon Estates and Trusts. The Order was thus issued in violation of the Due process clause of the 5th and 14th Amendments of the United States Constitution and Florida Constitution and is thus void. At all times relevant herein, Lower Tribunal Judge Phillips knew and should have known of the fraud, was advised of the fraud and thefts including at the September 1, 2016 hearing by licensed FL Attorney Peter Feaman, Esq., and should have Disqualified upon prior motions of Appellant or at minimum upon its own motion and therefore was further in violation of due process and must be reversed and vacated.

STATEMENT OF THE CASE AND FACTS

The Sept. 1, 2016 Order on Appeal is the culmination of a series of frauds upon the Court committed by attorneys and fiduciaries in the Trust and Estate cases herein and must be reversed and vacated. This Order was one of the last acts by Judge Phillips who was only in the cases for approximately one year and who retired from the Bench shortly after this Order was issued.

This Order came after a prior “Final Judgment” after an alleged “Validity Trial” some 10 months before on December 15, 2015 on various Trust and Testamentary documents in the Shirley Bernstein Trust case. It is undisputed that there was and is no Notice of Case Management hearing or other Scheduling Notice for Pre-Trial

Procedures and Scheduling Order for any such “Trial” in the entire Record on Appeal for the Shirley Trust case. See, ROA (1-2836),

Thus, this case proceeded along in fraud and in violation of Florida Rules of Civil Procedure Sec. 1.200 since on or about September of 2015, shortly after Judge Phillips took over the cases after Judge Coates Disqualified after Judge Colin had been moved for mandatory Disqualification but ultimately “recused” within 24 hours and where fraud on the court and fraud on the beneficiaries was already proven to have taken place under Colin’s leadership by former attorneys and fiduciaries in the cases. Judge Phillips had been specifically notified of the prior due process defects in the case and specifically the violations of 1.200 in the Shirley Trust case, missing witnesses and documents at the time of Trial and a legally sufficient motion to Disqualify the Judge as of the Motion for New Trial filed by Appellant Dec. 31. 2015 after a prejudicially determined “one day” Validity trial. See, ROA pp. 1822-1853.

Yet, some 4 days after Appellant had filed the Motion for New Trial, Trustee Ted Bernstein and his attorney Alan Rose continued and furthered the fraud by filing knowingly false statements in a motion to remove Appellant’s standing from all of the cases filed on Jan. 4, 2014. See, ROA 1887-1962.

Just one part of the “frauds” Alan Rose has perpetrated in these proceedings is this very filing before prior Judge Phillips falsely denying my Standing dated Jan. 04,

2016, Filing # 36122958 E-Filed 01/04/2016 04:32:05 PM, by knowingly falsely claiming actions had occurred by the Court at the Trial which he knew had not occurred, in Paragraph 1, signed as an attorney claiming:

“By its ruling at the trial held on December 15th, the Court upheld the 2012 Will and Trust of Simon L. Bernstein and the 2008 Will and Trust of Shirley Bernstein. As a result of upholding these documents, the Court has determined that Eliot Bernstein, individually, is not a beneficiary of either Simon's or Shirley's Trusts or Estates. Instead, his three sons are among the beneficiaries of both Simon's and Shirley's Trusts, in amounts to be determined by further proceedings. Eliot lacks standing to continue his individual involvement in this case.” (*emphasis added*). See ROA 1887, Par. 1.

This statement was a knowingly false and fraudulent statement promulgated by an Officer of the Court, Alan Rose, Esq. before the Court as Judge Phillips had not made any such Ruling or Determination as of January 4, 2016, no such Ruling or Determination was contained in the Final Judgement of the Validity Trial on Appeal, nor was any such Ruling or determination made upon the Record of

Proceedings at the Validity Trial on Dec. 15, 2015. See, Final Judgment at Validity Trial, ROA 1749-1753 and the entire ROA 1-2836.

Attorney Alan Rose, as an Officer of the Court had actual knowledge that Judge Phillips had never held a “Construction” hearing as of this date of Jan. 4, 2016 to determine the construction of any of the documents, and further had actual knowledge as an Officer of the Court that Judge Phillips Order setting a Trial of Sept. 24, 2015 only set for Trial the Amended Count II Validity and otherwise had stayed hearing on Count I for Construction or anything else that day consistent with prior Judge Colin’s Order referenced by Judge Phillips and dated Oct. 6, 2014. See, ROA 0945-0947, Order of Phillips setting Trial Sept. 24, 2015, ROA 1529-1530. (Order issued in the Shirley Case despite no Case Management Notice in the Shirley Trust case and only Notice in the Simon Bernstein Estate case.)

In fact, to this very day, attorney Alan Rose and Ted Bernstein both have actual knowledge that there *still has been No Construction Hearings whatsoever on any of the alleged “valid” Testamentary documents and trusts and yet neither party has come forward in any forum or court to correct the fraud.*

In fact, during the “Validity Trial” itself, attorney Alan Rose specifically notes that *“construction” would come at a “second trial”*, as shown by the following exchange on Dec. 15, 2015 at the Validity Trial:

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·25· · · · · MR. ROSE:· Your Honor, can I just -- I don't

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·1· ·want to go out of order, but this is only relevant
·2· ·if the documents are valid.· And if he's -- the
·3· ·whole point is the documents are valid.· And he
·4· ·wants to argue the second part, of what they mean,
·5· ·then we should not have wasted a whole day arguing
·6· ·over the validity of these five documents.

·7· · · · THE COURT:· Well, waste of time is what I do
·8· ·for a living sometimes.· Saying we shouldn't be
·9· ·here doesn't help me decide anything.

10· · · · I thought I was supposed to decide the
11· ·validity of the five documents that have been
12· ·pointed out; some of them might be valid and some
13· ·of them might be invalid.· And I'm struggling to
14· ·decide what's relevant or not relevant based upon
15· ·the possibility that one of them might be invalid
16· ·or one of them might not.· And so I'm letting in a
17· ·little bit more stuff than I normally think I
18· ·would.

19· · · · **MR. ROSE:· I'm concerned we're arguing the**
20· **second -- the second part of this trial is going to**
21· **be to determine what the documents mean and what**
22· **Simon's power of attorney could or couldn't do.**
23· **And this document goes to trial two and not trial**
24· **one, although I didn't object to its admissibility.**

(**emphasis added**)

See, SUPPLEMENTAL APPENDIX - EXHIBIT 1 - Trial
Transcript December 15, 2015.

Thus, there can be no doubt that clear and convincing evidence is present that Trustee Ted Bernstein, Attorney Alan Rose and Judge Phillips were knowingly furthering fraud by moving on Alan Rose's false claims on Jan. 4, 2016 that Judge Phillips had done things at the Trial which all parties know never happened and are not embodied in an Order anywhere. Judge Phillips proceeded to issue an Order knowingly based in fraud and taking away Appellant's "standing" in the case. See, 02/03/16 ORDER: DETERMINING ELIOT BERNSTEIN LACKS STANDING INDIVIDUALLY AND STRIKING FILINGS, ROA 2153-2158.

Yet, Judge Phillips actually knew that he did not make such "findings" at the Validity Trial and to the contrary, as Alan Rose says on the record, any such findings would come at a "second trial" which has never occurred and both Trustee Ted Bernstein and PR Brian O'Connell knew and have known these facts along with licensed attorney Alan Rose and yet have proceeded to allow the cases to move along in fraud for nearly a year until new Hearings have finally started before a new Judge at the Lower Tribunal.

Most importantly, Judge Phillips, licensed attorney Alan Rose, and at least PR Brian O'Connell in the Estate of Simon case who is also a licensed attorney all knew and have known that taking away "standing" at a non-evidentiary UMC

Hearing in Jan. of 2016 when no “construction” Hearing or Trial had occurred is improper. The basis for removal of standing was predicated on Eliot as Pro Se Litigant not knowing when asked by Phillips the exact FL Statute(s) off hand at the hearing that gave beneficiaries, children and interested parties standing and nothing more.

Appellant had filed a series of opposing papers and objections expressly notifying the Court and Judge Phillips of the various problems and improper practices going on. See, ROA Appellant’s Jan. 6, 2016 Objections pages 1989-2001; Appellant’s Jan. 13, 2016 Response in Opposition ROA 2034-2055; and Appellant’s Jan. 19, 2016 Objections to proposed Order which also expressly noted that Appellant did have “Standing” and other, ROA 2082-2114. This last filing by Appellant expressly notified the Court of specific statutory sections upon which granted Appellant standing in the cases among raising other important facts.

Further, these filed objections put the lower Tribunal on Notice of specifics regarding “Missing Witnesses”, “Missing Discovery” including missing all Original documents relevant to the Testamentary instruments, contradictory testimony and statements of witnesses like Traci Kratish who is an alleged “Witness” in some of the documents and even contradictory statements by former PR Donald Tescher himself. Yet, all of these motions and oppositions by Appellant were Summarily Disregarded and Denied in all proceedings leading up

to the present Order on Appeal. This Court should now review each and every one of Appellant's filings above to determine the specificity with which Appellant's claims are made in general but also in regard to fraud and misconduct.

The Lower Tribunal (Judge Phillips) not only had actual knowledge that No Construction Hearing has occurred in general as of the time of issuing the September 01, 2016 Order on Appeal but had specific knowledge that this expressly included no Construction Hearing on any terms, including but not limited to, on the "power of Appointment" of Simon Bernstein claimed by Rose as the basis for allegedly changing the Shirley Bernstein Trust as Alan Rose himself says to the Court at the Validity Hearing a "second trial" would be necessary and the Court's Order had Stayed any construction pending 1 Count on Validity. See, Judge Colin's Order referenced by Judge Phillips and dated Oct. 6, 2014. See, ROA 0945-0947, Order of Phillips setting Trial September 24, 2015, ROA 1529-1530. (Order issued in the Shirley Case despite no Case Management Notice in the Shirley Trust case and only Notice in the Simon Bernstein Estate case), and December 15, 2015 Validity Trial Transcript, see SUPPLEMENTAL APPENDIX - EXHIBIT 1.

Further, at all times relevant herein, Judge Phillips **knew and should have known that Appellant Eliot Bernstein was expressly a Named Beneficiary in plain language in the Shirley Bernstein Trust which became IRREVOCABLE upon**

her passing on December 08, 2010, predeceasing Simon Bernstein. See, Shirley Bernstein Trust Agreement 5-2-2008, ROA 2524-2553. Thus, Appellant Eliot Bernstein became a Vested Beneficiary under the Trust upon the Trust becoming IRREVOCABLE upon Shirley Bernstein's passing December 08, 2010. Even further, Judge Phillips had actual knowledge at all times relevant herein that former PR Donald Tescher, who was "Missing as a Witness" at the Validity Trial but who was involved in the Estate and Trust Planning for both Shirley and Simon Bernstein, had authored a Jan. 2014 "Resignation Letter" after other Fraud was exposed in the Shirley Bernstein Estate case saying as follows:

"Under the Shirley Bernstein Trust, there is a definition of children and lineal descendants. That definition excluded Pam Simon, Ted Bernstein and their respective children from inheriting. The document also contained a special Power of Appointment for Simon wherein he could appoint the assets of the Trust for Shirley's lineal descendants. Based upon the definition of children and lineal descendants, the Power of Appointment could not be exercised in favor of Pam Simon, Ted Bernstein or their respective children, although we believe it was

Simon Bernstein's wish to provide equality for all of his grandchildren. (**Emphasis added**).

This Document was Entered into the Validity Trial as Defense Exhibit 2, see ROA 2554-2556. Judge Phillips was moved for a new Trial based in part that former resigned Co- Trustee, Co-PR and Counsel to Ted Bernstein, Donald Tescher, Esq. was not available as a Witness who clearly had relevant testimony for “Validity” and certainly will have relevant testimony for any Construction hearing that should occur. Judge Phillips also knew and should have known at all times relevant herein by the plain reading of the express language in the Shirley Will (Estate) that Appellant Eliot Bernstein was a Beneficiary with Standing being one of the “children” of Shirley Bernstein and “children” being specifically named as Beneficiaries under the Will admitted and determined as Valid by Judge Phillips. See, ROA 2514-2523. The absence of Donald Tescher as a Witness at the Validity Trial alone is a basis to re-hear the Validity Trial and this Court’s related Decision of April 27, 2017 Per Curiam Affirmance in Case No. 4D16-0222 by its express terms is not final as subject to disposition after rehearing and Appellant will be moving for rehearing in that case as well.

Thus, at all times herein, Judge Phillips knew and should have known fraud was being furthered upon the Court in denying Appellant “Standing” and Striking all pleadings in the Shirley Trust case where the present Order on Appeal was issued.

Likewise, on the Estate of Simon Bernstein side, Judge Phillips knew and should have known at all times relevant herein that Appellant Bernstein had “standing” in the Estate of Simon Bernstein **by express written language and plain terms** as a “child” (“children”) of Simon Bernstein. See, ROA 2564-2573.

Despite all of this, fiduciaries Ted Bernstein along with his attorney Alan Rose and PR Brian O’Connell allowed this case and the related cases to proceed along in fraud leading to the Order now on Appeal. However, there is a change of circumstances in the Lower Tribunal such that PR Brian O’Connell has now issued a Statement as of Feb. 9th, 2016 that Appellant Bernstein is a “Beneficiary” in the Simon Bernstein case under the Will and new Lower Tribunal Judge Scher has both stated on the Record Appellant’s “Standing” in the Simon Bernstein Estate case which relates to the Order now on Appeal and has further issued an Order declaring Appellant as a “Beneficiary” in the Simon Bernstein Estate case. See, SUPPLEMENTAL APPENDIX - EXHIBIT 2 - April 27, 2017 Order of Scher. Thus, Appellant now has Standing at least in the related Simon Bernstein Estate case involved in the Order on Appeal which was denied at the time such Order was issued in fraud and thus the Order should be reversed, vacated and deemed void. Because related proceedings are ongoing in the Lower Tribunal where this “fraud” is slowly being peeled back and exposed, should this Court not outright vacate and

reverse the Order on Appeal, the Court should issue a Stay of Appeal and the Order pending further proceedings in the Lower Tribunal.

Because Appellant had a wrongful Order issued in fraud “Striking” and prohibiting any pleadings in the Shirley Trust case at the time of the Order now on Appeal, this Court is directed to SUPPLEMENTAL APPENDIX - EXHIBIT 3 - Appellant’s August 23, 2016 filing in Opposition, and objection to a related motion in the Simon Bernstein Estate case involving the TPP and other personal property relating to this Order.

Once again, Judge Phillips was notified by sworn statements and pleadings in this August 23, 2016 filing of fiduciary breaches, missing documents, missing discovery, missing Witnesses, but most importantly “missing property” and a host of outstanding issues which make the Order on Appeal void and lacking competent substantial evidence and an abuse of discretion not to hold proper evidentiary hearings and abuse of discretion to have not Disqualified on the Court’s own initiative. See, SUPPLEMENTAL APPENDIX EXHIBIT 3, Aug. 23, 2016 Opposition papers Estate of Simon Bernstein. Judge Phillips abused his discretion in Summarily Rejecting and Denying these motions and oppositions by Appellant and thus denying due process to Appellant.

It is undisputed that the Lower Tribunal had held no Hearings on Accountings of the Trusts and Estates at the time the Order on Appeal was issued despite specific

objections filed by Appellant on Accountings and other demands and papers by Appellant seeking Accountings and Discovery. See, ROA 1-2836. It is further undisputed that No Evidence was presented or received by the Court at the Sept. 1, 2016 UMC Hearing to support the Order herein by competent substantial evidence. See, ROA 1-2836. It is further undisputed that the “moving papers” by the Trustee giving rise to the Order on Appeal failed to provide any documents to clearly establish any numbers or value and in fact did not attach any documents in support whatsoever. See, Trustee’s Motion to Approve Agreement with Estate of Simon Bernstein, ROA 2475-2478.

More importantly, the Transcript of the brief UMC “Hearing” on September 01, 2016 shows that Creditor Stansbury’s counsel Peter Feaman presented to Judge Phillips,

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1 because there are continuing issues about missing
2 property in this estate, not just jewelry, that I
3 mentioned last week. But the property that was in
4 the condo was insured at the time of Shirley
5 Bernstein's death for a hundred thousand dollars.

(Emphasis Added)

See, SUPPLEMENTAL APPENDIX - EXHIBIT 4 -

Transcript September 01, 2016.

The non-evidentiary 10 minute UMC Hearing of Sept. 1, 2016 goes on to provide:

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6 **THE COURT: So you think that the personal**
7 **representative may have ripped the place off?**

8 MR. FEAMAN: Well, it was a previous
9 representative. You heard Mr. Spalina testify in
10 your court in a previous case in December, and
11 Mr. Tescher, they had to resign as personal
12 representatives. And Mr. O'Connell, who is the
13 successor personal representative. So he wasn't
14 around when all of this - -

15 THE COURT : Can I ask you this?

16 MR. FEAMAN: Yes, sir.

17 **THE COURT : Sounds like you think that**
18 **somebody has been playing with the assets of the**
19 **estates.**

20 **MR. FEAMAN: Yes, sir.**

21 **THE COURT : And diminishing the value of the**

22 estate that's available for your claim?

23 MR. FEAMAN: Yes, sir.

(emphasis added).

See, SUPPLEMENTAL APPENDIX - EXHIBIT 4 -

Transcript September 01, 2016.

Thus, not only is there a complete lack of competent substantial evidence to support the Order of Sept. 1, 2016 as no “evidence” was received at this non-evidentiary UMC Hearing, but with the statements of Licensed attorney Peter Feaman showing missing property and other missing assets at the UMC and Appellant’s Aug. 23, 2016 objections and other filed but unheard oppositions and objections herein, there clearly is no rationale basis for that part of the Order which says “*and there will be no further or outstanding obligations between those parties*” and thus at minimum this part of the Order must be reversed, vacated and void as an abuse of discretion and lacking competent substantial evidence.

Thus, attorneys and fiduciaries Rose, Ted, O’Connell and Feaman all are fully cognizant that **NO** Construction hearing occurred, all know I am a Child of Simon Bernstein and was named a beneficiary in the Notice of Admin and Notice of Trust documents filed and in the Wills of Simon and Shirley and yet all have gone along with the Fraud upon the Court denying my Standing in the Estate for nearly a year. See, ROA in related “Validity Appeal”, Case No. 4D16-0222 for Notices of Admin

in the Simon Estate, Shirley Estate and Notices of Trust each naming Appellant Eliot Bernstein as a Beneficiary.

Because of the known fraud in the proceedings falsely denying “standing” to Appellant Eliot Bernstein in relation to the Order on Appeal and relevant proceedings leading to such Order, Appellant was denied due process and the Order is thus void and must be vacated and reversed at this time.

ARGUMENT

Argument 1 -

AS THERE WAS NO “EVIDENCE” RECEIVED OR OFFERED AT THE UMC HEARING, THE ORDER ON APPEAL LACKS COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT THE ORDER WHICH MUST BE REVERSED AND VACATED AS VOID.

This 4th District Court of Appeals has recently addressed and upheld the substantial competent evidence standard to support Awards and Orders and the abuse of discretion standard in *Van Maerssen v. Gerdts*, No. 4D15-3910 (4th DCA March 2017) and *Washburn v. Washburn*, No. 4D16-1299 (4th DCA Jan. 2017).

“We review the trial court’s order for an abuse of discretion. “Temporary relief awards ‘are among the areas where trial judges have the very broadest discretion, which appellate courts are very reluctant to interfere with except under the most compelling of circumstances.’” *Mullins v. Mullins*, 799 So. 2d 450, 451 (Fla. 4th

DCA 2001) (quoting Pedraja v. Garcia, 667 So. 2d 461, 462 (Fla. 4th DCA 1996)).

But **temporary relief awards must be supported by competent, substantial evidence.** See Bengisu v. Bengisu, 12 So. 3d 283, 286 (Fla. 4th DCA 2009). **The court does not need to make explicit findings, but there must be sufficient evidence in the record to support the amount awarded.** Moore v. Kelso-Moore, 152 So. 3d 681, 682-83 (Fla. 4th DCA 2014); Piluso v. Piluso, 622 So. 2d 117, 118 (Fla. 4th DCA 1993),” See, Van Maerssen v Gerdts, No. 4D15-3910 (4th DCA March 2017). (emphasis added).

In this case, there was No evidence attached to the Motion bringing up the hearing, no evidentiary hearing at the 10 minute UMC Hearing, no evidence offered or admitted at the UMC Hearing of Sept. 1, 2016 and thus no competent substantial evidence. See, ROA 2475-2478, and 1-2836.

Likewise, as in Washburn v. Washburn, “Because there was no basis for the admission of the hearsay bank records, we reverse the trial court’s evidentiary determination. Without those records in evidence, there is no competent, substantial evidence of the husband making any income other than that from his business. See Heard v. Perales, 189 So. 3d 834, 836 (Fla. 4th DCA 2015) (setting forward the competent, substantial evidence standard).” See, Washburn v. Washburn, No. 4D16-1299 (4th DCA Jan. 2017).

In this case, there is not even a question about evidence being “hearsay” as this was a non-evidentiary UMC Hearing and thus no evidence accepted. Any out of court statements or documents relied upon would be hearsay. It was an abuse of discretion for the lower tribunal Judge Phillips to not Disqualify, not correct the fraud so Appellant had proper standing, and an abuse of discretion to not have a proper evidentiary hearing.

("[I]f a decree is manifestly against the weight of the evidence, or contrary to the legal effect of the evidence, then it becomes the duty of the appellate court to reverse the same."); Newman v. Smith, 77 Fla. 633, 650, 82 So. 236, 241 (1918)

("Where the finding of a trial judge is contrary to the legal effect of the evidence on the issues made the appellate court should reverse the finding even though the trial judge personally saw and heard the witnesses testify, and even though there were conflicts in the testimony, and there was some evidence tending to support the finding."). Accord Howell v. Blackburn, 100 Fla. 114, 129 So. 341 (1930); Boyd v.

Gosser, 78 Fla. 64, 82 So. 758 (1918); Fuller v. Fuller, 23 Fla. 236, 2 So. 426 (1887); John D.C. v. State, 16 Fla. 554 (1878); Uhley v. Tapio Constr. Co., Inc., 573 So.2d 390 (Fla. 4th DCA), rev. denied, 583 So.2d 1037 (Fla. 1991); C.M. Life Ins. Co. v. Ortega, 562 So.2d 702 (Fla. 3d DCA 1990), rev. denied, 576 So.2d 289

(Fla. 1991). See, *Miller v. First American Bank & Trust* 607 So.2d 483 (4th DCA 1992).

Further, as stated by this Court in *Faircloth v Bliss*, 917 So. 2d 1005 (2006).

“Here, the record is devoid of any competent evidence regarding the number of hours reasonably expended, the reasonable hourly rate or details of the services performed. We, therefore, reverse the fee award without remand.”

In this case on appeal, there was no trial, no witnesses, no evidence and the Order is therefore manifestly against the weight of evidence as there was none and thus the Record on Appeal is devoid of any competent substantial evidence to support the Order which must be vacated and reversed.

Argument 2 -

THE ORDER IS VOID AS A RESULT OF FRAUD UPON THE COURT AND DUE PROCESS VIOLATIONS AND MUST BE REVERSED AND VACATED.

“[A] judgment is void if, in the proceedings leading up to the judgment, there is ‘[a] violation of the due process guarantee of notice and an opportunity to be heard.’” *Shiver v. Wharton*, 9 So.3d 687, 690 (Fla. 4th DCA 2009) (quoting *Viets v. Am. Recruiters Enters.*, 922 So.2d 1090, 1095 (Fla. 4th DCA 2006)).

Tannenbaum v. Shea, No. 4D13–1368 (4th DCA 2014).

The right to be heard is so instrumental that error need not be preserved. “[T]he denial of a party's right to be heard — even if unpreserved — constitutes per se

reversible error and, therefore, can be raised at any time.”K.G. v. Fla. Dep’t of Children & Families, 66 So. 3d 366 (Fla. 1st DCA 2011), citing Vollmer v. Key Dev. Props., Inc., 966 So. 2d 1022, 1027 (Fla. 2d DCA 2007).

"The constitutional guarantee of due process requires that each litigant be given a full and fair opportunity to be heard... The violation of a litigant’s due process right to be heard requires reversal.” Vollmer v, Key Dev. Props., 966 So.2d 1022, 1027 (Fla. 2nd DCA 2007). See also, Minakan v. Husted, 27 So. 3d 695 (Fla. 4th DCA 2010)”.

According to Hendrix v. Department Stores National Bank, 4D14-1612 (Fla. App. 4 Dist. 9- 30-2015) citing Infante v. Vantage Plus Corp., 27 So.3d 678, 680 (Fla. 3d DCA 2009), "A judgment is void if, in proceedings leading up to the judgment, there is [a] violation of the due process guarantee of notice and an opportunity to be heard." See, Hendrix v. Department Stores National Bank, 4D14-1612 (Fla. App. 4 Dist. 9- 30-2015) citing Infante v. Vantage Plus Corp., 27 So.3d 678, 680 (Fla. 3d DCA 2009). Appellant has shown denials of due process opportunity to be heard in the wrongful denial of standing in the cases for a year and thus there have been due process violations in the proceedings leading up to judgment.

Courts throughout this state have repeatedly held “that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to

achieve her ends.” Metropolitan Dade County v. Martinsen, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) (quoting Hanono v. Murphy, 723 So. 2d 892, 895 (Fla. 3d DCA 1998)); see also Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998); O’Vahey v. Miller, 644 So. 2d 550, 551 (Fla. 3d DCA 1994); Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

If “it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier of fact or unfairly hampering the presentation of the opposing party’s claim or defense.” Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989)

The plaintiff’s false or misleading statement given under oath concerning issues central to her case amounted to fraud. See Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998). Alan Rose’s false filings of Jan. 4, 2016 and other false filings shown herein are sufficiently proven by clear and convincing evidence.

THERE IS CLEAR AND CONVINCING EVIDENCE IN THE RECORD THAT THE TRUSTEE AND HIS ATTORNEY SET IN MOTION WITH THE COURT OF JUDGE PHILLIPS A FRAUDULENT SCHEME TO DENY STANDING AND THE OPPORTUNITY TO BE HEARD TO THE APPELLANT, THUS BEING DENIED DUE PROCESS.

As shown in the Statement of the Case above and through the Records on Appeal herein, there is ample evidence to show by clear and convincing standards that the Trustee and his attorney Alan Rose began (or continued) a fraudulent scheme set

in motion and continued after the Validity Trial to fraudulently and wrongfully deny Appellant “standing” and the “opportunity to be heard” in the proceedings leading up to the Order.

As this Court has repeatedly held, “*the beneficiary’s interest vested upon the death of the decedent, when the trust became irrevocable.*” See, Hilgendorf v. ESTATE OF THELMA COLEMAN and JENNILYNN K. SMITH, No. 4D15-4870 (4th DCA Oct. 2016). Appellant Eliot Bernstein’s interest as a beneficiary of the Shirley Bernstein Trust vested when Shirley Bernstein passed in Dec. of 2010.

The Lower Tribunal thus knew and should have known Appellant had “standing” in the Shirley Trust from the express language of the Trust.

“§736.0603(1), Florida Statutes (2007), which provides that “[w]hile a trust is revocable, the duties of the trustee are owed exclusively to the settlor.”

§736.0603(1), Fla. Stat. This codified prior law, which held that a trustee owes duties to the settlor/beneficiary of a revocable trust and not to contingent beneficiaries. Brundage v. Bank of America, 996 So. 2d 877 (Fla. 4th DCA 2008).

As explained in Brundage, while a trustee owes no duties to a contingent beneficiary, *once the trust becomes irrevocable at the death of the settlor, “the beneficiary may sue for breach of a duty that the trustee owed to the settlor/beneficiary which was breached during the lifetime of the settlor and*

subsequently affects the interest of the vested beneficiary.”

Id. at 882. In Brundage, for example, the beneficiaries accused the trustee of violating a specific provision of the trust regarding self-dealing in the creation of partnerships and transfer of stock to those partnerships which benefited one of the trustees, the decedent’s niece.” See, Hilgendorf v. ESTATE OF THELMA COLEMAN and JENNILYNN K. SMITH, No. 4D15-4870 (4th DCA Oct. 2016).

A beneficiary’s interest in a trust vests upon the death of the settlor. Sorrels v. McNally, 89 Fla. 457, 105 So. 106, 107 (Fla.1925).

As set out in this 4th DCA’s 2014 decision in DORIS RICH CORYA, as Trustee of the Sanders Trust, et al v. Roy Sanders, Nos. 4D12-3067 and 4D12-3926 (4th DCA Nov. 2014, “**Failure to prepare an accounting is a breach of trust by a trustee. § 736.1001(1), Fla. Stat. (2008). The failure is also referred to as a breach of fiduciary duty. McCormick v. Cox, 118 So. 3d 980, 986-87 (Fla. 3d DCA 2013)** (holding that evidence that trustee filed no annual accounting was competent substantial evidence of a breach of fiduciary duty). **A breach of trust or fiduciary duty is the equivalent of at least a negligent tort, and, under certain facts, may be an intentional tort. The breach may result in an award of damages against the trustee personally. §§ 736.1002(1), 736.1013(2), Fla. Stat. (2008).**” See, DORIS RICH CORYA, as Trustee of the Sanders Trust, et al v. Roy Sanders, Nos. 4D12-3067 and 4D12-3926 (4th DCA Nov. 2014),

Appellant Eliot Bernstein has brought claims precisely alleging the types of fiduciary breaches and misconduct as referenced above but has had these claims Summarily Denied and Unheard in an abuse of discretion denial of due process orchestration of proceedings.

Appellant has repeatedly exposed fraud in the proceedings including in the lack of Accountings, failing to Account, objections to Accountings and missing assets by the Trustees and implicating the PR of the Estate as well. See, ROA pp. 83-91 Aug. 2014 Motion for Extension of Time to File Answer and Counterclaim; ROA pp. 117-182 Sept. 2014 Answer to Ted's Complaint; ROA 183-261 Appellant's CounterClaim of Sept. 2014, stayed and not heard thus Summarily denied without due process; ROA Appellant's Jan. 6, 2016 Objections pages 1989-2001; Appellant's Jan. 13, 2016 Response in Opposition ROA 2034-2055; and Appellant's Jan. 19, 2016 Objections to proposed Order which also expressly noted that Appellant did have "Standing" and other, ROA 2082-2114. Appellant's Aug. 23, 2016 Opposition filing to PR Motion on the TPP, Appendix Exhibit 3; and other filings as well. This is precisely part of why Appellant alleges these parties, including but not limited to, Officers of the Court (Judges) and Court Appointed Officers (Attorneys, Fiduciaries and Guardians) have engaged in fraud through fraud on the court against Appellant in order to deny inheritance and silence Appellant for exposing fraud, missing property, missing assets, missing discovery

etc. In fact, it is the very disposition of “property” relating to the Order on Appeal and the Sale of the Shirley Condo in 2013 that the parties have extensively sought to cover-up and deny Appellant’s standing in part to protect Trustee Ted Bernstein who is not a valid Trustee under the terms of the Trust and thus these “dispositions” of property by Ted have all been illegal and done in fraud as Ted is considered Predeceased for ALL PURPOSES OF DISPOSITION of the Shirley Trust and ALL PURPOSES in the Simon Trust by the express language of the trusts.

This is precisely why Appellant asserts that Alan Rose and Ted Bernstein sought to breeze by with a “one day” Validity Trial where Appellant was denied proper Opportunity to be Heard in the scheduling of the Trial itself in order to silence Appellant from bringing proper witnesses and evidence forward. As shown in the Statement of Facts, this scheme continued in the wrongful denying of Standing in both Shirley and Simon’s Estate and Trusts.

The Court abused its discretion and acted prejudicially and should have Disqualified by knowingly failing to correct the scheme of fraud furthered by Alan Rose and Ted Bernstein herein starting with the Jan. 4, 2016 “standing” filing just after the Validity Trial. See, ROA 1887-1962.

The Court repeatedly Summarily rejected and Denied Appellant’s filings in opposition without Hearings or opportunity to be heard in the proceedings leading

up to the Order on Appeal. As the 4th DCA said in *JOELLE SAWAYA, Appellant, v. MORRIS KENT THOMPSON, Appellee*. No. 4D15-841 [November 30, 2016], “By failing to hold an evidentiary hearing on the petition and motions, the trial court violated Appellant’s due process rights. There was a denial of procedural due process in the instant case because the trial court summarily denied Appellant’s petition without holding an evidentiary hearing. Such a summary denial violates a petitioner’s right to be heard. *Murphy v. Ridgard*, 757 So. 2d 607, 608 (Fla. 5th DCA 2000).” See, *JOELLE SAWAYA, Appellant, v. MORRIS KENT THOMPSON, Appellee*. No. 4D15-841 [November 30, 2016].

Further, “ As this Court explained in *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168 (Fla. 4th DCA 1991), “the purpose of an evidentiary hearing is to allow a party to ‘have a fair opportunity to contest’ the factual issues [I]t is reversible error for a trial court to deny a party an evidentiary hearing to which he is entitled.” *Id.* at 1169 (quoting *Malzahn v. Malzahn*, 29 541 So. 2d 1359, 1360 (Fla. 4th DCA 1989)). See, *Sperdute v. Household Realty Corp.*, 585 So. 2d 1168 (Fla. 4th DCA 1991)

“[A] judgment is void if, in the proceedings leading up to the judgment, there is ‘[a] violation of the due process guarantee of notice and an opportunity to be heard.’ “ *Shiver v. Wharton*, 9 So.3d 687, 690 (Fla. 4th DCA 2009) (quoting *Viets*

v. Am. Recruiters Enters., 922 So.2d 1090, 1095 (Fla. 4th DCA 2006)).

Tannenbaum v. Shea, No. 4D13–1368 (4th DCA 2014).

Alan Rose and the Court knew the Court had not made Findings at the Validity Trial or in the Final Judgment as alleged in the Jan. 4, 2016 motion. See, ROA 1887-1962 etc. Alan Rose and the Court knew no “Construction” hearing had occurred prior or up to the time of the Order on Appeal. See, ROA 1-2836. Alan Rose and the Court below knew and should have known Eliot Bernstein was expressly named as a Beneficiary in the Notice of Administration of both the Shirley and Simon Estate, expressly named in the Trust of Shirley Bernstein, clearly a beneficiary under plain meanings of express language in the Shirley and Simon Wills and Trusts, and specifically having knowledge that no construction on Simon’s power of Appointment had occurred either and that Donald Tescher’s resignation letter as a former PR clearly established Appellant as a Beneficiary in the Shirley Trust. See, ROA 2554-2556. This Court is reminded that because of the False and fraudulent Order denying Appellant’s “standing” and “striking all pleading” in this Shirley Trust case to refer to Appellant’s Aug. 24, 2016 Opposition to the PR’s related motion on TPP.

Courts throughout this state have repeatedly held “that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted to

achieve her ends.” Metropolitan Dade County v. Martinsen, 736 So. 2d 794, 795 (Fla. 3d DCA 1999) (quoting Hanono v. Murphy, 723 So. 2d 892, 895 (Fla. 3d DCA 1998)); see also Cox v. Burke, 706 So. 2d 43, 47 (Fla. 5th DCA 1998); O’Vahey v. Miller, 644 So. 2d 550, 551 (Fla. 3d DCA 1994); Kornblum v. Schneider, 609 So. 2d 138, 139 (Fla. 4th DCA 1992).

Ted Bernstein and Alan Rose must now be estopped from continuing to employ the very institution these parties have subverted. The Order on Appeal must now be reversed and vacated as fraud and the case remanded for specific proceedings on the misconduct of the fiduciaries and attorneys with proper discovery.

CONCLUSION

WHEREFORE, it is respectfully prayed for an Order reversing, vacating and voiding the Order of Judge Phillips dated Sept. 1, 2016, and Ordering the case remanded to the Lower Tribunal to schedule Hearings to determine the misconduct of the fiduciaries herein upon proper Discovery and Compliance for outstanding Discovery, or alternatively Staying the Appeal herein and the Lower Tribunal Order pending the outcome of further proceedings in the Lower Tribunal to address and correct the fraud upon the Court and for such other and further relief as may be just and proper.

This Court must also uphold its duties to the report the criminal, ethical and civil misconduct to the proper state and federal, civil, criminal and ethical authorities deemed appropriate regarding the Officers of the Court and Court Appointed Officers criminal and ethical misconduct, as mandated by Judicial Canons, Attorney Conduct Codes, the Florida Statewide Fraud Policy and Law.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

Dated: May 5th, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the within has been served upon all parties on the attached Service List by E-Mail Electronic Transmission, Court ECF on this 5th day of May, 2017.

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