UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

Case No. 9:15-cv-81298-KAM/Matthewman

JULIAN BIVINS, as Personal Representative of the ancillary Estate of Oliver Wilson Bivins,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR., as former guardian, *et. al*,

Defendants.
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DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND FOR NEW TRIAL, AND ALTERNATIVE MOTION FOR REMITTITUR

Defendants, Ciklin Lubitz & O'Connell, and attorneys Ashley N. Crispin and Brian M. O'Connell ("Defendants"), renew their motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 and move for a new trial or remittitur under Fed. R. Civ. P. 59, and state:

INTRODUCTION & OUTLINE OF DEFECTS IN PLAINTIFF'S PROOF

Defendants renew their motion for judgment as a matter of law because Plaintiff failed to present competent proof that Defendants committed legal malpractice or breached a fiduciary duty to Oliver Bivins, Sr. (the "Ward"). Plaintiff failed to present the jury with ***any*** expert testimony. That alone is fatal to the claims in this case and, by itself, should result in entry of judgment as a matter of law for Defendants under Rule 50.

While Plaintiff disclosed an expert on some of the issues – which expert was stricken – Plaintiff had no expert to testify about numerous critical elements of duty, causation and damages with regard to the Guardian's settlement of thirteen litigated matters. For example, Plaintiff had no expert to testify that "but-for" some breach of duty by Defendants, the Ward would have received a more favorable outcome at the conclusion of the pending complex litigation and appeals

in Texas, New York and Florida.[1] At the risk of oversimplification, absent expert testimony on that "case-within-a-case" issue, Plaintiff's claims all fail as a matter of law.

At most, Plaintiff tried to prove that the value of one property involved in the New York litigation was substantially higher than the broker's opinion relied upon by the Guardian, as a result of Defendants' alleged failure to obtain an MAI appraisal. Again, this case is about far more than just getting an MAI appraisal. But on just that narrow issue, Plaintiff's claims fail on all fronts. First, as to liability, there was no expert testimony that the standard of care in the relevant legal community required an MAI appraisal. The uncontroverted evidence from all three of the Guardian's lawyers and both experts was that using a broker's opinion does not fall below the standard of care. There is no expert testimony that a lawyer representing a Guardian or a Ward must obtain an MAI appraisal, rather than rely on a broker's opinion.

Second, as to causation, there is no proof that an appraisal obtained on or before May 8, 2013, the date of the settlement conference, would have shown a fair market value higher than the broker's opinion. Proof of causation in this case would have required Plaintiff to show, at a minimum, that an MAI appraisal would have been different than the broker's opinion. (And, beyond that, Plaintiff still would have needed to prove the Guardian would have obtained a better net outcome if he was aware of a higher market value at the time of the settlement.)

Third, as to damages, there is no way to sustain an award of any damages, let alone $16.4 million. There is no competent evidence as to the value of the 67th Street property in May 2013, other than the broker's opinion. Plaintiff failed to call an expert on value; relying solely on a sale nearly 18 months after the valuation date. That sale price – by itself and without the testimony of an expert– is not competent evidence of value. Moreover, the damages awarded in this case are so grossly excessive the Court would have to order a new trial or a remittitur if the claims had been proven.

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[1] The multi-facteted New York settlement included the dismissal of an appeal by the Ward's other son, Oliver Bivins, Jr. The appeal challenged a settlement between Julian Bivins and the Guardian over ownership of the Ward's oil, gas and mineral interests, valued at $20 million. The Florida Petition challenged the full faith and credit to be given to a Texas divorce decree and whether the Ward could receive an intestate share of his former wife's Florida estate. The jury needed expert testimony (perhaps multiple experts from different states) on these issues.

The jury was not free to speculate on the standard of care, without expert testimony. The question is not whether it might be ***better*** to get an appraisal, but whether the standard of care in the relevant legal community ***required*** one. The jury was not free to speculate on the outcome of any one issue – the Texas appellate proceedings; the New York partition action; or the Petition to Determine Beneficiaries in Florida – let alone the overall net outcome of this complex litigation. Without expert testimony as to each case, and expert testimony as to the overall net result to the Ward, there is no support for any verdict in favor of Plaintiff. The jury also was not free to speculate on damages. The verdict amount is more than double the amount "computed" by the Plaintiff's damages/math witness, and presupposes complete victory – the best possible outcome for the Ward on every issue in every case. [2]

This motion addresses the legal and factual defects of Plaintiff's case which were first addressed when the Court excluded Plaintiff's expert witness, and were raised again at the close of all evidence. The Court reserved ruling, and Defendants timely renew their Rule 50 motion for judgment as a matter of law. For brevity, clarity and judicial economy, Defendants combine in this Motion an alternate request under Rule 59 for a new trial or remittitur.

LIABILITY ISSUES

A. Plaintiff has not put forth ANY expert testimony on the duty owed or proof of a deviation from that standard of care.

Once Plaintiff's expert was stricken, both of Plaintiff's claims for professional negligence and breach of fiduciary duty failed as a matter of law. The Court reserved ruling on the motion for judgment as a matter of law before the verdict, but now should enter judgment in favor of Defendants. In a legal malpractice or breach of fiduciary duty case, each issue implicating a professional duty or exercise of professional judgment requires expert testimony. Plaintiff's counts for malpractice and breach of fiduciary duty are discussed below.

1. Malpractice

[2] The jury invented a damages number far beyond anything supported by the record evidence. Even a complete victory on the Florida Petition would have yielded only a 50% interest in the 67th Street property, net of mortgage debt and estate obligations under section 733.707.

The two claims at issue in this case are breach of fiduciary duty and legal malpractice concerning the discrete duties owed to the Ward by attorneys for the professional guardians. The underlying litigation involved a complex guardianship, with multiple litigated matters in three different states, and issues concerning the care of the 90-year old Ward. The applicable duty and standard of care for a professional guardian's counsel in this situation are far outside the common knowledge of a jury. Without expert testimony, a lay jury can only speculate as to whether an attorney's actions constituted negligence. *Willage v. Law Offices of Wallace & Breslow, P. A.*, 415 So. 2d 767, 768 (Fla. 3d DCA 1982)[3]. "Our review of Florida case law indicates that a legal malpractice plaintiff **must** present expert testimony to establish the appropriate standard of care (and breach thereof) unless the lawyer's lack of care and skill is so obvious[4] that the trier of fact can resolve the issue as a matter of common knowledge." *Evans v. McDonald*, 313 Fed. Appx. 256, 258 (11th Cir. 2009)(applying Fla. Law) (emphasis added). But, as here, "when the facts of the case are such that the duty owed and the standard of care are not common knowledge then an expert opinion is necessary to establish a breach." *Id*. As such, the professional negligence claims against Defendants fail as a matter of law for absence of expert testimony on the standard of care.

2. Breach of Fiduciary Duty

"[C]ourts usually end up analyzing both claims for breach of fiduciary duty and malpractice under the rubric of a malpractice claim." *Brenner v. Miller*, 09-60235-CIV, 2009 WL 1393420, at *2 (S.D. Fla. May 18, 2009). When the "essential thrust" of the breach of fiduciary duty claim is one of legal malpractice the case is evaluated from the lens of legal malpractice. *Jackson v. BellSouth Telecommunications*, 00-7558-CIV, 2002 WL 34382750, at *4–5 (S.D. Fla. Nov. 26, 2002)(Marra, J.).

[3] Substantive Florida law applies in this diversity action. *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986).

[4] This case does not involve an obvious neglect of duty, as in *Anderson v. Steven R. Andrews, P.A.*, 692 So. 2d 237, 242 (Fla. 1st DCA 1997)(failure to file notice of appearance); *Suritz v. Kelner*, 155 So. 2d 831, 834 (Fla. 3d DCA 1963)(directing client not to answer on penalty of dismissal); *Galloway v. Law Offices of Merkle, Bright & Sullivan, P.A.*, 596 So. 2d 1205 (Fla. 4th DCA 1992)(failure to file within statute of limitations).

In this case, Plaintiff's claims for legal malpractice and breach of fiduciary duty are identical. A claim by a client against an attorney for breach of fiduciary duties is a claim for legal malpractice. *See* 4 Ronald E. Mallen and Jeffrey M. Smith, LEGAL MALPRACTICE § 15:2 (2017 ed.)("a fiduciary breach is legal malpractice, because it concerns the representation of a client and involves the fundamental aspects of an attorney-client relationship"). As with negligence-based legal malpractice claims, expert evidence is required to establish the appropriate fiduciary duties owed by the attorneys unless such duties are a matter of common knowledge[5]. *Id*. § 34:20 at 1170-71 ("Just as the standard of care usually is beyond common knowledge, so are the often sophisticated issues concerning confidentiality and loyalty.").

Moreover, Plaintiff must also prove the case within a case – "but for" the settlement, the Ward would have achieved a better result. The duties and issues raised by Plaintiff in the Pretrial Stipulation[6] are beyond the understanding of a lay jury. Accordingly, Florida law requires Plaintiff to introduce expert testimony to meet its burden of proof in assisting the jury in coming to a conclusion. *Evans*, 313 Fed. Appx. at 258. Likewise, expert testimony is required on the standard for the duty owed by an attorney for breach of a fiduciary duty. The predicate of the breach of fiduciary duty claim is the attorney's duty owed as a lawyer for the guardian, therefore, the fiduciary duty owed is one of professional care and competence. *Supra* 4 LEGAL MALPRACTICE § 15:2 at 644-45. To that end, Plaintiff's breach of fiduciary duty claims here fails, because it relies on all of the same allegations as Plaintiff's malpractice claim. (Am. Compl. ¶¶ 100-105; 110-113; 127-133; 136-141 [DE 18]). *See e.g.* 4 LEGAL MALPRACTICE § 37:124 (sophisticated issues of breach of fiduciary duty like standard of care are beyond common knowledge requiring an expert); *Id*. at § 37:126 ("In some contexts, expert testimony truly is essential. Expert testimony is mandatory if the attorney purports to be a legal specialist or practiced in a legal specialty. Without expert testimony to establish the standard of care, there would be no basis for evaluating whether the attorney's conduct comported to the standard."); *Id*. at § 37:135 ("In most respects, the rules

[5] Mallen's authoritative treatise on attorney liability for malpractice and breach of fiduciary duty relies upon the same standard of law as Florida according to *Evans* discussed above.

[6] *See* Appendix A, comparing Plaintiff's issues of fact for the jury in the Pretrial Stipulation with the actual testimony at trial.

concerning establishing a fiduciary breach parallel those concerning negligence. Expert testimony usually is necessary to establish the "standard of conduct," which determines the fiduciary obligations and whether there was a deviation therefrom."). *Accord Floyd v. Hefner*, 556 F. Supp. 2d 617, 643 (S.D. Tex. 2008)("Expert testimony is also generally required to establish a fiduciary breach where the issues of confidentiality, loyalty in the context of conflicting interests or adverse representation or causation and damages are beyond common knowledge.")(Texas and Florida law are in accord).

The issue of whether expert testimony is required to prove a breach of fiduciary duty when the attorney is acting in a professional capacity was resolved by the 11th Circuit, applying Georgia Law, in *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344 (11th Cir. 2008). In that case, the 11th Circuit explained that the failure to provide expert testimony on Plaintiff's negligence claim was case dispositive because the breach of fiduciary duty and unjust enrichment claims incorporated the allegations of legal malpractice without adding any independent factual allegations. *Id*. at 1357, n. 8. *Accord Marciano v. Kraner*, 10 A.3d 572, 577, 578 (Conn. App. Ct. 2011)("a plaintiff cannot avoid his burden to present expert testimony to articulate the contours of that relationship by styling his cause of action as one for breach of fiduciary duty."). In sum, the governing treatise on this topic and numerous other jurisdictions agree, expert testimony in cases involving a specialist attorney[7] requires expert testimony on breach of fiduciary duty.

3. Appraisal

Insofar as Plaintiff's claims are partly based upon the alleged failure to obtain an MAI appraisal on the 67th Street property, there was no expert testimony on liability to prove the standard of care in the relevant legal community required an appraisal. Instead, the uncontroverted evidence established that the use of a broker's opinion met the standard of care, and that Defendants' counseled the guardian based upon the broker's opinions of value. Every witness and both experts testified it was appropriate to rely on a broker's opinion of value.[8] Plaintiff failed to

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[7] Plaintiff needed an expert with "expertise to be able to say how an attorney for a guardian's supposed to act in all these broad contexts, which we have in this case." (T. Vol. 8, 32:4-8)

[8] In the guardianship case, Judge Colin said no appraisal was needed. (T8:113) That was confirmed by Defendants' expert, Skatoff. Attorney Stein testified he prefers broker opinions which are better than appraisals. (T2:95). Robbins (Stein's expert) testified: "when I had a

meet his burden to establish through expert testimony the standard of care in this guardianship matter required an MAI appraisal, not a broker's opinion of value. Likewise, there was no expert testimony that counsel for a ward's professional guardian was required to obtain an MAI appraisal, as opposed to a broker's opinion of value in connection with Manhattan real estate. Further, the absence of an appraisal does not substitute for the necessary expert testimony on multi-state/multi-issue litigation

4. Summary

While there is no doubt Defendants owed some professional duty of care to the Ward, it is incumbent on Plaintiff to prove exactly what that standard of care requires. Here, the New York settlement that involved the Lexington and 67th Street properties also concerned the legal interplay of the settlement of 13 litigated matters as well as the guardian's decision-making as to the best interest of the Ward. Plaintiff had to present expert testimony of the standard of care and the breach of that standard for every issue. Otherwise, it is legally impossible for the jury to find malpractice or breach of fiduciary duty.[9]

In Plaintiff's case, there was no expert testimony of any kind as to the standard of care or Defendants' breach of that standard, as attorneys for a guardian, handling numerous litigated matters or representing the guardian in a complex settlement. Importantly, one of the largest issues was the appeal by Oliver, Jr. of the Texas settlement creating a multi-million dollar trust for the benefit of the Ward. The NY Settlement required a dismissal of that appeal. Thus, expert testimony was needed to view the settlement of Lexington and 67th Street *not* in isolation, but from an overall totality of the various cases.

Plaintiff failed to offer any expert testimony, in part, as a result of the Court striking his chosen expert. Nonetheless, even if that expert had testified, the expert's pretrial, court-ordered disclosure did not cover every issue on which expert testimony was required, including all causation and damages issues necessary to sustain the verdict. Absent expert testimony on any

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guardianship and we sold real property, we used a broker price opinion, and **that seems to be the common practice**." (T8:249)

[9] *Cronan v. Iwon*, 972 A.2d 172, 175 (R.I. 2009)(absent expert evidence to explain the appropriate standard of conduct owed by attorneys and guardians ad litem to an incapacitated ward, summary judgment was properly granted on plaintiffs' claim for breach of fiduciary duty).

element of the standard of care, the verdict must be vacated and judgment entered as a matter of law in favor of Defendants.

The testimony adduced and the Pretrial Stipulation in this case show the underlying duty and causation issues are multi-faceted and far too complex for a lay jury to decide on their own. "Without expert testimony, a lay jury could only speculate as to whether an attorney's conscious decision not to call a purported witness constituted negligence, where in the attorney's opinion, the witness on cross examination could have given testimony damaging to plaintiff's case." *Willage*, 415 So. 2d at 768.

"When the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict in favor of the defendant." *FDIC v. Icard, Merril, Cullis, Timm, Furen & Ginsburg, P.A.*, No. 8:11-CV-2831-T-33MAP; 13 WL 4402968 at *5 (M.D. Fla. Aug. 15, 2013).

Accordingly, Plaintiff similarly failed to meet his overall burden to establish through expert testimony the standard of care in this guardianship matter with regard to the settlement of thirteen litigated matters in the New York settlement, with particular regard to the difficulties inherent in mounting a successful full faith and credit challenge of a divorce, and vis a vis the needs of a ninety five year old ward.

It is not within the province of a jury to create or define the standard of care without expert testimony, nor can the jury ignore unrebutted expert testimony on the standard of care. Plaintiff's lawyer cannot merely allege what a lawyer is supposed to do; he must prove it. Because Plaintiff failed to prove the relevant standard of care required an appraisal, the verdict cannot stand and judgment as matter of law must be entered in favor of Defendants.

CAUSATION ISSUES

B. **Plaintiff did not prove how the "case-within-the-case" would have turned out but-for Defendants' alleged breaches.**

If there were an appraisal showing 67th Street was worth $22.5 million, or any number higher than the broker's opinion relied upon by guardian, Plaintiff still would have to establish causation. Such causation would require proof there would have been some outcome more favorable to the Ward than provided by the New York settlement.

In *Keramati v. Schackow*, 553 So. 2d 741, 742 (Fla. 5th DCA 1989), a former client of a law firm alleged she entered into a settlement in an amount substantially less than her claims were worth, because the attorneys forced her to take the settlement or would "no longer represent her, and it would be too expensive to continue the litigation." *Id.* at 743. In such a case, the former client may sue, but must prove at trial both (i) breach of duty and (ii) had the suit been properly handled, the client could have recovered "substantially greater damages than the settlement amount." *Id.* at 746.

There is no evidence that the guardianship would have recovered substantially more than the New York settlement achieved if there have been an appraisal. In fact, a failure to settle coupled with the risk of losing the twenty million dollar trust from the Texas settlement was an unacceptable risk to the Ward. No one testified a more favorable settlement would have been made if Defendants had a $22.5 million appraisal.

Likewise, and fatally deficient to the claim here, there is no proof the Ward would have prevailed in the underlying litigation especially with regard to the full faith and credit challenge to the Texas divorce and achieved a net result (after fees and costs) better than the New York settlement. For litigation-related malpractice such as negligently settling a case, this is what is often-referred to as the "case-within-a-case." In a malpractice or fiduciary duty case such as this, Plaintiff must prove by a preponderance of evidence he would have won the underlying case. *Keramati,* 553 So. 2d at 742. No such evidence was presented.

Here, that would not only require expert testimony that an MAI appraisal was the standard of care, but also would require a real estate appraiser testifying to the MAI appraised value of both properties on the date of the settlement conference. In addition, the net results of the thirteen litigated matters would also have to be analyzed by a qualified expert. Only by comparing the expected net result of the litigation, as determined by an expert lawyer and appraiser, with the actual value received from the settlement, could one compute any damages in this case. Because there is insufficient evidence of damages, the award must be vacated and judgment entered in favor of Defendants or, alternatively, a new trial would be warranted at least on damages, if not on all issues.

Specifically, Plaintiff must present evidence, which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a substantial factor in bringing about the result. *Gooding v. Univ. Hosp. Bldg., Inc.*, 445 So. 2d 1015, 1018 (Fla. 1984) "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." *Id*. Expert opinions based on sheer speculation and facts or inference not supported by the evidence should be rejected by the trial court in considering a motion for directed verdict. *Proto*, 788 So. 2d at 395.

The plaintiff must "demonstrate[ ] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence." *Olmsted v. Emmanuel*, 783 So. 2d 1122, 1125 (Fla. 1st DCA 2001) (*citing Sure Snap Corp. v. Baena,* 705 So. 2d 46, 49 (Fla. 3d DCA 1997)). Thus, in a case such as this, the plaintiff has to prove that he "would have prevailed on the underlying action but for the attorney's negligence." *Id*. "Under the 'trial within a trial' standard of proving proximate cause, the jury necessarily has to determine whether the client would have prevailed in the underlying action, [...], before determining whether the client would prevail in the malpractice action." *Tarleton v. Arnstein & Lehr*, 719 So. 2d 325, 330 (Fla. 4th DCA 1998). "In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages." *Resolution Trust Corp. v. Stroock & Stroock & Lavan*, 853 F. Supp. 1422, 1426 (S.D. Fla. 1994) (*citing Himes v. Brown & Co. Sec. Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1987)). Plaintiff's burden to prove the case within the case is clearly provided for in the law.

Consequently, Plaintiff is required to prove the Petition to Determine Beneficiaries would have succeeded and the Florida probate court would **not** have given full faith and credit to the Texas divorce. Therefore, Plaintiff had to prove, by a certain amount of money and with a reasonable degree of legal certainty that the Ward would have been better off by continuing to pursue the Petition to Determine Beneficiaries than he was after the New York Settlement. There is no evidence of this. To the contrary, the hearing transcript dated October 26, 2012, in evidence

as [CLO Ex. 64 (68:23-69:1)], evidences Plaintiff's beliefs that the Petition was without merit and that the Plaintiff believed the divorce was valid and should be given full faith and credit.

Plaintiff has **not introduced any evidence** that the jury could rely on to decide the outcomes of the underlying cases, which were supposedly handled negligently. In order to prevail on his theory that the Guardian should not have foregone the Ward's claims to Lorna's property via the Petition to Determine Beneficiaries, Plaintiff was required to prove that the action would have been successful and netted a better result for the Ward. No substantial or component evidence was presented on this point.

Plaintiff has not proven that the Ward would have prevailed in that proceeding. Additionally, Plaintiff has not accounted for how long or how much that litigation would have cost the Ward in order to determine if he would have been better off not entering into the New York Settlement. The guardianship Court however did consider this though in approving the New York Settlement and finding it in the ward's best interest. Plainly, the jury has no evidence to base a finding that the Ward would have obtained a greater amount and what that amount would have been. Plaintiff's damages are purely speculative and accordingly cannot be recovered.

Plaintiff's counsel acknowledged the claim was not easy to win, and never presented evidence of the likelihood of success on the merits. In closing, he stated: "And they told you this wasn't the easiest claim. But what did they do? Well, let's think about it. Do I fight this? Do I give my client the justice he deserves and fight this and get the true value, or ***do I just sell him out and I take the quick settlement***? Because, you know what, I'll get some money to him, and then I'll get attorney's fees." (9:28)

Even if the Ward's interests were sold out for a quick settlement, which is completely untrue, Plaintiff still had to prove what the Ward would have received-if the case proceeded to final judgment (*i.e.*, the result but-for the settlement). There is a complete absence of any relevant evidence on this point. Indeed, what evidence there is in the record is directly to the contrary.[10]

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[10] Skatoff testified Defendants' conduct neither fell below the standard of care for guardianship attorney in the community nor constituted a breach of fiduciary duty. (T8:104-07) Skatoff concluded Defendants were faced with "actions coming at the guardianship from every direction, from Lorna's estate, from Julian" and asserted a "**very difficult position**" with the petition to determine beneficiaries to set aside the divorce, filed on behalf of the guardians. (T8:105-06)

There is no evidentiary basis upon which a reasonable jury could conclude the Guardian, on behalf of the Ward, would have prevailed on the merits of ***any*** of the thirteen pieces of litigation.

Accordingly, because there were multiple pending claims and issues, Plaintiff's expert not only needed to opine that the Texas divorce would not be given full faith and credit in Florida, but also needed to opine the overall net outcome, including prevailing on the appeal of the twenty million dollar ($20,000,000) Texas settlement, would have been more favorable.

C. Plaintiff failed to prove what an MAI Appraisal would have shown.

As to causation, there is also no proof that an MAI appraisal obtained on or before May 8, 2013, the date of the settlement conference, would have shown a fair market value estimate higher than the broker's opinion of value that is the sole valuation in evidence. Plaintiff not only failed to prove breach of a duty, Plaintiff failed to prove causation. Plaintiff failed to prove that an MAI appraisal would have led to a different outcome. Separate and apart from failing to prove liability for the alleged failure to obtain an appraisal, Plaintiff failed to demonstrate causation from any such failure. The jury had no idea what an appraisal have looked like in May 2013 if Defendants had obtained one. Unless there is competent substantial evidence in the record that an appraisal obtained in May 2013 would show the value of 67th Street at $22.5 million, there is no causation.

For example, if an appraisal in May 2013 had shown an estimated fair market value of $7 to $9 million, the same as the broker's opinion,[11] the failure to obtain that appraisal caused no damage. For Plaintiff to succeed on any claim based on Defendants not having an appraisal at the time of the settlement, Plaintiff was required to introduce into evidence an MAI appraisal dated as of May 2013 or, at a minimum, testimony from a qualified expert witness that an appraisal would have shown the $22.5 million "valuation" Plaintiff argued to the jury.

The issue is not what the 67th Street property sold for eighteen months after the settlement conference; the issue is what a May 2013 appraisal would actually have shown. In the ultimate of ironies, given Plaintiff's vociferous arguments for such an appraisal, no appraisal was presented by Julian Bivins when the guardianship court approved the New York settlement and no such

[11] Defendants note that there was an appraisal on the Lexington property as of the settlement approval hearing in September 2013. That appraisal, obtained by Julian Bivins and his then-personal counsel, Mr. Denman, valued Lexington at $4.4 million. (T7:90) That value is consistent with, and actually slightly below, the low-end of the broker's opinion range of $4.5 to $6.5 million.

appraisal was presented by Plaintiff at this trial. Absent that critical evidence, the verdict cannot stand and judgment must be entered for Defendants.

DAMAGES ISSUES

A. There is no logical link from duty to causation to damages in this case.

Florida law requires Plaintiff to "demonstrate[ ] that there is *an amount of damages* which [he] would have recovered but for the attorney's negligence." *Olmsted v. Emmanuel*, 783 So. 2d 1122, 1125 (Fla. 1st DCA 2001) (*citing Sure Snap Corp. v. Baena,* 705 So. 2d 46, 49 (Fla. 3d DCA 1997)). "In Florida, unless the fact-finder is presented with evidence which will enable it to determine damages for lost profits with a reasonable degree of certainty, rather than by means of speculation and conjecture, the claimant may not recover such damages." *Resolution Trust Corp. v. Stroock & Stroock & Lavan*, 853 F. Supp. 1422, 1426 (S.D. Fla. 1994) (*citing Himes v. Brown & Co. Sec. Corp.*, 518 So. 2d 937, 938 (Fla. 3d DCA 1987)). Without expert testimony that properly analyzed the entire New York settlement and all of its numerous permutations, this vital legal link cannot be established. Without that vital expert testimony any award of damages is total speculation. Thus, judgment should be entered for Defendants.

B. Plaintiff did not prove the fair market value of 67th Street at the time of the New York settlement.

The $16.4 million damages award in the verdict is not supported by competent evidence. Most importantly, the damages fail as a matter of law because Plaintiff did not prove the value of 67th Street property on May 7 and 8, 2013 (the two-day settlement conference and May 8, 2013 the date the New York Settlement Term Sheet was signed). The only evidence of the property's value at that time is the broker's opinion – $7 to $9 million.

Plaintiff could have called a competent expert witness to testify there was no significant increase in New York real estate prices over those 17 months, but did not.[12] Plaintiff presented no

[12] If Plaintiff had called an MAI appraiser, that expert could not rely upon a sale which did not exist in May 2013 as the basis for the valuation as of May 2013. The New York broker, Lipa Lieberman, explained "an appraiser will look at *previous sales* to try to determine what the present

expert testimony, nor any ***competent*** evidence of value. By itself, a sale, which closed on October 28, 2014 – nearly 18 months later –, is not competent evidence of the value in May 2013. *Zipper v. Affordable Homes, Inc.*, 461 So. 2d 988 (Fla. 1st DCA 1984)("The measure of damages is the difference between the price the buyer agreed to pay for the property and the *fair market value on the date of the breach*," not the price on the date the property was sold to another party.").

Lieberman, the broker who gave the broker's opinion, testified property values had been "soaring" from 2012 to 2015. (T4:44) Plaintiff's witness, Sharp, was not a real estate appraiser nor competent to render any valuation opinion. She was only permitted to testify as to "math." (T. Vol. 1, 84:9-89:17) Sharp confirmed it was "absolutely correct" the numbers she used in her "damages" chart for the four different properties were not "values as of the New York settlement."[13] (T7:200-01) Indeed, she admitted the "numbers" she plugged in were just "hypothetical future" numbers because "there was no solid evidence of exact values for each of the properties." (*Id.*) Damages must be based upon a solid foundation, not mere guesswork. Damages cannot be established here by a witness doing math.

Absent an appraisal or competent testimony of the fair market value of 67th Street as of May 2013, the verdict cannot stand. Under Florida law, a valuation must be computed as of the appropriate date. *Parisi v. Miranda*, 15 So. 3d 816 (Fla. 4th DCA 2009)(verdict reversed where jury received no evidence of value on the valuation date; therefore, the jury's verdict was contrary to the manifest weight of the evidence); *Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1131 (Fla. 4th DCA), *rev. den'd*, 973 So. 2d 1120 (Fla. 2007)(reversing and remanding for entry of a directed verdict when plaintiff failed to present evidence of value on the

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value of that property is." (T4:35) Thus, no legitimate MAI appraiser would have relied upon the $22.5 million sale nearly 18 months after the relevant date.

[13] Although she was not competent to conduct real estate market research, Sharp agreed that property values were steadily increasing during the relevant time. (T7:172-73) That means there is no competent evidence the $22.5 sale price from October 2014 is the fair market value as of May 2013 (or even September 2013 at the approval hearing). Without proof of a number, the damages verdict cannot stand.

operative date: plaintiff "was not entitled to have the jury speculate as to the value of the stock on the date of sale. Rather, it was required to prove the stock's value on that date.").[14]

Similar to the instant case, in Parisi, the shareholders' agreement provided that if a shareholder was terminated, the terminated shareholder was required to sell his shares to the corporation at a price determined by the market value of all of the corporation's "tangible assets" plus "2 times net annual earnings" of the corporation. It was undisputed that Miranda was terminated on August 31, 2006. At trial, Miranda's expert valued Miranda's shares of stock as of December 31, 2006, because he used the 2006 tax return to plug numbers into the valuation formula. During deliberations, the jury asked what date it should use to value Miranda's shares. The trial court concluded that the shareholders' agreement contemplated using the date of termination to value the shares and instructed the jury to use the August 31, 2006 termination date. The jury received no evidence regarding the value of the shares on August 31, 2006. Therefore, the jury's verdict was contrary to the manifest weight of the evidence since the jury assigned a value to the shares identical to the December 31, 2006 value proffered by Miranda's expert. *Parisi v. Miranda*, 15 So. 3d 816, 817-18 (Fla. 4th DCA 2009).

C. The jury's verdict is grossly excessive; Judgment should be entered for Defendants based upon the lack of proof. Alternatively, there should be a remittitur or new trial.

In diversity cases, Florida law determines whether a jury award is excessive, while federal law governs the procedural question of whether a new trial or remittitur is warranted if the damages are found to be excessive. *Slip-N-Slide Records, Inc. v. TVT Records, LLC*, 05-21113-CIV, 2007 WL 3232274, at *9 (S.D. Fla. Oct. 31, 2007)(*citing Roboserve, Ltd. v. Tom's Foods, Inc.*, 940 F.2d 1441, 1446 (11th Cir.1991)).

It is well-settled under Florida law that damages must be proved with reasonable certainty. *Zinn v. United States*, 835 F. Supp. 2d 1280, 1328 (S.D. Fla. 2011) (*citing Nebula Glass Intern., Inc. v. Reichhold, Inc.*, 454 F.3d 1203, 1213 (11th Cir.2006)); *W.W. Gay Mech. Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So. 2d 1348, 1350–51 (Fla.1989). As such, a damage award must be

[14] The court rejected plaintiff's argument it should, at the least, be given a new trial to prove damages – "plaintiff is not entitled to a second 'bite at the apple' when there has been no proof at trial concerning the correct measure of damages." *Id*. at 1131; *see also, Teca, Inc. v. WM-TAB, Inc.*, 726 So. 2d 828, 830 (Fla. 4th DCA 1999) (remanding for entry of defense judgment because there was no proof at trial of the correct measure of damages).

based on substantial evidence, not speculation. *Jeffrey O. v. City of Boca Raton*, 511 F. Supp. 2d 1339, 1360 (S.D. Fla. 2007) (*citing Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir.1979)).

The damages awarded in this case are grossly excessive because they are based upon the $22.5 million sale on October 28, 2014, not the fair market value of 67th Street in early May 2013 when the New York Settlement was reached. Also, they ignore not only the two and half million dollar mortgage, but Florida law, which would reduce any inheritance by the Ward for fifty (50%) percent of the Lorna estate's taxes, claims, costs of administration and other obligations. Florida Statute 733.707.

Overall, the damages are grossly excessive because they exceed the number computed by Sharp, Plaintiff's math witness. In her "computations," Sharp attempted to reflect what dollar amount it would take to achieve an equal distribution of assets between the Ward and Lorna's estate. Nevertheless, despite Sharp's objectives, there is no competent evidence as to the value of the 67th Street property in May 2013, other than the broker's opinion of value. Plaintiff's valuation issue, which purposely ignores the net effect of the numerous financial issues resolved in the New York settlement, was whether two properties involved in one aspect of the settlement were of roughly equal value, net of mortgages, and they were roughly equal according to the broker's opinion. Thus, even under Plaintiff's improperly narrow factual analysis, there are no recoverable damages. Plaintiff failed to call a competent expert to testify on value, relying solely on a sale nearly eighteen (18) months after the applicable valuation date. The sale price – by itself and without the testimony of an expert– is not competent evidence of value. Moreover, the damages awarded in this case are so grossly excessive the Court would have to order a new trial or a remittitur even if the claims had been proven, as the verdict assumes one hundred percent success of the recovery of one hundred (100%) per cent of the 67th Street property through the denial of full faith and credit, where the best case result was a fifty (50%) percent intestate share **less** a pro rata share of the Lorna Bivins estate claims, taxes, obligations and expenses of administration pursuant to Florida Statute 733.707 and **less** a pro rata share of a two and half million dollar mortgage while "crediting" Defendants with a six million one hundred thousand unaccepted offer

for the 808 Lexington Property (22.5 million 67th Street sales price less 6.1 million 808 Lexington offer equal 16.4 million.)

1. Maximum Damages Improperly Valuing 67th Street at $22.5 Million.

Bottom line, even assuming 67th Street was worth $22.5 million, Sharp's maximum damages equaled $5,940,509:

	OLIVER BIVINS SR.		ESTATE OF LORNA BIVINS	
Property	808 Lexington	330 S. Ocean	39 E. 67th St.	Portland
Estimated "value"	9,750,000	1,205,304	22,500,000	1,205,304
Less: Mortgages/liens	(652,229)	0	(2,500,000)	0
Net Value	9,097,771	1,205,304	20,000,000	1,205,304
Total Value Received	10,303,075		21,205,304	
Mid-Point	15,754,190			
Difference to equalize	5,451,115			
Plus "Other Damages": Commission Expense	300,000			
Lost Rental Expense	273,154			
Excess Interest	171,640			
Less: Received in settlement with Julian	(255,000)			
	Subtotal $489,795			
MAX. DAMAGE	**5,940,909**		**Per Kara Sharp**	

The above numbers come straight from Sharp's testimony and the demonstrative chart she used while testifying. (T7:166-75) Despite her conclusion, even as improper as it is, the jury awarded $16.4 million – nearly three times the maximum damages under Plaintiff's flawed theory.

The jury's verdict can only be explained as they took the difference between (A) the value of $6.1 million which Defendants advised the probate court was the highest offer for Lexington

received as of a September 2013 hearing without further marketing of the property, and (B) the $22.5 sales price for 67th Street. But in reaching that number, the jury inexplicably ignored (i) the $2.5 million mortgage on the 67th Street property; and (ii) that Plaintiff's best case was an inheritance from the Lorna Bivins estate of 50% less a pro rata share of estate obligations, not sole ownership of 100% of 67th Street. (There is no expert testimony in this record that any law suit would have vested the Ward with 100% of 67th Street.) Sharp's computation does not make those same two mistakes as the jury, and it yields only $5.9 million.

2. Analysis of Maximum Damages If Properly Rely on Broker's Opinions.

Because there is no evidence to support the $22.5 million number, there should be no damages at all. As the guardianship court acknowledged that the benefit of settlement of multiple litigated matters is not subject to a precise formula. (CLO Ex. 30, 35:16-40:3) Even if the jury believed there should be an absolute true-up, Plaintiff's best case is nowhere close to the amount of the verdict.

The only competent record evidence of values are the two broker's opinions by Lieberman. If one uses the mid-points of the ranges set forth in the broker opinions, that would yield only a maximum damages award of $815,910 as shown in the following chart:

Property	808 Lexington	330 S. Ocean	39 E. 67th St.	Portland
Estimated value	5,500,000	1,205,304	8,000,000	1,205,304
Less: Mortgages/liens	(652,229)	0	(2,500,000)	0
Net Value	4,847,771	1,205,304	5,500,000	1,205,304
Total Value Received	6,053,075		6,705,304	
Mid-Point	6,379,190			
Difference to equalize	**326,115**		**Per Lipa's Opinions**, solely related to Petition to Determine Beneficiaries	
Plus: "Other Damages"	489,795			
MAX. DAMAGES	**815,910**		**Per Lipa's Opinions, any and all damages possible**	

"In order to shock the sense of justice of the judicial mind the verdict must be so excessive or so inadequate so as to at least imply an inference that the verdict evinces or carries an implication of passion or prejudice, corruption, partiality, improper influences, or the like." *Slip-n-Slide Records*,, 2007 WL 3232274, at*9; *Markland v. Norfolk Dredging Co.*, 772 F. Supp. 1241, 1242 (M.D. Fla. 1991) ("A jury award is not to be set aside or a new trial ordered unless the award is so exorbitant as to shock the judicial conscience or indicate bias, passion, prejudice, or other improper motive on the part of the jury.").

In *Martinez v. Brinks*, 410 F. Supp. 2d 1202, 1215 (S.D. Fla. 2004), a case involving malicious prosecution brought by a courier against a secure cash handling company, a jury awarded lost wages of $1,260,000 when, even under the courier's method of determining lost wages, the courier would have only earned $644,800. The court found this award, which was double the maximum amount supported by the evidence, was "grossly excessive," and ordered a new trial.

As a general rule, "a remittitur order reducing a jury's award to the outer limit of the proof is the appropriate remedy where the jury's damage award exceeds the amount established by the evidence." *Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1266 (11th Cir. 2008) (*citing Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1448 (11th Cir. 1985)); *see also Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1284 (11th Cir. 2000) ("The rule in this circuit states that where a jury's determination of liability was not the product of undue passion or prejudice, we can order a remittitur to the maximum award the evidence can support.").

In *Rodriguez*, a case involving the violation of the FLSA overtime provision, the court instructed the jury that if they found the defendants violated the provision, it must award payback damages in the amount of unpaid overtime. 518 F. 3d at 1265. Remittitur was granted when, even viewing the evidence in the light most favorable to appellee, the jury awarded damages nearly twice the amount the evidence supported. If the jury's damages verdict far exceed the maximum amount that could have been awarded based on the evidence and the instructions, it must be vacated for new trial or remitted to a number the evidence supports:

> we cannot "permit damage speculation where the formula for calculation is articulable and definable. Flexibility beyond the range of the evidence will not be tolerated."

Id. at 1268 (*citing Jamison Co. v. Westvaco Corp.*, 526 F.2d 922, 936 (5th Cir.1976)).

In *Frederick*, the appellant argued that the district court erred in not granting its motion for remittitur, or alternatively, a new trial on damages only, due to the jury's excessive award for maintenance, cure, and unearned wages. 205 F.3d at 1283. The appellant specifically argued that the evidence presented at trial supported a maximum award of only $107,947.43, well below the jury's award of $525,069. The Eleventh Circuit agreed the maximum damages number calculated by the plaintiff-appellee's expert was the outer limit of the damages award. *Id.; see also, Deakle v. John E. Graham & Sons*, 756 F. 2d 821, 834 (11th Cir. 1985) (remitting damages to maximum possible award reasonably supported by the record evidence).

CONCLUSION

Plaintiffs failed to prove breach of the standard of care or any fiduciary duty by expert testimony, failed to prove causation, and failed to prove damages. This Court should enter judgment as a matter of law for Defendants. Alternatively, and at a minimum, this grossly excessive verdict should be remitted to a number no greater than $815,795; or the Court should grant a new trial.

WHEREFORE, Defendants request entry of judgment as a matter of law under Rule 50, in their favor and against Plaintiff; alternatively remittitur or a new trial under Rule 59; and an award of reasonable attorneys' fees and costs pursuant to law, including sections 744.108 and 768.89 of the Florida Statutes.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF, or in some other authorized manner for those counsel or parties who are not authorized to receive Notices of Electronic Filing.

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