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

CASE NO. 9:15-cv-81298-KAM

JULIAN BIVINS, as Personal Representative of the ancillary Estate of OLIVER WILSON BIVINS,

Plaintiff,

v.

CURTIS CAHALLONER ROGERS, JR., as former guardian; STEPHEN M. KELLY, as successor guardian; BRIAN M. O'CONNELL; ASHLEY N. CRISPIN; CIKLIN LUBITZ & O'CONNELL; KEITH B. STEIN; BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP; and LAW OFFICES OF KEITH B. STEIN, PLLC n/k/a STEIN LAW, PLLC,

Defendants.
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STEIN DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL

Defendants, KEITH B. STEIN, BEYS LISTON MOBARGHA & BERLAND, LLP f/k/a BEYS STEIN MOBARGHA & BERLAND, LLP and LAW OFFICE OF KEITH B. STEIN, PLLC n/k/a STEIN LAW, PLLC (hereinafter referred to collectively as "the STEIN

DEFENDANTS"), pursuant to the provisions of Local Rule 7.1(c), file the following Memorandum of Law in Opposition to Plaintiff's Motion for New Trial (D.E. 419) pursuant to the provisions of Rule 59 of the Federal Rules of Civil Procedure. As the following arguments and citations of authority demonstrate, Plaintiff's Motion for New Trial must be denied. Plaintiff's arguments are: (1) unsupported by the record and trial transcript; (2) based on a failure to address and apply the appropriate standards under Daubert[1] and Federal Rule of Evidence 103(a); and (3) ignore that the issues relating to attorney-client and work-product privileges were substantially briefed, argued numerous times, and ruled upon by the trial court. Furthermore, even if the Plaintiff's expert were permitted to testify to all matters contained in the Rule 26 disclosure, there would have been insufficient evidence to support a verdict, such that the STEIN DEFENDANTS were entitled to judgment as a matter of law.

INTRODUCTION

I. General Background[2]

As this Court is aware from the pretrial proceedings and trial testimony, this case involves claims of legal malpractice and breach of fiduciary duty against several attorneys and guardians whose actions were approved and/or mandated by orders from a state guardianship court. Defendant, KEITH STEIN, is an attorney who has been practicing real estate law in New York since 1987. Mr. Stein was retained to represent Curtis Rogers and Stephen Kelly, Guardians of the Ward, now-deceased, Oliver Bivins, Sr. (the "Ward"), in a limited capacity to protect the Ward's interest in real estate located at 808 Lexington Avenue in New York City.

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1 Daubert v. Merrill Dow Pharmaceuticals, 509 U.S. 579 (1993).

2 These undisputed facts are based on the STEIN DEFENDANTS' Statement of Material Facts Not in Dispute filed in support of their Motion for Summary Judgment (D.E. 226) and/or were established by the evidence at trial.

The retainer agreements introduced at trial detailing the limited engagement were not contradicted by any trial testimony.

Plaintiff, JULIAN BIVINS ("JULIAN"), is the Ward's son and the Personal Representative of the Ward's Estate. JULIAN has been involved in litigation against his father's former and current guardians, Curtis Rogers and Stephen Kelly, respectively, dating back to January 2011, when the Ward's caregiver, Sonja Kobrin, filed a Petition to Determine Incapacity and Petition for the Appointment of an Emergency Temporary Guardian in the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida.

The instant suit involved the disposition of four real estate properties located in New York ("808 Lexington" and "67th Street"), Palm Beach ("330 Ocean"), and London ("Portland Place"). Disputes had arisen between JULIAN and Oliver Bivins, Jr. ("Oliver Jr."), the Ward's youngest son, regarding these properties. Mr. Stein, a New York attorney, was retained by Rogers, the permanent guardian, in connection with the partition, sale, and delinquent mortgage debt on 808 Lexington. Upon the succession of Kelly to the guardianship, Mr. Stein was retained to defend the foreclosure action instituted against 808 Lexington and to effect the sale of the property.

Over the course of his representation of the Guardians, Mr. Stein filed a Petition to partition 808 Lexington, successfully prevented the foreclosure on the property, and assisted in the negotiation of two settlement agreements, resulting in the Estate of Lorna Bivins relinquishing her half interest in 808 Lexington and 330 Ocean and the ultimate sale of 808 Lexington for $5,000,000.00.

II. The Amended Complaint And Trial

Plaintiff filed suit in this matter on September 17, 2015, and on January 8, 2016, filed an Amended Complaint. The Amended Complaint, the pleading on which the case was tried, alleged that Mr. Stein: (1) failed to diligently assess the discrepancy in values of 808 Lexington and 67th Street, and, therefore, did not adequately advise the permanent guardian on the fairness of the New York Settlement; (2) failed to advise the permanent guardian to collect rent from the 808 Lexington tenants in order to pay down the mortgage on the property, and relatedly failed to collect taxes and rental income from Lorna's estate; (3) failed to arrange for commercially reasonable substitute financing for the mortgage; (4) failed to have the mortgage deemed satisfied or released; (5) failed to have the mortgage interest declared usurious; (6) charged the guardianship excessive fees and took "large sums of money under the guise of retainers without accounting or documentation;" and (7) failed to "account to the Court or to JULIAN regarding the failure to comply with the terms of the Global Settlement Agreement as the closing agent."

Following a two-week trial, the jury rendered its verdict and found the CIKLIN LUBITZ Co-Defendants[3] liable for breach of fiduciary duty and professional malpractice and awarded $16.4 million in damages. The same jury that heard that same evidence found in favor of the STEIN DEFENDANTS on the identical breach of fiduciary duty and professional malpractice claims.

III. The Motion For New Trial

Despite the jury verdict, Plaintiff JULIAN BIVINS asserts the verdict in favor of the STEIN DEFENDANTS was against the <u>clear weight of the evidence</u> and that evidentiary rulings <u>substantially prejudiced</u> the Plaintiff. As demonstrated herein, however, Plaintiff's arguments

[3] Throughout the case and trial the Defendants were referred to generally as the "CIKLIN LUBITZ" Defendants, and the "STEIN DEFENDANTS".

are meritless in that they ignore the record, disregard the standard to be applied under Rule 103(a) of the Federal Rules of Evidence, and fail to recognize or appreciate the import of the verdict Plaintiff obtained against the CIKLIN LUBITZ Co-Defendants in the amount of $16.4 million.

First, with regard to the argument that the Court abused its discretion in striking Irwin Gilbert as an expert, the Plaintiff's position ignores the wide latitude granted to the Court, ignores substantial testimony regarding the complete lack of qualifications of Irwin Gilbert to opine on STEIN's adherence or lack of adherence to acceptable standards of care, and evades the fact that even if Irwin Gilbert's Rule 26 Disclosure was permitted to be introduced into evidence, there would still have been insufficient evidence to establish a claim against the STEIN DEFENDANTS.

Second, with regard to the Court's exclusion of the excessively late disclosure of a title history on 67th Street, no substantial rights were affected. The Plaintiff JULIAN BIVINS himself testified that his father, Oliver Bivins, Sr., owned the property prior to his marriage to Lorna Bivins. Furthermore, the testimony was uncontradicted it had been transferred to his wife, Lorna Bivins, decades ago. Again, as with the Daubert issue, there was no testimony disclosed in any Rule 26 report or otherwise that would have even established any equitable interest in 67th Street available to Oliver Bivins, Sr.

Third, regarding the "improper acts of JULIAN BIVINS," no substantial rights of the Plaintiff were affected. All testimony regarding deeds, transfer, and the like was necessary background information for the initiation of the guardianship and all that transpired thereafter. Furthermore, Plaintiff and his counsel completely ignore the $16.4 million verdict obtained

against the CIKLIN LUBITZ Co-Defendants which actually refutes Plaintiff's position. Moreover, the STEIN DEFENDANTS' counsel argued appropriately.

Finally, with regard to the attorney-client privilege and work-product communications between STEIN and his client, the Guardians, this issue was extensively briefed, both before the United States Magistrate and this Court, (D.E. 83, 85, 89, 112, 113) and multiple orders entered upholding objections. (D.E. 132, 137) Yet again, Plaintiff ignores the substantial verdict obtained against the CIKLIN LUBITZ Co-Defendants which vitiates his arguments.

ARGUMENT

As a threshold matter, Plaintiff in reciting the standard this Court must utilize in addressing the Motion for New Trial ignores the great deference afforded to the right to trial by jury and the jury verdict. Hewitt v. B. F. Goodrich Co., 732 F.2d 1554, 1556 (11th Cir. 1984). "The right to trial by jury is also protected by our requirement that 'new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great – not merely the greater – weight of the evidence.'" R. V. Fondren v. Allstate Insurance Co., 790 F.2d 1533, 1534 (11th Cir. 1986), citing Conway v. Chemical Leaman Tank Lines, 610 F.2d 360, 363 (5th Cir. 1980).

Furthermore, the evidentiary rulings on which Plaintiff substantially predicates his Motion for New Trial did not, as demonstrated herein, affect Plaintiff's "substantial rights." Fed. R. Evid. 103(c). The Court should uphold the sanctity of the jury's verdict, and reaffirm its prior rulings, all of which were eminently correct under the applicable legal standards.

I. This Court Appropriately Exercised Its Discretion In Striking Irwin Gilbert Under Daubert

Plaintiff's argument that a new trial is warranted based upon the Court's striking Irwin Gilbert as an expert (D.E. 374) ignores well-established law under Daubert. The record

conclusively establishes that Mr. Gilbert's qualifications as a New York transactional real estate lawyer are non-existent, thereby supporting this Court's order.

A. Daubert Requirements

Because the task of evaluating the reliability of expert testimony is uniquely entrusted to the district Court under Daubert, *see* McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253, 1256 (11th Cir. 2002), this court is given "considerable leeway" in the execution of its duty. Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. at 137, 152 (1998). This Court appropriately exercised its discretion and properly struck Mr. Gilbert as an expert. This was proper for the CIKLIN LUBITZ Co-Defendants and even more importantly for the STEIN DEFENDANTS. By his own admission, Mr. Gilbert never practiced real estate transactional law in New York, the exact services STEIN was retained to perform on behalf of the guardians in New York.

Pursuant to Daubert, in addressing the contours of the trial court's discretion, the admission of expert evidence is governed by Federal Rule of Evidence 702. Under Rule 702 and Daubert, district courts must act as "gatekeepers" which admit expert testimony only if it is both reliable and relevant. *See* Daubert, 509 U.S. at 589. District courts are charged with this gatekeeping function "to ensure that speculative, unreliable expert testimony does not reach the jury" under the mantle of reliability that accompanies the appellation "expert testimony." McCorvey, 298 F.3d at 1256.

To fulfill their obligation under Daubert, district courts must engage in a rigorous inquiry to determine whether: "(1) the expert is qualified to testify competently regarding the matters he intends to address;" (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier-of-fact, through the application of scientific, technical, or specialized

expertise, to understand the evidence or to determine a fact of issue." City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (footnote omitted). Because the Daubert prongs are conjunctive, the failure to satisfy any of them is fatal. See *Id*. The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence. *See* Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999).

B. The Court Correctly Held Gilbert Was Not Qualified

Here, the decision to strike Mr. Gilbert was proper based on the first prong of Daubert. At the Daubert hearing Mr. Gilbert, despite his reluctance, admitted he had **never** practiced transaction law; he was a litigator:

> Q. Okay. Mr. Stein's a New York real estate lawyer, right?
>
> A. Yes, he is.
>
> Q. And you are not a specialist in New York real estate transactions, are you?
>
> A. I have litigated countless lawsuits involving New York real estate transactions, the title to property, the partition of property, and, in fact, have litigated whether or not a divisible marital interest remained in New York property.
>
> * * *
>
> Q. In the last five years, you've not actually handled a New York real estate transaction for commercial property; is that right?
>
> A. Not for the purchase or sale, but I've litigated lease disputes.
>
> Q. So, no?
>
> A. I'm not sure. I think lease disputes would mean yes.

(D.E. 390, p.301-3)

Mr. Gilbert and Plaintiff erroneously assumed that if a lawyer represented a professional, that alone qualified him to testify as to appropriate standards of care. Such a position does not

come even close to even creating an issue that this Court's discretion was abused. The lack of Mr. Gilbert's qualifications are best summarized in the cross-examination at the Daubert hearing when it was pointed out that representation of an orthopedist by an attorney does not render the attorney qualified to perform orthopedic surgery:

> Q. Have you ever litigated a medical malpractice case?
>
> A. I've defended a medical malpractice case.
>
> Q. Okay. But you're not a doctor. You don't practice as a doctor, right?
>
> A. I would take it a step further. I would never call myself a medical malpractice lawyer.
>
> Q. Okay.
>
> A. The doctor didn't have insurance and had no means of defense, and so I agreed to defend the doctor.
>
> Q. Okay. But my point being, sir, is that you litigate all different kinds of cases, but it doesn't mean you practice what you're litigating about.
>
> For instance, that medical malpractice case - - and I understand that the doctor, from your testimony, didn't have insurance, okay, and so you stepped in and you defended the doctor. And you defended the doctor, I assume, and you discuss the standard of care, et cetera, correct?
>
> A. Yes.
>
> Q. Okay. But you, yourself, did not practice as a doctor, but you were defending what the doctor did. You see my point?
>
> A. Not really.
>
> Q. Okay.
>
> A. But it is correct, I'm not a doctor.

(D.E. 390, p.305-6)

The inquiry conducted of Gilbert by counsel before this Court established this Court's discretion was appropriately exercised. The evidence established: (1) Mr. Gilbert never provided legal representation to a professional guardian, nor ever administered a guardianship, both of which were at the crux of Plaintiff's case against the STEIN DEFENDANTS; (2) Mr. Gilbert never handled the administration of a guardianship due to incapacitation or degenerative age conditions of a ward which the STEIN DEFENDANTS in this case were appointed to do; (3) Mr. Gilbert never was an emergency temporary guardian; (4) Mr. Gilbert never assisted a guardian in preparing a final accounting; and (5) Mr. Gilbert does not practice real estate law, cannot testify as a real estate expert, and has never conducted real estate transactional representation in New York as Mr. Stein was retained to do. (D.E. 390, p.305) Indeed, Mr. Gilbert **never** has been qualified to testify as an expert on New York real estate transactional legal services.

C. Even If Gilbert Had Been Permitted To Testify, His Rule 26 Report Did Not Establish The Required "But For" Causation

While the foregoing conclusively demonstrates Gilbert was properly stricken based on Daubert, even if Mr. Gilbert was permitted to testify on every issue in his Rule 26 Pre-Trial Disclosure, (D.E. 288-4) Plaintiff's substantial rights could not have been affected because there still would have been insufficient testimony to support a finding in favor of the Plaintiff. See, LeBlanc v. Chevron USA, Inc., 2009 WL 3837397 (E.D. La. Nov. 13, 2009) (holding that even if Daubert motion not granted such testimony would be insufficient to allow a reasonable juror to conclude causation exists and judgment for Defendant proper).[4] Plaintiff still would have to

[4] Because a verdict was rendered in favor of the STEIN DEFENDANTS and judgment thereafter entered, the STEIN DEFENDANTS did not need to renew their Motions for Directed Verdict timely made at the conclusion of Plaintiff's case and at the close of evidence. This portion of the argument, however, establishes that even if Gilbert was permitted to testify

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. There simply existed no such evidence.

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. That court discussed that 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 guardian whom STEIN represented in New York with regard to the 808 Lexington Avenue property would have recovered substantially more than the New York Settlement achieved. No one testified, nor did Gilbert's Rule 26 report opine, a more favorable settlement could have been made.

Specifically, Plaintiff must have presented evidence which would have afforded a reasonable basis for the conclusion that it is more likely than not that the conduct of the STEIN DEFENDANTS 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

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regarding his Rule 26 report, insufficient evidence existed that would have supported a verdict in Plaintiff's favor. This is an additional ground to deny a new trial.

evidence should be rejected by the trial court in considering a motion for directed verdict. Proto v. Graham, 788 So.2d 393, 395 (Fla. 5th DCA 2001).

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 had 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.

Plaintiff **introduced no evidence,** nor did Gilbert's Rule 26 report opine in any fashion, what the more favorable result would have or could have been. In order to prevail on his theory that the Guardian should not have foregone the Ward's claims to Lorna's 67th Street property Plaintiff was required to prove that the actions of any of the Defendants foreclosed or precluded a better result for the Ward. No substantial or competent evidence was presented on this point.

The only testimony on this issue was that the guardianship court considered all potentialities in approving the New York Settlement and finding it in the Ward's best interest.

Plainly, the jury had no evidence to base a finding that the Ward would have obtained a greater amount or what that amount would have been, again, even if Gilbert testified.

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" in the New York Settlement, which is completely untrue, Plaintiff still had to prove what the Ward would have received in all litigation resolved in that settlement if it had 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.[5] 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.

<u>Plaintiff failed to prove causation</u>. Even assuming Plaintiff had submitted evidence a duty of care was violated by the STEIN DEFENDANTS, Plaintiff failed to demonstrate causation from any such failure. Additionally, unless there is competent substantial evidence in the record that an appraisal obtained in May 2013, the date of the New York Settlement, would

[5] Skatoff, the CIKLIN LUBITZ Co-Defendants' expert, 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 **"<u>very difficult position</u>"** with the petition to determine beneficiaries to set aside the divorce, filed on behalf of the guardians. (T8:105-06)

show the value of 67th Street at $22.5 million, there is no showing the settlement caused damage.

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,[6] 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 appraisal was presented by Plaintiff at trial. Absent that critical evidence, the STEIN DEFENDANTS were entitled to judgment in their favor as a matter of law.

II. The 67th Street Title History Was Not Properly Disclosed And No Prejudice Resulted From Its Exclusion.

The exclusion of a title report and deeds on the 67th Street Property based upon the Plaintiff's failure to disclose this information until immediately before trial was correct, completely within the Court's discretion, and in no way warrants a new trial. "A district court

[6] 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.

has broad discretion to determine the admissibility of evidence … ." U.S. v. McLean, 138 F.3d 1398, 1403 (11th Cir. 1998).

A. Standard On Admissibility Of Evidence

The law is well-established that if a party fails to provide information or identify a witness as required by Federal Rule 26(a) or (e), the party is not allowed to use that information at trial unless the failure was substantially justified or is harmless. Fed.R.Civ.P. 37(c)(1). Barring substantial justification, therefore, a plaintiff should not be able to present documents not disclosed during fact discovery.

Second, even if the ruling was somehow infirm, pursuant to Federal Rules of Evidence 103(a), a court may not overturn a jury's verdict based on alleged errors in evidentiary rulings unless a party's substantial rights have been affected by the rulings. *See* Haygood v. Auto-Owners Ins. Co., 995 F.2d 1512, 1515 (11th Cir. 1993) ("Evidentiary rulings are reviewed under an abuse of discretion standard [and] [e]rror in the admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties.").

B. The Exclusion Of The Evidence Was Proper And In No Way Affected Plaintiff's Substantial Rights

The exclusion of this evidence was completely appropriate. Second, even if the exclusion of the evidence was improper, it certainly did not affect Plaintiff's "substantial rights" as: (1) Plaintiff JULIAN BIVINS himself testified regarding the ownership history of 67th Street; (2) there was no testimony disclosed in any Rule 26 Report or offered through any witness regarding any equitable interest in 67th Street; and (3) there was no evidence adduced, nor disclosed pre-trial regarding what any MAI appraisal on 67th Street would have revealed.

It is uncontroverted and indeed admitted by Plaintiff that the 67th Street decades-old deeds were not properly disclosed. There was extensive argument and discussion between the

Court and Plaintiff that Plaintiff failed to disclose this information timely regarding the 67th Street title history, did not seek any continuance, and had the opportunity to obtain this information even prior to suit being filed. In fact, Plaintiff's counsel conceded he did not even order the title report until May 16, 2017 and supplied it May 31, 2017. This disclosure occurred after all witnesses had been deposed, all experts deposed, and all Rule 26 Reports submitted. The refusal to allow Plaintiff to utilize this title history was completely appropriate.

Based upon all of the evidence adduced at trial, it is disingenuous at best to suggest that the exclusion of the 67th Street deed history affected Plaintiff's "substantial rights." Plaintiff himself testified that his father owned 67th Street prior to his marriage. This testimony was never refuted and the one thing the jury heard other than Lorna Bivins owned it alone at the time of her death.

The testimony on direct of Plaintiff by his counsel absolutely forecloses any suggestion that Plaintiff was not able to adduce evidence regarding the ownership history:

> Q. And what was your mother's name?
>
> A. Dorothy Clarendon, when she passed away a few years ago.
>
> Q. Okay. And you mentioned that when your parents split, that you moved up to New York. Given or take, when are we talking?
>
> A. I was six years old. That would have been 1951. And we moved - - my sister and I and mother moved to Manhattan.
>
> Q. And where was your father when you moved?
>
> A. He was in Amarillo, Texas. And then shortly after we moved, he moved up to New York, or bought a - - the Scribner mansion in New York to stay when he was there.
>
> Q. Okay. Did you ever go to the Scribner mansion when you were a kid?

A. Yes, I did. I can remember playing in the basement there.

Q. Okay. And was your father married to Lorna at the time that you recall playing in the basement of the Scribner mansion?

A. No, he wasn't married. I think there was a time when he and Elaine, his second wife, liver there.

Q. And at some point in time he met Lorna?

A. Yes.

Q. And that was - - do you recall about when that was?

A. Late '50s, I think.

(D.E. 3690, p.121-2)

The jury heard all it needed to hear regarding ownership. Oliver Bivins, Sr. owned it in 1951; he continued to own it when he got married the second time; he owned it when he married Lorna Bivins in 1959; and Lorna owned it alone when they were divorced in 2010. The deeds in any event would have been cumulative. Furthermore, as has been established beyond and to the exclusion of any possible doubt, there was never any testimony adduced or even proffered establishing any equitable interest of Oliver Bivins, Sr. in the 67th Street property after the divorce, the apparent basis for Plaintiff's claim to 67th Street.

The singular case relied upon by Plaintiff, S.E.C. v. Samuel H. Sloan & Co., 369 F.Supp. 994 (S.D.N.Y. 1973), is completely inapplicable. The document in that case was a public record equally accessible to all parties: a transcript of a hearing conducted before the S.E.C. in the case. The appellant there simply did not obtain the hearing transcript because he did not pay for the transcript. The court, therefore, found no error.

In the instant case, however, while the 67th Street title history was available in the public records, these were deeds going back over 50 years and were not part of the District Court

docket. No new trial is warranted for the exclusion of the 67th Street deed history. The assertion in Plaintiff's Motion for New Trial that the exclusion of the deeds created a "false impression regarding the ownership of the 67th Street property in the minds of the jury" completely ignores the verdict in favor of Plaintiff and against the CIKLIN LUBITZ Co-Defendants, ignores the trial testimony, and ignores the import of Rule 103(a) of the Federal Rules of Evidence.

C. No Improper "Character Evidence" Of Julian Bivins Was Elicited.

Plaintiff next argues that somehow a prejudicial character assassination occurred when the CIKLIN LUBITZ Co-Defendants argued about the "greed" of JULIAN BIVINS. The Motion for New Trial contains four references to greed and that pre-guardianship transfers were "improper." Plaintiff, of course, ignores that the STEIN DEFENDANTS never said or adopted those comments. Likewise, the transfers to JULIAN BIVINS prior to the guardianship were mere background information. U.S. v. Butch, 256 F.3d 171, 175-76 (3d Cir. 2001) (evidence is admissible if it is necessary background information rather than an attempt to impugn character).

Counsel for the STEIN DEFENDANTS, on the contrary, argued a "Cain & Abel" theme that JULIAN BIVINS wanted 67th Street which was his brother's. This was absolute fair comment on the evidence by the STEIN DEFENDANTS and, furthermore, no "bad character" evidence was elicited. The history of the Texas mineral, oil and gas deeds and other activity immediately prior to the appointment of an emergency temporary guardian was necessary background information. See Butch, supra. What the STEIN DEFENDANTS' counsel argued, completely properly, was that JULIAN BIVINS wanted that which belonged to his brother - the 67th Street property. This was the crux of the case and the only basis for the award against the Co-Defendants - that JULIAN and his father were entitled to 67th Street.

Of even greater significance is Plaintiff's refusal to acknowledge the $16.4 million verdict against the CIKLIN LUBITZ Co-Defendants. That substantial verdict vitiates Plaintiff's arguments regarding any possible prejudice under Rule 103(a).

Plaintiff's reliance on Aetna Casualty & Surety Co. v. Gosdin, 803 F.2d 1153 (11th Cir. 1986) is, furthermore, misplaced. Gosdin involved voluminous documents admitted, improperly, in summary form that contained gross hearsay, and conclusory accusations. The Eleventh Circuit cited its own precedent for the proposition that reversal on evidentiary error is not proper unless the verdict was the product of such one-sided evidence. This is simply not the situation presented here.

Moreover, Plaintiff's reliance on Peat, Inc. v. Vanguard Research, Inc., 378 F.3d 1154 (11th Cir. 2004) conclusively establishes the Plaintiff's substantial rights were not affected by any evidence regarding transfers to JULIAN BIVINS from his father that occurred prior to the establishment of the guardianship in the Texas lawsuit. Courts look at how much of an affect the improperly admitted or excluded evidence has on the verdict. Again, it simply defies logic to argue that substantial prejudice occurred when the Plaintiff obtained an award in the amount of $16.4 million against the CIKLIN LUBITZ Co-Defendants, the same Co-Defendants who characterized the Plaintiff as "greedy."

D. The Attorney/Client Privilege Was Properly Upheld.

Plaintiff spent a substantial amount of time at trial addressing bills from the Co-Defendant CIKLIN LUBITZ firm that included communications with KEITH STEIN prior to STEIN's retention in October 2012. Plaintiff takes the position that the Court should have required Defendant ASHLEY CRISPIN to testify as to the substance of these communications. The argument, however, that Plaintiff is entitled to a new trial because it was denied the ability to

introduce evidence concerning these communications: (1) ignores well-settled law; (2) ignores the fact that these issues were substantially briefed, both before the United States Magistrate and this district Court and at every turn the privilege was upheld; and (3) ignores the fact that it is undisputed STEIN provided no legal services prior to October or November 2012, well after the Beachton mortgage was in default and accelerated.

As Plaintiff himself concedes, Magistrate Matthewman entered two separate orders refuting identical arguments raised in the Motion for New Trial. (D.E. 132 and 137). This Court then affirmed these orders (D.E. 167). Unsatisfied with the extensive briefing and multiple rulings refuting Plaintiff's arguments, further Motions to Compel, Motions to Re-Open Discovery, and Renewed Motions to Compel were filed. (D.E. 205, 209, 210, 201). Again, an omnibus order was entered by Magistrate Matthewman denying all of these Motions. This Court then affirmed the ruling, (D.E. 319). And again, for the seventh time Plaintiff's contentions should be rejected.

In any event, it was absolutely undisputed there was no representation of the guardian by STEIN prior to October 2012, and it certainly cannot be said that any communications affected substantial rights of the Plaintiff in presenting his case as to the STEIN DEFENDANTS. The suggestion that communications emanating from CIKLIN LUBITZ prior to STEIN's representation could somehow impose liability on STEIN for the Beachton mortgage default is absurd.

CONCLUSION

This case was fairly tried over a two-week period. Plaintiff obtained a verdict of $16.4 million against the STEIN DEFENDANTS' Co-Defendants. Plaintiff's dissatisfaction that the jury returned a verdict in favor the STEIN DEFENDANTS does not warrant a new trial. The

arguments advanced in the Motion for New Trial are unsupported by the record, unsupported by law, and must be denied.

DATED this 22nd day of September, 2017.

CONROY SIMBERG
Attorney for Stein Defendants
1801 Centrepark Drive East, Suite 200
West Palm Beach, FL 33401
(561) 697-8088/(561) 697-8664/Fax
eservicewpb@conroysimberg.com
jblaker@conroysimberg.com
kmelby@conroysimberg.com

By: /s/ Jeffrey A. Blaker
Jeffrey A. Blaker, Esquire
Florida Bar No. 443913

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 22, 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 identified on the attached Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jeffrey A. Blaker
Jeffrey A. Blaker, Esquire
Florida Bar No.: 443913

SERVICE LIST

J. Ronald Denman, Esq.
Charles D. Bavol, Esq.
Counsel for Plaintiff
The Bleakley Bavol Law Firm
15170 North Florida Avenue
Tampa, FL 33613
(813) 221-3759/(813) 221-3198/Fax
rdenman@bleakleybavol.com
cbavol@bleakleybavol.com

Rachel Studley, Esq.
Brandon J. Hechtman, Esq.
Counsel for Brian M. O'Connell, Ashley Crispin & Ciklin Lubitz O'Connell Firm
Wicker Smith O'Hara McCoy & Ford, P.A.
515 N. Flagler Drive, #1600
West Palm Beach, FL 33401
(561) 689-3800/(561) 689- 9206/Fax
RStudley@wickersmith.com
BHechtman@wickersmith.com