UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

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

Plaintiff,

v.

BRIAN M. O'CONNELL, ASHLEY
N. CRISPIN, CIKLIN LUBITZ &
O'CONNELL, KEITH B. STEIN,
BEYS LISTON MOBARGHA &
BERLAND, LLP and LAW
OFFICES OF KEITH B. STEIN,
PLLC, n/k/a STEIN LAW, PLLC,

Defendants.
_______________________________________/

DEFENDANTS', CIKLIN LUBITZ & O'CONNELL, BRIAN M. O'CONNELL, AND ASHLEY N. CRISPIN, MOTION FOR ENTRY OF FINAL JUDGMENT ON AFFIRMATIVE DEFENSES OF COLLATERAL ESTOPPEL/RES JUDICATA AND RELEASE

Defendants, Ciklin Lubitz & O'Connell ("CLO"), Brian M. O'Connell ("O'Connell"), and Ashley N. Crispin ("Crispin") (collectively "Defendants"), move for final judgment on their affirmative defenses of collateral estoppel/res judicata and release.

I. INTRODUCTION.

This civil action was tried to the jury from July 17 - 20 and 24 - 28, 2017. On July 28, 2017, the jury entered a catastrophic verdict in the amount of $16.4 million against Crispin and

O'Connell. CLO was not on the verdict form. However, CLO is vicariously liable for the conduct of Crispin and O'Connell.

During the course of the trial on July 27, 2017, the Court indicated to the parties that the issues of collateral estoppel/res judicata and release would be decided by the Court, after the jury verdict was rendered. No party objected to that procedure.[1] T. 8:281-82.[2]

II. COLLATERAL ESTOPPEL/RES JUDICATA.

Before trial, Defendants, plus Defendant, Stephen M. Kelly, as Successor Guardian ("Kelly"), filed their Motion for Final Summary Judgment on the issues of collateral estoppel/res judicata (DE 227). That motion was fully briefed[3] and Defendants adopt herein the arguments made in the motion. The Court granted final summary judgment as to Kelly, but denied it as to Defendants.

A. The Elements of Collateral Estoppel/Res Judicata.

As this Court previously has noted:

> Under Florida law,[4] collateral estoppel will preclude relitigation of an issue when the (1) the identical issue; (2) has been fully litigated; (3) by the same parties or their privies and (4) a final decision has been rendered by a court of competent jurisdiction. See *Wingard v. Emerald Venture Florida LLC*, 438 F.3d 1288, 1293 (11th Cir. 2006); *Quinn v. Monroe County*, 330 F.3d 1320, 1329 (11th Cir. 2003).

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1 The Court indicated that it could deal with these issues by way of a Rule 50 motion. Accordingly, this Motion is filed pursuant to Rule 50 or as a request for the Court to rule on the non-jury aspects of this civil action.

2 Trial Transcript shall be "T. vol:page."

3 Plaintiff's Response to Motion for Final Summary Judgment (DE 258); Defendants' Reply in Support of Motion for Final Summary Judgment (DE 274).

4 The Court also noted that "[I]n a diversity case, the Court applies Florida law. See *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1132-33 (11th Cir. 2010); *Royal Ins. Co. of America v. Whitaker Contracting Corp.*, 242 F.3d 1035, 1040 (11th Cir. 2001)."

Under res judicata, a final judgment issued by a court of competent jurisdiction bars a subsequent suit between the same parties based upon the same cause of action. *Felder v. State, Dept. of Management Services, Div. of Retirement*, 993 So. 2d 1031, 1034 (Fla. Dist. Ct. App. 2008). Res judicata precludes consideration not only of issues that were raised but also of issues that could have been raised, but were not raised in the prior case. *Fla. DOT v. Juliano*, 801 So. 2d 101, 105 (Fla. 2001). The doctrine of res judicata applies under Florida law when the following conditions are present: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in persons for or against whom claim is made." *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324, 1332 (11th Cir. 2010) (citing *Fla. Bar v. Rodriguez*, 959 So. 2d 150, 158 (Fla. 2007)); *Bloch v. Home Mortgage*, No. 14-cv-80464, 2014 WL 12580434, at * 1 (S.D. Fla. July 23, 2014).

B. The Court Orders Giving Rise to Collateral Estoppel/Res Judicata.

The Court orders giving rise to collateral estoppel/res judicata include the following:

1. Order on Motion for Court Approval of Settlement Agreement and Mutual Release, dated September 17, 2013 (DE 18-1), (Attached as Exhibit "A") (the "New York Settlement Agreement."). That order has attached to it the Settlement Agreement and Mutual Release.

2. Order on Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs, dated May 23, 2014 (DE 158-5), (Attached as Exhibit "B").

3. Agreed Order on Petitions for Payment of Attorney's Fees and Costs by the Law Firm of Ciklin Lubitz Martens & O'Connell, Bill T. Smith, Jr., P.A., and Agreed Award of Attorney's Fees and Costs to Perlman, Bajandas, Yevoli & Albright, P.L., dated May 23, 2014 (DE 228-24); (Attached as Exhibit "C").

4. Order Approving Global Settlement Agreement, dated March 19, 2015 (DE 158-9), (Attached as Exhibit "D") ("Global Settlement Agreement"). The Order includes the terms of the Global Settlement Agreement.

Each of the orders above resulted from a settlement, but that is of no consequence when considering the application of Florida preclusion doctrines. That is so because it is the law of Florida that when a settlement becomes approved by a court order, it becomes a final judgment in all respects as to issue preclusion doctrines. *Lee v. State Farm Mutual Ins. Co.*, 303 So. 2d 349, 350 (Fla. 3d DCA 1974); *Baron v. Provencial*, 908 So. 2d 526, 527 (Fla. 4th DCA 2005); *Kaplan v. Kaplan*, 624 Fed.Appx 680, 682 (11th Cir. 2015).[5]

C. The Effect of the Settlement and Attorney Fee Orders.

The effect of the settlements and court orders approving those settlements is simple. They establish that all of Julian's complaints for legal malpractice and breach of fiduciary duty are precluded by the doctrines of collateral estoppel/res judicata. The court-approved settlement agreements fall into one of two categories: (a) the Global Settlement Agreement which Julian entered into and the court approved and (b) the New York Settlement Agreement to which Julian objected, the court approved and Julian never appealed.

By those orders the guardianship court concluded that the settlements were in the best interest of the Ward and those orders are now final and non-appealable. For example, by the order of September 17, 2013, the guardianship court approved the New York Settlement Agreement. Paragraph 16 of that Agreement provides that is binding on the heirs, successors and personal representatives of the parties. One of those parties was the guardian standing in the shoes of the

[5] Thus the instant case is distinguished from *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989). The court in that case addressed the issue of collateral estoppel in the context of a settlement that was not approved by a court order and thus had not become a final judgment for purposes of issue preclusion law.

Ward. (Defendants in this case were the guardian's attorneys.) Under Florida law, that agreement is now binding on Plaintiff as the Ward's personal representative. Plaintiff is the personal representative of a party to the order, the Ward. Thus the Ward's estate is bound to the order, as was the Ward himself, through his guardian. See *Kensington Associates v. Moss*, 426 So. 2d 1076, 1078 (Fla. 4th DCA 1983) and *Davis v. Evans*, 132 So. 2d 476, 481-82 (Fla. 1st DCA 1961). Plaintiff now alleges that the terms of the settlement were not fair to his father's (the Ward's) estate because, for example, according to Plaintiff one piece of property (67th Street) of the four properties involved in the settlement was undervalued.

However, those settlement agreements were either approved by and advocated for by Julian, **or** they were approved over his objection after he had the full opportunity to be heard. At the time he did so he was the nominated personal representative under his father's last known will, for the entire period of his father's guardianship. Equally important, Julian was the sole beneficiary of his father's estate under that will.[6]

Further, the orders are effective to bar Julian's claims because in each of the orders, attorneys' fees were approved to be paid to the Ciklin law firm on account of the work performed by its lawyers, O'Connell and Crispin. If any party to those agreements and orders wished to challenge those fees on the grounds of legal malpractice or breach of fiduciary duty, they should have done so during the proceeding and, having not done so, they are barred by the doctrine of res

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[6] As the son and sole beneficiary, Julian Bivins was a "next of kin" as defined by Fla. Stat. § 744.102(14). A next of kin is entitled generally to notice of the guardianship proceedings and the opportunity to be heard. In fact, Julian received notice and participated in the guardianship proceedings, after entering an appearance as an "interested person" under Florida law knowing that he was the nominated executor and sole beneficiary of the Ward's last known will.

judicata. The Order on Motion for Court Approval of Settlement Agreement and Mutual Release provided for attorneys' fees in paragraphs 3(g) and (h). The Order on Hybrid/Contingences Fee Portion of Application of Attorneys for Ward for Fees and Costs provided for the payments of fees in paragraphs 11 and 12. Importantly, that order in paragraph 10 held that "[I]n this case, the ward's best interests were extremely well considered by the work and efforts of his lawyers [i.e., the Ciklin law firm]." The Agreed Order on Petitions for Payment of Attorney's Fees and Costs by the Law Firm of Ciklin Lubitz Martens & O'Connell, Bill T. Smith, Jr., P.A., and Agreed Award of Attorney's Fees and Costs to Perlman, Bajandas, Yevoli & Albright, P.L., dated May 23, 2014, provided for the payment of attorneys' fees to the Ciklin law firm in paragraph 1. Finally, the Order Approving Global Settlement Agreement, dated March 19, 2015, provided for the payment of attorneys' fees to the Ciklin law firm in paragraph 8(c), (d), and (e).

If one were a party to the proceeding, as was Julian, in which the Ciklin law firm was awarded fees, then one was under an obligation to assert claims of malpractice and breach of fiduciary duty in opposition to the award of such fees. By way of an analogy, according to well-established bankruptcy law, when an application that approves an award of attorneys' fees becomes a final, non-appealable order, as a matter of law, any parties who could have objected to the application on grounds of malpractice, negligence, breach of fiduciary duty or malfeasance of any kind on the part of the lawyers, are precluded from doing so because of the doctrine of res judicata. Legal malpractice and a breach of fiduciary duty are obviously grounds that could and should be considered by a court in awarding attorneys' fees and, if those grounds are not asserted by parties to the proceeding in opposition to the award, then those parties are barred by the doctrine of res judicata from attempting to re-litigate the fee award by asserting wrongs on the part of the

attorneys. *Capitol Hill Grp. v. Pillsbury, Winthrop, Shaw, Pittman, LLC*, 569 F.3d 485, 493 (D.C. Cir. 2009)(approving of the district court and bankruptcy court determinations that Capitol Hill "could have pursued claims against Shaw Pittman regarding the adequacy of its representation ... at the bankruptcy fee hearings but that it failed to do so and would therefore be barred from later asserting claims based on Shaw Pittman's representation by the doctrine of res judicata"); *Iannochino v. Rokolakis (In re Iannochino)*, 242 F.3d 36, 47 (1st Cir. 2001) (noting that, during the fee application proceedings, "[a] bankruptcy court . . . makes an implied 'finding of quality and value' in the professional services provided . . . during the bankruptcy," and affirming summary judgment of the malpractice claims on res judicata grounds); *Osherow v. Ernst & Young, LLP (In re Intelogic Trace, Inc.)*, 200 F.3d 382, 387-88 (5th Cir. 2000)(affirming summary judgment on the malpractice claims, and noting that "an award of fees for professionals . . . employed by a bankruptcy estate represents a determination of 'the nature, the extent, and the value of such services,' the same services that were at issue in the trustee's malpractice complaint. Because those issues could have been raised at the fee petition proceedings, they were barred by res judicata, which "bars claims that should have been litigated in a previous proceeding").

As the bankruptcy court cases indicate, when a guardianship court judge enters an order regarding the amount of attorneys' fees to be paid to lawyers providing service to the guardianship, that award of fees must necessarily include an implied "finding of quality and value" in the professional services provided during the course of the guardianship. There could be no doubt that any interested party in the guardianship proceedings could have objected to the amount of the fees awarded and such objection could have been based upon an alleged legal malpractice or breach of fiduciary duty. Julian did not object, although he had every right to do so, and he is

bound by the doctrine of res judicata through the court's explicit finding that the conduct of the Ciklin law firm was in the best interest of the Ward. Thus, both the settlements and the attorneys' fees were approved by the guardianship court, barring by res judicata Plaintiff's claims.

D. The Same Issues Were Litigated in the Guardianship Proceedings Leading to the Cited Court Orders as Were Litigated in This Legal Malpractice Case.

There is no dispute that Plaintiff, through his attorney, Mr. Denman, raised the same issues in opposition to the guardianship court orders as he raised in this malpractice action. For example, as to the failure to obtain MAI appraisals, upon which the jury predicated its malpractice verdict, Mr. Denman, Plaintiff's attorney (then and now), where he unsuccessfully argued on Julian's behalf that the New York Settlement Agreement should not be approved and made an order of the court, made the following arguments to the guardianship court:

> MR. DENMAN: He [Julian] is a proper party because all this comes back to is the amount of attorney's fees that are being paid and the amount of payoffs being made between what we call the collusion of parties in order to have this go away. Rogers [the first guardian] is staying in power so he can payoff of his friends, to the expense of Julian. He's made it clear he could care less what happens to Julian. He wants to take care of all these expenses. What we seek to prove is that while maybe a benefit to the ward out of this, we still haven't received the appropriate -- we've been requesting -- <u>what are the valuations? How is the settlement made?</u> Look at the amount of attorney's fees.

DE 395 (CLO Def Ex 35/11:15–12:3) (emphasis added).

> MR. DENMAN: … within -- by August 30. So we object to certain aspects of it because if this were a commercial closing, we would have done -- <u>any attorney would do a considerable amount of due diligence to understand the valuation.</u>

DE 395 (CLO Def Ex 35/62:19–23) (emphasis added).

> MR. DENMAN: Your Honor, what all comes into play here is the fact that -- <u>the next thing is, there is four properties. There has been no appraisals that we've seen on the four properties. We just got last week -- there was a letter from a realtor as to her opinion on the two New York properties.</u> I still don't have anything on

> London. Rogers has never gone over there. He's never sent anything over there as to full appraisal. We don't have the background on that. We still don't even have an appraisal on 330. So we're doing an exchange of all these properties, supposedly in settlement of -- I'm not exactly sure which claim is being settled here, but then what we –

DE 395 (CLO Def Ex 35/68:23-69:12) (emphasis added).

> MR. DENMAN: I think we should at least have an appraisal, not just one realtor's opinion, but an appraisal.
>
> THE COURT: I don't care where that – first of all, this doesn't even have a value.

DE 395 (CLO Def Ex 35/120:11-15) (emphasis added).

Thus, in the guardianship proceedings, Plaintiff litigated and lost his objection that there were no MAI appraisals. He is not permitted a second bite at the apple. *Carson v. Gibson*, 638 So. 2d 79, 81 (Fla. 2d DCA 1994) ("the estoppel in this case arises from the fact that Carson chose to litigate as affirmative defenses the same issues that he now wishes to litigate as a malpractice cause of action. Estoppel by judgment or collateral estoppel applies when the identical parties wish to relitigate issues that were actually litigated as necessary and material issues in a prior action.")[7].

E. There Is Privity Between Julian as Personal Representative of the Estate of Oliver Wilson Bivins and Julian as the Nominated Personal Representative and the Sole Beneficiary of the Estate of Oliver Wilson Bivins.

This Court denied the Ciklin law firm's motion for summary judgment on the grounds of res judicata "for the simple reason that the Defendants' attorneys were not parties or in privity with

[7] This case holds that while the malpractice claim was not barred by res judicata because the parties were not identical in the charging lien dispute, the later malpractice claim would be barred by collateral estoppel. That is so because the same issues that were presented in opposition to the attorney's charging lien were alleged to be the basis of the later legal malpractice case.

any party before the guardianship court" (DE 296, p. 6). The Court cited *Keramati v. Schackow*, 553 So. 2d 741 (Fla. 5th DCA 1989).[8]

In *Keramti*, a minor child, Keramati, and his parents sued Dr. Richardson and Monroe Memorial Hospital for medical malpractice. That case was settled. Then Keramati and his parents sued for legal malpractice the lawyers (Schackow and McGalliard) that represented them in the medical malpractice case. The court held that the doctrine of res judicata could not applied because "the defendants in the prior suit were Dr. Richardson and the hospital. In this case, the defendants are Schackow and McGalliard."

That is a far cry from the case at hand in which Julian during the guardianship proceedings was (1) the nominated personal representative of his father's estate; (2) the sole beneficiary of the estate; (3) an "interested party" and "next of kin" who actively participated in the guardianship proceedings; and (4) one who either approved or objected to the settlements at issue. Now Julian as personal representative of his father's estate brings this malpractice action against Defendants, claiming that during the guardianship proceedings the estate was not in privity with the guardian's attorneys. Julian is wrong. As discussed below, Defendants were either parties before the guardianship court or in privity with a party before the guardianship court or both.

1. Defendants as parties.

When examining the attorneys' fees orders in section II.B. above, it is apparent that the

[8] The court also observed that the *Keramati* court held that in the context of a settlement agreement "the adequacy of the amount settled for was not litigated." *Id.* at 744. That was true in *Keramati* because that case did not involve a court-approved settlement. However, once and if a settlement becomes approved by a court, it becomes a final order subject to the doctrine of res judicata as discussed in section II(B) above.

Defendants were some of the moving parties pursuant to written petitions under Florida Statues 744.108 in seeking those orders. Defendants asked the court to authorize them to be paid fees for the legal services they rendered to the guardian. The court awarded the requested fees. Thus, even if limited to those proceedings alone, which encompass all of Plaintiff's alleged wrongful acts of the Defendants, Defendants were "parties … before the guardianship court." Further, under the Florida Guardianship Law (chapter 744) attorneys for a guardian play an essential role in the entire guardianship administration process and as this very case demonstrates are effectively parties before the guardianship court. **Defendants in privity with a party to the guardianship.**

It is irrefutable that Defendants were in privity with the professional guardians for the Ward. (Orders [DE 132, 167, and 296]) It is also clear that those same guardians were parties to the guardianship. Thus, Defendants were in privity with a party to the guardianship.

F. Florida Law is Well Established That, By Any Test, Julian, as a Nominated Personal Representative, the Sole Beneficiary of the Estate, the Next of Kin, and an Interested Person in the Guardianship Proceedings is in Privity in This Legal Malpractice Case, Where He is the Personal Representative of the Ward's Estate and the Plaintiff.

The law on this issue is as follows:

> As to the identity of the persons and parties to the action, in the first case, they sued individually, and in this case they sued in their capacity as trustees. 'The term 'parties' has frequently been given a much broader coverage than merely embracing parties to the record of an action [.]' *Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 863 (Fla. 4th DCA 1972). As the supreme court explained later, '[f]or one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party.' *Stogniew v. McQueen*, 656 So. 2d 917, 920 (Fla.1995) (*citing Se. Fid. Ins. Co. v. Rice*, 515 So. 2d 240 (Fla. 4th DCA 1987)). The children, as trustees, fit within that broad definition. While the children also added their father's corporation as a defendant because it was an asset of the void trust, it too can be considered a party for res judicata purposes.

Jasser v. Saadeh, 103 So. 3d 982, 985 (Fla. 4th DCA 2012). The concept of privity is dispositive here:

> 'privity' refers to a cluster of relationships ... under which the preclusive effects of a judgment extend beyond a party to the original action and apply to persons having specified relationships to that party....' Restatement (Second) of Judgments: ch. 1, Scope. 'One party may be said to be a privy of another whenever there is a mutual or successive relationship to the same right.' *Osburn v. Stickel*, 187 So. 2d 89, 91–92 (Fla. 3d DCA 1966); *see also EEOC v. Pemco Aeroplex, Inc*., 383 F.3d 1280, 1286 (11th Cir.2004) ("Privity' is a flexible legal term, comprising several different types of relationships and generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.'). The existence of a virtual representation relationship is based on 'closely aligned' interests of a party and a person who is not a formal party. *Stogniew*, 656 So. 2d at 920 (*quoting Aerojet–Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.1975)); see also *Pemco*, 383 F.3d at 1287 (setting forth "four factors [used] in determining whether there is virtual representation: whether there was 'participation in the first litigation, apparent consent to be bound, apparent tactical maneuvering, [and] close relationships between the parties and nonparties."

Cook v. State, 921 So. 2d 631, 635 (Fla. 2d DCA 2005).

> It is well settled that even though a party in a subsequent suit was not a named party in a prior suit, such party is bound by the prior judgment if he participated in the first proceeding or was represented by a party to that proceeding. In *McGregor v. Provident Trust Co. of Philadelphia*, 1935, 119 Fla. 718, 162 So. 323, our Supreme Court stated:
>
>> 'There can be no question but that, in order for a person or corporation to be brought within the estoppel of the rule of res adjudicata, it is not necessary for him to have been a formal record party. His conduct may have been such as to give him the status of a party in actuality, and in such event the courts will not withhold from him the application of the rule because of the technical objection that he was not a party on the record. See . . . *Plumb v. Crane*, 123 U.S. 560, 8 S.Ct. 216, 31 L.Ed. 268 . . ..'

Kline v. Heyman, 309 So. 2d 242, 244-45 (Fla. 2d DCA 1975).

> In its broadest sense, privity is defined as "mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." *Black's Law Dictionary* 1079 (5th ed. 1979). One not a party to a suit is in privity with one who is where his interest in the action was such that he will be bound by the final judgment as if he were a party. *Id*.

Southeastern Fidelity Ins. Co. v. Rice, 515 So. 2d 240 (1987)(going on to discuss collateral estoppel).

A couple of additional points should be made.

First, Plaintiff's case for malpractice and breach of fiduciary duty is based on finding privity between the Ward and the Ciklin law firm through the concept of "intended third-party beneficiary." Before *Saadeh v. Connors*, 166 So. 3d 959 (Fla. 4th DCA 2015), the lack of privity between Julian Bivins and the Ciklin law firm would have foreclosed this action. However, now that there is a duty of care owed by the attorney for the guardian to the Ward, it must follow that Defendants were in privity with the Ward, i.e., the central party to the entire guardianship, and that privity carries over to the Ward's estate, thereby barring Plaintiff's claims. The privity declared by the *Saadeh* court must flow both ways. If the Ward is in privity with Defendants, Defendants must be in privity with the Ward's estate.

Further, defendant guardian Kelly was granted summary judgment in this case. He undisputedly had a fiduciary duty to the Ward. If the defendant guardian, who owed a direct duty to the Ward, was entitled to summary judgment, then likewise the guardian's lawyers, who only owed an indirect third-party beneficiary duty to the Ward, must be protected by the very same doctrines of collateral estoppel and res judicata that protected the guardian.

Finally, during the trial, the Court allowed statements by the now deceased Ward, to be admitted into evidence over hearsay objection under the business record exception finding that the Ward was a necessary part of the guardianship entity. (T. 740-41) If the deceased Ward is a necessary component of the guardianship entity, then the attorneys for the guardianship, i.e. Defendants, are likewise a necessary component of the guardianship entity.

Specifically, there are four essential components to the guardianship: (1) the Court; (2) the ward; (3) the court-appointed guardian; and (4) the guardian's required attorney. There are other non-essential persons involved in a guardianship, but a guardianship cannot exist without counsel for the guardian. "Every guardian […] shall be represented by an attorney admitted to practice in Florida." *See* Fla. Prob. R. 5.030(a). Thus, there is privity between the guardian's attorneys and the guardianship as they are bound by the guardianship court's decisions effecting the guardian. *Jasser v. Saadeh*, 103 So. 3d 982, 985 (Fla. 4th DCA 2012) ("The term 'parties' has frequently been given a much broader coverage than merely embracing parties to the record of an action [.]"

As the Supreme Court explained, "[f]or one to be in privity with one who is a party to a lawsuit or for one to have been virtually represented by one who is party to a lawsuit, one must have an interest in the action such that she will be bound by the final judgment as if she were a party.")(*quoting Seaboard Coast Line R.R. Co. v. Indus. Contracting Co.*, 260 So. 2d 860, 863 (Fla. 4th DCA 1972)). Here there is no doubt that the estate is bound to the orders, even though the estate was not a named party in the guardianship proceedings.

III. <u>RELEASE</u>.

Plaintiff has released all of his claims in this case. The following documents and evidence were admitted into evidence during the trial, which establish the defense of release. First, on

September 17, 2013, the New York Settlement Agreement was entered into and ordered by the Court (Pl. Ex. 78). Second, in the afternoon of September 19, 2014, the Court heard and entered onto the record the terms of the Global Settlement that included mutual releases (CLO Def. Ex. 8, p. 39 lines 15-20). Third, Oliver Bivins, Sr. died on March 2, 2015 (Pl. Ex. 112). Fourth, after the death of his father, Julian, the nominated executor of Oliver, Sr.'s will (Pl. Ex. 45), moved to compel entry of the Order on Global Settlement on March 16, 2015 (CLO Def. Ex. 129). Fifth, on March 19, 2015 the Court entered the Order on Global Settlement (Pl. Ex. 113). Sixth, before trial, the parties stipulated as follows: "The terms of the Global Settlement Agreement entered into between the Guardian, **its attorneys**, and Julian Bivins on September 19, 2014 was read into the court record to document the settlement on September 19, 2014" (DE 318, § 5, ¶ 13) (emphasis added). Seventh, at trial, Stephen Kelly, the Successor Guardian, testified that the mutual release was part of a "total global settlement" that released "myself, Julian [and] the attorneys" (T. 5:289).

Under Florida Statue section 733.601, the actions of Julian after the death of his father bind the estate. As this Court already has ruled, relation back under section 733.601 applies after the death of the testator, Oliver, Sr. (DE 296, p. 8). After the death of his father, Julian moved to compel entry of an order approving the Global Settlement. That Order was entered March 19, 2015. The release approved by that Order includes all of the issues raised as facts to be resolved by the jury outlined in the Pretrial Stipulation because each of those issues predate March 16, 2015 (DE 318, §6). Further, the release includes all of the issues stemming from the New York Settlement Agreement, which was the focus of the trial, because the New York Settlement was approved more than a year before the Global Settlement was entered on March 19, 2015 and 17 days after the Ward's death. Accordingly, Plaintiff's claims all fail because the Estate by operation

of section 733.601 released the Guardians and their attorneys from any claims arising out of the guardianship prior to the date of the Order on Global Settlement, March 19, 2015.

The releases at issue are part of court-approved settlements. As such, they are favored by the courts and should be enforced when possible. *Blunt v. Tripp Scott, P.A.*, 962 So. 2d 987, 989 (Fla 4th DCA 2007; *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So. 2d 306, 314 (Fla. 2000)("Generally, Florida courts enforce general releases to further the policy of encouraging settlements."); *Hanson v. Maxfield*, 23 So. 3d 736, 739 (Fla. 1st DCA 2009)("Settlements are highly favored and will be enforced whenever possible."); *Hernandez v. Gil*, 958 So. 2d 390, 391 (Fla. 3d DCA 2007)("As reiterated in numerous court decisions, '[t]he public policy of the State of Florida ... highly favors settlement agreement among parties and will seek to enforce them whenever possible.'").

IV. CONCLUSION.

In this case, both the application of the doctrines of collateral estoppel/res judicata and the doctrine of release turn on the issue of privity. Over the course of time and during the trial the record has developed to a point where it is clear that Julian, as next of kin, an interested party, the sole beneficiary, and the nominated personal representative of the Ward is in privity with Julian as personal representative of the Ward's estate, its sole beneficiary, and the Defendants in this action. In fact, Julian as Plaintiff stipulated in the Pretrial Stipulation that the attorneys were parties to the Global Settlement Agreement which Julian moved to compel entry of after his father's (the Ward's) death.

The doctrine of privity is not confined to "merely embracing parties to the record." Instead, one must have an interest in the action such that he will be bound by the final judgment.

Julian, as the nominated representative of the estate and its sole beneficiary is bound to the final orders of the guardianship court, just as the estate is bound to those orders.

Further, there is a mutual or successive relationship to the same right between Julian as the nominated personal representative and the sole beneficiary and Julian as the appointed personal representative, the sole beneficiary, and the Plaintiff in this action. Julian as the sole beneficiary, nominated personal representative, and next of kin adequately represented himself in the guardianship proceedings and had the same interest as he does now that he is the actual personal representative of the estate and its sole beneficiary. Julian's interests are closely aligned in the guardianship proceedings and this malpractice action.

Accordingly, final judgment should be entered in favor of Defendants on their affirmative defenses of collateral estoppel/res judicata and release.

Dated: August 25, 2017 Respectfully submitted,

s/ *L. Louis Mrachek*
L. Louis Mrachek (Florida Bar No. 182880)
lmrachek@mrachek-law.com
mchandler@mrachek-law.com
Alan B. Rose (Florida Bar No. 961825)
arose@mrachek-law.com
Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A.
505 South Flagler Drive, Suite 600
West Palm Beach, Florida 33401
Telephone:(561) 655-2250| Fax: (561) 655-5537
Attorneys for Ciklin Lubitz & O'Connell

s/Rachel Studley
Rachel Studley, Esquire (0578088)
Rstudley@WickerSmith.com
Brandon J. Hechtman, Esquire (88652)
Bhechtman@wickersmith.com
WICKER SMITH O'HARA McCOY & FORD, P.A.
515 N. Flagler Dr. Suite 1600
West Palm Beach, FL 33401
Phone: (561) 689-3800
Fax: (561) 689-9206
Attorneys for Ashley N. Crispin, Brian M. O'Connell, and Ciklin Lubitz & O'Connell

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.

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L. Louis Mrachek (Florida Bar No. 182880)

SERVICE LIST
Case No. 9:15-cv-81298-KAM/Matthewman
United States District Court, Southern District of Florida

J. Ronald Denman, Esquire
Email: rdenman@bleakleybavol.com
The Bleakley Bavol Law Firm
15170 North Florida Avenue
Tampa, FL 33613
(813) 221-3759 - Telephone
(813) 221-3198 - Facsimile

Rachel Studley, Esquire
Email: rstudley@wickersmith.com
Brandon J. Hechtman, Esquire
Email: bhechtman@wickersmith.com
Wicker Smith O'Hara McCoy &
Ford, P.A.
2800 Ponce de Leon Blvd., Suite 800
Coral Gables, FL 33135
(305) 448-3939 - Telephone
(305) 441-1745 - Facsimile

Jeffrey A. Blaker, Esquire
Email: jblaker@conroysimberg.com
aschultz@conroysimberg.com;
earanda@conroysimberg.com
Conroy, Simberg, Ganon, Krevans, Abel,
Lurvey, Morrow & Schefer, P.A.
1801 Centrepark Drive East, #200
West Palm Beach, FL 33401
(561) 697-8088 - Telephone
(561) 697-8664 - Facsimile

Wendy J. Stein, Esquire
Email: wstein@bonnerkiernan.com
Bonner Kiernan Trebach & Crociata, LLP
1233 20th Street NW, 8th Floor
Washington, DC 20036
(202) 712-7000 - Telephone
(202) 712-7100 - Facsimile