

1 IN THE FIFTEENTH JUDICIAL CIRCUIT COURT
2 IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CASE NO: 502012CP004391XXXXNBIH

4
5 IN RE:
6 ESTATE OF SIMON L. BERNSTEIN,
7 _____/

8
9
10 Proceedings before the Honorable
11 ROSEMARIE SCHER

12
13 [EXCERPT - BRIAN O'CONNELL TESTIMONY]

14
15
16 Thursday, February 16, 2017
17 3188 PGA Boulevard
18 North County Courthouse
19 Palm Beach Gardens, Florida 33410
20 2:38 p.m. - 4:46 p.m.

21 ORIGINAL

22
23 Reported by:
24 Lisa Mudrick, RPR, FPR
25 Notary Public, State of Florida

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42

1 P R O C E E D I N G S

2 - - -

3 * * * * *

4 BRIAN O'CONNELL TESTIMONY

5 - - -

6 MR. FEAMAN: Next I would call Brian
7 O'Connell to the stand.

8 THE COURT: Okay.

9 - - -

10 Thereupon,

11 BRIAN O'CONNELL,

12 a witness, being by the Court duly sworn, was
13 examined and testified as follows:

14 THE WITNESS: I do.

15 THE COURT: Have a seat. Thank you very
16 much.

17 Before we start I need six minutes to use
18 the restroom. I will be back in six minutes.

19 (A recess was taken.)

20 THE COURT: All right. Call

21 Mr. O'Connell. I apologize. Let's proceed.

22 MR. FEAMAN: Thank you, Your Honor.

23 DIRECT (BRIAN O'CONNELL)

24 BY MR. FEAMAN:

25 Q. Please state your name.

1 A. Brian O'Connell.

2 Q. And your business address?

3 A. 515 North Flagler Drive, West Palm Beach,
4 Florida.

5 Q. And you are the personal representative,
6 the successor personal representative of the Estate
7 of Simon Bernstein; is that correct?

8 A. Yes.

9 Q. And I handed you during the break Florida
10 Statute 733.602. Do you have that in front of you?

11 A. I do.

12 Q. Would you agree with me, Mr. O'Connell,
13 that as personal representative of the estate that
14 you have a fiduciary duty to all interested persons
15 of the estate?

16 A. To interested persons, yes.

17 Q. Okay. Are you aware that Mr. Stansbury,
18 obviously, has a lawsuit against the estate,
19 correct?

20 A. Correct.

21 Q. And he is seeking damages as far as you
22 know in excess of \$2 million dollars; is that
23 correct?

24 A. Yes.

25 Q. Okay. And the present asset value of the

1 estate excluding a potential expectancy in Chicago
2 I heard on opening statement was around somewhere a
3 little bit over \$200,000; is that correct?

4 A. Correct.

5 Q. And --

6 A. Little over that.

7 Q. Okay. And you are aware that in Chicago
8 the amount at stake is in excess of \$1.7 million
9 dollars, correct?

10 A. Yes.

11 Q. And if the estate is successful in that
12 lawsuit then that money would come to the Estate of
13 Simon Bernstein, correct?

14 A. Correct.

15 Q. And then obviously that would quintuple,
16 if my math is correct, the assets that are in the
17 estate right now; is that correct?

18 A. They would greatly enhance the value of
19 the estate, whatever the math is.

20 Q. Okay. So would you agree that
21 Mr. Stansbury is reasonably affected by the outcome
22 of the Chicago litigation if he has an action
23 against the estate in excess of two million?

24 A. Depends how one defines a claimant versus
25 a creditor. He certainly sits in a claimant

1 position. He has an independent action.

2 Q. Right.

3 A. So on that level he would be affected with
4 regard to what happens in that litigation if his
5 claim matures into an allowed claim, reduced to a
6 judgment in your civil litigation.

7 Q. So if he is successful in his litigation,
8 it would -- the result of the Chicago action, if
9 it's favorable to the estate, would significantly
10 increase the assets that he would be able to look
11 to if he was successful either in the amount of
12 300,000 or in an amount of two million?

13 A. Right. If he is a creditor or there's a
14 recovery then certainly he would benefit from that
15 under the probate code because then he would be
16 paid under a certain priority of payment before
17 beneficiaries.

18 Q. All right. And so then Mr. Stansbury
19 potentially could stand to benefit from the result
20 of the outcome of the Chicago litigation depending
21 upon the outcome of his litigation against the
22 estate?

23 A. True.

24 Q. Correct?

25 A. Yes.

1 Q. So in that respect would you agree that
2 Mr. Stansbury is an interested person in the
3 outcome of the estate in Chicago?

4 A. I think in a very broad sense, yes. But
5 if we are going to be debating claimants and
6 creditors then that calls upon certain case law.

7 Q. Okay.

8 A. But I am answering it in sort of a general
9 financial sense, yes.

10 Q. Okay. We entered into evidence Exhibits 7
11 and 8 which were e-mails that were sent to you
12 first by an associate in Mr. Stamos's office and --

13 MR. FEAMAN: Could I approach, Your Honor?

14 THE COURT: Yes. Do you have an extra
15 copy for him so I can follow along?

16 MR. FEAMAN: I think I do.

17 THE COURT: Okay. If you don't, no
18 worries. Let me know.

19 Does anyone object to me maintaining the
20 originals so that I can follow along? If you
21 don't --

22 MR. FEAMAN: I know we do.

23 MR. ROSE: If you need my copy to speed
24 things up, here.

25 ///

1 BY MR. FEAMAN:

2 Q. There's our copies of 7 and 8.

3 A. Which one did you want me to look at
4 first?

5 Q. Take a look at the one that came first on
6 January 31st, 2007. Do you see that that was an
7 e-mail directed to you from is it Mr. Kuyper, is
8 that how you pronounce his name?

9 A. Yes.

10 Q. Okay. On January 31st. Do you recall
11 receiving this?

12 A. Let me take a look at it.

13 Q. Sure.

14 A. I do remember this.

15 Q. All right. And did you have any
16 discussions with Mr. Kuyper or Mr. Stamos
17 concerning your comments regarding the Court's
18 ruling which was denying the estate's motion for
19 summary judgment?

20 A. There might have been another e-mail
21 communication, but no oral communication since
22 January.

23 Q. Did you send an e-mail back in response to
24 this?

25 A. That I don't recall, and I don't have my

1 records here.

2 Q. Okay.

3 A. I am not sure.

4 Q. Why don't we take a look at Exhibit 8, if
5 we could. That's the e-mail from Mr. Stamos dated
6 February 14th to you and me and Mr. Stansbury. Do
7 you see that?

8 A. Yes.

9 Q. And he says, "What's our position on
10 settlement?," correct?

11 A. Correct.

12 Q. Okay. And that's because Mr. Stamos had
13 received an e-mail from plaintiff's counsel in
14 Chicago soliciting some input on a possible
15 settlement, correct?

16 A. Yes.

17 Q. And when you received this did you respond
18 to Mr. Stamos either orally or in writing?

19 A. Not yet. I was in a mediation that lasted
20 until 2:30 in the morning yesterday, so I haven't
21 had a chance to speak to him.

22 Q. So then you haven't had any discussions
23 with Mr. Stamos concerning settlement --

24 A. No.

25 Q. -- since this?

1 A. Not -- let's correct that. Not in terms
2 of these communications.

3 Q. Right.

4 A. I have spoken to him previously about
5 settlement, but obviously those are privileged that
6 he is my counsel.

7 Q. Okay. And you are aware that -- would you
8 agree with me that Mr. Ted Bernstein, who is in the
9 courtroom today, is a plaintiff in that action in
10 Chicago?

11 A. Which action?

12 Q. The Chicago filed, the action filed by
13 Mr. Bernstein?

14 A. Can you give me the complaint?

15 Q. Sure.

16 MR. FEAMAN: If I can take a look?

17 THE COURT: Go ahead.

18 BY MR. FEAMAN:

19 Q. This is the --

20 MR. ROSE: We'll stipulate. The documents
21 are already in evidence.

22 THE COURT: Same objection?

23 MR. ROSE: I mean, we are trying to save
24 time.

25 ///

1 BY MR. FEAMAN:

2 Q. Take a look at the third page.

3 (Overspeaking.)

4 THE COURT: Hold on. Hold on. Hold on.

5 I have got everybody talking at once. It's
6 Feaman's case. We are going until 4:30. I
7 have already got one emergency in the, we call
8 it the Cad, that means nothing to you, but I am
9 telling you all right now I said we are going
10 to 4:30.

11 THE WITNESS: Yes, sir, Ted Bernstein is a
12 plaintiff.

13 BY MR. FEAMAN:

14 Q. Individually, correct?

15 A. Individually and as trustee.

16 Q. And Mr. Stamos is your attorney who
17 represents the estate, correct?

18 A. Correct.

19 Q. And the estate is adverse to the
20 plaintiffs, including Mr. Bernstein, correct?

21 A. In this action, call it the Illinois
22 action, yes.

23 Q. Correct.

24 A. Okay.

25 THE COURT: Hold on. One more time. Go

1 back and say that again. You are represented
2 by Mr. Stamos?

3 THE WITNESS: Right, in the Illinois
4 action, Your Honor.

5 THE COURT: Right.

6 THE WITNESS: And Ted Bernstein
7 individually and as trustee is a plaintiff.

8 THE COURT: Right, individually and as
9 trustee, got it.

10 THE WITNESS: And the estate is adverse to
11 Ted Bernstein in those capacities in that
12 litigation.

13 BY MR. FEAMAN:

14 Q. All right. And are you aware --

15 THE COURT: Thank you.

16 BY MR. FEAMAN:

17 Q. And are you aware that Mr. Rose represents
18 Mr. Ted Bernstein in various capacities?

19 A. Yes.

20 Q. Generally?

21 A. In various capacities generally, right.

22 Q. Including individually, correct?

23 A. That I am not -- I know as a fiduciary,
24 for example, as trustee from our various and sundry
25 actions, Shirley Bernstein, estate and trust and so

1 forth. I am not sure individually.

2 Q. How long have you been involved with this
3 Estate of Simon Bernstein?

4 A. A few years.

5 Q. Okay. And as far as you know
6 Mr. Bernstein has been represented in whatever
7 capacity in all of this since that time; is that
8 correct?

9 A. He is definitely -- Mr. Rose has
10 definitely represented Ted Bernstein since I have
11 been involved. I just want to be totally correct
12 about exactly what capacity. Definitely as a
13 fiduciary no doubt.

14 Q. Okay. And did you ever see the deposition
15 that was taken by your lawyer in the Chicago action
16 that was introduced as Exhibit 6 in this action?

17 A. Could I take a look at it?

18 Q. Sure. Have you seen that deposition
19 before, Mr. O'Connell?

20 A. I am not sure. I don't want to guess.
21 Because I know it's May of 2015. It's possible.
22 There were a number of documents in all this
23 litigation, and I would be giving you a guess.

24 Q. On that first page is there an appearance
25 by Mr. Rose on behalf of Ted Bernstein in that

1 deposition?

2 A. Yes.

3 Q. So would you agree with me that Ted
4 Bernstein is adverse to the estate in the Chicago
5 litigation? You said that earlier, correct?

6 A. Yes.

7 Q. Okay. And would you agree with me upon
8 reviewing that deposition that Mr. Rose is
9 representing Ted Bernstein there?

10 MR. ROSE: Objection, calls for a legal
11 conclusion.

12 THE WITNESS: There's an appearance by
13 him.

14 THE COURT: Sustained.

15 BY MR. FEAMAN:

16 Q. There's an appearance by him? Where does
17 it show that?

18 MR. ROSE: The objection is sustained.

19 THE COURT: I sustained the objection.

20 MR. FEAMAN: Oh, okay. Sorry.

21 BY MR. FEAMAN:

22 Q. Now, you have not gotten -- you said that
23 you wanted to retain Mr. Rose to represent the
24 estate here in Florida, correct?

25 A. Yes. But I want to state my position

1 precisely, which is as now has been pled that Ted
2 Bernstein should be the administrator ad litem to
3 defend that litigation. And then if he chooses,
4 which I expect he would, employ Mr. Rose, and
5 Mr. Rose would operate as his counsel.

6 Q. Okay. So let me get this, if I understand
7 your position correctly. You think that Ted
8 Bernstein, who you have already told me is suing
9 the estate as a plaintiff in Chicago, it would be
10 okay for him to come in to the estate that he is
11 suing in Chicago to represent the estate as
12 administrator ad litem along with his attorney
13 Mr. Rose? Is that your position?

14 A. Here's why, yes, because of events. You
15 have an apple and an orange with respect to
16 Illinois. Mr. Rose and Ted Bernstein is not going
17 to have any -- doesn't have any involvement in the
18 prosecution by the estate of its position to those
19 insurance proceeds. That's not on the table.

20 THE COURT: Say it again, Ted has no
21 involvement?

22 THE WITNESS: Ted Bernstein and Mr. Rose
23 have no involvement in connection with the
24 estate's position in the Illinois litigation,
25 Your Honor. I am not seeking that. If someone

1 asked me that, I would say absolutely no.

2 BY MR. FEAMAN:

3 Q. I am confused, though, Mr. O'Connell.
4 Isn't Ted Bernstein a plaintiff in the insurance
5 litigation?

6 A. Yes.

7 Q. Okay. And as plaintiff in that insurance
8 litigation isn't he seeking to keep those insurance
9 proceeds from going to the estate?

10 A. Right.

11 Q. Okay.

12 A. Which is why the estate has a contrary
13 position --

14 Q. So if the estate --
15 (Overspeaking.)

16 THE COURT: Let him finish his answer.

17 THE WITNESS: It's my position as personal
18 representative that those proceeds should come
19 into the estate.

20 BY MR. FEAMAN:

21 Q. Correct.

22 A. Correct.

23 Q. And it's Mr. Bernstein's position both
24 individually and as trustee in that same action
25 that those proceeds should not come into the.

1 estate?

2 A. Right.

3 Q. Correct? And Mr. Bernstein is not a
4 monetary beneficiary of the estate, is he?

5 A. As a trustee he is a beneficiary,
6 residuary beneficiary of the estate. And then he
7 would be a beneficiary as to tangible personal
8 property.

9 Q. So on one hand you say it's okay for
10 Mr. Bernstein to be suing the estate to keep the
11 estate from getting \$1.7 million dollars, and on
12 the other hand it's okay for him and his attorney
13 to defend the estate. So let me ask you this --

14 A. That's not what I am saying.

15 Q. Okay. Well, go back to Exhibit 8, if we
16 could.

17 A. Which one is Exhibit 8?

18 Q. That's the e-mail from Mr. Stamos that you
19 got last week asking about settlement.

20 A. The 31st?

21 Q. Right.

22 A. Well, actually the Stamos e-mail is
23 February 14th.

24 Q. Sorry, February 14th. And Mr. Rose right
25 now has entered an appearance on behalf of the

1 estate, correct?

2 A. You have to state what case.

3 Q. Down here in Florida.

4 A. Which case?

5 Q. The Stansbury action.

6 A. The civil action?

7 Q. Yes.

8 A. Yes. You need to be precise because
9 there's a number of actions and various
10 jurisdictions and various courts.

11 Q. And Mr. Rose's client in Chicago doesn't
12 want any money to go to the estate. So when you
13 are discussing settlement with Mr. Stamos, are you
14 going to talk to your other counsel, Mr. Rose,
15 about that settlement when he is representing a
16 client adverse to you?

17 A. No.

18 Q. How do we know that?

19 A. Because I don't do that and have not done
20 that.

21 Q. So you --

22 A. Again, can I finish, Your Honor?

23 THE COURT: Yes, please.

24 THE WITNESS: Thanks. Because there's a
25 differentiation you are not making between

1 these pieces of litigation. You have an
2 Illinois litigation pending in federal court
3 that has discrete issues as to who gets the
4 proceeds of a life insurance policy. Then you
5 have what you will call the Stansbury
6 litigation, you represent him, your civil
7 action, pending in circuit civil, your client
8 seeking to recover damages against the estate.

9 BY MR. FEAMAN:

10 Q. So Mr. Rose could advise you as to terms
11 of settlement, assuming he is allowed to be counsel
12 for the estate in the Stansbury action down here,
13 correct?

14 A. About the Stansbury action?

15 Q. Right, about how much we should settle
16 for, blah, blah, blah?

17 A. That's possible.

18 Q. Okay. And part of those settlement
19 discussions would have to entail how much money is
20 actually in the estate, correct?

21 A. Depends on what the facts and
22 circumstances are. Right now, as everyone knows I
23 think at this point, there isn't enough money to
24 settle, unless Mr. Stansbury would take less than
25 what is available. There have been attempts made

1 to settle at mediations and through communications
2 which haven't been successful. So certainly I am
3 not as personal representative able or going to
4 settle with someone in excess of what's available.

5 Q. Correct. But the outcome of the Chicago
6 litigation could make more money available for
7 settlement, correct?

8 A. It it's successful it could.

9 Q. Okay. May be a number that would be
10 acceptable to Mr. Stansbury, I don't know, that's
11 conjecture, right?

12 A. Total conjecture.

13 Q. Okay.

14 A. Unless we are going to get into what
15 settlement discussions have been.

16 Q. And at the same time Mr. Rose, who has
17 entered an appearance at that deposition for
18 Mr. Bernstein in the Chicago action, his client has
19 an interest there not to let that money come into
20 the estate, correct?

21 MR. ROSE: Objection again to the extent
22 it calls for a legal conclusion as to what I
23 did in Chicago. I mean, the records speak for
24 themselves.

25 THE COURT: Could you read back the

1 question for me?

2 (The following portion of the record was
3 read back.)

4 "Q. And at the same time Mr. Rose, who
5 has entered an appearance at that deposition
6 for Mr. Bernstein in the Chicago action, his
7 client has an interest there not to let that
8 money come into the estate, correct?"

9 THE COURT: I am going to allow it as the
10 personal representative his impressions of
11 what's going on, not as a legal conclusion
12 because he is also a lawyer.

13 THE WITNESS: My impression based on
14 stated positions is that Mr. Ted Bernstein does
15 not want the life insurance proceeds to come
16 into the probate estate of Simon Bernstein.
17 That's what he has pled.

18 BY MR. FEAMAN:

19 Q. Right. And you disagree with Mr. Ted
20 Bernstein on that, correct?

21 A. Yes.

22 MR. FEAMAN: Thank you.

23 CROSS (BRIAN O'CONNELL)

24 BY MR. ROSE:

25 Q. And notwithstanding that disagreement, you

1 still believe that --

2 MR. ROSE: I thought he was done, I am
3 sorry.

4 MR. ELIOT BERNSTEIN: Are you done, Peter?

5 MR. FEAMAN: No, I am not, Your Honor.

6 MR. ROSE: I am sorry, Your Honor.

7 THE COURT: That's okay. I didn't think
8 that you were trying to.

9 MR. FEAMAN: Okay. We'll rest.

10 THE COURT: All right.

11 MR. FEAMAN: Not rest. No more questions.

12 MR. ELIOT BERNSTEIN: Excuse me, Your
13 Honor.

14 BY MR. ROSE:

15 Q. And notwithstanding the fact that in
16 Illinois Ted as the trustee of this insurance trust
17 wants the money to go into this 1995 insurance
18 trust, right?

19 A. Right.

20 Q. And he has got an affidavit from Spallina
21 that says that's what Simon wanted, or he's got
22 some affidavit he filed, whatever it is? And you
23 have your own lawyer up there Stamos and Trucco,
24 right?

25 A. Correct.

1 Q. And notwithstanding that, you still
2 believe that it's in the best interests of the
3 estate as a whole to have Ted to be the
4 administrator ad litem and me to represent the
5 estate given our prior knowledge and involvement in
6 the case, right?

7 A. It's based on maybe three things. It's
8 the prior knowledge and involvement that you had,
9 the amount of money, limited amount of funds that
10 are available in the estate to defend the action,
11 and then a number of the beneficiaries, or call
12 them contingent beneficiaries because they are
13 trust beneficiaries, have requested that we consent
14 to what we have just outlined, ad litem and your
15 representation, those items.

16 Q. And clearly you are adverse to
17 Mr. Stansbury, right?

18 A. Yes.

19 Q. But in this settlement letter your lawyer
20 in Chicago is copying Mr. Stansbury and Mr. Feaman
21 about settlement position, right?

22 A. Correct.

23 Q. Because that's the deal we have,
24 Mr. Stansbury is funding litigation in Illinois and
25 he gets to sort of be involved in it and have a say

1 in it, how it turns out? Because he stands to
2 improve his chances of winning some money if the
3 Illinois case goes the way he wants, right?

4 A. Well, he is paying, he is financing it.

5 Q. So he hasn't paid in full, right? You
6 know he is \$40,000 in arrears with the lawyer?

7 A. Approximately, yes.

8 Q. And there's an order that's already in
9 evidence, and the judge can hear that later, but --
10 okay. So --

11 THE COURT: I don't have an order in
12 evidence.

13 MR. ROSE: You do. If you look at Exhibit
14 Number 2, page --

15 THE COURT: Oh, in the Illinois?

16 MR. ROSE: Yes, they filed it in Illinois.

17 THE COURT: Oh, in the Illinois.

18 MR. ROSE: But it's in evidence now, Your
19 Honor.

20 THE COURT: Yes, I am sorry, I didn't
21 realize it was in --

22 MR. ROSE: I am sorry.

23 THE COURT: No, no, that's okay.

24 MR. ROSE: I was going to save it for
25 closing.

1 THE COURT: In the Illinois is the Florida
2 order?

3 MR. ROSE: Yes.

4 THE COURT: Okay. That's the only thing I
5 missed.

6 MR. ROSE: Right.

7 BY MR. ROSE:

8 Q. The evidence it says for the reasons and
9 subject to the conditions stated on the record
10 during the hearing, all fees and costs incurred,
11 including for the curator in connection with his
12 work, and any counsel retained by the administrator
13 ad litem will initially be borne by William
14 Stansbury. You have seen that order before, right?

15 A. I have seen the order, yes.

16 Q. And the Court will consider a petition to
17 pay back Mr. Stansbury. If the estate wins in
18 Illinois, we certainly have to pay back
19 Mr. Stansbury first because he has fronted all the
20 costs, right?

21 A. Absolutely.

22 Q. Okay. So despite that order, you have
23 personal knowledge that he is \$40,000 in arrears
24 with the Chicago counsel?

25 A. I have knowledge from my counsel.

1 Q. Okay. That you shared with me, though?

2 A. Yes. It's information everyone has.

3 Q. Okay.

4 A. Should have.

5 Q. Would you agree with me that you have
6 spent almost no money defending the estate so far
7 in the Stansbury litigation?

8 A. Well, there's been some money spent. I
9 wouldn't say no money. I have to look at the
10 billings to tell you.

11 Q. Very minimal. Minimal?

12 A. Not a significant amount.

13 Q. Okay. Minimal in comparison to what it's
14 going to cost to try the case?

15 A. Yes.

16 Q. Have you had the time to study all the
17 documents, the depositions, the exhibits, the tax
18 returns, and all the stuff that is going to need to
19 be dealt with in this litigation?

20 A. I have reviewed some of them. I can't say
21 reviewed all of them because I would have to
22 obviously have the records here to give you a
23 correct answer on that.

24 Q. And you bill for your time when you do
25 that?

1 A. Sure.

2 Q. And if Ted is not the administrator ad
3 litem, you are going to have to spend money to sit
4 through a two-week trial maybe?

5 A. Yes.

6 Q. You are not willing to do that for free,
7 are you?

8 A. No.

9 Q. Okay. Would you agree with me that you
10 know nothing about the relationship, personal
11 knowledge, between Ted, Simon and Bill Stansbury,
12 personal knowledge? Were you in any of the
13 meetings between them?

14 A. No, not personal knowledge.

15 Q. Were you involved in the business?

16 A. No.

17 Q. Do you have any idea who the accountant --
18 well, you know who the accountant was because they
19 have a claim. Have you ever spoken to the
20 accountant about the lawsuit?

21 A. No.

22 Q. Have you ever interviewed any witnesses
23 about the lawsuit independent of maybe talking to
24 Mr. Stansbury and saying hello and saying hello to
25 Ted?

1 A. Or talking to different parties, different
2 family members.

3 Q. Now, did you sign a waiver, written waiver
4 form?

5 A. Yes.

6 Q. And did you read it before you signed it?

7 A. Yes.

8 Q. Did you edit it substantially and put it
9 in your own words?

10 A. Yes.

11 Q. Much different than the draft I prepared?

12 A. Seven pages shorter.

13 MR. ROSE: Okay. I move Exhibit 1 into
14 evidence. This is the three-page PR statement
15 of his position.

16 MR. FEAMAN: Objection, it's cumulative
17 and it's hearsay.

18 THE COURT: This is his affidavit, his
19 sworn consent?

20 MR. ROSE: Right. It's not cumulative.
21 It's the only evidence of written consent.

22 THE COURT: How is it cumulative? That's
23 what I was going to say.

24 MR. FEAMAN: He just testified as to why
25 he thinks there's no conflict.

1 THE COURT: But a written consent is
2 necessary under the rules, and that's been
3 raised as an issue.

4 MR. FEAMAN: The rule says that --

5 THE COURT: I mean, whether you can waive
6 is an issue, and I think that specifically
7 under four point -- I am going to allow it.
8 Overruled.

9 MR. ELIOT BERNSTEIN: Can I object?

10 THE COURT: Sure.

11 MR. ELIOT BERNSTEIN: That just came on
12 February 9th to me.

13 THE COURT: Okay.

14 MR. ELIOT BERNSTEIN: They didn't copy me
15 on this thing. I just saw it.

16 THE COURT: Okay.

17 MR. ELIOT BERNSTEIN: Which kind of
18 actually exposes a huge fraud going on here.
19 But I will get to that when I get a moment. It
20 shouldn't be in. I hardly had time to review
21 it. And I will explain some of that in a
22 moment, but.

23 THE COURT: I am overruling that
24 objection. All documents were supposed to be
25 provided by the Court pursuant to my order by

1 February 9th. This is a waiver of any
2 potential conflict that's three pages. And if
3 you got it February 9th you had sufficient
4 time. So overruled.

5 I am not sure what to call this,
6 petitioner's or respondent's, in this case. I
7 am going to mark these as respondent's.

8 MR. ROSE: You can call it Trustee's 1.

9 THE COURT: I could do that. Let me mark
10 it.

11 (Trustee's Exb. No. 1, Personal
12 Representative Position Statement.)

13 BY MR. ROSE:

14 Q. I think you alluded to it. But after the
15 mediation that was held in July, there were some
16 discussions with the beneficiaries, including Judge
17 Lewis who's a guardian ad litem for three of the
18 children, correct?

19 A. Yes.

20 Q. And you were asked if you would consent to
21 this procedure of having me come in as counsel
22 because --

23 THE COURT: I know you are going fast, but
24 you didn't pre-mark it, so you got to give me a
25 second to mark it.

1 MR. ROSE: Oh, I am sorry.

2 THE COURT: That's okay.

3 I have to add it to my exhibit list.

4 You may proceed, thank you.

5 BY MR. ROSE:

6 Q. You agreed to this procedure that I would
7 become counsel and Ted would become the
8 administrator ad litem because you thought it was
9 in the best interests of the estate as a whole,
10 right?

11 A. For the reasons stated previously, yes.

12 Q. And other than having to go through this
13 expensive procedure to not be disqualified, you
14 still agree that it's in the best interests of the
15 estate that our firm be counsel and that Ted
16 Bernstein be administrator ad litem?

17 A. For the defense of the Stansbury civil
18 action, yes.

19 Q. And that's the only thing we are asking to
20 get involved in, correct?

21 A. Correct.

22 Q. Now, you were asked if you had a fiduciary
23 duty to the interested persons including
24 Mr. Stansbury, right?

25 A. I was asked that, yes.

1 Q. So if you have a fiduciary duty to him,
2 why don't you just stipulate that he can have a two
3 and a half million dollar judgment and give all the
4 money in the estate to him? Because just because
5 you have a duty, you have multiple duties to a lot
6 of people, correct?

7 A. Correct.

8 Q. And you have to balance those duties and
9 do what you believe in your professional judgment
10 is in the best interests of the estate as a whole?

11 A. Correct.

12 Q. And you have been a lawyer for many years?

13 A. Yes.

14 Q. Correct? And you have served as trustee
15 as a fiduciary, serving as a fiduciary,
16 representing a fiduciary, opposing fiduciary,
17 that's been the bulk of your practice, correct?

18 A. Yes, yes and yes.

19 MR. ROSE: Nothing further.

20 THE COURT: Redirect?

21 MR. FEAMAN: Yes.

22 THE COURT: Wait a minute. Let me let
23 Mr. Eliot Bernstein ask any questions.

24 MR. ELIOT BERNSTEIN: Can I ask him
25 questions at one point?

1 THE COURT: You can.

2 MR. ELIOT BERNSTEIN: Your Honor, first, I
3 just wanted to give you this and apologize for
4 being late.

5 THE COURT: Don't worry about it. Okay.

6 MR. ELIOT BERNSTEIN: Well, no, it's
7 important so you understand some things.

8 I have got ten steel nails in my mouth so
9 I speak a little funny right now. It's been
10 for a few weeks. I wasn't prepared because I
11 am on a lot of medication, and that should
12 explain that. But I still got some questions
13 and I would like to have my....

14 MR. ROSE: I would just state for the
15 record that he has been determined to have no
16 standing in the estate proceeding as a
17 beneficiary.

18 THE COURT: I thought that was in the
19 Estate of Shirley Bernstein.

20 MR. ROSE: It's the same ruling --
21 (Overspeaking.)

22 THE COURT: Please, I will not entertain
23 more than one person.

24 MR. ROSE: By virtue of Judge Phillips'
25 final judgment upholding the documents, he is

1 not a beneficiary of the residuary estate. He
2 has a small interest as a one-fifth beneficiary
3 of tangible personal property, which is --

4 THE COURT: I understand.

5 MR. ROSE: Yes, he has a very limited
6 interest in this. And I don't know that he --

7 THE COURT: Wouldn't that give him
8 standing, though?

9 MR. ROSE: Well, I don't think for the
10 purposes of the disqualification by Mr. Feaman
11 it wouldn't.

12 THE COURT: Well, that would be your
13 argument, just like you are arguing that
14 Mr. Stansbury doesn't have standing to
15 disqualify you, correct?

16 MR. ROSE: Right.

17 THE COURT: So that's an argument you can
18 raise.

19 You may proceed.

20 CROSS (BRIAN O'CONNELL)

21 BY MR. ELIOT BERNSTEIN:

22 Q. Mr. O'Connell, am I a devisee of the will
23 of Simon?

24 MR. ROSE: Objection, outside the scope of
25 direct.

1 THE COURT: That is true. Sustained.

2 That was not discussed.

3 BY MR. ELIOT BERNSTEIN:

4 Q. Do I have standing in the Simon estate
5 case --

6 MR. ROSE: Objection, calls for a legal
7 conclusion.

8 BY MR. ELIOT BERNSTEIN:

9 Q. -- in your opinion?

10 MR. ELIOT BERNSTEIN: Well, he is a
11 fiduciary.

12 THE COURT: He was asked regarding his
13 thoughts regarding a claimant, so I will allow
14 it. Overruled.

15 THE WITNESS: You have standing in certain
16 actions by virtue of your being a beneficiary
17 of the tangible personal property.

18 BY MR. ELIOT BERNSTEIN:

19 Q. Okay, so beneficiary?

20 A. Right.

21 Q. Okay. Thank you. Which will go to the
22 bigger point of the fraud going on here, by the
23 way.

24 Are you aware that Ted Bernstein is a
25 defendant in the Stansbury action?

1 A. Which Stansbury action?

2 Q. The lawsuit that Mr. Rose wants Ted to
3 represent the estate in?

4 A. I'd have to see the action, see the
5 complaint.

6 Q. You have never seen the complaint?

7 A. I have seen the complaint, but I want to
8 make sure it's the same documents.

9 Q. So Ted --

10 THE COURT: You must allow him to answer
11 the questions.

12 MR. ELIOT BERNSTEIN: I am sorry, okay.

13 THE WITNESS: I would like to see if you
14 are referring to Ted Bernstein being a
15 defendant, if someone has a copy of it.

16 MR. ROSE: Well, I object. Mr. Feaman
17 knows that he has dismissed the claims against
18 all these people, and this is a complete waste.
19 We have a limited amount of time and these are
20 very important issues.

21 MR. ELIOT BERNSTEIN: Excuse me.

22 THE COURT: Wait.

23 MR. ROSE: These defendants they are
24 dismissed, they are settled. Mr. Feaman knows
25 because he filed the paper in this court.

1 THE COURT: Mr. Rose.

2 MR. ROSE: It's public record.

3 THE COURT: Mr. Rose, you are going to
4 have to let go of the -- it's going to finish
5 by 4:30.

6 MR. ROSE: Okay.

7 THE COURT: Because I know that's why you
8 are objecting, and you know I have to allow --

9 MR. ROSE: Okay.

10 THE COURT: All right? The legal
11 objection is noted. Mr. O'Connell can respond.
12 He asked to see a document.

13 BY MR. ELIOT BERNSTEIN:

14 Q. I would like to show you --

15 THE DEPUTY: Ask to approach, please.

16 MR. ELIOT BERNSTEIN: Oh, ask to.

17 BY MR. ELIOT BERNSTEIN:

18 Q. Can I approach you?

19 THE COURT: What do you want to approach
20 with?

21 MR. ELIOT BERNSTEIN: I just want to show
22 him the complaint.

23 THE COURT: Complaint? As long as you
24 show the other side what you are approaching
25 with.

1 MR. ELIOT BERNSTEIN: It's your second
2 amended complaint.

3 MR. ROSE: No objection.

4 BY MR. ELIOT BERNSTEIN:

5 Q. Is Ted Bernstein a defendant in that
6 action?

7 A. I believe he was a defendant, past tense.

8 Q. Okay. Let me ask you a question. Has the
9 estate that you are in charge of settled with Ted
10 Bernstein?

11 A. In connection with this action?

12 MR. ROSE: Objection, relevance.

13 BY MR. ELIOT BERNSTEIN:

14 Q. Yes, in connection with this action?

15 THE COURT: Which action?

16 MR. ELIOT BERNSTEIN: The Stansbury
17 lawsuit that Ted wants to represent.

18 THE COURT: If he can answer.

19 MR. ELIOT BERNSTEIN: This is the conflict
20 that's the elephant in the room.

21 THE COURT: No, no, no.

22 MR. ELIOT BERNSTEIN: Okay.

23 THE COURT: I didn't allow anyone else to
24 have any kind of narrative.

25 MR. ELIOT BERNSTEIN: Sorry.

1 THE COURT: Ask a question and move on.

2 MR. ELIOT BERNSTEIN: Got it.

3 THE COURT: Mr. O'Connell, if you can
4 answer the question, answer the question.

5 THE WITNESS: Sure. Thanks, Your Honor.
6 I am going to give a correct answer. We have
7 not had a settlement in connection with Ted
8 Bernstein in connection with what I will call
9 the Stansbury independent or civil action.

10 BY MR. ELIOT BERNSTEIN:

11 Q. Okay. So that lawsuit --

12 A. The estate has not entered into such a
13 settlement.

14 Q. So Stansbury or Ted Bernstein is still a
15 defendant because he sued the estate and the estate
16 hasn't settled with him and let him out?

17 A. The estate prior to -- I thought you were
18 talking about me, my involvement. Prior to my
19 involvement there was a settlement.

20 Q. With Shirley's trust, correct?

21 A. No, I don't recall there being --

22 Q. Well, you just --

23 THE COURT: Wait. You have to let him
24 answer.

25 MR. ELIOT BERNSTEIN: Sorry, okay.

1 THE WITNESS: I recall there being a
2 settlement again prior to my involvement with
3 Mr. Stansbury and Ted Bernstein.

4 BY MR. ELIOT BERNSTEIN:

5 Q. But not the estate? The estate as of
6 today hasn't settled the case with Ted?

7 A. The estate, the estate, my estate, when I
8 have been personal representative, we are not in
9 litigation with Ted. We are in litigation with
10 Mr. Stansbury. That's where the disconnect is.

11 Q. In the litigation Ted is a defendant,
12 correct?

13 A. I have to look at the pleadings. But as I
14 recall the claims against Ted Bernstein were
15 settled, resolved.

16 Q. Only with Mr. Stansbury in the Shirley
17 trust and individually.

18 So let me ask you --

19 THE COURT: You can't testify.

20 MR. ELIOT BERNSTEIN: Okay.

21 BY MR. ELIOT BERNSTEIN:

22 Q. Ted Bernstein, if you are representing the
23 estate, there's a thing called shared liability,
24 meaning if Ted is a defendant in the Stansbury
25 action, which he is, and he hasn't been let out by

1 the estate, then Ted Bernstein coming into the
2 estate can settle his liability with the estate.
3 You following? He can settle his liability by
4 making a settlement that says Ted Bernstein is out
5 of the lawsuit, the estate is letting him out, we
6 are not going to sue him. Because the estate
7 should be saying that Ted Bernstein and Simon
8 Bernstein were sued.

9 THE COURT: I am sorry, Mr. Bernstein, I
10 am trying to give you all due respect.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: But is that a question?

13 MR. ELIOT BERNSTEIN: Yeah, okay.

14 THE COURT: I can't --

15 MR. ELIOT BERNSTEIN: I will break it
16 down, because it is a little bit complex, and I
17 want to go step by step.

18 THE COURT: Thank you. And we will be
19 concluding in six minutes.

20 MR. ELIOT BERNSTEIN: Then I would ask for
21 a continuance.

22 THE COURT: We will be concluding in six
23 minutes.

24 MR. ELIOT BERNSTEIN: Okay.

25 THE COURT: Ask what you can.

1 MR. ELIOT BERNSTEIN: Okay.

2 BY MR. ELIOT BERNSTEIN:

3 Q. Ted Bernstein was sued by Mr. Stansbury
4 with Simon Bernstein; are you aware of that?

5 A. I am aware of the parties to the second
6 amended complaint that you have handed me.

7 Q. Okay.

8 A. At that point in time.

9 Q. So both those parties share liability if
10 Stansbury wins, correct?

11 MR. ROSE: Objection.

12 THE WITNESS: No.

13 THE COURT: Hold on.

14 MR. ROSE: Objection, calls for a legal
15 conclusion, misstates the law and the facts.

16 MR. ELIOT BERNSTEIN: Well, if
17 Mr. Stansbury won his suit and was suing Ted
18 Bernstein --

19 THE COURT: Hold on one second. Hold on,
20 please. You have got to let me rule. I don't
21 mean to raise my voice at all.

22 But his question in theory is appropriate.
23 He says they are both defendants, they share
24 liability. Mr. O'Connell can answer that. The
25 record speaks for itself.

1 THE WITNESS: And the problem, Your Honor,
2 would be this, and I will answer the question,
3 but I am answering it in the blind without all
4 the pleadings. Because as I -- I will give you
5 the best answer I can without looking at the
6 pleadings.

7 THE COURT: You can only answer how you
8 can.

9 THE WITNESS: As I recall the state of
10 this matter, sir, this is the independent
11 action, the Stansbury action, whatever you want
12 to call it, Ted Bernstein is no longer a
13 defendant due to a settlement.

14 BY MR. ELIOT BERNSTEIN:

15 Q. He only settled with Mr. Stansbury,
16 correct? The estate, as you said a moment ago, has
17 not settled with Ted Bernstein as a defendant. So
18 the estate could be --

19 THE COURT: Mr. Bernstein, Mr. Bernstein.

20 MR. ELIOT BERNSTEIN: Uh-huh.

21 THE COURT: From the pleadings the Court
22 understands there is not a claim from the
23 estate against Ted Bernstein in the Stansbury
24 litigation. Is the Court correct?

25 MR. ELIOT BERNSTEIN: The Court is

1 correct.

2 THE COURT: Okay.

3 MR. ELIOT BERNSTEIN: But the estate, if
4 Mr. O'Connell was representing the
5 beneficiaries properly, should be suing Ted
6 Bernstein because the complaint alleges that he
7 did most of the fraud against Mr. Stansbury,
8 and my dad was just a partner.

9 THE COURT: Okay. So that's your
10 argument, I understand.

11 MR. ELIOT BERNSTEIN: Okay.

12 THE COURT: But please ask the questions
13 pursuant to the pleadings as they stand.

14 MR. ELIOT BERNSTEIN: Okay.

15 BY MR. ELIOT BERNSTEIN:

16 Q. Could the estate sue Ted Bernstein since
17 he is a defendant in the action who has shared
18 liability with Simon Bernstein?

19 MR. ROSE: Objection, misstates -- there's
20 no such thing as shared liability.

21 THE COURT: He can answer the question if
22 he can.

23 MR. ROSE: Okay.

24 THE WITNESS: One of the disconnects here
25 is that he is not a current beneficiary in the

1 litigation as you just stated.

2 MR. ELIOT BERNSTEIN: There's no
3 beneficiary in that litigation.

4 THE COURT: Okay. You can't answer again.

5 MR. ELIOT BERNSTEIN: Oh.

6 THE COURT: Remember, you have got to ask
7 questions.

8 THE WITNESS: Defendant, Your Honor, wrong
9 term. He is not a named defendant at this
10 point due to a settlement.

11 BY MR. ELIOT BERNSTEIN:

12 Q. Could the estate sue back a
13 counter-complaint to Ted Bernstein individually who
14 is alleged to have committed most of the egregious
15 acts against Mr. Stansbury? He is a defendant in
16 the action. Nobody settled with him yet from the
17 estate. Could you sue him and say that half of the
18 liability, at least half, if not all, is on Ted
19 Bernstein?

20 A. Anyone, of course, theoretically could sue
21 anyone for anything. What that would involve would
22 be someone presenting in this case me the facts,
23 the circumstances, the evidence that would support
24 a claim by the estate against Ted Bernstein. That
25 I haven't seen or been told.

1 Q. Okay. Mr. Stansbury's complaint, you see
2 Ted and Simon Bernstein were sued. So the estate
3 could meet the argument, correct, that Ted
4 Bernstein is a hundred percent liable for the
5 damages to Mr. Stansbury, correct?

6 A. I can't say that without having all the
7 facts, figures, documents --

8 Q. You haven't read this case?

9 A. -- in front of me. Not on that level.
10 Not to the point that you are -- not to the point
11 that you are --

12 Q. Let me ask you a question.

13 A. -- trying to.

14 MR. ROSE: Your Honor?

15 BY MR. ELIOT BERNSTEIN:

16 Q. Let me ask you a question.

17 THE COURT: Hold on one second, sir.

18 MR. ROSE: He is not going to finish in
19 two minutes and there are other things we need
20 to address, if we have two minutes left. So
21 can he continue his cross-examination at the
22 continuance?

23 THE COURT: March we have another hearing.

24 MR. ELIOT BERNSTEIN: Can we continue this
25 hearing?

1 THE COURT: Yes. But I am going to give
2 you a limitation. You get as much time as
3 everybody else has.

4 MR. ELIOT BERNSTEIN: That's fine.

5 THE COURT: You have about ten more
6 minutes when we come back.

7 MR. ELIOT BERNSTEIN: Okay. Can I submit
8 to you the binder that I filed late?

9 THE COURT: Sure.

10 MR. ELIOT BERNSTEIN: (Overspeaking).

11 THE COURT: As long as it has been -- has
12 it been filed with the Court and has everybody
13 gotten a copy?

14 MR. ELIOT BERNSTEIN: I sent them copies
15 and I brought them copies today.

16 THE COURT: As long as everybody else gets
17 a copy --

18 MR. ELIOT BERNSTEIN: Okay.

19 THE COURT: -- you can submit the binder.
20 Just give it to my deputy.

21

22 (Brian O'Connell excerpt concluded.)

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C E R T I F I C A T E

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5 County of Palm Beach

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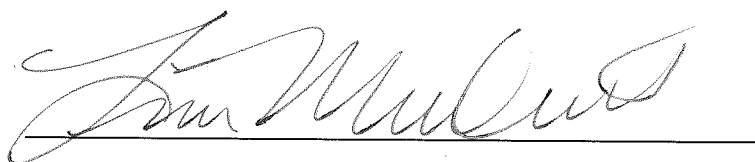
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I, Lisa Mudrick, RPR, FPR, certify that I was authorized to and did stenographically report the foregoing proceedings, and that the excerpted transcript is a true record.

Dated February 21, 2017.



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