

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO.: 15-cv-81298-MARRA/MATTHEWMAN

JULIAN BIVINS, as Personal)
Representative of the ancillary)
Estate of Oliver Wilson Bivins,)
Plaintiff,)
v.)
CURTIS CAHALLONER ROGERS, JR., as)
Former guardian, et al.,)
Defendants.)
_____ /

April 25, 2017
Pages 1 - 82

HEARING PROCEEDINGS

BEFORE THE HONORABLE WILLIAM MATTHEWMAN
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiff:

THE BLEAKLEY BAVOL LAW FIRM
15170 N. Florida Avenue
Tampa, FL 33613
BY: JOSEPH R. DENMAN, ESQ.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

APPEARANCES CONTINUED:

On behalf of the Defendants:

WICKER, SMITH, O'HARA, MCCOY & FORD, P.A.
Regions Bank Building
2800 Ponce de Leon Boulevard
Suite 800,
Coral Gables, FL 33134
BY: BRANDON J. HECHTMAN, ESQ.

On behalf of Keith B. Stein:

CONROY SIMBERG
1801 Centerpark Drive East
Suite 200,
West Palm Beach, FL 33401
BY: ALEXANDRA J. SCHULTZ, ESQ.
BY: JEFFREY BLAKER, ESQ.

Transcribed By:

BONNIE JOY LEWIS, R.P.R.
7001 SW 13 Street
Pembroke Pines, FL 33023
954-985-8875
Case1awrptg@gmail.com.

1 (Thereupon, the following proceeding was held:)

2 THE COURT: All right. Let's go ahead and call the
3 case.

4 THE COURTROOM DEPUTY: Calling Case Number
5 15-81298-cv-Marra/Matthewman, Julian Bivens versus Curtis
6 Cahalloner Rogers, et al.

7 THE COURT: All right. Let's see who we have here on
8 behalf of Plaintiff.

9 MR. DENMAN: Your Honor, Ron Denman on behalf of
10 Julian Bivins as the Personal Representative of the Estate of
11 Oliver Bivins, Senior.

12 THE COURT: All right.

13 MR. DENMAN: Mr. Bivins is present with me.

14 THE COURT: All right. Thank you.

15 MR. J. BIVINS: Good afternoon.

16 THE COURT: And who do we have here on behalf of the
17 Defendants?

18 MR. HECHTMAN: Good afternoon, Your Honor. May it
19 please the Court.

20 Brandon Hechtman of Wicker Smith on behalf of the
21 Defendants Ciklin Lubitz O'Connell, Ashley Crispin, Brian
22 O'Connell, and his successor guardian Stephen Kelly.

23 THE COURT: All right.

24 MS. SCHULTZ: Good afternoon, Your Honor.

25 Alexandra Schultz on behalf of the Stein Defendants

1 and I am joined today by Jeffery Blaker who is observing.

2 THE COURT: All right. Thank you.

3 So the hearing today is on Plaintiff's motion to
4 compel Defendant Crispin's deposition responses, Docket Entry
5 205, Plaintiff's amended motion to compel Mr. O'Connell's
6 deposition responses, Docket Entry 209, and Plaintiff's motion
7 to compel Stephen Kelly's deposition responses, Docket Entry
8 210.

9 Now, I note that pursuant to Docket Entry 134,
10 calendar call is currently set for July 7th of 2017 and trial
11 is set for July 10th of 2017. Fact discovery closed on January
12 17th of 2017.

13 And per his order, at Docket Entry 275, Judge Marra is
14 holding the motion to reopen discovery and renew motions to
15 compel, which is Docket Entry 201, in abeyance until these work
16 product and attorney/client privilege issues are resolved.

17 Now, let me just ask counsel. I know that the matter
18 was sent to mediation, but there was no notice of what
19 happened. Without getting into what occurred at the mediation,
20 can the parties just tell me whether the case completely did
21 not settle, or adjourned for future settlement, or what the
22 status is of the settlement?

23 MR. DENMAN: Your Honor, at this point, I would say it
24 completely didn't settle.

25 THE COURT: All right.

1 MR. HECHTMAN: It doesn't mean everything else is --
2 there is no potential, but at this point, it is a complete
3 impasse.

4 THE COURT: All right. So the mediation was
5 terminated with a complete impasse?

6 MR. DENMAN: Yes, Your Honor.

7 THE COURT: Okay. So let's go to the motions.

8 And the first motion is Docket Entry 205, Plaintiff's
9 motion to compel Defendant Crispin's responses. The response
10 of Ashley Crispin is at Docket Entry 216.

11 And then, the Plaintiff's reply is at Docket Entry 221
12 and it seemed like in reading the motion there were seven
13 inquiry areas at issue, which the parties are disputing.

14 So let me hear first from Mr. Denman.

15 MR. DENMAN: Yes, Your Honor.

16 Your Honor, in a nutshell, the motion with respect to
17 Miss Crispin and Mr. O'Connell, who are the two attorneys who
18 essentially worked on the file for the guardians at Ciklin
19 Lubitz, all three of the motions really tie in.

20 Because what is occurring here, the attorneys upon
21 questioning are precluded by the objections for attorney/client
22 privilege from giving answers as to what advice they gave, what
23 they did, the reasoning behind their decision and their advice
24 to the guardians under attorney/client privilege, work product
25 privilege but, at the same time, during the deposition of Mr.

1 Kelly as well as Mr. Rogers, virtually every answer was, well,
2 why did you do this? Why did you take this action? Why did
3 you not get an appraisal, for example, of the buildings?

4 I relied upon advice of counsel. I relied upon advice
5 of counsel. Everything else is I relied upon advice of
6 counsel, but a privilege as to, well, what was that advice.
7 And then, the attorney/client privilege from the attorneys
8 explaining what advice they gave. So that's --

9 THE COURT: Have they raised an advice of counsel
10 defense in this case?

11 MR. DENMAN: They haven't raised it in their answer,
12 so-to-speak, but with regard to every decision.

13 I don't think that it's necessary that it be solely in
14 their answer based on every decision made by the guardians.
15 It's advice of counsel, relied upon advice of counsel, but I am
16 precluded from getting the advice that you relied upon.

17 So I don't know, one, well, are there communications?
18 How was that advice provided? Well, we can't get the
19 communications because those have been deemed privileged. And
20 then, I can't tell you what they told me because that is
21 attorney/client privilege communication.

22 So, essentially, where we are, we are were sort of in
23 this quagmire, well, where I wasn't negligent because I relied
24 upon advice of counsel, but I can't tell you what that advice
25 was. So I can't tell you.

1 So there is no way for us to be able to determine,
2 well, was that reasonable advice for you to follow.

3 THE COURT: Did they say that in the deposition?

4 I mean, speaking as far as Ashley Crispin, did that
5 witness in the depo say that I did not do anything wrong
6 because I relied on advice of counsel, or did somebody say
7 that?

8 MR. DENMAN: Well, no.

9 In Miss Crispin and Mr. O'Connell's depositions, which
10 were taken first, it was pretty clear that any communications
11 to get into -- for example, one example may be, there was an
12 issue over attorney --

13 THE COURT: Well, why don't we do this?

14 Why don't we deal with the inquiries that are at issue
15 in 205. The first inquiry was, in effect, when was the
16 valuation of the 808 Lexington property obtained and the
17 purpose of why it was obtained. That was the first inquiry
18 area.

19 So what are you seeking there and what was their
20 objection there?

21 MR. DENMAN: Well, their objection, my question there
22 what I am trying to find out is did you get a valuation prior
23 to entering into this New York settlement transaction, or was
24 that the purpose of getting this valuation from Mr. Lieberman.

25 And I'm not getting an answer because subsequent to

1 this New York settlement, there was an attorney fees hearing
2 where the fees at issue were based upon valuation. So if they
3 went and they got the valuation for the purposes of their
4 attorney fees hearing, but they didn't get it several months
5 before for the purposes of negotiating this settlement of the
6 ward's property, then, that would be important for me to know.

7 THE COURT: Right.

8 But inquiry in your motion, at Docket Entry 205, it
9 seems like the question was asked why did your firm obtain
10 valuation from Lieberman.

11 And it seemed like in reading that, it was partially
12 answered. The witness, Crispin, indicated that the premise of
13 the valuation was for the recovery of the guardianship.

14 So it seems likes some of this was answered. And
15 then, I am just trying to understand what it is really that we
16 are fighting about here on this work product and
17 attorney/client privilege issue.

18 MR. DENMAN: Well, because some of it may have been
19 answered, but it was still limited.

20 And if you notice the objection it is still limited
21 and what was it in? And if there is an answer as far as why we
22 did, well, then, where are the communications for that?

23 I shouldn't have to just rely upon the verbal
24 statements if you opened up the door. If I am entitled to know
25 the reason that you got this valuation, which I think I should

1 be entitled to know because, since it's an issue in this
2 lawsuit, then, I should also be entitled to communication.

3 So, as you said, I got a partial answer and what I
4 didn't get, I am getting objections as to -- for example, on
5 Page 37, Line 19:

6 To the extent you can answer without waiving work
7 product or attorney/client privilege -- so I am getting a
8 partial answer, but I am not getting the answer -- I don't know
9 whether that answer is full, or whether there is a part of it
10 that has not been responded to because it is subject to
11 attorney/client privilege.

12 THE COURT: Now, your third inquiry dealt within
13 Crispin's conversation with Keith Stein. Now, Keith Stein was
14 who?

15 MR. DENMAN: Keith Stein was an attorney who was
16 retained in New York to assist with all of the issues that
17 dealt with New York and the property in New York.

18 THE COURT: All right. So the objection was that any
19 conversations that Crispin had with Keith Stein were
20 attorney/client privilege, correct?

21 MR. DENMAN: Yes, Your Honor.

22 THE COURT: All right. Now, I know some of the basic
23 issues that I have read when reading through all this was,
24 first, I think you have an argument that Stephen Kelly is
25 guardian allegedly repeatedly testified at his January 11th of

1 2017 depo, that he relied upon advice of legal counsel in
2 acting for the now deceased ward, Oliver Bivins Senior. And
3 that is sort of the sword and shield argument that you are
4 making.

5 MR. DENMAN: Yes, Your Honor.

6 THE COURT: But is it really a sword and shield or
7 advice of counsel defense, or is it simply saying that he
8 simply was acting upon instructions of legal counsel, or that
9 he was consulting with legal counsel in making decisions?

10 I am trying to understand what is at issue here.

11 MR. DENMAN: Well, what's at issue is when we go into
12 a trial and I try to find out whether or not he was negligent
13 or not, he's going to say, well, I relied upon advice of
14 counsel.

15 So, one, if you relied upon advice of counsel what was
16 that advice? What did they tell you? How was it interpreted?
17 Was it reasonable or not reasonable? Depending were these in
18 written communications. Were they all oral communications?

19 He's going to probably defend this case, I would
20 assume saying, hey, I am not responsible. I went and I got
21 advice of counsel in every instance. Therefore, you shouldn't
22 hold me responsible because, look, I relied upon advice of
23 counsel and what else could I have done?

24 So, at this point, I am limited, just based upon him
25 saying I relied upon advice of counsel. Well, what was that

1 advice? Do we have written communication? Am I able to
2 cross-examine that advice? Am I able to determine whether it
3 is objectively reasonable?

4 Am I able to present evidence as to whether he should
5 have or should not have relied upon that advice? He had his
6 own responsibilities besides those of counsel to make
7 evaluations.

8 And at this point, I am limited to solely to
9 essentially his defense being I'm not responsible because I did
10 what I was supposed to do. I relied upon advice of counsel.

11 I mean, if you read his transcript -- and I know we
12 cited to many instances, it is replete. Virtually a hundred
13 instances where I asked him questions and it is I relied upon
14 advice of counsel.

15 THE COURT: That is Stephen Kelly's deposition?

16 MR. DENMAN: Yes.

17 For example, why didn't you pursue the New York
18 settlement against Oliver Junior? I relied upon advice of
19 counsel. Well, what was that advice?

20 Well, even if your attorney said, X, do you not still
21 have your own independent duty that you should do something?
22 So the jury should be able to see, well, what was that advice
23 and should you have done more? Did you breach your fiduciary
24 duty by not acting in a reasonable manner as you should have in
25 the circumstances?

1 And at this point, by saying I have relied upon advice
2 of counsel, he is essentially saying I've done nothing wrong.
3 I did all I needed to do, which was get advice of counsel.

4 THE COURT: Now, you are also relying, apparently, on
5 the fact that Defendant Curtis Rogers, as the guardian, signed
6 a waiver of attorney/client privilege; is that right?

7 MR. DENMAN: Yes, Your Honor.

8 THE COURT: Okay. And I noted that one of your
9 inquiries, number 4, was a question to Miss Crispin:

10 Did you ever advise Curtis Rogers not to pay one half
11 of the sovereign mortgage.

12 What is all that about?

13 MR. DENMAN: The sovereign mortgage went into default
14 in May of 2012 and Curtis Rogers found out about it in August
15 of 2012 and never paid any money, or never made efforts to cure
16 that mortgage.

17 As a result of that, it was \$387,000 at the time. As
18 a result of letting it go into default, it was purchased by
19 another entity. And ultimately, about two years later, the
20 ward had to pay \$600,000 to satisfy that \$387,000 mortgage.

21 So the issues, according to notes from Curtis Rogers,
22 his e-mails, he was instructed by counsel not to pay the
23 mortgage. Well, why not?

24 And then, I asked Miss Crispin, well, did you look at
25 -- they claimed that there was not enough money in the account,

1 which we believe we have evidence to dispute, but Miss Crispin,
2 did you look at those records? And I think that's where it all
3 ties around. She claimed attorney/client privilege as to her
4 analysis of whether there was actually money, sufficient money
5 in the account or not, but there are many issues.

6 Because not only did you not pay the mortgage, well,
7 did you try to cure it? Did you do anything regarding the
8 mortgage? Did you take action in New York? Because Oliver
9 Junior, the brother, was taking half of the money for the rents
10 in New York.

11 And that's one of the arguments, we couldn't pay the
12 mortgage because he's taking rents. Did you take action in New
13 York to get a receiver to take control of these rents so that
14 you could take care of the mortgage?

15 And that is part of all of our claim on you didn't
16 take reasonable measures. If you are acting for the ward the
17 ward would have, we believe, gone and taken the reasonable
18 measure of freezing the assets, getting the rent, getting a
19 receiver, paying the mortgage and preventing it from going into
20 default.

21 By virtue of allowing it to go into default, \$387,000
22 became \$599,000. So that is part of our -- it all sort of
23 wraps into each other, Your Honor.

24 THE COURT: So how do you get around the
25 attorney/client privilege if Miss Crispin, or Ashley Crispin,

1 was representing the guardian and the question is, did you ever
2 advise Curtis Rogers not to pay half of the sovereign mortgage?
3 How is that not under the attorney/client umbrella? It is
4 advice from an attorney, Miss Crispin, to a guardian, her
5 client, Mr. Rogers?

6 MR. DENMAN: Well, two reasons.

7 One, Mr. Rogers raised the privilege, but Mr. Rogers
8 also said that he relied upon advice of counsel as to whether
9 to pay that the sovereign mortgage.

10 So if he relied upon advice of counsel, he has now put
11 it into issue. And for that reason, if he puts it into issue
12 in a defensive posture, then, it comes back to what was the
13 advice that counsel gave? We believe that that constitutes a
14 waiver of the attorney/client privilege.

15 THE COURT: And that was in Mr. Rogers' depo?

16 MR. DENMAN: Yes, Your Honor.

17 THE COURT: All right. And anything else?

18 MR. DENMAN: I mean, with specifics it's a repetitive
19 mantra, so-to-speak.

20 I mean, it happened so often with -- it was pretty
21 clear that any advice from reading O'Connell and Crispin's
22 deposition, when I asked the questions there was going to be no
23 ability to get any information as to communications.

24 And then, later when I asked the reason why certain
25 actions were taken by the guardians and they repeatedly say

1 advice of counsel, I have now effectively been barred to
2 getting to what the reasons were for these actions.

3 So it is now just -- and again, if Your Honor
4 ultimately rules, no, you can't get to it, I guess what my
5 concern is I don't want to get into trial when there is no
6 evidence whatsoever as to why one party did something. Why Mr.
7 Rogers or Stephen Kelly took action.

8 The attorneys are saying attorney/client privilege.
9 So they can't explain the reason they did or didn't do
10 anything. And then, we get into trial and somebody wants to
11 start explaining things about why or why not they're negligent.

12 Well, right now my hands are tied. I can't find out
13 the reasons for that. So there is no evidence as to why or why
14 not actions were taken.

15 THE COURT: Now, your inquiry number 5 is to Miss
16 Crispin:

17 Did you review bank accounts to determine if there was
18 sufficient money in the accounts to pay the mortgage when it
19 went into default.

20 And I think the objection was either attorney/client,
21 or work product, or both?

22 MR. DENMAN: Yes, Your Honor.

23 THE COURT: What is all that about?

24 MR. DENMAN: Well, because I believe our experts will
25 come forward and say there was sufficient money in the account

1 to be able to pay the mortgage at the time it was in default.

2 And if they're claiming the position that we couldn't
3 pay the mortgage -- and that is what is repeated over and over
4 that we couldn't pay the mortgage. We couldn't do these
5 actions because there wasn't enough money.

6 Well, I want to inquire on, well, did you make the
7 valuation? How did you make the valuation? What was the
8 calculation? What was the reason that you believe that there
9 wasn't enough money that you chose not to pay this mortgage?

10 Because if they are going to defend it and say there
11 wasn't enough money and this is why we didn't do anything
12 irresponsible or negligent. Then, what is the basis for that?
13 At this point, I don't know what they saw. I know what we
14 have. But, again, I want to make sure when we get into trial
15 there aren't any surprises.

16 THE COURT: All right. In inquiry 6 was:

17 What evidence do you have that at the time the will
18 was signed in 2009 that there was a lack of evidentiary
19 capacity, or undue influence?

20 And there was a work product objection based on
21 pending litigation. I believe attorney/client privilege in
22 that Crispin is the attorney for the guardian. And you made an
23 argument that the firm was a creditor of the estate.

24 What is all that about in inquiry 6?

25 MR. DENMAN: What that is about is after we filed this

1 federal action in the underlying action, this is now about
2 eight months, nine months after the ward had passed, the
3 guardians filed a verified petition to set aside the Last Will
4 and Testament from Oliver Bivins Senior from 2009.

5 And the questions are, so what was the basis for
6 filing this petition? What is the evidentiary foundation for
7 filing this saying that he had no testamentary capacity back in
8 2009? Where is the evidence of that?

9 Because we are saying that that is more of the waste
10 of money. The more of the litigation. How does that benefit
11 the ward? That only benefits the attorney's conflict of
12 interest.

13 We, then, inquired of the guardians who signed the
14 verification under oath as to what facts did you rely upon in
15 having an evidentiary basis to set aside the will? And both of
16 them said, none, we relied completely upon counsel.

17 So, again, we've sued the counsel saying they're not
18 acting in the best interest of the ward. He's dead nine
19 months. What is the basis for doing this? We can't tell you.
20 And then, the guardians are saying, well, I have no idea why it
21 was done. We relied on counsel.

22 Again, we are either stuck and they can't come in and
23 explain why it was done or what evidence is there, or we're
24 able to look at what was the basis and be able to argue to the
25 jury whether that was reasonable under the circumstances.

1 THE COURT: All right. And then, finally, inquiry
2 number 7 dealt with questions about whether an agreement exists
3 with Ciklin Lubitz and its insurance company to provide a
4 defense in the federal case.

5 Your argument was there that it, apparently, goes to
6 bias and other parties have been required to produce I guess
7 such agreements. So tell me about that last inquiry number 7.

8 MR. DENMAN: Well, apparently, Stephen Kelly has no
9 insurance and he was represented in connection with the federal
10 action by the Ciklin Lubitz firm, originally.

11 And then, their carriers came in, or the carrier for
12 Ciklin Lubitz came in and is providing a defense to Stephen
13 Kelly and to Ciklin Lubitz. And we've asked about agreements
14 because we do believe it goes to bias and motive. Why would
15 Stephen Kelly --

16 THE COURT: How does it go to bias?

17 MR. DENMAN: Because why would Stephen Kelly be
18 supporting -- it goes to argue that Stephen Kelly is supporting
19 the attorneys because he is being gratuitously indemnified for
20 any potential liability that he could have in this case.

21 His defense is being paid for gratuitously by the
22 insurer. So he must play ball and that's essentially the heart
23 of bias and motive. Why are you testifying one way as opposed
24 to the other? And if somebody's defense is being paid for, if
25 conceivably they are being indemnified for any liability they

1 receive, it could have an impact upon someone's testimony.

2 THE COURT: All right. And then, you also, I think,
3 had indicated that other parties have been required to produce
4 this information. What were you referring to there?

5 MR. DENMAN: That Curtis Rogers was required to
6 produce his release.

7 THE COURT: His release or his insurance coverage?

8 Because, I mean, inquiry number 7 seemed to deal with
9 whether Ciklin Lubitz and its insurance company was providing a
10 defense or what agreement exists.

11 Was there somebody else in the case who was ordered to
12 provide an insurance agreement or something similar to what is
13 at issue in inquiry 7?

14 MR. DENMAN: No, Your Honor.

15 That is not the case and there was no order. I think
16 it comes down to whether parties have to provide the releases.
17 And I believe it is pretty common that you would have to
18 provide a release, or any agreements between the parties prior
19 to trial because it does go to bias, motive, interest.

20 THE COURT: You are not suggesting there is any type
21 of merit card, or anything like that, but it does go to -- if
22 you are getting a benefit from another party does that impact
23 your testimony?

24 All right. So that is pretty much your argument on
25 Docket Entry 205, Plaintiff's motion to compel Crispin's depo

1 responses. Anything else that you wanted to add before I turn
2 to the other side on that motion?

3 MR. DENMAN: No, Your Honor.

4 THE COURT: All right. Thank you.

5 So let me turn to the Defense. Who wants to argue for
6 them?

7 MR. HECHTMAN: Thank you, Your Honor.

8 Brandon Hechtman of Wicker Smith on behalf of this
9 motion for Miss Crispin.

10 THE COURT: Okay.

11 MR. HECHTMAN: I think I can start with the broad
12 umbrella and, then, we can kind of work our way down. I think
13 that makes the most sense.

14 THE COURT: Why should the Court sustain the
15 attorney/client work product privilege over the motion to
16 compel?

17 MR. HECHTMAN: Of course.

18 And I think you nailed the issue on the head with your
19 first question to counsel. You said has the advice of counsel
20 defense been raised? No, it has not.

21 In fact, let's frame the case where we are at today.
22 The fact is discovery is closed. Expert discovery closed.
23 Motions for summary judgment have been fully briefed. Not a
24 single advice of counsel defense has been raised in the motion
25 for summary judgment.

1 Counsel for the Plaintiff did not file a Rule 56(d)
2 motion asking for an extension of time to respond saying I
3 don't have adequate information to respond and I am somehow
4 prejudiced by this lack of information.

5 So at the close of fact discovery, showing no due
6 diligence under Rule 16 and showing no reason why they couldn't
7 have done this sooner, they file a motion to compel saying,
8 hey, we want the attorney/client objections.

9 This attorney/client privilege is governed by Florida
10 law in this diversity action. Florida is very strict in its
11 application of this issue. All personal privileges may be
12 waived, sure, that is what Florida says:

13 But a party does not waive the privilege merely by
14 bringing a lawsuit or defending against one. Rather, waiver of
15 the privilege occurs when a party raises a claim that will
16 necessarily require proof by waived privileged communication.

17 There is no privileged communication in which proof is
18 necessary here.

19 THE COURT: There is no counterclaim?

20 MR. HECHTMAN: No.

21 THE COURT: There is no affirmative defense that says
22 I relied upon advice of counsel?

23 MR. HECHTMAN: No. And that would be --

24 THE COURT: Let me just ask you, on Kelly's depo and
25 Rogers' depo, did they say I relied upon advice of counsel not

1 to pay the sovereign mortgage, or I relied upon advice of
2 counsel to not do A, B, or C?

3 MR. HECHTMAN: I think we need to reframe how that
4 happened because I think some things were left out.

5 The sovereign note, there was two borrowers on it.
6 The ward and so when there was a guardianship established, the
7 guardian then became the obligor. So that would be Mr. Rogers
8 at the time.

9 And then, the other side of the equation was Mr.
10 Bivens, the ward's wife, Lorna, who had passed away. Meaning
11 that Lorna's estate was the other obligor.

12 So there was a default entered and the facts are clear
13 that the party who was responsible for dealing with those
14 issues was not the guardianship. The guardianship actually
15 found out after-the-fact. We all know this. It is all in the
16 deposition transcripts.

17 Then, the question was -- and I think we have to
18 really pin this down and if I could find it I will. The
19 defense is why the mortgage is already in default. In other
20 words, it is not don't keep the mortgage current. It was
21 already in default. Now what do we do?

22 As Mr. O'Connell testified -- and I am paraphrasing
23 because I would have to pull it and read it exactly and I could
24 do that if given a moment.

25 What he explained was there are numerous factors

1 involved in whether once a default is entered on a mortgage,
2 the ward is obligated. So we have to look at everything. Can
3 the ward afford to reinstate it? Can the ward afford to keep
4 it current?

5 And in this case, we have a ward who was a
6 co-borrower. So what that advice was is privileged and that's
7 not an issue here because, ultimately, that issue was resolved.
8 How do we know that? Because Mr. Bivens, Julian, an interested
9 person, paid off that mortgage when he purchased 808.

10 So the issue was resolved. In other words, there was
11 advice of counsel between the guardians and the attorney. They
12 went to the Court. They petitioned the Court. A resolution
13 was had and that resolution, through a global settlement
14 agreement with the person who eventually became the Plaintiff
15 in this case to pay off that mortgage.

16 So how we eventually got to the point of petitioning
17 the Court does not matter because what happened was, the Court
18 approved the transaction. The defense in this case is the
19 Court approved our conduct.

20 So there is a public record of this. We petitioned
21 the Court. The parties participated. There was a response.
22 There was a hearing. The Court entered an order.

23 In other words , our entire defense whether *res*
24 *judicata* or collateral estoppel, or judicial estoppel, or a
25 hundred other issues related to that is we petitioned the

1 Court. The Court told us what to do and we did what the Court
2 said. Just as we are supposed to do as attorneys for the
3 guardian or if the guardian as an agent of the Court.

4 And I think one other thing that needs to be clarified
5 factually is Curtis Rogers' waiver of attorney/client privilege
6 was deemed invalid by Judge Marra.

7 THE COURT: Right. Let me just get to a few points.

8 What are your arguments or what are your main -- not
9 your main. What are all of your arguments as to why the motion
10 to compel Crispin's responses should be denied?

11 MR. HECHTMAN: The first is that it is untimely.
12 There has been absolutely no showing under Rule 16 for good
13 cause that this could not have been brought sooner.

14 It goes well after fact discovery was cutoff. In
15 fact, some 30 days later. When Miss Crispin's deposition
16 occurred in early January this motion was not originally
17 brought until February 8th, which was after the close of fact
18 discovery, in the middle of expert discovery.

19 We are now months beyond that after the briefing,
20 after the full briefing of the substantive issues in the case
21 at summary judgment where the Plaintiff has made no showing of
22 undue prejudice of not having access to this information. Has
23 not filed an affidavit explaining what that undue prejudice is
24 as required under Rule 16.

25 So we should not even have to get to this inquiry

1 because the procedural mechanisms to have this discovery, which
2 would result in a complete amendment of the scheduling order,
3 reopen fact discovery, reopen expert discovery, probably redo
4 summary judgments and. In effect, a continuance.

5 THE COURT: Why do you say it is untimely?

6 MR. HECHTMAN: It was brought after the close of fact
7 discovery and it could have been brought within the time of
8 fact discovery cutoff.

9 THE COURT: The depo was taken when? For example, we
10 are talking about Miss Crispin's depo, that was taken January
11 9th of 2017?

12 MR. HECHTMAN: Yes. And this motion as to her was
13 filed a month later. The issue as to attorney/client privilege
14 was raised during the motion.

15 THE COURT: So the Crispin depo is January 9th?

16 MR. HECHTMAN: Yes.

17 THE COURT: And the motion is filed --

18 MR. HECHTMAN: February 8th.

19 THE COURT: February 8th. So within 30 days.

20 MR. HECHTMAN: But after the Rule 16 scheduling order
21 was cut off.

22 THE COURT: But after the discovery cutoff of 1/17?

23 MR. HECHTMAN: Yes. And there was no reason why Miss
24 Crispin, who resides in this district, could not have been
25 deposed at any point in the proceeding ten months that this

1 case had open discovery.

2 THE COURT: Now, if certain questions of Miss Crispin
3 were ordered to be answered, they would be limited if that were
4 to occur. I am not saying that is going to occur. I am just
5 thinking it through. You say it would affect summary judgment,
6 which was briefed and what else?

7 MR. HECHTMAN: Experts.

8 Because I am sure Plaintiff's expert would like an
9 opportunity to opine as to those facts and Defense experts
10 would like an opportunity to opine as to those facts. And
11 then, we would have a whole other round of expert issues when
12 we're -- I think we're almost a month out from close of expert
13 discovery as well.

14 So, as far as prejudice goes, it is unduly prejudicial
15 to the Defense. We have already incurred all of the expenses
16 related to expert discovery. All the expenses incurred in
17 briefing summary judgment.

18 And now we are sitting here this far out trying to
19 deal with issues that could have been raised months and months
20 ago. And we don't even have the predicate fact to get there
21 because we don't actually have any of the at issue doctrine
22 paradigm established.

23 Because the Defense is, for example, if you don't pay
24 your taxes, oh, I got an opinion letter from tax counsel which
25 says I don't have to pay my taxes. That's a *mens rea* defense

1 to not paying your taxes. That's not what we have here.

2 THE COURT: Well, that is sort of the *U.S. v.*
3 *Bilzerian* case that is cited and that, I am very familiar with
4 that.

5 That is basically a defense in a criminal case where
6 the defendant says I had advice upon my counsel to do what I
7 did and, therefore, I cannot be found guilty.

8 MR. HECHTMAN: And there is similar civil fact pattern
9 and you can look up the case. It was in this district.
10 *Industrial Maritime Carriers v. Dantzer*. That was my case.
11 It was appealed to the Eleventh Circuit. The defense in that
12 case was good faith reliance on counsel.

13 The issue was wrongful arrest of a vessel. The vessel
14 was arrested and they said it was wrongful. One of the
15 admiralty defenses is your attorney, through legal process,
16 said it was okay in that case.

17 Yes, the conversations between my client and their
18 counsel as to why they could rightfully arrest the vessel are
19 at issue and there is no question about that.

20 THE COURT: Why are they not at issue here?

21 MR. HECHTMAN: Because there is absolutely no defense
22 predicated upon what advice the guardians received.

23 THE COURT: There is nothing in the summary judgment
24 motions or responses about that?

25 MR. HECHTMAN: No.

1 THE COURT: And there is no affirmative defense about
2 that?

3 MR. HECHTMAN: No.

4 THE COURT: There is no counterclaim?

5 MR. HECHTMAN: No. So we don't meet the first part.

6 THE COURT: In the depositions, however, were there
7 statements made by either Kelly or Rogers that said, listen, we
8 did that because we relied on counsel and that is our defense
9 and that is the way it is?

10 MR. HECHTMAN: So pairing, if you go specifically to
11 the questions what they are, are leading questions by
12 Plaintiff's counsel saying something along the lines of so you
13 relied on counsel when you petitioned to revoke probate?

14 That was one of the issues we just discussed. Yes, of
15 course they did. Professional guardians are required to have
16 attorneys, but they are still protected by attorney/client
17 privilege.

18 We've dealt with this issue *ad nauseam* in this very
19 proceeding. In this very case 90.5021 says that guardians and
20 their attorneys are entitled to attorney/client privilege. You
21 dealt with the issue. It was appealed to Judge Marra and your
22 order was affirmed as to that issue.

23 So are they entitled as to advice of counsel? Yes.
24 And then, what do they do? They talk to their lawyers and then
25 they go and they petition the Court. And they say, Judge, we

1 need to sell 808 Lexington. It is in default. We have limited
2 resources. The ward is 97-years-old. We don't see any value
3 in rehabilitating the property when we could sell the property.

4 Judge, do we have permission to sell the property?
5 Have an open hearing. Evidence is put forth. And then, the
6 Judge enters an order approving the sale. That is our defense.
7 The issue was raised, the issue was heard. Arguments are
8 argued against it and the Judge approved the conduct.

9 In other words, we cannot be found in breach of
10 fiduciary duty if we were complying with a court order and
11 everyone had an opportunity to raise an objection. The issue
12 was fully litigated. The primary defense is *res judicata*.

13 THE COURT: All right. So you are arguing that it is
14 untimely. That the Bilzerian case does not apply because this
15 is a true reliance upon counsel defense in a civil case.

16 MR. HECHTMAN: Correct.

17 THE COURT: What is the third next reason why the
18 motion should be denied?

19 MR. HECHTMAN: Those are my best two arguments.

20 THE COURT: All right.

21 MR. HECHTMAN: And I would just add --

22 THE COURT: I think was there an argument made by the
23 Plaintiffs that because guardian Rogers signed a waiver of the
24 attorney/client privilege that for some reason --

25 MR. HECHTMAN: There was --

1 THE COURT: -- releases the attorney/client privilege
2 in this case?

3 MR. HECHTMAN: There was and Judge Marra resolved that
4 issue.

5 THE COURT: Right. I am aware of that. And I know
6 that back on September 7th of 2016 I entered an order.

7 MR. HECHTMAN: That's another order.

8 THE COURT: Right. But that was Docket Entry, I
9 believe, 132 in which I found that the attorney/client
10 privilege in this case runs between the guardians of the
11 deceased ward and the guardian's attorney.

12 And that the guardians and the guardian's attorneys
13 may assert the attorney/client privilege to prevent the
14 production of privileged documents sought by Plaintiff.

15 And then, I know that Judge Marra had previously
16 concluded -- or subsequent to that order but previous to today
17 -- concluded that Stephen Kelly is the guardian who has the
18 authority to waive the privilege at issue. Not Curtis Rogers.

19 So, obviously, I am going to stand by my prior order
20 and Judge Marra's order to that effect. So how does that
21 affect your argument?

22 MR. HECHTMAN: Simply that Curtis Rogers' written
23 waiver is a nullity. It doesn't waive anything. And I think
24 that was crystal clear from the two orders on the topic, which
25 is Docket Entry 220 and Docket Entry 275.

1 THE COURT: All right. So let me ask you.

2 Is there any other argument against as to why the
3 motion to compel should be denied? Before I get into some of
4 the individual questions I just wanted to ask a few things from
5 you about that.

6 MR. HECHTMAN: Of course.

7 Well, I would just point out that there is two
8 distinct components to the motion that has been raised. One is
9 attorney/client privilege, which is Florida law which Florida
10 is, again, very strict on the side of nonwaiver and you have to
11 have some super compelling need to get around it.

12 THE COURT: Right. And then, there is the work
13 product which is federal law.

14 MR. HECHTMAN: Federal. Right.

15 And then, Plaintiff has made no effort to make any
16 distinction between opinion or fact work product what it is
17 seeking here.

18 As we know, opinion work product is near absolutely
19 immune. And the Eleventh Circuit hasn't even explained that --
20 they haven't even seen a case to date, which would allow for
21 getting around opinion work product. So I don't know that this
22 is the fact pattern that we are going to say that. I certainly
23 don't think so.

24 And then, as far as fact opinion work product, there
25 has been no showing as to what the substantial need or undue

1 prejudice would be. And what is especially compelling about
2 that is that Plaintiff was able to fully respond to two motions
3 for summary judgment.

4 One by this dying Defendant and one by on my office on
5 behalf of Ciklin Lubitz and O'Connell. Mr. O'Connell, Miss
6 Crispin, and Mr. Kelly where they were able to fully address
7 all of the liability defenses in the case without need for this
8 information showing that there is no undue prejudice.

9 THE COURT: Okay. So those would be the arguments,
10 then, as to why the motion should be denied?

11 MR. HECHTMAN: Correct.

12 THE COURT: Now, let me just ask you, as far as in the
13 motion at Docket Entry 205, the Plaintiff refers to seven
14 inquiries. Inquiry one is when was the valuation of 808
15 Lexington obtained and the purpose for which it was obtained?

16 And there was an objection made to it. I believe, it
17 was either attorney/client privilege or work product, or both.

18 And then, inquiry number 2 sort of, I think, falls
19 into that or folds into that. Why did your firm obtain a
20 valuation from Lieberman?

21 And that was partially answered by the witness stating
22 that the premise of the valuation was for the recovery of the
23 guardianship. It seemed like the questioning was, well, didn't
24 you get that valuation just to support your fee request?

25 And the response was that the premise of the valuation

1 was for the recovery of the guardianship. And obviously, the
2 more the guardianship recovers, the more the fee will be
3 because I think it was a contingency and that is the argument.

4 So on one and two, why should that be subject to
5 either attorney/client privilege or work product and why was it
6 not waived by a partial answer?

7 MR. HECHTMAN: So let me go -- I am actually going to
8 go to the transcript itself because there seems to have been a
9 typo in the motion. There are two questions raised and you
10 could go to Page 34.

11 THE COURT: All right. So this is Page 34 of the
12 Crispin depo?

13 MR. HECHTMAN: Correct.

14 THE COURT: All right. Go ahead.

15 MR. HECHTMAN: It starts at Line 23. And then, this
16 is about the Lieberman valuation:

17 Q. And when was it obtained?

18 A. I can't recall. I mean, possibly in 2013.

19 And this document has been filed with the Court and it
20 has been exchanged in discovery.

21 THE COURT: So there wasn't an objection to
22 attorney/client privilege as to when it was obtained?

23 MR. HECHTMAN: Correct.

24 THE COURT: All right.

25 MR. HECHTMAN: And then, the next question -- and I

1 think this is where the typo arises. And when was it obtained
2 and I think that should be why because the answer is to why.

3 And this is Page 35, Lines 1 through 2. That would be
4 attorney/client privilege and work product and so that's where
5 the -- this is Miss Crispin answering on behalf her client.
6 And why do I make that distinction?

7 Miss Crispin is still counsel of record for the
8 guardianship, in the ongoing guardianship case that has not
9 been finally discharged. She's saying I have an ongoing
10 litigation. It is not resolved. With these very same
11 Plaintiffs in state court.

12 THE COURT: So it is work product.

13 MR. HECHTMAN: Correct.

14 So breaking it down that's why I would say that's
15 definition of work product.

16 THE COURT: And why is this 808 Lexington property
17 important in this lawsuit?

18 MR. HECHTMAN: Okay. In this lawsuit there are four
19 critical properties. There is 330 Ocean Boulevard, which is a
20 condominium down the street from here, which was owned after
21 the divorce of Lorna and Oliver, the ward, and his wife joint
22 tenants with right of survivorship.

23 There was a property, a commercial piece of real
24 estate in New York, 808 Lexington, which was joint tenants
25 owned. Joint tenancy with right of survivorship. And then,

1 there was a property, East 67 Street, which was a luxurious
2 condominium in Manhattan, I believe, which Lorna owned. At all
3 times -- and this is in the complaint in the answer -- at all
4 times individually before the marriage Mr. Bivens was never on
5 the title to it.

6 And finally, there is a 99-year lease condominium
7 apartment in London that we call Portland Place. That, again,
8 Miss Lorna owned, or had the contract to in her own name.

9 The New York settlement agreement, which came to bear
10 -- and this is all laid out in the summary judgment -- came to
11 bear after the guardian filed the petition to determine
12 beneficiaries of Lorna's estate. So why is that important?

13 What the guardian did in order to enhance the value of
14 the guardianship estate was say I am entitled to inherent some
15 of what Lorna owned in her own name because the divorce was
16 invalid and, therefore, I am the rightful heir of Lorna. We
17 never should have been divorced in the first place. There is a
18 whole lot that goes on about the divorce and I do not want to
19 get into that. It is super messy.

20 Anyway, the result of that is the New York settlement
21 agreement. The New York settlement agreement is between
22 Lorna's estate and the guardianship and Mr. Bivens, Julian who
23 is now the Plaintiff as the PR had an attorney present during
24 the settlement conference and is now a party to the settlement.
25 That agreement results in the ward getting one hundred percent

1 of 330.

2 Again, he was only 50 percent titleholder. So that's
3 50 percent there to one hundred percent. He was a 50 percent
4 titleholder in 808. The end result of the New York settlement
5 agreement is he is one hundred percent titleholder of. This is
6 while the mortgage is in default.

7 In other words, he now is the sole titleholder. In
8 other words, he can now deal with issues related to the
9 mortgage without having to deal with the wife's estate, which
10 was a problem.

11 And then, when they released the claim as to 67 Street
12 in Portland Place, which again they didn't have title to by any
13 document. They just asserted a contingent claim on it by
14 virtue of this petition to determine beneficiaries. So why is
15 this important?

16 Because you have a five -- you have a multimillion
17 dollar asset, which at one point was owned half by the
18 guardianship and is now owned full by the guardianship. It was
19 eventually purchased by the son of the ward for five million
20 dollars out of the guardianship.

21 Did that help?

22 THE COURT: Yes.

23 All right, now inquiry 3 was questions about Crispin's
24 conversations with Keith Stein. And Keith Stein is an attorney
25 in New York that was retained to assist with the property?

1 MR. HECHTMAN: Correct. There is property in New
2 York. None of the Ciklin Lubitz firm is not admitted in New
3 York. They needed assistance. And one of the things that Mr.
4 Stein did and the purpose of his retention was to actually file
5 a partition action on 808 while the New York settlement
6 agreement is happening.

7 The plan was, okay, well, we're going to divide up our
8 interests in it. That way, in other words, if Mr. Bivens'
9 guardianship could afford to pay their mortgage and collect
10 their rents, well, we divide the property in half. That was
11 the goal of that proceeding. That was the scope of Mr. Stein's
12 representation. That was again briefed in the summary
13 judgments.

14 THE COURT: All right. And then, obviously, your
15 position is that this is attorney/client privilege conversation
16 and the only way it could be ordered produced would be if there
17 was a reliance on counsel or some other sort of waiver?

18 MR. HECHTMAN: I would take a step further than that.
19 I would say if it is only between Mr. Stein and Miss Crispin,
20 only between the lawyers, it is actually work product and
21 opinion work product.

22 THE COURT: And attorney/client privilege?

23 MR. HECHTMAN: Yes. And if a client is copied to it,
24 then, maybe it is attorney/client privilege, but we haven't
25 even met the predicate for good faith reliance on counsel.

1 THE COURT: All right. What about inquiry 4, did you
2 ever advise Curtis Rogers not to pay half of the sovereign
3 mortgage?

4 MR. HECHTMAN: That's what I just discussed. It was
5 already in default.

6 THE COURT: And just so I am clear, Rogers is not
7 saying, listen, the reason I did not pay the mortgage is
8 because Crispin told me not to?

9 MR. HECHTMAN: Let me take a step back.

10 The reason the mortgage fell into default is not
11 because Miss Crispin told me not to pay it. The mortgage was
12 already in default and I consulted with my lawyers about what
13 to do now.

14 In other words, help me with legal advice now that it
15 is in default. And that is, again, where Mr. Stein comes in
16 and files a partition action and gets a forbearance agreement
17 by the note-holder while they deal with the issues related to
18 the guardianship and the estate down here and again is breached
19 in summary judgment.

20 THE COURT: All right. And inquiry number 5, did you
21 review bank accounts to determine whether there was sufficient
22 monies in the accounts to pay the mortgage when it went into
23 default?

24 Now, normally, it would seem to me reviewing bank
25 accounts would not be attorney/client privileged. So what is

1 the fight over here where a question is asked about whether or
2 not Miss Crispin reviewed bank accounts?

3 MR. HECHTMAN: The issue stems from -- so there is a
4 particularized fact question there and I need to define the
5 page lines because you kind of have to follow along.

6 That issue stems from the guardian's testimony. So
7 Mr. Rogers and then, subsequently, Mr. Kelly's testimony that
8 they did not have enough liquid assets in the guardianship to
9 reinstate and keep the mortgage current.

10 So that's what it stems from. They say I didn't have
11 this. And then, that's uncontroverted that is what actually
12 happened in the state court and, then, they testified to that
13 same thing here.

14 And then, you have counsel for the Plaintiff in this
15 case going to the lawyers, well, did you while the guardians
16 were making a determination as to whether there was liquidity
17 to reinstate and pay these things, while there was still a
18 person that you are co-borrower with, did you review the
19 underlying documents to make a determination as to whether the
20 guardian was right?

21 That is the definition of attorney/client privilege
22 communication. I didn't review it in order to be, like , well,
23 yeah, it's twenty dollars a month and you have one hundred
24 dollars in the bank account and I am sure that you could pay
25 it. That wasn't a context in which that ever occurred.

1 THE COURT: All right. In inquiry number 6, what
2 evidence do you have that at the time the will was signed in
3 2009 that there was a lack of evidentiary capacity or undue
4 influence?

5 There was a work product objection about pending
6 litigation. An argument that Crispin is attorney for the
7 client, the guardian. And then, there was an argument about
8 whether the firm was a creditor of the estate, which apparently
9 it is. So what about that inquiry?

10 MR. HECHTMAN: I would take two steps back again and
11 identify Miss Crispin, and Mr. O'Connell, and CLO are currently
12 in active litigation concerning that petition in state court
13 right now. The adversary is sitting in this courtroom as well.
14 So we start there. Definition of work product.

15 Second, that petition is verified. It is under oath
16 and it lays out a specific factual predicate. In other words,
17 the factual predicate behind the petition is in the petition.
18 So what they're relying on to do it is actually in the public
19 record.

20 In other words, so this question is, well, what did
21 you discuss with your lawyers that may be what's in there,
22 what's not in there? In other words, decision of counsel and
23 client as to what to put in a public petition. That's what
24 this is getting at. It is a definition of attorney/client and
25 work product again and that is why we are objecting so

1 strenuously.

2 THE COURT: All right. And then, the seventh and last
3 inquiry in this motion was questions about whether an agreement
4 exists with Ciklin Lubitz and its insurance company to provide
5 a defense in the federal case.

6 And the Plaintiff argues it goes to bias and I think
7 he withdrew the argument that other parties have been required
8 to produce this. So the question goes to bias it appears.

9 MR. HECHTMAN: I would say that evidence of insurance
10 coverage is never admissible. And that is exactly what the
11 target of what counsel told you in argument was that he wants
12 to be able to say that the insurance are providing a gratuitous
13 defense.

14 Well, the jury can't hear about insurance coverage at
15 trial. So we shouldn't even have that discussion. And then,
16 on top of that, it's with me. That's an agreement with my
17 firm. It's an agreement with Mr. Kelly as successor guardian
18 as to an agreement to defend him because his agents are being
19 sued. Now, let's put this, again, back in the paradigm.

20 Ciklin Lubitz O'Connell have insurance coverage. He's
21 the principal. They're his agents. They're being sued
22 jointly. There is joint and several liability here. Like,
23 there is one hundred reasons why this could go down, why it
24 went down, what agreements he signed outside of -- we're not
25 outside of if we were to seek fees, sure, then maybe he's

1 entitled to a fee agreement that we have, but we're not at a
2 fee hearing.

3 So what he's asking for is an agreement that may or
4 may not exist waiving attorney/client -- waiving a conflict of
5 interest between my firm and Mr. Kelly. How that was ever
6 relevant to this proceeding is beyond my level of
7 comprehension. Mr. Kelly can be cross-examined at length about
8 his relationship with Ciklin Lubitz O'Connell if we get to
9 trial, but again --

10 THE COURT: What about a question -- and again, I am
11 just trying to think this through.

12 It seems to be that the Plaintiff wants to ask the
13 question something to the effect of, Mr. Kelly, well, you know,
14 isn't it true that you are biased against me, or you are
15 biased in favor of the Defendants because you are getting a
16 free defense in this case?

17 MR. HECHTMAN: But doesn't that, then, go directly to
18 how that free defense comes about?

19 THE COURT: Insurance coverage?

20 MR. HECHTMAN: Yes.

21 THE COURT: Again, I don't know. I am still thinking
22 this through, but I am trying to understand how this issue
23 comes out down the road, if at all.

24 MR. HECHTMAN: I could think of a question that does
25 not implicate an agreement between my firm and the carrier and

1 the clients that goes to the same effect without necessarily
2 getting into issues that are inadmissible for purposes of a
3 jury. I mean, it's for me to provide a defense. We just
4 watched the public defender defend someone. That's not
5 anything, Your Honor.

6 THE COURT: All right. Anything else you wanted to
7 add in response to this motion?

8 MR. HECHTMAN: Not at this time.

9 THE COURT: All right. Then, Mr. Denman, I will give
10 you a chance to respond to all that as to, especially the
11 timeliness issue. I understand the Bilzerian case. You can
12 respond to that if you have any specific citations to a depo,
13 but the untimeliness issue.

14 MR. DENMAN: Your Honor, with regard to the
15 untimeliness issue, I mean, I think we have to go way back to
16 when counsel is moving for the stay and moving, if you recall,
17 to dismiss this.

18 And the state court, they wanted to have it there and
19 then they wanted -- it was going back and forth and there were
20 stays. And then, we got into the issue of the privilege and we
21 were setting depositions and because of the privilege issue it
22 would have been so important to the depositions.

23 I believe there is an order and we all agreed that we
24 would stay the depositions pending a resolution that Your Honor
25 ruled upon and after that we all got busy trying to set

1 depositions.

2 I think we tried to get an extension of the time to
3 set depositions because it came upon so quickly. The Court
4 denied that. So we scrambled and we got the depositions.
5 According to the procedural rules, we have 30 days from the
6 date of the deposition in which to seek to compel responses.

7 THE COURT: Right.

8 The local rules give you 30 days, but it is sort of a
9 unique situation because the depo was taken on January 9th of
10 2017. The motion was filed within 30 days on February 8th of
11 2017, but in the interim on January 17th there was a discovery
12 cutoff. So I guess the argument from the other side is you
13 should have filed that before January 17th.

14 MR. DENMAN: I heard the argument.

15 I mean, I think we were from the date of probably the
16 8th until discovery cutoff and with some agreements to allow
17 depositions after discovery cutoff, we were pretty much taking
18 depositions and flying different places every day. I don't
19 even know if we got the transcript from Miss Crispin by the
20 time of discovery cutoff.

21 Nevertheless, we filed the timely motion to compel the
22 better responses and, you know, until the argument was raised
23 by counsel honestly never considered it otherwise. The rule
24 gives us the 30 days. We had 30 days and we complied. So we
25 really never considered it in a different fashion that that

1 rule would somehow be limited or less because of the discovery
2 cutoff.

3 THE COURT: Okay. So what about the Bilzerian issue,
4 you know, the waiver of sword and shield by reliance on a
5 defense of advice of counsel?

6 Do you have any specific citations from the
7 depositions that you want to cite to me that show where one of
8 the deponents -- one of the guardians, either Rogers or Kelly,
9 said I am relying on the advice of counsel for my actions and,
10 therefore, I am not answering that?

11 MR. DENMAN: Your Honor, respectfully, the depositions
12 would have to be read from start to finish.

13 If you read the depositions from start to finish there
14 is no mistake in the entire intent of Kelly and of Rogers to
15 cite to the reliance upon counsel. It's unmistakable.

16 THE COURT: I mean, they're saying that there is
17 attorney/client objections, but are they saying, you know, are
18 they going beyond an attorney/client objection saying I'm not
19 answering that because -- let me rephrase it.

20 I am defending myself from this specific action
21 because counsel advised me to take that action. Is there
22 anything in the depos that say that?

23 MR. DENMAN: Well, replete, I think there is no way to
24 read these depositions without realizing or recognizing it is
25 clear, I am not responsible because, hey, I relied upon

1 counsel. What more could I do?

2 And the objections were raised throughout the
3 deposition of attorney/client. I am not going to give you the
4 information, but it is clear. I don't think that anybody
5 objectively could read that and not recognize that the entire
6 purpose of saying I relied upon counsel is I did nothing wrong
7 because I was advised by counsel.

8 THE COURT: All right. And then, you had made the
9 argument that Curtis Rogers waived the attorney/client
10 privilege.

11 But, again, based on the prior orders in this case, I
12 am going to find that that is not applicable. In other words,
13 the Rogers waiver is really a nullity. I mean, it does not
14 apply because in this case the current guardian is Stephen
15 Kelly. And I understand that you disagree with that
16 assessment, but that is the law of the case at this point.

17 MR. DENMAN: I understand and I recognize that, Your
18 Honor.

19 THE COURT: All right. Anything else that you wanted
20 to just in rebuttal to the Defense argument on --

21 MR. DENMAN: Yes, Your Honor. I think there are a
22 couple of things.

23 For example, I wrote with big explanation points as
24 counsel advised you that this was the plan. And I forget
25 exactly what it was, but this was the plan. What we were going

1 to do was the plan of Ciklin Lubitz of counsel.

2 So that's exactly what my point is. We are going to
3 come in and explain, here's our plan, here's our defense, but
4 you don't get to look at any documents or ask any questions to
5 inquire of --

6 THE COURT: We are not talking about any documents
7 here. We are only talking about depo questions.

8 MR. DENMAN: Well, I recognize that, but the first
9 thing would be to ask the questions through attorney/client
10 privilege. Did you send e-mails to confirm that? Did you not
11 send e-mails?

12 I mean, you would get to the ability to cross-examine
13 what that's based upon, but when you are talking about plans --
14 and I don't have the right -- the ability to get into, well,
15 how did you come up with that plan?

16 What was the basis for the plan? So it's almost as
17 though they are want to be able to come in and voice the
18 conclusions without giving me the ability to inquire as to how
19 you reached those conclusions.

20 For example, it gets right down to the essence of it.
21 The one thing I want to hit on is Judge Collin in the
22 underlying case was pretty clear when he entered the orders on
23 the settlements and I objected to the settlements.

24 And I said, well, we believe that Curtis Rogers may
25 have done this, or whatnot. And we put this quoted to the

1 language in our motion to reopen discovery where the Judge made
2 it very clear, my ruling does not release the guardians.

3 My ruling doesn't release people. I am relying upon
4 what they are telling me here today. When they seek their
5 discharge and you are going to come up and tell me whether they
6 did right or wrong under the law, the probate law, you have the
7 right to show me that they were irresponsible. They were
8 negligent.

9 So I just want to respond that the mere fact that the
10 Court, for example, approved the New York settlement of which
11 my client was not a party and which objected, is important.
12 The New York settlement divvied up these four pieces of
13 property.

14 One of our main arguments is that they came into this
15 horse trade and they failed to conduct the due diligence. And
16 they split these properties up telling the Court they are of
17 equal value, when 67 street is 22 million dollars and 808 is
18 approximately, let's see, best day, 9 million dollars.

19 So, if you are going to come into a settlement on
20 behalf of the ward and negotiate his property, then, our
21 argument is you must conduct due diligence. So what due
22 diligence did you conduct? What appraisals did you get? To
23 Curtis Rogers, to Stephen Kelly, why did you take actions that
24 relied upon counsel?

25 They don't have an independent reason. Did you get an

1 appraisal? No. Why not? I relied upon counsel. So why did
2 you not conduct this due diligence? I relied upon my counsel.
3 So, did counsel say, hey, the valuation is just as good or we
4 actually did conduct this due diligence?

5 These are all, to me, these are the issues. If you
6 are going to say we entered into the settlement for the best
7 interests of the ward and it turns out that it is not a fair
8 settlement, what was the logic behind it? What did you do to
9 show that you exercised your fiduciary responsibilities for the
10 ward?

11 THE COURT: All right. I got your argument.

12 MR. DENMAN: And just to move up one moment.

13 Some of the arguments about when Crispin told Rogers
14 to pay the mortgage, or how it went into default, and where it
15 went into default.

16 I mean, we can sit here and give you our explanation
17 of the facts of what occurred. And I think we have differing
18 views on how that led up, or whether the advice went to cure
19 the default and couldn't be cured.

20 The fact of the matter is, Curtis Rogers is saying, I
21 didn't take action to cure this default based upon advice of
22 counsel. And one of the arguments is about looking at the bank
23 records that the witnesses, they're saying the evidence is
24 replete that the witnesses looked at the bank records and there
25 wasn't enough money in the account.

1 And the attorneys did not have the responsibility to
2 look at those bank records. And therefore, that isn't of issue
3 and it shouldn't be important, but our position, it is
4 important because if the attorneys are going to go into Court
5 and argue to the Judge that we should approve the settlement
6 because there is not enough money, or we need to sell the
7 property because the trust isn't paying the expenses of the
8 ward when, in fact, the trust was paying the expenses.

9 We believe that the attorneys can't hide behind the
10 fact that, well, my client, you know, the guardian said that
11 this is the case, but I can go into court and argue this to the
12 Judge without doing my own due diligence without -- if the
13 attorneys have their own duties to the client, which is the
14 ward, then, they have their own duties to him to look to these
15 bank records.

16 And that's why I should be able to inquire directly as
17 to what they did, whether they complied with their duties. And
18 that's why under that *Saadah* case, the ward is the intended
19 beneficiary of the attorney/client relationship. They owe a
20 separate duty to him. It's not the situation where they can
21 just say I relied upon the guardians. They have to undertake
22 their own responsibilities.

23 THE COURT: But, now the *Saadah* case that issue has
24 already been decided against you.

25 MR. DENMAN: I agree.

1 THE COURT: That case weren't you trying to argue that
2 the attorney/client privilege runs from the attorney back to
3 the ward?

4 MR. DENMAN: In that instance and Your Honor ruled
5 against me, but if we are going to have a reliance upon counsel
6 as to why certain things were done --

7 THE COURT: But is there really a reliance on counsel
8 defense when it has not been raised in an answer, it has not
9 been raised in a summary judgment motion response, and it has
10 only been asserted at a depo?

11 And I will go through the depo one more time, but is
12 there really a true reliance on counsel defense in this case,
13 or is there just an assertion of attorney/client privilege to
14 various questions?

15 MR. DENMAN: Your Honor, I will read from a passage
16 from the *Cox v. Administrator U.S. Steel & Carnegie* case,
17 17 F.3d 1386, 1994 case. It is Page 37. And the Court states:

18 "As we discussed in the previous section, the
19 attorney/client privilege was intended as a shield and not as a
20 sword. Citing to the GAB case...", which we cited to.

21 "...in this case USX waives the privilege if it
22 injects into the case an issue that in fairness requires an
23 examination of otherwise protected communications."

24 THE COURT: But are they injecting it or did you
25 inject it in the complaint?

1 MR. DENMAN: Your Honor, they're injecting it.

2 I did because they haven't filed an answer saying
3 reliance on counsel. They haven't filed a summary judgment
4 saying reliance on counsel or responded to one.

5 It's more just assertions to specific questions that
6 there is an attorney/client privilege.

7 THE COURT: Is that really issue injection and sword
8 and shield?

9 MR. DENMAN: Your Honor, I believe from reading the
10 language of *Cox* it is. It is not limited to whether they
11 raised it in the answer.

12 If I am going to ask them questions about which they
13 are defending their own negligence based upon reliance of
14 counsel, they've injected it into the case. If they had said I
15 don't know, or I don't have a good reason.

16 But, if they are going to say I am justified in doing
17 this because of reliance upon counsel, then, I should be able
18 to determine or prove to the jury whether their reliance was
19 justified, whether it was good advice, bad advice.

20 The jury gets to make the determination as to whether
21 they think that either the guardian or the attorneys were
22 acting properly in their fiduciary capacity. If, for example,
23 I relied upon advice of counsel I did something. Well, if the
24 testimony of the communication show, well, we want to take X,
25 for example, we don't want to try to overturn the divorce

1 decree in Texas on a narrowly basis before the Texas court that
2 raised it.

3 Instead we want to pursue it under a Florida Court not
4 to give full faith and credit to the divorce in Texas so we can
5 argue to the probate Judge that the parties are still married
6 so that we can try to get these properties in Florida, but to
7 do so, Guardian, you have to give us a contingency fee of a
8 percentage.

9 And then, the questions are, well, why did you choose
10 to go with the contingency fee that would cost the ward
11 hundreds of thousands of dollars as opposed to go on with an
12 hourly before the same Judge and advise him of the facts which
13 they're saying was improper service? Why didn't you attack it
14 this way? Wouldn't that have been the less expensive? I
15 relied upon the advice of counsel.

16 THE COURT: All right. Anything else on that motion?

17 MR. DENMAN: I think there was one. Just regarding
18 the insurance, Your Honor. My effort is not to inject
19 insurance. I almost was going to --

20 THE COURT: You know that insurance coverage does not
21 come into a civil trial.

22 MR. DENMAN: Of course.

23 THE COURT: How would you ask a question on that?

24 MR. DENMAN: Exactly how you did it, you know. Who's
25 paying for -- the insurance is paying on behalf of Ciklin

1 Lubitz. It is still Ciklin Lubitz. For months Ciklin Lubitz
2 was representing Kelly directly before my esteemed colleagues
3 came in to take over the defense on behalf of insurance
4 company.

5 The question can still come in without inserting
6 insurance into the case. The fact of the matter is that he is
7 being provided a defense. And the jury should be able to
8 understand whether or not that leads to a bias in favor of his
9 testimony and in favor of Ciklin Lubitz.

10 THE COURT: All right. So the next motion is Docket
11 Entry 209. It's Plaintiff's motion to he compel O'Connell's
12 deposition responses.

13 And I will, just for the record, there was a
14 Plaintiff's motion to compel O'Connell's deposition responses
15 at Docket Entry 206. And I will deny Docket Entry 206 as moot
16 in light of Docket Entry 209.

17 And we will have argument on 209, but we are going to
18 take a short break in just a few minutes, maybe five minutes,
19 and I will be back.

20 So the next motion will be Docket Entry 209,
21 Plaintiff's amended motion to compel O'Connell's deposition
22 responses.

23 (Recess.)

24 THE COURT: So we are all back.

25 So let me just ask Mr. Denman one question. I know

1 you argued that the depositions of the two guardians, Mr.
2 Rogers and Mr. Kelly, were replete with reliance on counsel
3 answers.

4 Can you give me what is your best question and answer
5 from each of those depositions that shows a reliance on
6 counsel? Are you able to do that now?

7 MR. DENMAN: I think I can, Your Honor. Can I give
8 you the best if you just bear with me?

9 THE COURT: What do you think is your best example of
10 where the guardian argued a reliance of counsel defense?

11 MR. DENMAN: I mean, one of them would be --

12 THE COURT: In which depo?

13 MR. DENMAN: In the depo of Kelly, Page 171, Lines 10
14 through 20:

15 Q. Why did you sign the exclusive listing agreement
16 with Lisa Lieberman?

17 A. You will have to ask my attorneys --
18 Essentially objection, form.

19 A. You will have to ask my attorneys about that.

20 Q. So you relied upon the advice of counsel to
21 execute an exclusive listing agreement with Lisa Lieberman and
22 Eastern Consolidated?

23 A. Yes. And eventually it was paid in the global
24 settlement.

25 And the reason why this is an important one, one of

1 our arguments, is that three days before the Court, the hearing
2 on the petition to sell 808 Lexington, the guardians and the
3 attorneys rushed an exclusive listing agreement with Leo
4 Lieberman so that under any circumstance, whoever bought the
5 property, which in this case Julian Bivens, himself, bought the
6 property, Leo Lieberman would be paid \$300,000 from the
7 proceeds of the sale, which means that the ward, the guardian
8 and the attorneys have now obligated the ward to \$300,000
9 automatically for any sales.

10 So the question here is, why did you do this? And his
11 defense is you will have to ask my attorneys about that. So
12 his position is I am pushing this away on them. Ask them why
13 it was done to avoid his exposure.

14 THE COURT: All right. What about Mr. Rogers' depo?
15 Any citation that you can give me of Mr. Rogers' depo about
16 this argument of advice of counsel issue?

17 MR. DENMAN: Yes, Your Honor.

18 Your Honor, just before I get there because I am
19 looking through just the excerpts, another one was, for
20 example --

21 THE COURT: In whose depo?

22 MR. DENMAN: This is Kelly's depo. Page 276, Line 18:

23 Q. Without getting into leading up to it did you
24 rely upon advice of counsel to sell 808 Lexington and answer is
25 yes.

1 THE COURT: Okay.

2 MR. DENMAN: Here's Curtis Rogers, Page 127.

3 One of our arguments is that under the allegations of
4 the original settlement agreement, Mr. Rogers, part of the
5 agreement in the Texas agreement, was that Rogers would resign
6 within 30 days and immediately seek discharge because
7 technically the Court doesn't accept his resignation until a
8 hearing is had and there is a discharge.

9 So that's the only time that he is effectively
10 resigned when the Court accepts it. So the question is -- and
11 we argued that he never did that. He never did the things that
12 he needed to do to be resigned. He stayed on for an entire
13 year after that.

14 Q. What, if anything, did you do on behalf of
15 guardianship to make sure that those obligations under the
16 Texas settlement agreement with respect to the discharge of
17 Curtis Rogers were carried out?

18 Excuse me. Your Honor. I messed up. I read it the
19 wrong way. This is Stephen Kelly's deposition still.

20 THE COURT: Oh, okay. Well, you have already given me
21 a couple on Kelly. I am trying to find out if you have one of
22 your best one on Mr. Rogers.

23 MR. DENMAN: I thought that I read it wrong and it was
24 Rogers. Let me pull out Rogers for a moment.

25 THE COURT: And I will reread the whole depo again. I

1 just want you to just give me briefly where you think your best
2 argument is from the depo.

3 MR. DENMAN: Here in Rogers, Page 86, Line 17:

4 Q. Okay. Do you recall after the settlement
5 conference ever seeing an appraisal of any of the four
6 properties that were the subject of the New York settlement,
7 which I will go through, but won't have to go through again
8 because I am sure you know these as well as I do; 808
9 Lexington, 67 Street, the London Portland Place property, and
10 330 South Ocean here in Palm Beach.

11 Do you remember seeing an appraisal of any of those
12 properties from the time of the settlement conference to the
13 time of the Court approval?

14 Objection by Mr. Stein and Miss Schultz as to form.

15 A. No, I'm sorry.

16 Q. Did you rely upon your counsel to do the due
17 diligence necessary to tell you what the value of the
18 respective properties were?

19 Objections again; form.

20 A. Yes.

21 Q. Did you undertake any direct steps to determine
22 the value of those properties, or was that something you
23 entirely relied upon counsel?

24 Objection to form.

25 A. Relied upon counsel.

1 THE COURT: Okay.

2 MR. HECHTMAN: Your Honor, let me just object to the
3 extent that --

4 THE COURT: Let me just turn to Mr. Hechtman and if
5 you want to respond to those.

6 MR. DENMAN: Yes. I just wanted to -- I can respond
7 factually to those, but I also wanted to just object briefly to
8 the extent that there was no written motion citing any single
9 portion of Mr. Rogers' deposition, I would object to that.

10 Now, subsequently, in a conferral, Mr. Denman
11 identified portions of Mr. Rogers' deposition, but I would like
12 to say they were not actually part of any motion or notice.

13 THE COURT: So why don't those citations that he just
14 made, why do they not invoke the sword/shield advice of
15 reliance on counsel?

16 MR. HECHTMAN: The simple answer -- I can go to each
17 one. Not once was the question asked did you in good faith
18 rely on counsel and is that your defense here?

19 That question wasn't asked so they didn't answer --

20 THE COURT: The question was did you rely on counsel?

21 MR. HECHTMAN: Correct. It's just a fact. Did you do
22 that? Well, of course they did. And the answer is never: No,
23 no, no, I didn't do anything wrong. I relied on counsel to do
24 that. That is never the answer. Not once. You never heard
25 that once.

1 They just said, yeah, I talked to my lawyers and in
2 each one of those instances you have a petition and approval by
3 the Court. Our petition is based upon Court approval and that
4 is and always has been. And all these issues were actually
5 litigated in the probate court. Counsel is trying to
6 relitigate the guardianship issues, which is exactly what we
7 are saying is a basis for summary judgment.

8 THE COURT: Okay. All right. So I just wanted to
9 flesh that out a little bit more.

10 Okay. So now, the next motion is Docket Entry number
11 209 and that's Plaintiff's amended motion to compel O'Connell's
12 deposition responses and memorandum in support.

13 There is a Defendant's response at Docket Entry 217
14 and there is a Plaintiff's reply at Docket Entry number 222.

15 Let me turn to you, Mr. Denman, since it is your
16 motion. Mr. O'Connell, what is his role in this case?

17 MR. DENMAN: O'Connell is the lead attorney
18 representing the guardians. He is the partner and Miss Crispin
19 is his associate.

20 THE COURT: All right. And he currently represents
21 the guardian, correct?

22 MR. DENMAN: He currently represents Stephen Kelly.
23 He is withdrawing from Curtis Rogers.

24 THE COURT: Okay. All right. So in looking at this
25 motion, I understand that a lot of the issues that we argued in

1 the prior motion overlap with this motion.

2 Would you agree with that?

3 MR. DENMAN: Yes, Your Honor.

4 THE COURT: So to the extent we argued all those, I
5 know the positions of these -- what I am trying to do is find
6 out as to the specific questions involving O'Connell's
7 deposition and whether there are any particular issues that
8 apply to O'Connell that would not have applied to Crispin.

9 So the first inquiry area is, did you advise the
10 guardian that you would be seeking your fees outside of the
11 contingency fee for the work done on the Texas settlement?

12 Objection, I think that's privileged. You are asking
13 him would he advise the guardian.

14 Yes. Mischaracterization and invades attorney/client.
15 So you are telling him not to answer yes.

16 So what are you seeking in inquiry one and why is this
17 relevant and why should it be compelled?

18 MR. DENMAN: As far as the Texas case, the guardian
19 sought and obtained approval for a pretty lucrative contingency
20 fee award for attorneys in Texas to handle all of the
21 responsibilities involving the Texas litigation.

22 And as part of our conflict of interest and breach of
23 fiduciary duty claims against the ward, in this case the Ciklin
24 Lubitz firm billed a significant amount of hourly money to the
25 ward for drafting, for example, the trust agreement, the Texas

1 trust agreement. Things that should have been handled by the
2 Texas attorney pursuant to -- I believe they were paid a
3 million five under the settlement. That should have been
4 pursuant to a contingency fee.

5 So the issue is here I am asking did you advise -- who
6 was responsible for these additional fees? Was it the guardian
7 who approved it or did you advise the guardian that you would
8 be seeking additional fees outside of the --

9 THE COURT: Okay. Well, why would not O'Connell's
10 advice to the guardian be covered by the attorney/client
11 privilege and work product?

12 In other words, as far as attorney/client it is the
13 attorney advising the guardian, which is his client. Why would
14 that not be? I mean, I understand you have argued the issue
15 injection and other things, but why would that not be pure
16 attorney/client privileged information?

17 MR. DENMAN: I think by virtue of the fact if they are
18 -- it goes to who is responsible for approving these additional
19 fees outside of the -- or in violation of the fiduciary duty to
20 the ward.

21 If you already have a fee relationship is this the
22 guardian who is undertaking to incur additional expenses when
23 they told the Court he couldn't pay hourly fees, or is it the
24 attorneys? Whose responsibility is it?

25 So I understand Your Honor's position, but I believe

1 this goes to the ultimate issue of why did you do this?

2 THE COURT: All right. And inquiry number 2, did you
3 ever request anyone to perform an appraisal of the 67 Street
4 property and the answer is not that I recall.

5 Did you ever request that anyone perform or provide a
6 broker's opinion for any of the four properties? Same
7 objection and instructions.

8 I know that, of course, there were broker opinions
9 obtained on 330 and 808 and there might have been and that's
10 why I am uncertain on 67 Street.

11 Do you believe that actual documentation was provided
12 to you -- it says 'Mr.' Lieberman -- with some degree of
13 analysis of the opinion of 67 Street.

14 There was an objection and the answer is that's not
15 what I am sure about.

16 Then is failure to pay the sovereign mortgage would
17 cause the mortgage to go into default, would that be in the
18 best interest of the ward?

19 There is an objection form predicate and objection.
20 And then it says I can answer, okay. She was making a
21 privilege objection and it would depend on the facts and
22 circumstances if the ward was short of funds as here, not
23 paying the mortgage could well be in the ward's best interest.

24 It seems like all the questions were answered in
25 inquiry number 2. What is it that was not answered in inquiry

1 2 on a privilege basis?

2 And before you answer that, we are going to take just
3 a second. I have an agent here that I need to see for just a
4 second.

5 Ken, can you put the noise on?

6 THE COURTROOM DEPUTY: Yes.

7 (Recess.)

8 THE COURT: All right. So let's go ahead to inquiry
9 number 2. You were going to respond, Mr. Denman?

10 MR. DENMAN: Yes, Your Honor.

11 Number 2, as I put in any motion, it is seeking
12 clarification as to whether any information was withheld on the
13 basis of privilege because Miss Studley advises Mr. O'Connell
14 to the extent that it is not involving anything privileged you
15 can answer.

16 So I am not clear as to whether anything was withheld
17 because of privilege and what was provided was not based on
18 privilege.

19 And then, that's one, two, and the last portion of the
20 answer where it says it would depend on the facts and
21 circumstances if the ward were short on funds or was short on
22 funds as here, not paying the mortgage could well be in the
23 ward's best interest.

24 Here, I believe that by Mr. O'Connell inserting an
25 opinion that the ward was short of funds, then, to whatever

1 extent, or how his knowledge is based where he comes up with
2 that statement, the privilege would be waived with respect to
3 that entitling me to inquire further of that.

4 THE COURT: Okay. And then, finally, there is inquiry
5 number 3. And inquiry number 3 deals with, but when you came
6 into court on September 13th to seek approval of the New York
7 settlement, you wanted the Court to approve the New York
8 settlement, correct?

9 The client: Of course.

10 Do you have communication from the guardian, to you
11 that he wanted the settlement to be approved?

12 That's attorney/client. He just opened the door, you
13 say.

14 A. The client signed the petition to have the
15 settlement approved.

16 Q. So other than the client signing the petition to
17 have the settlement approved, there is no other communication
18 from the client to you regarding the approval of the
19 settlement; is that right?

20 That's privileged. I am going to direct him not to
21 answer.

22 Q. And the client signed the petition after
23 receiving advice from you as his counsel, correct?

24 I am going to direct him not to answer.

25 Q. Did you rely on Keith Stein for valuating the 808

1 and 67th Street properties?

2 Are you instructing him not to answer? Yes.

3 So this inquiry number 3, if the guardian signed the
4 petition, why do you need to get any underlying documents that
5 might be covered under the attorney/client privilege?

6 MR. DENMAN: Because if the guardian advised that he
7 relied upon the advice of counsel to take this action, then,
8 those communications back and forth, as to why this would be in
9 the best interest of the ward, would be the subject of the
10 inquiry.

11 And Mr. Rogers did advise that he relied upon the
12 advice of counsel to have the settlement approved. So,
13 therefore, if he relied upon advice of counsel and there are
14 communications that caused the guardian to sign the petition,
15 then, those would be essentially waived or open by virtue of
16 the Cox case and the GAB case and the others that we've cited.

17 THE COURT: All right. Anything else on this inquiry?

18 MR. DENMAN: No, Your Honor.

19 THE COURT: All right. So let me turn to Defense
20 counsel and just if you would respond to those areas.

21 MR. HECHTMAN: Of course.

22 Inquiry number 1, which was the petition for fees as I
23 think, one, the client answered the question. And again, this
24 really applies to all three is, and as you pointed out, there
25 was a petition and there was court approval.

1 The defense is based upon court approval. So again,
2 fee petition, was there a fee petition by Ciklin Lubitz and
3 O'Connell of an hourly rate on top of the contingency fee
4 agreement? They petitioned the Court. The guardian signed off
5 on the fees. The Court approved them.

6 The fees are identified in the final report of the
7 guardian pending discharge. That has all happened. I don't
8 know why, again, just as you said, why do we need to go
9 anything underneath that.

10 Again, for appraisal of 67th Street, I think the key
11 is Mr. Denman is basically asking to keep asking questions that
12 he stopped asking and I think you pointed that out and that's
13 inquiry number 2.

14 The attorney says I can answer that. He, then, starts
15 answering. And then, Mr. Denman asks a question: So it
16 depends on whether or not the ward had sufficient cash to pay
17 the mortgage at the time; is that right? Page 52, Lines 11
18 through 13.

19 The client answers 15 through 16: That would be one
20 factor. A significant factor. And then, Mr. Denman doesn't
21 keep following up and now he's asking for an opportunity to get
22 more clarification when he stopped taking the depo.

23 This isn't a motion to compel based upon at issue.
24 This is I stopped asking questions. That's not a valid basis.

25 Number 3 is approval of the New York settlement

1 agreement, again, just as you said. Well, what communications
2 did you have with the attorneys, with your client between the
3 attorneys before you petitioned for it again where in the fact
4 pattern it's not?

5 I relied on my attorneys in good faith that the New
6 York settlement agreement was a good idea. It's the next step
7 in a non guardianship case that may be a legitimate issue, but
8 in a guardianship case, we have petition for court approval and
9 the Court approved it. Our defense is it was court approval.

10 You can find plenty of cases out there and several of
11 them are cited in this briefing about you inject
12 attorney/client communications when you say we should or should
13 not have settled something and you go to compel a settlement
14 agreement. That happens on a routine basis.

15 That's not this case. We have a settlement agreement
16 that was ultimately Court approved. So why was it Court
17 approved? Why are we here? What's our defense? The Court
18 approved it. We didn't breach our fiduciary duty. We acted by
19 definition in good faith because the Court said we did acting
20 in the best interest of the ward.

21 The key predicate -- and I think I missed this in my
22 introduction. The basis of liability in this case and the
23 basis of the defense in this case is did you act in the best
24 interest of the ward?

25 Every single court order in the guardianship is

1 predicated upon that premise. So if the Court approved a New
2 York settlement agreement the Court said you are acting in the
3 best interest of the ward under the settlement agreement, go
4 for it. That's what that means. That's what all these orders
5 mean. Attorney's fees, approval to sell something.

6 THE COURT: And that, of course, goes to the summary
7 judgment argument?

8 MR. HECHTMAN: Exactly.

9 THE COURT: But that's pending.

10 All right. Anything you wanted to respond, Mr.
11 Denman, before I go to the next motion?

12 MR. DENMAN: No, Your Honor.

13 I am not going to respond to the arguments regarding
14 settlement because it is summary judgment.

15 THE COURT: Right.

16 MR. DENMAN: Obviously, I have some pretty passionate
17 beliefs on that, but obviously we are not here on that. So I
18 am just hoping that you are not asking me to or wanting me to.

19 THE COURT: I do not want you to comment on summary
20 judgment. That is a whole separate matter, but I am just
21 taking that in to understand what the underlying facts are for
22 all these discovery issues.

23 Okay. So then, the final motion is Docket Entry 210,
24 which is the Plaintiff's motion to compel Stephen Kelly's
25 deposition and responses and memorandum in support thereof.

1 Now, Kelly was not an attorney. He was the guardian.
2 So he was not acting as an attorney. He was acting as a
3 guardian for the ward; is that right?

4 MR. HECHTMAN: Yes, Your Honor.

5 THE COURT: All right. So the first area of -- this
6 is Docket Entry number 210 and there was a response by the
7 Defendants at Docket Entry 218. And then, a reply by
8 Plaintiff's, and amended reply at Docket Entry 224.

9 The first inquiry was, okay, you said you executed an
10 agreement with Miss Studley's firm, correct? Did that include
11 anything pertaining to conflicts of interest?

12 The objection is I'm going to object to form. I'm
13 going to mover for a protective order on that not to answer and
14 it goes on. It says:

15 Q. Do you know whether you executed a conflict of
16 interest waiver with Miss Studley's firm?

17 A. Yes.

18 So that question is answered. The question then,
19 says:

20 Q. Did you consult with independent counsel in
21 connection with your rights pertaining to the conflict of
22 interest?

23 I am going to direct you not to answer.

24 The next question is:

25 Q. Did you seek counsel to provide independent

1 counsel with respect to the execution of the conflict waiver?

2 Same privileges. The objection directing witness not
3 to answer.

4 Q. Did you consult with any independent counsel
5 regarding the conflict interest waiver?

6 Same objection. It's attorney/client.

7 And the question goes on and, then, the final question
8 appears to be:

9 Q. Have you sought the advice of any independent
10 counsel besides Ciklin Lubitz or Wicker Smith since this
11 federal lawsuit was filed?

12 I am going to directed the witness not to answer.

13 So why, whether or not Mr. Kelly sought independent
14 counsel about a conflict of interest waiver or contacted
15 counsel after the federal lawsuit was filed, why is that
16 discoverable and relevant?

17 MR. DENMAN: I guess no different than the Defendant
18 seeking and obtaining the retainer agreement between our firm
19 and Julian Bivins.

20 You said you executed an agreement. There shouldn't
21 be any limitation on answering questions as to what's in that
22 agreement and whether he consulted with counsel. I don't know
23 why that would be -- whether he sought counsel is an act.

24 Did he seek counsel. I didn't ask what was the advice
25 that counsel gave him. Did he seek counsel. And I don't know

1 where that is attorney/client privileged communication, did you
2 seek counsel.

3 THE COURT: What about the conflict of interest
4 waiver? He answers one question. It says do you know whether
5 you executed a conflict of interest waiver with Miss Studley's
6 firm? Yes. And then you go on to ask whether he sought
7 independent counsel.

8 Why would it be relevant and why would there not be a
9 attorney/client privilege to whether or not he sought
10 independent counsel or consulted with independent counsel
11 regarding a conflict of interest waiver?

12 MR. DENMAN: Because I think it all goes to the heart
13 of the bias. That he is being presented with agreements first
14 from Ciklin Lubitz firm and, then, from Miss Studley's firm.

15 And he's entering into agreements to have his defense
16 paid for and potentially for indemnification and it goes to
17 bias. That's really where I'm going. I am exploring what is
18 the nature of the bias between a guardian and an attorney.

19 THE COURT: All right. And then, the last area was
20 whether he sought the advice of counsel since the lawsuit was
21 filed.

22 Why would that be important to discover and why would
23 that not be covered by the attorney/client privilege whether
24 somebody is out seeking an attorney?

25 MR. DENMAN: I'm not sure of the exact timing, but I

1 believe it went to where we had put into a motion regarding
2 potential conflicts and settlement negotiations. So with
3 regard to that, I will strike that from this aspect of the
4 hearing, Your Honor.

5 THE COURT: Okay. All right. So you are withdrawing
6 that last part about on Page 2 of Docket Entry 210 where it
7 talks about have you consulted with independent counsel besides
8 Ciklin Lubitz since the lawsuit was filed.

9 All right. Now, inquiry 2 is -- yes?

10 MR. DENMAN: I apologize.

11 I just read it now and I realize what part of the
12 testimony for Mr. Kelly and what was coming out is that the
13 counsel may be seeking -- all the attorneys may be --

14 THE COURT: So now you are not withdrawing it?

15 MR. DENMAN: I'm sorry. No, I am not.

16 Let me back up. The argument is that counsel -- it
17 has been raised that counsel will be potentially seeking fees
18 in the guardianship court with regard to any fees that are
19 being incurred in this court to defend this lawsuit.

20 THE COURT: Okay. So assuming that they will be
21 seeking fees in the guardianship court for defending this
22 lawsuit, why would whether or not the guardian, Mr. Kelly,
23 contact independent counsel about this lawsuit, why would that
24 be relevant?

25 MR. DENMAN: Because I think it goes to, again,

1 directly to the bias and to the conflict of the guardian in his
2 services. He's still the guardian and his services for the
3 ward.

4 So if he is getting -- if he has got a relationship
5 here where he is going to be seeking attorney's fees back for
6 the attorneys that are representing him in this federal case,
7 in return for those same attorneys funding a free defense for
8 him in this case, there are a lot of issues of bias and motive
9 and interest that are being raised here.

10 This is something that should be explored. What is
11 the true nature of the relationship? Are you getting a free
12 defense here because you have agreed that you are going to go
13 back and seek the fees in connection with the underlying
14 matter?

15 Well, is that in the best interest of the ward or is
16 that a conflict with regard to the ward? These are somewhat
17 interrelated, Your Honor.

18 THE COURT: All right. Then inquiry number 2 seems to
19 follow up on this. The question starts out, it says:

20 You've already told us that you intend to go to the
21 guardianship court and seek reimbursement for the fees that
22 Ciklin Lubitz incurred in representing you in this federal
23 lawsuit, correct?

24 There's an answer. He says I will talk with them and
25 let them decide which court we are going to get the attorney's

1 fees filed.

2 And then, there's a question, you are going to let the
3 attorneys decide where to seek fees?

4 There's an objection. I am going to direct the
5 witness not to answer any questions related to any
6 communications he is going to have with his attorneys.

7 You argue he opened the door. I have a right to
8 follow up.

9 The witness says I am not an attorney. And then, you
10 go on and it says you relied upon the advice of your attorneys,
11 correct? Answer is correct.

12 So what are you seeking here in inquiry number 2?

13 MR. DENMAN: It goes to the same issue I just raised,
14 Your Honor.

15 THE COURT: Bias?

16 MR. DENMAN: Same argument as to bias.

17 THE COURT: Okay.

18 MR. DENMAN: Motive.

19 THE COURT: And then the final one -- not the final
20 one. The next one is inquiry 3, so will you rely upon your
21 attorneys as to what you will do next if an interested party
22 objects to your final accounting?

23 I am going to direct him not to answer that. I am
24 entitled to know what he relied upon the advice of counsel.

25 What about inquiry 3, what are you seeking there? I

1 mean, what is the issue there? Any argument you want to make,
2 Mr. Denman?

3 MR. DENMAN: There are issues regarding his final
4 accounting and what he did and reliance upon advice of counsel.
5 As to this specific reference, I just don't recall.

6 THE COURT: All right. And finally, we have inquiry
7 number 4 about whether it was his choice to switch firms
8 representing him in the federal case.

9 MR. DENMAN: This, again, goes to bias.

10 THE COURT: Goes to bias.

11 And then, of course, the other arguments you made
12 earlier apply to this motion as well, correct?

13 MR. DENMAN: Yes, Your Honor.

14 And for the limitation of space, we've referred to
15 other page and line excerpts. I started going through some of
16 those with you before.

17 THE COURT: I understand. And I will read, again, all
18 of Mr. Kelly's deposition and all of Mr. Rogers' deposition
19 before entering any order in the case.

20 MR. DENMAN: Thank you, Your Honor.

21 THE COURT: All right. So let me hear from the
22 Defense.

23 MR. HECHTMAN: Inquiry number 1 goes to whether I
24 complied with my ethical obligations.

25 I don't think that has any bearing on this case and I

1 do not take lightly to this issue whether I had told my clients
2 and whether I complied with the rules of the Florida Bar is not
3 an appropriate inquiry here.

4 So I strenuously object to anything going because it
5 has nothing to do with bias. It has to do with --

6 THE COURT: So you are saying that only relates to
7 conflict waiver issue and whether you complied with Bar rules
8 about conflict waiver, et cetera?

9 MR. HECHTMAN: That is the question.

10 Then, it is whether I told him to go and get
11 independent counsel and what I did when I was representing
12 joint defendants. I don't think that's an appropriate area of
13 inquiry ever.

14 As to question number 2, it's some future act. It's
15 whether my attorney/clients Ciklin Lubitz & O'Connell, Mr.
16 O'Connell and Miss Crispin, would be seeking fees at some
17 future event in the event that they succeed in a successful
18 defense of this proceeding under the Florida statutes and
19 whether the guardianship would award those fees.

20 Something that hasn't even happened yet and I couldn't
21 even imagine how that would be an issue for trial. Maybe it's
22 an issue for inquiry in the guardian ship court, or if somehow
23 we find a way to petition after a successful defense in this
24 case, maybe you want to get to a fee agreement or the
25 relationship there as to a fee hearing where there is no jury

1 present and you want to talk about that, that's there. That's
2 not here.

3 THE COURT: Well, what about the last part of that
4 question where it says you relied upon the advice of your
5 attorneys, correct? It's on the last part of inquiry 2, the
6 last one question and answer.

7 MR. HECHTMAN: The last bit of that question, which is
8 related to some future event what Court he will seek --

9 THE COURT: Right.

10 MR. HECHTMAN: -- fees from?

11 Yes. I imagine that Mr. Kelly, not a lawyer, is going
12 to ask his attorneys for legal advice as to which court he
13 should petition for a fee award for defending himself in a
14 breach of fiduciary duty action and whether the attorney's fees
15 are compensable under the guardianship code.

16 THE COURT: All right. What about inquiry 3?

17 MR. HECHTMAN: That's I think -- did I not get that
18 right that that was withdrawn?

19 MR. DENMAN: I don't think he withdrew it. I think he
20 just said he cannot recall the basis for it.

21 MR. HECHTMAN: Okay. That would be if there is an
22 objection to the final accounting.

23 So this is the guardian accounts. There is an
24 objection pending. So he can't get discharged from liability,
25 but he no longer has affirmative acts to do for the benefit of

1 the ward.

2 And now, there is an objection. And so he goes to his
3 lawyers and says, okay, I need to defend against the objection.
4 That's what happened there. I don't know how that would --
5 this lawsuit, how do I defend myself in this lawsuit? That's
6 that question, basically.

7 THE COURT: What about inquiry 4, the final one?

8 MR. HECHTMAN: Sure.

9 That's again, that is the guardian asking if it was
10 okay for my firm to represent him in the federal case and what
11 lawyers he should ask that to.

12 Again, how that bears on any claim or defense or
13 whether he injected this issue in the proceeding, what's he
14 going to say at trial? Oh, I didn't choose those lawyers.
15 They were thrust upon me. Don't find me liable.

16 He didn't inject anything in the proceeding. That was
17 just a question. He said I talked with my guardianship lawyers
18 about who should defend us in the federal case. That's not the
19 fact pattern. It's not the fact pattern at issue.

20 THE COURT: All right. I think that covers
21 everything. Those are all the motions that are pending. I am
22 going to take them all under advisement and I will get an order
23 out very quickly or as quickly as I can on these.

24 MR. DENMAN: Your Honor, may I make one comment? It
25 may be self-evident but --

1 THE COURT: Sure.

2 MR. HECHTMAN: I am not looking for issues with the
3 Bar for Mr. Hechtman's firm.

4 I am looking to find out bias and when it goes to were
5 there promises made as to whether I will object or not object
6 to fees in the probate court, that all goes to -- even if it is
7 in a future act, hey, I will do X for you.

8 You know, I will scratch your back if you scratch
9 mine. It all the goes to bias. And whether it's a little bias
10 or big bias, that's not the issue. The issue is, is it
11 impeachable. Is it an area of impeachable cross-examination
12 because a jury could consider it to support bias, Your Honor.

13 Thank you.

14 THE COURT: All right. Was there anything else from
15 the Defense?

16 MR. HECHTMAN: I just wanted to point out because I
17 know there was a rebuttal issue.

18 And I just wanted to direct Your Honor's attention to
19 a subpart of the Cox case where -- and this is going back to
20 the timeliness issue and the predicate for Rule 16, as I am
21 sure Your Honor already knows, courts have found -- sorry. I
22 am reading from the wrong part.

23 The case explains that in order to be timely you have
24 to be able to explain why you couldn't have done it to comply
25 with the Rule 16 guidelines.

1 And you haven't heard a single explanation today why
2 you couldn't have complied with the deadline. You heard it
3 explain why you didn't, but not why you couldn't.

4 THE COURT: All right. Thank you all very much.

5 The hearing is concluded. I will get an order out in
6 due course.

7 MR. HECHTMAN: Thank you, Your Honor.

8 MR. DENMAN: Thank you, Your Honor.

9 THE COURT: All right.

10 (Thereupon, the proceedings concluded.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I hereby certify that the foregoing transcript is an accurate transcript of the audio taped proceedings in the above-entitled matter.

05/17/17

Bonnie Joy Lewis,
Registered Professional Reporter
CASE LAW REPORTING, INC.
7001 Southwest 13 Street,
Pembroke Pines, Florida 33023
954-985-8875