

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT, 1525 PALM BEACH LAKES BLVD.,
WEST PALM BEACH, FL 33401

CASE NO.: 4D16-1449, 4D16-1476,
4D16-1478

L.T. No.: 2014CP002815XXXXNB,
2014CP002815XXXXNB,
2014CP003698XXXXNB

ELIOT IVAN BERNSTEIN v. OPPENHEIMER TRUST CO.
OF DELAWARE, ET AL.

AND OTHER NON RELATED TRUST CASE TO OPPENHEIMER CASE
CONSOLIDATED BY 4TH DCA 4D16-1478

ELIOT IVAN BERNSTEIN v. TED BERNSTEIN, AS TRUSTEE,
ETC., ET AL.

**MOTION FOR RE-HEARING, CERTIFICATION AND TO VACATE
ORDER DISMISSING THE APPEAL HEREIN AND ACCEPT LATE
FILING OF INITIAL BRIEF**

Comes now Appellant Eliot I. Bernstein, pro se, who respectfully pleads and moves this Court as follows:

1. I am the Appellant-Petitioner herein and make this motion under Rule 9.330 to Re-Hear this Court's Order of Nov. 29, 2016 Dismissing the Appeal for lack of prosecution and move to vacate such Order and permit the late filing of the Initial Brief on the Merits which was filed in this Court on December 15, 2016, or alternatively certify this matter to the Florida Supreme Court.
2. This Court has the inherent authority and power to reconsider and correct prior rulings particularly where there are exceptional circumstances and manifest injustice will occur.
3. As the Supreme Court explained in *Beverly Beach Properties, Inc. v. Nelson*, 68 So. 2d 604, 608 (Fla. 1953), “We may change ‘the law of the case’ at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice.” *Beverly Beach Properties v. Nelson*, 68 So.2d 604 (1953).
4. Further, that the appellate court need not adhere to a prior, incorrect ruling where to do so would constitute a “manifest injustice.”¹⁶ *Strazzulla v. Hendrick*, 177 So. 2d 1, 3-4 (Fla. 1965).
5. There is manifest injustice by not vacating and correcting the Dismissal Order on the Appeal as the Orders appointing Guardian below must be

vacated and reversed as issued in fraud, by the Lower Court deliberately violating the mandatory rules for recording Guardian hearings, by a lack of competent and substantial evidence to support such Orders and by due process violations both procedural and substantive including that the Lower Tribunal should have recused. See, Initial Brief on the Merits and the Records on Appeal.

6. Further, one of the persons over whom Guardian was Ordered was Joshua Bernstein who was known to the Appellees to be over the age of 18 years at the time, who was not Served with Process, had no due process opportunity to be heard and no Petition or Hearings to determine a Guardian over a competent adult over the age of 18.
7. This is not a case of lack of prosecution and this Order should be vacated and reversed.
8. Showing the exceptional circumstances of this case, Appellant showed this Court in the initial motion for Extension filed 6-28-16 that, 4. "This case brings clearly into focus exactly why Production of Full Records and Indexes on Appeal in ALL related cases is necessary and further why proceedings in all cases should be stayed pending full investigation of fraud upon the Court under the Statewide Fraud Policy of the Court's dated September 27, 2012, attorney conduct codes, judicial canons and law."

9. Further, in Paragraphs 7-9 it was shown:

“7. This case takes the fraud involving Robert Spallina of Tescher & Spallina back to at least 2010 as shown by the original filings by Oppenheimer herein by falsely and fraudulently claiming in Paragraph 8 as seen on Record on Appeal Page 000010 as follows: 8. “In 2010, Eliot and Candice Bernstein, as the parents and natural guardians of Joshua, Jake and Daniel Bernstein, filed Petitions to Appoint Successor Trustee for each of the Trusts in the Circuit Court and for Palm Beach County, Case Nos. 50201 OCP003123XXXXSB, 50201 OCP003125XXXXSB and 50201 OCP003128XXXXSB.”

8. Said Petitions from July 2010 were filed by the Offices of Tescher and Spallina under the signature of Robert Spallina yet falsely and fraudulently claiming and purporting to have been signed by myself and my wife Candice Bernstein when neither of us had ever met Robert Spallina or Donald Tescher or signed the document to file any such Petition in July of 2012.

9. This fraud was reported on the Record to Judge Colin and further reported to the Palm Beach County Sheriff’s Office as further fraud on the Court and in these cases involving the forgery of our signatures for said Petition.”

10. Contrary to a lack of prosecution, Appellant proceeded to file Motions with this 4th District Court of Appeals pursuing and prosecuting Appellant’s rights on 6/28/16; 7/26/16; 8/15/16; 9/6/16 EOT FOR INITIAL BRIEF -

NOTICE OF MEDICAL UNAVAILABILITY; 10-13-16 Mot. for Extension of time to file Initial Brief; 10/25/16 NOTICE OF FLORIDA LICENSED MEDICAL DOCTOR INSTRUCTIONS OCT. 24, 2016 AND EXTENSION AND STAY REQUEST; and 11/15/16 "MOTION FOR EXTENSION AFTER DRAFT BRIEF ACTUALLY FILED; FOR STAY AND FURTHER RELIEF".

11. Said motions provided Actual Florida Licensed Medical Doctor's instructions and notice that Appellant was facing life-threatening medical issues and to avoid stress yet has continually been faced with disregard, sharp practices and continuing fraud by the Appellees.
12. In fact, as shown in the Initial Brief on the Merits, "In continuing and ongoing Fraud upon the Court in these proceedings, the very First Paragraph of the Petition under the signature of attorney Alan M. Rose filed on behalf of his client Ted Bernstein to obtain the Guardian appointments herein is **ripe with fraud** falsely stating and claiming in this Jan. 4th, 2016 filing as follows: "*As a result of upholding these documents, the Court has determined that Eliot Bernstein, individually, is not a beneficiary of either Simon's or Shirley's Trusts or Estates. Instead, his three sons are among the beneficiaries of both Simon's and Shirley's Trusts, in amounts to be determined by further proceedings. Eliot lacks standing to continue his*

individual involvement in this case.” See, R-4 page 1711. Yet, this entire factual statement by attorney Alan M. Rose is False and Fraudulent as at this time, the Lower Tribunal (Judge Phillips) had made NO SUCH DETERMINATIONS or Findings “constructing” the meaning of alleged documents at a Validity Hearing or determining “Standing”. See, R-4 1578-1582 Final Judgement Dec. 16, 2015. It is noted that attorney Alan Rose and Ted Bernstein acting as a fiduciary originally attempted to get this Guardian Appointed by Judge Phillips through this Jan. 4, 2016 Petition at a UMC Hearing, one of the many continuing and ongoing “sharp practices” Appellant has been faced with throughout these related cases.”

13. Thus, not only is there exceptional circumstances when viewing the pervasive fraud in the proceedings, multiple cases with different factual pleadings and records consolidated into one appeal, voluminous Records on Appeals to even remotely have proper full Records for appeal, Appellant facing life-threatening medical issues under Doctor’s orders while also diligently filing motions for extensions to prosecute Appellant’s rights, but there is manifest injustice by the Orders being upheld for a Dismissal on these grounds.

14. As shown in the Initial Brief and in pleadings to the Lower Tribunal which are part of the Record on Appeal, “***That Chief Administrative Judge***

Colbrath's Judicial Assistant Diana Grant suggested this matter should be Noticed back for a Hearing since no Electronic Record and did confirm Judge Phillips was Administrative Judge in the North Branch." See, Appendix Exhibit 1 - Shirley Trust Objections.

15. In HIGHTOWER v. BERRY, 490 So.2d 1029 (District Court of Appeal of Florida, First District. 1986), even where "No further activity took place" by Appellant for over 90 days, the First District Court of Appeal declined "to impose the severe sanction of dismissal in this case" even where the Appellant thereafter missed a further deadline after having 90 days of no activity claiming an illness.
16. Yet in this case, Appellant has had activity virtually every 30 days since the Records on Appeal were produced, has moved for extensions, has had life-threatening health conditions all the while continuing to deal with fraud in the proceedings below and sharp practices.
17. This is not a case where Appellant is disregarding Court Orders or Court deadlines but has consistently moved to extend the deadlines for meritorious reasons while no prejudice has been shown by the Appellees who have continued fraud in the proceedings.
18. In Swicegood v Florida Dept of Transportation, 394 So.2d 1111 (First District Court of Appeals 1981), the First DCA promulgated a standard

whereby “where there has been a flagrant disregard of the rules and appellant has been afforded an opportunity to explain the reasons for noncompliance but does not do so, dismissal is justified. Winstead v. Adams, 363 So.2d 807 (Fla. 1 DCA 1978); Akin v. Harvey, 283 So.2d 872 (Fla. 1 DCA 1973).”

19. In that case, Dismissal of the Appeal was **only granted after again a 90 day plus period of no activity followed by no explanation of the delay.**
20. This Court of the 4th District Court of Appeals ***has made no finding of any flagrant disregard of the rules and failure to explain non-compliance, and to the contrary the record shows otherwise as Appellant has filed 7 some motions during the relevant time and provided explanations for non-compliance and moved for extensions of time.***
21. Appellant has now completed the Initial Brief on the Merits attached as Exhibit 1 and is but a few hours outside the 15 day time period for a Motion for Re-hearing which is not a jurisdictional time period.
22. Appellant has repeatedly shown good faith real life-threatening medical reasons for extensions while diligently continuing to prosecute in all all cases despite continuing ongoing frauds.
23. This Court should permit the late filing of this motion which is less than one full day late under the Florida Rules of Appellate Procedure which says such

motion “**may be filed within 15 days of an order or within such other time set by the court.**”

24. Appellant has not attempted to disregard the Court’s Orders or deadlines but has instead moved in good faith for extensions under extra-ordinary circumstances.
25. This Court should now grant the Motion for Rehearing, Vacate and reverse the Order of Dismissal, permit the late filing of the Initial Brief and restore the Appeals to the calendar, or alternatively certify the matters to the Florida Supreme Court based upon the conflicts in the District Courts of Appeal on the standard for Dismissal for lack of prosecution and the important public policy of exceptional circumstances shown by fraud in the proceedings.

WHEREFORE, it is respectfully prayed for an Order granting the Motion for Rehearing, Vacating and reversing the Order of Dismissal, permitting the late filing of the Initial Brief and restoring the Appeals to the calendar, or alternatively certifying the matters to the Florida Supreme Court based upon the conflicts in the District Courts of Appeal on the standard for Dismissal for lack of prosecution and the important public policy of exceptional circumstances shown by fraud in the proceedings and for such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

Dated: December 15, 2016

/s/ Eliot Ivan Bernstein

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements
of Fla. R. App. P. 9.210(a)(2).

Dated: December 15th, 2016

/s/ Eliot Ivan Bernstein

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CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing has been furnished to parties listed
on attached Service List by E-mail Electronic Transmission; Court ECF; this 15th
day of December, 2016.

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