IN THE DISTRICT COURT OF APPEAL OF FLORIDA
FOURTH DISTRICT

CASE NO. 4D09-1805

RICHARD S. LEHMAN,

Appellant,

vs.

HILDA PIZA LUCOM, ET AL.,

Appellees.

On Appeal from a Final Judgment of the
Circuit Court for the Fifteenth Judicial Circuit
in and for Palm Beach County, Florida

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

A. THE CASE

This is an appeal by Richard Lehman from a March 5, 2009 Final Judgment declaring "*void ab initio*" Lehman's appointment as Florida Ancillary Personal Representative for the Estate of Wilson C. Lucom and that he acted in bad faith. The decision entered money judgments against Lehman for $1,013,547.05 for estate money "improperly spent," and curator fees, plus $423,261.15 for damages for improper transfers. R30:5784-5794 (Final Judgment). A copy of the Final Judgment is attached as Appendix A.

The case arose from the 2006 death of Wilson Charles Lucom in the Republic of Panama, leaving an estate valued at 25 to 50 million dollars. *Id.* at 5785, Appendix A, at 2. Lehman, who had been Lucom's long time lawyer in Florida was named in Lucom's will as an albacea of Lucom's estate, along with Lucom's wife Hilda Piza Lucom and one Christopher Ruddy. *Id.*[1]

Lucom had real property and a $655,241.25 bank account in Florida and Lehman filed a Petition for Administration in the Circuit Court for the 15th Judicial Circuit on July 19, 2006 (R1:1-76), with an authenticated/exemplified copy of the will from the Panama court. *Id.* at 77-152. An order admitting the will and codicils

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[1] In Spanish, the term "albacea" equates with "executor." *Id.*

was entered; Lehman was designated the Personal Representative and Letters of Administration were issued. *Id.* at 158. He proceeded to secure information regarding Lucom's assets (R2:201-268). In October 2006, a Petition for Revocation of the Letters of Administration and Removal of the Personal Representative was filed (R2:274-400) and a Petition for Appointment of an Administrator Ad Litem or Curator was also filed. R3:410-452. Hilda Piza Lucom was sought to be joined as ancillary personal representative (R3:533-546) and Lehman answered the petitions seeking to remove him and to appoint a curator. R4:604-622.

Months of discovery and motions ensued, including a motion for summary judgment on the appointment of a curator and revocation of the letters of administration and removal of the personal representative which were denied. R13:2476-2479.

In March 2008, an agreed order accepted the resignation of Lehman as Personal Representative and Lawrence Miller was appointed as Curator. R19:3751-3752. Various interim orders were entered on various motions and objections, and ultimately the matter of Lehman's authority and his uses of that authority was tried in February 2009.

The Final Judgment that is the subject of this appeal is the product of that trial.

B. THE FACTS

1. Panama Probate

Wilson Lucom died on June 2, 2006. Appendix A, at 2. Lehman, as a named albacea in the will, opened the estate in Panama on July 5, 2006 and was appointed albacea. *Id.* On July 18, 2006, Hilda Lucom, Charles' wife, appealed the July 5 appointment and installation of Lehman to a court in Panama. Hilda, who is 84 years old, was asked about the litigation she instituted in Florida against Lehman's handling of the estate:

> Q. Okay. I'm going to ask you one more time, Mrs. Lucom, because this is a very serious allegation you've brought. You just said that the first sentence of paragraph 50 is true. Is it true?
>
> A. I don't know.
>
> Q. So you don't know whether or not Mrs. – whether or not Richard Lehman has failed to properly administer the estate, right?
>
> A. No, I don't know.
>
> Q. Okay. Other – ma'am, you can't tell me as we sit here today whether or not Mr. Lehman has ever stolen anything from the estate, can you?
>
> A. I don't know.
>
> Q. Okay. You don't know, do you, of any

wrongdoing by Mr. Lehman?

A. I don't remember.

Q. And you don't – did you authorize any lawsuits or any petitions since June 2nd, 2006, to be filed?

A. I don't remember.

TR-Vol. V: 548-550.[2] Notwithstanding Hilda's lack of knowledge, the Panama appeal she filed seeking review of Lehman's appointment and installation as albacea, was a focus of this case.

The effect of the appeal of the July 5, 2006 appointment and installation of Lehman in Panama was the subject of the testimony of Hilda's expert witness, a Panamanian lawyer, Ruben Rodriguez Avilar. Avilar's testimony on direct was that the appeal resulted in the "immediate suspension" of the order appointing Lehman as albacea and that he had never "been effectively appointed by final order as albacea of the Lucom estate." TR-Vol. VI: 607. The colloquy on cross-examination created an important issue on that critical-to-this-case point:

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2 "TR" references are to the trial transcript.

Q. And your opinion is, sir, as I understand it, that pursuant to this order Mr. Lehman's appointment as albacea was a legal nullity under Panama law?

A. No.

Q. So his appointment is not a nullity?

A. No. Only his installation.

Q. Okay. So his installation as albacea is a nullity; is that correct?

A. Indeed.

Q. What is that the difference between installment and appointment?

A. Appointment is incumbent upon the testator exclusively, and installation is incumbent upon the judge.

Q. Okay. Under what provision of the Panama code, the statues in Panama does it say that if you appeal the installation of an albacea, that the albacea's installation is null – is a nullity?

A. There are no specific provisions, but –

* * *

Q. And my understanding is Panama is a code jurisdiction, not a common law jurisdiction?

A. Indeed.

Q. So there would be no case law in Panama

addressing the appeal of the installation of an albacea becoming a nullity; isn't that correct?

A. I am only acquainted with this case.

* * *

Q. Thank you. So there is no specific provision of Panama code which requires that a Panama judge declare the installation of an albacea to be a nullity as a consequence of an appeal?

A. Yes.

Q. So isn't it true, sir that a different judge could have a different opinion and perhaps not declare a nullity?

A. That is part of the business of being a judge.

Id. at 615-617. Mr. Avilar agreed ("yes, I said that") that "there's no Panama code which specifically defines that Panama requires that the installation be a nullity once there's an appeal" (*id.* at 618), although he disagreed with Lehman's Panamanian lawyer's contrary written opinion. That opinion was: "Until the time in which in fact your faculties as albacea as granted by the Panamanian law are suspended, any action carried out by you as such are legal and [sic] invalid [i.e., valid]," and that "Now you remain as albacea as long as we reiterate you're not removed by any competent authority which in this case is the same authority who appointed you." *Id.* at 618-619.

Seeking to salvage Mr. Avilar's testimony, Hilda's counsel offered Panama Code provision 995 as the basis for Avilar's opinion. Section 995 was read into the record, followed by these pertinent questions of Avilar, and his answers:

> Q. Can you have – is that – do you know if that is the statute that you're referring to that suspends the effectiveness of the order?
>
> A. Yes.
>
> Q. Can you have Dr. Duran translate it, please.
>
> THE INTERPRETER: 995 in parentheses 982. Court resolutions become final through the mere lapse of time. A resolution becomes final when it does not admit within the same process any appeals where either because such an appeal would be improper or because it has not been filed within the legal term.
>
> A resolution is deemed to have become final when the appeal is granted without staying power for the sole purpose of continuing the process and without prejudice of what the higher court may decide.
>
> When there is a withholding of property or in the case of a measure that might cause irreparable damage, the order shall not be complied within this aspect.
>
> In the case of a revocation what has been done shall be rendered without effect by virtue of the resolution sought revoked. The resolution subject to query shall not become final until such a time as the resolution of the Superior Court reviewing it

becomes final.

* * *

Q. And what does the last sentence of that article state? No. What does the last – listen to my question. The last sentence of that article states what, sir?

A. That the resolution under review or under query shall not become final until the Superior Court rules on it.

Q. And is that the portion that suspends the final and effectiveness of the installation of Mr. Lehman until the appeal that was filed is resolved?

A. Indeed.

MR. DORTA: Nor further questions. Thank you.

Id. at 625-627.[3]

On cross-examination Avilar conceded that if Lehman's appointment as albacea was a "nullity" on July 18, 2006 when Hilda filed a notice of appeal, an administrator had to be immediately appointed:

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[3] As we demonstrate *infra* in the argument, Lehman's installation as albacea may not have been "final" until the appeals had been exhausted, but the appeal did not oust him of authority during its pendency. Nor, as we explain below, did Order No. 952, entered on August 29, 2008 (TR-Vol. III: 276, Hilda Exhibit 72, Appendix B) render Lehman a nullity at the time he filed the petition to be appointed ancillary representative in July, 2006.

Q. To properly protect the estate, the Panama judge, once the appeal happened, should have appointed an administrator right then and there, right?

A. Correct.

Id. at 623. An administrator was not appointed in Panama until August 2008. TR-Vol. VI: 620.

2. <u>The Panama Estate</u>

The translation of Lucom's will introduced as Lehman Exhibit 1, is attached as Appendix C. Lucom appointed "Mr. Richard Lehman of Boca Raton, Florida, USA; Ruben Carlos of Panama . . . and my beloved wife Hilda Piza Lucom . . . daughter-in-law of the former President of the Republic of Panama," as "Executors." Appendix C, at 2. Lucom made numerous generous bequests to friends and relatives, and one million dollars "to the MAYO CLINIC IN ROCHESTER MINNESOTA, FROM THE WILSON C. LUCOM TRUST FUND FOUNDATION, for urological investigations . . . ." (*id.* at 4), and as to Hilda, the Will stated:

> The legacy to my wife, HILDA PIZA LUCOM, shall be for her comfort, health, support and well being, including all expenses arising out of her present standard of living (as the wife of a wealthy man). These reasonable expenses shall only include any expense related to the Royal Palace, Apartment 11 and five (5) employees, which include a cook, a chauffeur, maid,

> housekeeper, and part-time launderer. I am not including in this standard of living, luxuries like the purchase of another house or apartment, without first selling Apartment No. 11 of the Royal Palace Building in order to obtain funds for the purchase of another house, purchase of works of art, a yacht or other purchases and I forbid these additional luxuries to be considered as reasonable. Upon the death of my wife, 50% and any other payment of any kind shall cease and be returned to the WILSON LUCOM TRUST FUND FOUNDATION, and not to her estate. None of the valuable works of art or antiques, such as the grand piano, shall be sold or exchanged by my wife.

Id. at 7.

The major asset of Lucom's Estate was a large Panamanian property valued at about $40 million (TR-Vol. IV: 439) known as Hacienda Santa Monica; and Lucom's will said:

> I own the entirety of Hacienda Santa Monica without mortgage or encumbrances. I instruct my executors to put Hacienda Santa Monica on the market, as SUN CITY on the Panamanian Riviera, to be sold as one sole lot to city developers, not to intermediaries. It may take two to three years to sell this property as I do not want Hacienda Santa Monica to be sold immediately for any inferior price which might be immediately offered. The proceeds of the sale of Hacienda Santa Monica shall go to the WILSON C. LUCOM TRUST FUND Foundation.

> Hacienda Santa Monica shall continue its operations and sales process in the manner that it has been so doing in the interest of not causing a deterioration of its structure, its land or its own assets.

Id. at 6. He also authorized the sale of real estate in Okeechobee, Florida "at any time" for the benefit of the Foundation. *Id.* The Foundation was the focus of Lucom's testamentary wishes, and the executors who were also trustees of the Foundation were charged with the responsibility of carrying out his wishes:

> The principal aim of the WILSON C. LUCOM TRUST FUND FOUNDATION is to feed children in need in Panama. I instruct my trustees to find an area where there are schools with children who are not given lunch food and whose basic needs are not being met in schools that do provide lunch.

Id. at 8.

3. Lehman's Efforts as Executor

(a) On Direct Examination

Prior to Lucom's death, Lehman made sure that the Foundation was properly established. TR-Vol. II, pp. 110-111. After Lucom died on June 2, 2006, and before Lehman's appointment as albacea, Lehman paid personal expenses for Hilda and for Hacienda Santa Monica from his professional association, Richard S. Lehman, P.A. He did so "because I had a responsibility. I was appointed by

Lucom to be the administrator, to protect his estate and take care of the Will and make sure that these children got their money." *Id.* at 114.

He hired lawyers in Panama, "advancing money from my law firm" (*id.* at 118-122), and unable to access money in Panama because Hilda's lawyers froze the accounts, Lehman hired counsel and petitioned the Palm Beach County Circuit Court to appoint him as ancillary personal representative without bond and took control of $665,241.25 that was in a Lucom Florida Wachovia account. *Id.* at 126-127. He was appointed on July 18, 2006.

Lehman ultimately resigned as ancillary personal representative eighteen months later and provided a "Final Accounting of Ancillary Personal Representative: June 2, 2006 – January 21, 2008," prepared by his counsel and himself. Lehman Exhibit 2; Appendix D to this Brief. Lehman's offer of composite Exhibit 4, the five volume notebook containing the backup material supporting the Final Accounting, was rejected by the trial court because it is "unnecessary and unduly burdens the record." *Id.* at 132.

Lehman's use of the Wachovia monies was a focal point of the trial. At a motion in limine hearing on February 12, 2009, the trial court said: "That's what the trial is about, isn't it? . . . They want the money back. They say your guy had taken it and done something sinister with it and they want it back." TR-February 12, 2009,

p. 35.

The Final Accounting reported how the $665,241.25 was expended, and included documentation for the approximately one million dollars that Lehman had personally expended. TR-Vol. II: 129. The Final Accounting showed that Lehman had placed approximately $400,000 into his P.A. account and paid estate expenses through that account because "I had a lot of administrative problems getting money quickly to Panama from the estate account. They weren't really set up for wires and everything. I sent some checks down there, and it took three weeks and people weren't responding. So I started to use my P.A. account much more to pay expenses." *Id.* at 135-136. Lehman said: "It went into my P.A. and out as expenses .... for – to protect and preserve the estate along with a million dollars of my own money." *Id.* at 138.

Lehman explained the various uses he put the money to – protecting and preserving Hacienda Santa Monica; protecting the shares in a British Virgin Islands company named Valores Globales; hiring lawyers in Panama; expenses for litigation in Florida and Panama (*id.* at 174-197; 214-235):

> Q. Why did you need to travel to Panama post death?
>
> * * *
>
> A. I had to go to Panama each time that there

was an emergency that was going to destroy the ability to protect this will. There was emergency after emergency. If I had the time sheets to compare, I could tell you exactly which emergency was occurring.

Q. Did you ever go to Panama on Mr. Lucom's money out of the Wachovia account through your P.A. – spent through your P.A. for personal reasons not related –

A. Absolutely not.

Id. at 199-200. Commenting on Exhibit 4 – the excluded backup materials – Lehman said:

A. She prepared a total exhibit so that we could prove that every single penny that I spent, nothing went to me. Everything went to third parties. Everything had a bill to accompany it and proof of my transfers of fund.

Q. And is that Exhibit 4 for identification?

A. Yes.

Id. at 207.

(b) <u>On Cross-Examination</u>

Lehman's cross-examination established that the trustee of the Wilson C. Lucom Trust Fund Foundation is Lucom World Peace (TR-Vol. III: 258-259) and Lehman, a director of World Peace, removed Hilda and another director, leaving Lehman as the sole director of Lucom World Peace and the sole trustee of the Trust.

Id. at 262. Lehman's time records reflected July 18, 2006 knowledge of litigation in Panama after his July 5, 2006 appointment as albacea (*id.* at 270) (but not that it was Hilda's appeal (TR-Vol. IV: 491)), and the fact that only Lehman signed the Petition to Waive Bond when he was appointed on July 19, 2006 as ancillary personal representative. *Id.* at 273, 280.

It was established that the Panama court denied Lehman's request for access to approximately $2.7 million in a Panama Bank and other assets in Panama (*id.* at 294-296), and that various payments were made from the Florida Wachovia account, through the Lehman P.A. account to pay debts in Panama. *Id.* at 298-301.

> Q. The total amount paid from the Estate to Richard S. Lehman P.A. or transferred from the Estate to Richard S. Lehman, P.A. was $423,261?
>
> A. That's correct.
>
> Q. Okay.
>
> A. And all of it was spent on third parties.

Id. at 302-303.

> Q. Your firm's operating account at SunTrust contained money both from the estate and money from your law firm's general operations, correct?
>
> A. Yes, it did.

Q. So the estate funds were commingled with your law firm's money in its operating account at SunTrust Bank, correct?

A. Well, I paid out expenses and I paid myself back money.

Q. The question is so the estate funds were commingled with your law firm's money in its operating account at SunTrust, correct? It's a yes-or-no answer.

A. I would say for a short period of time there – where there was – where there was estate funds in my account more than enough to reimburse me.

Q. Okay.

A. For that short period of time that would be correct.

Id. at 310. Various exhibits and testimony addressed that matter (*id.* at 314-350) and the uses of the monies, and Lehman acknowledged that as "a result of the payments made to other jurisdictions and to Panama, the Florida Estate does not have enough cash to pay the potential claims against the estate if they are found to be valid," *Id.* at 330, although the record showed that there were non-cash assets available to pay potential claims against the Estate. *Id.* at 324-325.

Lehman's testimony and the Final Accounting summed up his efforts to protect the Lucom Estate:

Q. What happened to the money? What was it used for?

A. It all – every penny was paid out in expenses.

Q. For what?

A. For the entire Lucom estate. I paid a total of a million six hundred thousand plus.

* * *

Q. Isn't that what the purpose of the final accounting is is to report at the end what you've done with the money?

A. Yes, exactly.

Q. And have you prepared a final accounting?

A. Yes.

Q. Did you hire a professional to do it?

A. Yes.

Q. Is it accurate?

A. Yes.

TR-Vol. IV: 481-482.

4. <u>Lawrence Miller, Curator</u>

Lawrence Miller was appointed in February 2007 "to protect the interests of the estate and to investigate alleged improprieties and certain expenditures made by

the ancillary personal representatives." TR-Vol. V: 556. He submitted a report that was introduced (over objection) as Hilda's Exhibit 36. *Id.* at 560. Miller spent thirteen months and charged $158,000 for his report. *Id.* at 569-570. He questioned Lehman's record keeping and described difficulties in obtaining documentation (*id.* at 567-568), but he acknowledged that he never checked the backup materials that Lehman provided in his final accounting. *Id.* at 569.

* * *

The trial court's Final Judgment found that Lehman had no authority when he opened the Ancillary Florida estate because his installation in Panama was *void ab initio*, and that he acted in bad faith and with reckless indifference. Appendix A. This appeal seeks reversal of that judgment.

SUMMARY OF THE ARGUMENT

1. Richard Lehman was the sole albacea of the Lucom Estate when he applied for Letters of Administration in Florida. His appointment was not *void ab initio*, and the trial court's contrary finding was contrary to Panama law and the evidence. The code provision relied upon by Hilda Lucom's Panama law expert plainly contradicts his legal conclusion. In addition, he should not have been permitted to testify because the code provision at issue was plain and did not require expert testimony. Finally, the issue of the effect of Hilda Lucom's appeal of

Lehman's appointment was not pled by those challenging Lehman's actions and should not have been tried at all by the court.

2. The trial court's conclusion that Lehman acted in bad faith with reckless indifference must be reversed because the court improperly excluded Lehman's evidence and expert witness, relied upon inadmissible hearsay, and failed to identify specific acts that constituted bad faith and reckless indifference.

ARGUMENT

I.

THE TRIAL COURT ERRED IN HOLDING THAT LEHMAN "WAS NOT INSTALLED OR PROPERLY SERVING AS THE ALBACEA OF THE PANAMA ESTATE" AND THAT HIS APPOINTMENT AS ANCILLARY PERSONAL REPRESENTATIVE IN FLORIDA WAS "*VOID AB INITIO*"

STANDARD OF REVIEW

The standard of review is *de novo* because the issue of Lehman's status under Panama law, and therefore under Florida law, is a question of law, and questions of law are reviewed *de novo* on appeal. *See Nelson v. State*, 16 So. 3d 286 (Fla. 4th DCA 2009) (citing *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007) ("[J]udicial interpretation of statutes . . . are pure questions of law subject to the *de novo* standard

of review.")).

A. THE PANAMANIAN ESSENCE OF THE CASE

The Final Judgment Denying Discharge, Denying Personal Representative's Fee, Granting Surcharge, Voiding Transactions, and Granting Objections to the Final Accounting" (Appendix A) leaves no doubt that the linchpin of the decision was the trial court's view that Hilda Lucom's appeal of Lehman's appointment as albacea rendered Lehman a testamentary non-entity:

> Unequivocal evidence received at trial proved the July 5, 2006 Panama Order appointing Lehman "Executor" of the domiciliary estate (from the English translation of the Order) was automatically and immediately *null and void when Hilda P. Lucom filed her appeal* of that Order on July 18, 2006. At all times material to the action before this court Lehman was not installed or properly serving as the albacea of the Panama Estate.

Appendix A, p. 2 (emphasis supplied). The fundamentalness of that issue – the effect of the appeal – cannot be denied. Hilda's lawyer said it this way: "what we're here today to determine is whether or not he was properly serving as the foreign and the ancillary personal representative." TR-Vol. I: 54-55. The "pending appeal by Hilda Piza Lucom" (*id.*) was the legal elephant in the courtroom. As we show below, the trial court and Hilda's lawyers and expert witness misread and misunderstood Panama

law, and the trial court erred in even allowing the Panamanian law "expert" to testify, or the issue to be tried.

Lehman's lawyer objected to the testimony of Mr. Avilar: "Panama, my understanding is it's a code, not a common law jurisdiction . . . . respectfully, Judge you can read the Panama law that I've given you and make that determination yourself." TR-Vol. V: 539. The proponents of the Panama lawyer's testimony countered "there's a marked difference between having an expert testify about Florida law. . .and having an expert testify about the effect of Panama law. . . ." *Id.* at 541.

The trial court allowed Avilar to testify about "the effect of an appeal being filed in the Panama court and its effect on suspending or nullifying the appointment of the albacea. . . ." *Id.* at 541-542.

We have set forth in detail the Avilar testimony in the Statement of Facts, *supra* at pp. 3-18. Lehman's lawyer was right; Panama is a Code country and Avilar confirmed Lehman's lawyer's prescience when Alivar referred to Code section 995 and read the one sentence that formed his nullification opinion – an opinion belied by the very words he read, and an opinion offered by Hilda's lawyer believing it to be the *coup de grace* to Lehman's defense:

> Q. And what does the last sentence of that article state? No. What does the last – listen to my question. The last sentence of that article

states what, sir?

A. That the *resolution under review or under query shall not become final until* the Superior Court rules on it.

Q. And is that the portion that suspends the final and effectiveness of the installation of Mr. Lehman until the appeal that was filed is resolved?

A. Indeed.

MR. DORTA: No further questions. Thank you.

TR-Vol. VI: 627 (emphasis supplied). The mis-reading is disturbing. Lehman had been appointed and installed as the albacea on July 5, 2006. So the "resolution under review or under query" was the fact of his appointment and installation. The plain language of the sentence in question makes it clear that the appointment would "not become final" until the Superior Court ruled, but that does not state or mean that Lehman was stripped of his position by the mere filing of a Notice of Appeal.

Such an interpretation belittles Panama law, suggesting anarchy by appeal, i.e., file a Notice of Appeal and the court's ruling is suspended *vel non*. Section 995 does not say that. Legal common sense does not support such a construction. A lack of "finality" does not render the trial court order meaningless. By way of comparison, in Florida the appellate process does not automatically stay a judgment; it may

postpone finality, but it does not undo the order below. Compare *Porter Lumber Co. Inc. v. Tim Kris, Inc.*, 530 So. 2d 398, 399 (Fla. 4th DCA 1988) ("The appellate process was timely invoked and therefore the judgement will not be final until it is completed, when the mandate is issued.").

So here, where there was no stay, no injunction against Lehman, no administrator immediately appointed (as Avilar conceded would have had to be done (TR-Vol. VI: 623)), there was no way to say that there was "[u]nequivocal evidence" that Hilda's appeal made Lehman's installation "automatically and immediately null and void." Appendix A, p. 2. Indeed, Avilar, the former judge, was a model of equivocation:

> Q. Thank you. So there is no specific provision of Panama code which requires that a Panama judge declare the installation of an albacea to be a nullity as a consequence of an appeal?
>
> A. Yes. [There is no provision].
>
> Q. So isn't it true, sir, that a different judge could have a different opinion and perhaps not declare a nullity?
>
> A. That is a part of the business of being a judge.

TR-Vol. VI: 616-617.

Nor did the August 29, 2008 Order 952 (Appendix B, Hilda Exhibit 72, TR-

Vol. III: 276) support the trial court's holding that "[u]nequivocal evidence . . . proved the July 5, 2006 Panama Order appointing Lehman "Executor" of the domiciliary estate . . . was *automatically* null and void when Hilda P. Lucom filed her appeal of that Order on July 18, 2006." Appendix A, at 2. Order 952, which was not the result of Hilda's July 2006 appeal in Panama, was issued *more than 2 years* after Lehman's appointment and installation, and while it does, in August 2008, speak of declaring the installation null and void, it cannot overcome the fact that between July 5, 2006 and August 29, 2008, Lehman did have the albacea authority because the filing of the appeal did not neuter that authority. Therefore the trial court's statement that "[a]t all times material to this action, Lehman was not installed or properly serving as the albacea of the Panama Estate" because of Hilda's Notice of Appeal (Appendix A, at 2), is clearly erroneous.[4]

* * *

In addition, it was a clear abuse of discretion to allow Avilar to testify. Where the only need is to read a statute, no expert lawyer testimony is necessary, even if the statute is from a foreign jurisdiction. *See Briggs v. Jupiter Hills Lighthouse Marina,*

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[4] Subsequent Panama Court Orders have actually neutralized Order 952. They have been issued subsequent to the trial below and are not part of this record, but at the moment there is no need to seek to supplement the record with them because nothing supports the trial court's "at all times" findings.

9 So. 3d 29, 32 (Fla. 4th DCA 2009) ("The trial court properly disregarded those portions of the expert witnesses' affidavits which were merely legal conclusions. A trial judge may not rely on expert testimony 'to determine the meaning of terms which were questions of law to be decided by the trial court.'"). Lehman's objection to Avilar's testimony should have been granted. Had the trial court read the code provision itself, untutored by Avilar's misconceptions, perhaps the "null and void" error could have been avoided. But in any event, the ultimate erroneousness was in reading "null and void" into a sentence that said no such thing. Since that error infected the decision below, there must be a new trial.

A final reason for setting aside the Final Judgment is that the trial court should not have tried the issue of the validity of Lehman's Panama status *ab initio*. Lehman's counsel filed a motion in limine to prevent the excursion into that area (R26:5096), telling the trial court: "The next motion is the motion in limine as to the interested persons claims that Mr. Lehman's appointment is void ab initio." The basis of the motion was that that issue had never been pled:

> [What] he's trying to proceed under now is that Mr. Lehman, if he's not the . . . ancillary personal representative nunc pro tunc, then he's an officious intermeddler who took the money and should be liable for it under 733.309. The problem with that argument is it's not – 733.309 is not in their pleadings.

> I'm now, with less than two weeks to go before trial, going to defend against an allegation that was never there.

TR-February 12, 2009, at 12, 17. The motion was denied.

That was error. *See E.I. DuPont DeNemours and Co., v. Desarrollo Industrial Bio Acuatico,* 857 So. 2d 925 (Fla. 4th DCA 2003):

> This case is controlled by *Arky, Freed, Stearns, Watson, Greer, Weaver & Harris, P.A. v. Bowmar Instrument Corp.*, 537 So. 2d 561, 563 (Fla. 1988), in which the supreme court held that where a claim is not pled with sufficient particularity for the opposing party to prepare a defense, the plaintiff is precluded from recovery on the unpled claim and a directed verdict is properly entered.
>
> * * *
>
> In short, the failure to warn claim was not pled, and it was strenuously objected to prior to trial. As in *Arky, Freed*, counsel's motion in limine to exclude evidence of the claim was denied. Thus, DIBSA's counsel knew that the evidence came in over objection.
>
> * * *
>
> The trial court erred, and reversal is required.

Id. at 929, 931. The same result obtains here. The trial court should have granted the motion in limine and not tried the unpled Florida Statute section 733.309 Executor *de son* tort/*void ab initio* theory advanced by those opposing Lehman's ancillary

personal representative efforts.

II.

IT WAS A CLEAR ABUSE OF DISCRETION TO PRECLUDE LEHMAN FROM PRESENTING EXPERT TESTIMONY REGARDING THE DUTIES AND FUNCTIONS OF AN ANCILLARY PERSONAL REPRESENTATIVE AND FROM PRESENTING THE DOCUMENTARY EVIDENCE REFLECTING LEHMAN'S FINAL ACCOUNTING; AND THE TRIAL COURT ERRED BY FAILING TO EXCLUDE PREJUDICIAL HEARSAY TESTIMONY AND BY FAILING TO PROVIDE SPECIFIC FACTUAL BASES FOR ITS CONCLUSIONARY FINDINGS OF BAD FAITH AND RECKLESS INDIFFERENCE

STANDARD OF REVIEW

Evidentiary rulings are reviewed for abuse of discretion. *See McDuffie v. State*, 970 So. 2d 312, 326 (Fla. 2007) ("The standard of review of a trial court's evidentiary rulings is abuse of discretion"). Whether conclusions of law are supported by competent substantial evidence is reviewed by a *de novo* review of the record. *See Hair v. State*, ___So. 3d ___, 2009 WL 2513475, *1 (Fla. 1st DCA 2009) ("the court's findings of fact must be supported by competent substantial evidence.

Conclusions of law . . . are subject to *de novo* review").

The trial court recognized the possibility that Lehman's appointment as ancillary personal representative was valid. As an alternative to its "null and void" and "*void ab initio*" conclusions, the court wrote: "Should another court hold that Lehman was properly appointed APR, his actions were still improper, objectionable and not excused by the terms of the exculpatory clause of the will." Appendix A, at 7.[5]

The court listed some things that it believed justified finding "breaches of fiduciary duty made in bad faith, with reckless indifference to the rights or interests

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[5] The exculpatory clause of the will provided: "Each individual EXECUTOR OR TRUSTEE shall not be subject to any legal liability for any act, omission or loss in connection with the Administration of this estate, except for fraud or theft or any other crime committed against the assets of the WILSON C. LUCOM TRUST FUND FOUNDATION, Appendix B, at 7. The trial court granted Lehman's Motion in Limine to Determine Enforceability of the Exculpatory Clause and set this "standard of liability for the personal representative during the trial:"

> Each individual executor or trustee shall not be subject to any legal liability for any act, omission, or loss in connection with the administration of this estate, except for bad faith or with reckless indifference to the purposes of the will or the interests of interested persons, or for fraud or theft, or any other crime committed against the assets of the Wilson C. Lucom Trust Fund Foundation.

R26:5093. Order of January 15, 2009.

of interested parties," rendering him liable for damages to the Estate under Fla. Stat. 733.609 and under the terms of the Exculpatory Clause as modified by this Court's January 15, 2009 Order." Appendix A, at 7-8.

The list included using the Florida liquid assets "for illegitimate purposes," but the court did not set forth any statement of fact to support its statement. The court wrote that Lehman "sought to avoid or circumvent legitimate Orders of the Panama Court. . .with actions financed by converting hundreds of thousands of dollars in cash assets from the Florida ancillary estate." Again, no specific factual examples were provided. The court found that the "[c]ommingling of $423,261.15 of estate money with the assets of RLPA without any formal loan documentation or and interest paid to the estate was a conflict of interest. *Id.* The court ignored the undisputed fact that every dime expended by Lehman was present and accounted for in the April 22, 2008 Final Accounting submitted by Lehman. Indeed, the Curator (whose Report was objected to by Lehman – see below) conceded that his Report did not consider or analyze the extensive documentation of Lehman's Exhibit 4 (which was improperly excluded – see below): "Q: And your testimony is that if you reviewed Exhibit 4, that the information you have in your report would not change? A: I don't know, I've never reviewed Exhibit 4." TR-Vol. V: 571.

The trial court's alterative to the *void ab initio* ruling found Lehman liable

under section 733.609, Florida Statutes (Appendix A, at 8) which provides:

> **733.609. Improper exercise of power; breach of fiduciary duty**
>
> If the exercise of power concerning the estate is improper or in bad faith, the personal representative is liable to interested persons for damage or loss resulting from a breach of his fiduciary duty to the same extent as a trustee of an express trust. In all actions challenging the proper exercise of a personal representative's powers, the court shall award taxable costs as in chancery actions, including attorney's fees.

Several reasons require reversal of the bad faith/reckless indifference breach of fiduciary duty alternative ruling. First, the Order failed to provide underlying factual findings for its conclusionary assertions of "bad faith," "illegitimate purposes," "circumvent[ing] legitimate orders" and "converting hundreds of thousands of dollars. . . ." Appendix A, at 7.[6] Second, the trial court's exclusion of Exhibit 4 – the backup documentation reflecting the monies spent and the reasons for

---

[6] The "*void ab initio*" portion of the Order was tied to Florida Statute section 733.309, Executor *de son* tort, which provides in relevant part "any person taking, converting or intermeddling with the property of a decedent shall be liable . . . for the value of all the property so taken and controverted. . . ." Appendix A, at 3-5. That section of the Order – portraying Lehman as a "covetous opportunist" – contained a few specifics, but if it falls because Lehman's albacea status was not nullified by Hilda's appeal, so therefore the 733.609 conclusion is devoid of the findings necessary to support a 609 finding.

the expenditures – was clearly erroneous and prejudicial. Third, the admission of the Curator's Report was clearly erroneous because it constituted highly prejudicial hearsay that was a major feature of the trial Court's Order. Appendix A, at 5. Fourth, the exclusion of Lehman's proffered expert witness whose testimony related to the reasons why Lehman's actions were to the ultimate benefit of the estate, was erroneous and contributed to the trial court's adverse conclusions.

We address each ground below.

A. THE EXCLUSION OF EXHIBIT 4

Lehman accepted the responsibility to prove "that the money expended was a proper disbursement." *Benton v. Benton*, 117 Fla. 37, 157 So. 512, 519 (Fla. 1934); *Beck v. Beck*, 383 So. 2d 268, 271 (Fla. 3d DCA 1980) (quoting *Benton*). A centerpiece of that proof was Lehman's "Exhibit 4," "the dispositive backup for everything that is in the final accounting." TR-Vol. II: 239. The trial court repeatedly rejected the effort to admit Exhibit 4 because it is "unnecessary and unduly burdens the record" (*id.* at 132); because "the stack of documents that are being given to me seem to be huge in relation to what good become of it" (*id.* at 212), and "I will not voluntarily haul a truckload of documents around and the clerk is not required to." *Id.* at 240.

The court said that "[i]f I need to refer to one because one of them [the expenditures] is challenged, I'll allow that one to go into evidence. . . . But I'll not receive that whole batch of stuff." *Id.* at 132. But the truth was that all of Lehman's expenditures were challenged; the three lawyer cross-examination of Lehman occupied 217 pages of transcript challenging fees, costs, travel, telephone, etc. In fact, Lehman's testimony at pages 102-515 comprised the overwhelming bulk of the 716 page trial, and the cross-examination on expenditures and authority was the basis of the judgment below.

The test for relevant evidence is that "it must have a logical tendency to prove or disprove a fact which is of consequence to the outcome of the action." Charles W. Ehrhardt, *Florida Evidence*, § 401.1 (2004). Nothing could be more relevant to Lehman's defense of his expenditures than the "backup" to his testimony and the accounting establishing what he paid, to whom, and for what. Especially where there was commingling, and the court focused on it (Appendix A, at 7), and there was cross-examination that relentlessly attacked his spending, and there was a negative Curator's Report that criticized the expenditures without having seen the documentation of Exhibit 4.[7] The exclusion of that exhibit for housekeeping

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[7] "Q. But you've never checked the backup of the final accounting, have you? A: No, I haven't. Q. Not a stitch of paper? A. No, I haven't." R-Vol. V: 569.

purposes was an abuse of discretion. *See Zupnik Haverland, L.L.C. v. Current Builders of Florida, Inc.*, 7 So. 3d 1132, 1134 (4th DCA 2009) ("The trial court's decisions regarding exclusion of evidence are reviewed for abuse of discretion").

B. THE EXCLUSION OF LEHMAN'S EXPERT

Lehman wanted to present Charles Gnash, an attorney, as an expert:

> Mr. Gnash will testify that under these circumstances that the standard in the American community, the standard in the Florida community for this particular fiduciary, that being Mr. Lehman, under these set of facts where you've got a perhaps albacea in Panama and certainly is still ancillary personal representative in Florida
>
> who has a duty to preserve and protect the overall estate, spent Florida money in Panama.
>
> Now, if the Panama expert is going to testify that that's improper under Panama law, then certainly we should be permitted to let Mr. Gnash tell about the expenditures under Florida law and the fact situation that he's observed over the past two days.
>
> A key issue in this action and for which Mr. Gnash will offer an opinion is what is the standard in the community for a fiduciary under these circumstances.
>
> If Mr. Lehman didn't do what Mr. Lehman did, no one else would have done it. These

> assets are still here. We're arguing about them today because of what Mr. Lehman did.
>
> So that's what Mr. Gnash will testify about.

TR-Vol. V: 526-527. The court disallowed the Gnash testimony, agreeing with the opposition argument that "whether or not he can expend it under Florida law . . . is clearly a legal decision that Your Honor can make." *Id.* at 530-531.

But that does not end the inquiry under the evidence code, sections 90.703 and 90.704. "Many courts have interpreted Section 90.703 or its equivalent Federal Rule 704 as permitting witnesses to testify as to the substantive law relevant to the case, to draw legal conclusions and to suggest to the trier of fact the proper decision to reach. *See Guy v. Knight*, 431 So. 2d 653 (Fla. 5th DCA 1983)." *In re Estate of Lenahan*, 511 So. 2d 365, 370 (Fla. 1st DCA 1987). In *Lenahan*, "assist[ing] the court in understanding and making an informed decision concerning the complex and obscure legal questions involved in the instant case, specifically concerning probate law, federal and state estate taxation, and will construction" was within the parameters of admissibility under the evidence code. *Id.* at 371. Here, the same should have been said as to Mr. Gnash.

C. THE LACK OF SPECIFIC FINDINGS

The trial court used harsh language: "bad faith, with reckless indifference . . . ." Appendix A, at 8. Other than commingling, which Lehman conceded may have cost the Estate "[m]aybe $2000 in interest" (TR-Vol. VI: 650), Lehman acted in what he believed to be the best interests of protecting Lucom's Estate and carrying out the philanthropic purposes of Lucom's will. And he acted with the advice of counsel, both in Florida and Panama.

Bad faith and reckless indifference are mixed questions of fact and law. The trial court, in its breach of fiduciary section, did not identify the specific facts that supported its harsh conclusions of law.

The acts that may support such conclusions include: "making of authorized payments to other beneficiaries; conversions of trust property; negligence in recording instruments affecting the trust property, or in obtaining security, or in collecting trust property, or in holding the property until it became worthless; wrongful sale of trust property, and negligence or misconduct in the making or retaining of investments." *In re Estate of Pearce*, 507 So. 2d 729, 731 (Fla. 4th DCA 1987). There is no evidence that Lehman engaged in any of these acts.

The trial court apparently took offense at Lehman's actions because they were not the traditional acts of an ancillary representative, but Lucom's Estate and its

commitment to the poor children of Panama, and the vagaries of the Panama court system presented a non-traditional situation. Against the backdrop of believing Lehman's albacea status was *void ab initio*, against the exclusion of Lehman's backup materials and his expert who would have explained why Lehman's actions were not bad faith or recklessly indifferent, the trial court's failure to identify the specific acts that merited its conclusions, render the conclusions deficient and unenforceable.

D. THE CURATOR'S REPORT

Pretrial (R25:4911) Lehman unsuccessfully sought to exclude the Curator's Report because it was replete with hearsay. The Report, and Miller's testimony, were based on out of court statements offered for their truth. That is classic hearsay, and should have been excluded. Compare *Scaringe v. Henrich*, 711 So. 2d 204-205 (Fla. 2d DCA 1998) applying hearsay rules to a guardian ad litem's report, holding that the report is not "in evidence" and stating that "when a guardian attempts to testify to hearsay statements and a valid hearsay objection is raised, that objection should be sustained." *See also Rose v. ADT Security Services, Inc.*, 989 So. 2d 1244 (Fla. 1st DCA 2008) ("Second, the report is a letter written from Zwirn to appellants' counsel, which, as the trial court correctly determined, constitutes inadmissible hearsay. *See* § 90.802, Fla. Stat. (2005). A trial court cannot consider inadmissible evidence in determining the disposition of a motion for summary judgment."). The same result

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this 22nd day of October, 2009 to the following:

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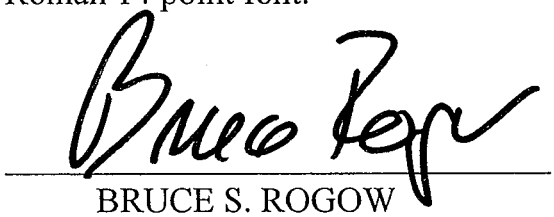
I HEREBY CERTIFY that this Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.



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