

IN THE CIRCUIT COURT OF THE 17<sup>TH</sup>  
JUDICIAL CIRCUIT IN AND FOR  
BROWARD COUNTY, FLORIDA  
CASE NO. 12-034123 (07)

P & S ASSOCIATES GENERAL  
PARTNERSHIP, etc. et al.,  
Plaintiffs,

vs.

MICHAEL D. SULLIVAN, et al.  
Defendants.

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**DEFENDANT FRANK AVELLINO'S REPLY IN SUPPORT OF HIS MOTION TO  
COMPEL PLAINTIFF TO PRODUCE DOCUMENTS IN RESPONSE TO HIS SECOND  
REQUEST FOR PRODUCTION DATED APRIL 29, 2014**

Defendant, Frank Avellino ("Avellino"), files this reply in support of his motion compelling Plaintiff Philip J. Von Kahle, as Conservator of P&S Associates and of S&P Associates (hereinafter "Plaintiff") to produce documents in response to Avellino's Second Request for Production dated April 29, 2014 (the "Request").

At issue is Avellino's Request 1 which seeks documents relating to settlements or other resolutions Plaintiff has entered into with Avellino's co-defendants in this action. Plaintiff refuses to produce documents relating to such settlement agreements claiming privilege and that such documents are irrelevant.

In his response to Avellino's motion to compel, Plaintiff contends that the settlements entered into with other defendants are not discoverable because Florida no longer has joint and several liability, thus, what other defendants may have paid to settle is irrelevant to a determination of Avellino's percentage of fault. See, § 768.81, *Florida Statutes*. While Plaintiff may be correct that what other defendants paid in settlement is not relevant to a determination of

Avellino's liability with regard to claims of negligence, such contention is not dispositive on the issue.

Initially, the apportionment of fault provisions of section 768.81, *Florida Statutes*, applies only to negligence causes of action and do not apply to an action based upon an intentional tort. *Hennis v. City Tropics Bistro, Inc.*, 1 So.3d 1152, 1154 (Fla. 5<sup>th</sup> DCA 2009); *Slawson v. Fast Food Enterprises*, 671 So.2d 255, 258 (Fla. 4<sup>th</sup> DCA 1996). The Third Amended Complaint asserts intentional tort claims against Avellino for Aiding and Abetting a Breach of Fiduciary Duty (Count II), Breach of Fiduciary Duty (Count VIII), Fraudulent Misrepresentation (Count X), Fraudulent Inducement (Count XI) and Negligent Misrepresentation (Count XII), as well as Civil Conspiracy (Count IX), all of which claims but for Counts X, XI and XII, involved those defendants which settled with Plaintiff.

Additionally, Avellino is entitled to the settlement agreements Plaintiff entered into with the other defendants because in all likelihood, such individuals will be called as witnesses at trial. Provisions of the settlement agreements could be relevant to a determination of such witnesses' motivation or bias.

Plaintiff went the extreme step of not only entering into confidential settlement agreements with the co-defendants but also having them reviewed in camera by the Court. Thus, Avellino has no knowledge of the settlement agreements' terms and conditions. The settlement agreements may include concessions or admissions by Plaintiff or evidence lack of liability of Avellino. Further, the confidentiality provisions of the agreements may limit or restrict the co-defendants from testifying or communicating with others, impeding Avellino's ability to defend himself. Any basis for the confidentiality of the settlement agreements is outweighed by the right of Avellino to defend himself in this action.

WHEREFORE, Avellino moves this Court for the entry of an order compelling Plaintiff to produce all settlement agreements and other documents evidencing the settlement or other resolution Plaintiff has reached with any other defendant in this action, including documents being withheld upon a claim of privilege or produce a privilege log.

**HAILE, SHAW & PFAFFENBERGER, P.A.**

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing document is being served on those on the attached service list by electronic service via the Florida Court E-Filing Portal in compliance with Fla. Admin. Order No. 13-49 this 28th day of July, 2014.

By: /s/ Gary A. Woodfield  
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