2012 WL 7801348 (Or.Cir.) (Trial Motion, Memorandum and Affidavit)
Circuit Court of Oregon.
Multnomah County

Michael GATTUCCIO, as Personal Representative of the Estate of Mary T. Gattuccio Pence, Plaintiff,
v.
Colleen A. AVERILL, an individual; the O.N. Equity Sales Company, a foreign corporation; and New York Life Insurance Co., a foreign corporation;, Defendants.
Michael GATTUCCIO, as Personal Representative of the Estate of Mary T. Gattuccio Pence, Plaintiff,
v.
ONPOINT COMMUNITY CREDIT UNION, an Oregon state-chartered credit union; Ohio National Financial Services, Inc., an Ohio corporation; New York Life Insurance and Annuity Corporation, a Delaware corporation; New York Life Investment Management LLC, a Delaware limited liability company; and Nylife Securities LLC, a Delaware limited liability company;, Defendants.

No. 101116582.
May 17, 2012.

Oral Argument Requested
No.: 1105-06352

Defendants the O.N. Equity Sales Company and Ohio National Financial Services, Inc.'s Motion in Limine to Prohibit Use of Mary T. Gattuccio Pence's Recorded Statement

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Zeiger, Tigges & Little LLP, Marion H. Little, Jr. (0042679), Christopher J. Hogan (0079829), Attorneys for Defendant the O.N. Equity Sales Company and Ohio National Financial Services, Inc.

I. REQUEST FOR ORAL ARGUMENT

Defendants The O.N. Equity Sales Company and Ohio National Financial Services, Inc. (“Defendants”), request oral argument on this motion, which they estimate will take one hour. Court reporting services are not requested.

II. MOTION

Pursuant to Rules 801 through 804 of the Oregon Rules of Evidence, Defendants move the Court for an Order prohibiting Plaintiff from making or offering any and all reference or citation to the recorded statement of Mary T. Gattuccio Pence taken at a video examination on August 13, 2010 (the “August 13, 2010, Transcript”), on grounds the entire statement is inadmissible hearsay and violates the prohibition on spoliation of evidence. *Declaration of Marion H. Little, Jr. (“Little Decl.”)* at ¶ 20.

III. BACKGROUND FACTS

The inadmissibility of the August 13, 2010, Transcript is probably most easily demonstrated by the timeline of the events predating filing of this litigation.

A. Plaintiff's Ability - Since May 2009 - Pursuant To A Power Of Attorney To Initiate Litigation And Otherwise Preserve And Perpetuate Evidence.

Plaintiff filed this action in November 2010 but he had been empowered to do so since at least May 2009. It was in May 2009 that Ms. Pence granted Plaintiff, Michael Gattuccio, her son, a power of attorney to pursue any litigation. *Id.* at ¶¶ 2, 14, at p. 30-32 (referencing M. Gattuccio Dep. Exh. 3-A (power of attorney)). Specifically, Paragraph 14 of the power of attorney granted to Plaintiff the following powers with respect to litigation:
Litigation. To sue upon, defend, compromise, submit to arbitration or adjust any controversies in which I may be interested; and to act in my name in any complaints, proceedings or suits with all the powers I would possess if personally present and under no legal disability.

The catch-all provision of paragraph 27 of the power of attorney gave Plaintiff broad powers to perform all acts necessary to carry out the enumerated powers listed above:
Perform Other Acts to Carry Out the Powers Granted. Execute and deliver any written instrument and perform any other act necessary or desirable to carry out any of the powers granted to my Agent under this power of attorney, as fully as I might do personally. I ratify and confirm all acts performed by my Agent pursuant to this power of attorney.

Accordingly, since May, 2009, Plaintiff was and has been free to hire legal counsel and pursue his mother's claim against Defendants - a claim Plaintiff ultimately valued as a $2.1 million asset of Ms. Pence's estate. *Little Decl.* at ¶ 2, at p. 126. According to Plaintiff, Ms. Pence had no reservations about her children going forward with litigation; “she was all for it.” *Id.* at pp. 57, 60-61.

Personally, Plaintiff (as well as his siblings) had every incentive to timely and properly pursue the claim since it is not subject to any creditor claim and is to be divided evenly among Ms. Pence's three children.
Q. Now, of the $2.1 million claim, those moneys if they entered the estate are payable equally between you and your two siblings?

A. Correct.

Q. Is there anyone else other than you and your two siblings that would have a claim for those moneys?

A. No.

Q. That is, are there any outstanding creditors of your mother's estate?

A. None.

Id. at ¶ 2, at p. 44.

Acting in the capacity of power of attorney for Ms. Pence, Plaintiff first filed a petition for a restraining order against Defendant Colleen Averill. Plaintiff represented that Ms. Averill had **abused** Ms. Pence within the meaning or ORS § 124.005, the **abuse** occurred within the past 180 days, and there was immediate and present danger of further **abuse**. That petition ultimately gave rise to a sequence in the events that resulted in a November 2, 2009, indictment of Ms. Averill.

It was not long after the initiation of the criminal proceedings, that Ms. Pence (or those acting on her behalf) contacted ONESCO. For example, on or about July 9, 2009, a letter was sent in Ms. Pence's name to ONESCO's compliance department (the “July 9,

2009, Correspondence") stating allegations involving Ms. Averill and advising that her daughter, Joyce Bolliger, was authorized to "obtain any and all information on [Ms. Pence's accounts] and [her] behalf." Subsequently, by a correspondence dated August 23, 2009, Ms. Bolliger forwarded to ONESCO correspondence providing some additional information regarding an ongoing criminal matter involving Ms. Pence and Ms. Averill (the "August 23, 2009, Correspondence"). *Declaration of William C. Price ("Price Decl.")* at ¶ 12.

Thus, in terms of the timetable, the initial contact with law enforcement officials occurred in May 2009 (some 18 months prior to the filing of this litigation), and Ms. Pence's and/or relatives had initiated contact with ONESCO some 16 months prior to pursuing this case.

B. Plaintiff/Pence's Threat To Initiate Litigation.

More importantly, by no later than December 15, 2009, Ms. Pence and her family had retained counsel. This is evidenced by correspondence of that date from the law firm of Black Helterline, LLP, and specifically Attorney Andrew T. Reilly (the "December 15, 2009, Correspondence") directed to ONESCO. *Id.* at ¶13. The December 15, 2009, Correspondence set forth Ms. Pence's position and made clear Ms. Pence's intentions to pursue litigation against ONESCO.

In-house counsel for Defendants responded to the December 15, 2009, Correspondence on January 6, 2010 (the "January 6, 2010, Correspondence"). *Price Decl.* at 14. The letter specifically stated: "While The O.N. Equity Sales Company does not agree with the statements in your letter, I will serve as your contact person for any future correspondence to The O.N. Equity Sales Company with regard to this matter." The January 6, 2010, Correspondence to Attorney Reilly also specified in-house counsel's address, provided a business email address, and provided a phone number where he could be contacted.

Plaintiff did not communicate any further information until May 28, 2010, when the Black Helterline, LLP, firm sent a letter (the "May 28, 2010, Correspondence"). Price Decl. at ¶ 16. Therein, Attorney Reilly and the law firm of Black Helterline, LLP, made a settlement demand upon ONESCO. Defendants note a number of items with respect to this correspondence: (a) before the text of the May 28, 2010, Correspondence, Attorney Reilly specifically wrote: "SETTLEMENT DEMAND AND NOTICE OF INTENT TO FILE SUIT"; (b) the May 28, 2010, Correspondence reiterated that Attorney Reilly and the law firm of Black Helterline, LLP, represented Mary Pence; (b) the May 28, 2010, Correspondence expressly referenced a demand for reimbursement of losses; (c) in the body of the May 28, 2010, Correspondence, Attorney Reilly stated Mary Pence's "intent to file suit against The O.N. Equity Sales Company"; (d) the May 28, 2010, Correspondence stated Attorney Reilly's belief that ONESCO was liable; (e) the May 28, 2010, Correspondence included a specific settlement demand; and (f) the May 28, 2010, Correspondence stated that if the settlement demand was not paid by June 11, 2010, or other suitable arrangements were not made, that Attorney Reilly and Black Helterline, LLP, were authorized to initiate suit.

In-house counsel responded by a letter of June 10, 2010 (the "June 10, 2010, Correspondence"), and made a specific request for additional information regarding the claims that Attorney Reilly and his law firm indicated they intended to file if a settlement was not resolved by June 11. *Price Decl.* at ¶ 17. However, at that point, no further word was received from Plaintiff or Plaintiff's counsel regarding production of the requested documents until November 2010, more than two months after Ms. Pence's death.

C. The Improperly Noticed Examination Of Ms. Pence - On The Eve Of Her Passing.

It was late in the day on Friday, August 13, 2010, that Defendants next received any further communications from Plaintiff or his counsel. The emails (all located in Price Decl. at ¶19) reflect the following communications:

1. Attorney Reilly sent the first email at approximately 4:57 p.m. (EST) on Friday, August 13, 2010, and stated his intention to depose Ms. Pence in Oregon to perpetuate her testimony "on an expedited basis."

Ms. Martin and Mr. Price: As you both may recall, I represent Mary Pence, a victim of several crimes committed by Colleen Averill, a former agent/representative of The O.N. Equity Sales Company ("ONESCO"), all of which arose out of Ms. Averill's theft of funds from Ms. Pence's various bank and investment accounts while acting as Ms. Pence's financial advisor and supposed confidant (a position she obtained and nurtured through her relationship with ONESCO). Attached are my prior letters to ONESCO to provide background.

I learned just this past hour that Ms. Pence, who is in her mid-90's, is suffering from heart failure and is at Providence Hospital, the expectation being that she may not live through the weekend. I am writing to provide notice as quickly as possible of my intent to seek a perpetuation deposition of Ms. Pence, or something similar, on as expedited a basis as possible. Once I know more about our next steps, I will let you know so that you - or some other appropriate representative - can have an opportunity to attend the proceedings.

2. As of August 13, no lawsuit had been filed, no proper notice had been provided, and counsel sought to conduct a video deposition by simply sending an email notice. ONESCO's in-house counsel therefore responded at 5:06 p.m. (EST) that same day:
You have our formal objection as this is not timely or proper notice nor does it provide time to retain appropriate counsel or to properly review and prepare for a fair and reasonable cross examination.

If this occurs, we will be materially prejudiced.

3. In response, Attorney Reilly responded on August 13, 2010, at 5:06 p.m. (EST) : "You, of course, have my sympathies."

4. Attorney Reilly then sent the following email a little less than an hour later, at 6:01 p.m. (EST) stating his intentions to take the deposition of Ms. Pence within the next 30 minutes.
Ms. Martin and Mr. Price: Mary Pence apparently has hours or at most, days to live. She has been taken off all medication and IV's, and is being given only Tylenol to "keep her comfortable." While I can understand the fact that this is short notice and a general inconvenience, death waits for no one.

I have secured the services of a court reporter and videographer for this afternoon, and will be taking a deposition/recorded statement from Ms. Pence regarding her dealings with Ms. Averill as soon as possible. She is currently in Room 2R19 at Providence Hospital (NE Glisan); we will commence with the statement at or shortly after 3:30, but will hold off until 4:00 p.m. if we hear back from either of you indicating that someone from your side is on his or her way.

5. After receiving Attorney Reilly's email and then reviewing their records to determine whether Attorney Reilly had ever responded to in-house counsel's June 10, 2010 request for information, Defendants followed up with Attorney Reilly with the following email at 6:39 p.m. (EST) on August 13, 2010:
I renew my objection to the deposition. Thirty minutes notice is unacceptable and prejudicial under any circumstances. By any measurement, insufficient notice has been provided and no effort has been made to comply with the applicable rules.

Although you contacted me at the end of May, 2010, you apparently have elected to ignore my written request for additional Information. Now, even though it appears you have been representing Mrs. Pence for an extended period of time, you are attempting to give notice to me in Ohio for a deposition in Oregon on thirty minutes notice. Obviously our regular counsel, who is located in Ohio, cannot appear on such short notice, nor can we identify and retain counsel in Oregon on such short notice. Any prudent counsel would obviously seek to first review any available records and properly prepare before conducting any deposition. Your lack of notice has denied us that right. Any deposition today, accordingly, is not properly perpetuate.

Also, understand we have a standing objection to each of your questions as to form. In addition to form and all other available objections and defenses, we object to the perpetuation of her testimony based upon her capacity to provide any testimony.

I am willing to engage counsel on an expedited basis, but anticipate it will take five to seven days to do so. My willingness, of course, is dependent upon your good faith cooperation in making documents available for preparation purposes. Please advise.

6. Defendants did not receive any response to their last email or any word whether a deposition had ever occurred. Thus on August 17, 2010, at 3:37 p.m. (EST), Defendants sent an email to Attorney Reilly, stating:
We have not received a response as to whether you are going to provide the information requested in my June, 2010 letter and whether you are going to set up some form of deposition of Mrs. Pence for the end of this week so we have the opportunity to make plans to participate. If we are going to have a deposition at the end of the week, we need to know today so we can engage counsel and make travel plans to attend.

Thanks, Bill

Only as part of the litigation in this case, Defendants learned that a video examination had been taken on August 13, 2010. A subpoena was served for a copy of the video. However, Plaintiff stated that a copy could not be found and simply made the transcript available. On May 8, 2012, however, Plaintiff declared that the court reporter had found the video and stated his intentions to utilize it. It is obvious that Plaintiff intends to offer the evidence inasmuch as he has no other witnesses to support his claims.

In short, at least nine months elapsed between Plaintiff and his family's retention of counsel and the taking of the deposition shortly before Ms. Pence's death. There is no excuse for not having done so earlier. No one can be surprised that Ms. Pence would be at risk of passing away given her age. This is especially true since her health condition in the time period leading up to her death was deteriorating. Ms. Pence was hospitalized at least twice after May 2009 and before August 2010 because she was having difficulty breathing and poor circulation was causing her extremities to turn blue. *Little Decl.* at ¶ 2, at pp. 136-38. Her hospitalization in August 2010 was for the same condition. *Id.* at 121-23.

Thus, the health condition resulting in Ms. Pence's death had been previously experienced, was known, and had manifested itself on multiple occasions. It is also inexcusable given the amount of activity that had otherwise been undertaken by Plaintiff, as evidenced by the various letters written. And as Plaintiff stated there was no reluctance on the part of Ms. Pence to sue and in 2009 and again in 2010, in writing, her counsel stated we are prepared to proceed.

IV. POINTS AND AUTHORITIES

A. The August 13, 2010, Transcript Is Inadmissible Under Evidence Rule 804(3)(a).

At the outset, given that Ms. Pence is deceased and therefore "unavailable" under Rule 804(1)(d) of the Oregon Rules of Evidence, the statements in the deposition transcript are obviously hearsay under Evidence Rule 801(3) and thus inadmissible under Evidence Rule 802. No provision of the Oregon Rules applies to allow admission of the transcript into evidence, whether under the Rule 803 hearsay exceptions or the Rule 804 provisions regarding unavailable declarants.

Rule 804(3)(a) makes clear that testimony given by an unavailable declarant at a deposition can be admissible, but *only if* "the party against whom the testimony is now offered... had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Suffice it to say that this Rule is unavailing - the 30-minute notice was not an "opportunity" under any measurement for Defendants' counsel to even be present, let alone "develop" the testimony through cross examination.

B. The August 13, 2010, Transcript Is Inadmissible Under Evidence Rule 803(18).

The statements in the deposition transcript are also admissible under Evidence Rule 803(18), the special hearsay exception for certain statements, including "a statement made by a person concerning an act of **abuse** of an **elderly** person, as those terms are defined in ORS 124.050." Quite simply, the **elder abuse** claim in this case against ONESCO was already dismissed by this Court.

C. The August 13, 2010, Transcript Is Inadmissible Under Evidence Rule 804(3)(h).

Nor is the statement admissible under the catch-all provisions of Evidence Rule 804(3)(h), which allows admission of statements made by an unavailable declarant under certain conditions. That section reads:

> (h) A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; *(B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts;* and (C) the general purposes of the Oregon Evidence Code and the interests of justice will best be served by admission of the statement into evidence. *However, a statement may not be admitted under this paragraph unless the proponent of it makes known to the adverse party the intention to offer the statement and the particulars of it, including the name and address of the declarant, sufficiently in advance of the trial or hearing, or as soon as practicable after it becomes apparent that the statement is probative of the issues at hand, to provide the adverse party with a fair opportunity to prepare to meet it.*

(Emphasis added.)

1. Plaintiff May Not Take Advantage of Evidence Rule 804(3)(h) After Having Created The Very Scenario Offered By Plaintiff That Created A Situation In Which Defendants Were Denied Any Opportunity To Cross Examine Ms. Pence.

As an initial point, the last sentence of Rule 804(3)(h) provides that even if the conditions set forth in Rule 804(3)(h)(A), (B), and (C) are met, a statement is inadmissible "unless the proponent of it makes known to the adverse party the intention to offer the statement... sufficiently in advance of the trial or hearing, or as soon as practicable... to provide the adverse party with a fair opportunity to prepare to meet it."

As set forth above, Plaintiff and his counsel knew in December 2009 that they intended to pursue litigation; they also knew of the age and medical condition of Ms. Pence, and yet they made no effort to preserve her testimony until she was near death - and even then only under circumstances guaranteed to deprive Defendants of "a fair opportunity to prepare to meet it."

Plaintiffs conduct not only fails to satisfy this hearsay exception, it amounts to spoliation of evidence warranting its exclusion. For example, in *Sauls v. Wyeth Pharm., Inc.*, 2012 WL 724794 (D.S.C., Mar. 7, 2012), plaintiff brought a failure-to-warn claim against a drug company but failed to preserve the testimony of her prescribing physician, which was essential to prove the element of proximate causation on her claim. Plaintiffs doctor developed health problems that forced him to retire from practice, and he died two years later while the suit was pending. *Id.* at *1-2.

"Significantly," the court remarked, "[plaintiff] failed to preserve any testimony prior to [her doctor's] death regarding... whether a different warning would have affected his decision to prescribe hormone therapy medication...." *Id.* at *3. Plaintiffs failure constituted spoliation of evidence, which the court defined as a violation of the duty every party has "to preserve evidence

during litigation and at any time before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Id.* So, too, here, Plaintiff should not be afforded a hearsay exception for the same misconduct.

2. The August 13, 2010, Transcript Does Not Evidence Trustworthiness.

Even if Plaintiff's conduct is overlooked, the August 13, 2010, Transcript should be deemed inadmissible for other reasons. Focusing on the condition referenced in Rule 804(3)(h)(B), the catch-all provision does not apply to admit a statement into evidence unless "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." Under the circumstances, given Plaintiff's access to his mother and the authorization he received to take every step necessary to pursue litigation, Plaintiff obviously could have used "reasonable efforts" under Rule 804(3)(h)(B) to procure a statement from Ms. Pence well before she was in the hospital during the last hours of her life.

As for the probative value of the statement that was taken, the Rule does not expand on the meaning of *probative*, but at its most basic, *probative evidence* is defined as "testimony carrying the quality of proof and having fitness to induce conviction of truth, consisting of fact and reason cooperating as coordinate factors." Black's Law Dictionary, at 1203 (6th ed. 1990). Next, we discuss a number of factors should be considered in determining whether an out-of-court statement otherwise inadmissible under any other exception, should be permitted under Evidence Rule 804(3)(h).

a. Timing And Context.

The improper timing of the statement itself - made on Ms. Pence's deathbed - is obvious, and so is the nature of the examination. For example, the statements made certainly were not volunteered. Rather, they were specifically extracted by litigation counsel, who repeatedly asked Ms. Pence to search her memory of events that had happened years before the deposition. This is the exact opposite of an excited utterance under Evidence Rule 803(2), which is deemed reliable and therefore admissible precisely because it is spontaneous and voluntary, and there is no time lag between the event and the statement about the event. These factors detract from the probative value of the statements elicited from Ms. Pence.

b. Stressful Situation.

Clearly, if a declarant makes a statement under mental or physical stress or distress, the probative value of the statement is reduced. Even under the best circumstances, hospitals can be stressful places and depositions are stressful to the witness. In this case, the circumstances would have put Ms. Pence was under a great deal of stress: she was in the hospital, on her deathbed, under physical distress from her breathing difficulties and lack of oxygen, mentally stressed by having to remember and recount events that were - as the transcript itself demonstrates - only hazy recollections in her mind, all the while with a video camera running and a court reporter taking down her answers.

c. Incoherent And/Or Tainted Answers.

Other considerations of whether a statement is probative involve whether the statements made are coherent and internally consistent, whether answers are responsive to the questions, and whether answers are in fact incorrect. Here, the transcript itself contains incorrect answers. In one example, Ms. Pence described Ms. Averill as "an investor."
Q. Okay. Real briefly, let me just ask you if you can describe who Colleen Averill is.

A. She was supposedly an acquaintance and a good friend.

Q. Okay. Of yours?

A. An investor.

Little Decl. at ¶ 20, at p. 5-6.

Parts of the examination were influenced by referring to inadmissible events, such as Ms. Averill's criminal conviction. It is true that Ms. Averill entered a no-contest plea in prior criminal proceedings, but a conviction based on such a plea is inadmissible under Evidence Rule 803(22). Nevertheless, counsel utilized such information during the course of the examination. For example:
Q. Well, let's put this into context. We know that Colleen Averill was charged and convicted of a number of crimes against you.

A. Yes.

Q. And that was in the spring of this year, 2010. Does that help refresh your recollection as to when you first discovered she was not as she held herself out to be?

A. No. It was... Was it... In my head comes 2006, but I'm not sure. No.

Little Decl. at ¶ 20, at p. 12-13.

d. Leading Questions.

It was no surprise given the timing and circumstances of the deposition that many passages of the transcript show Ms. Pence was not coherent and gave nonresponsive answers. This is so even though her counsel repeatedly asked leading questions:
Q. Okay. That's fine. I don't want you to work too hard. In any event, subsequent to learning that she had taken money from you, did you file a police report?

A. A what?

Q. Did you file a police report?

A. Yes.

Q. And was Colleen Averill, in fact, charged of committing a number of crimes against you -

A. Yes.

Q. -All related to the theft of -

A. My daughter called the police and a detective came.

Q. Okay. And do you recall being at the - Well, let me back up.

Do you recall whether that matter went to trial or whether it was, there was a plea bargain reached?

A. I don't know what it was, but I saw her once on TV and once in person.

Q. When you saw her in person, was that in court when she was pleading to these counts?

A. Yes.

Q. Okay. Do you remember providing a statement at that time to The Court? Do you recall providing a statement at that time to The Court?

A. I don't remember.

Little Decl. at ¶ 20, at p. 14-15.

Many of the questions were not only leading but often blatantly so - signaling the witness to the answer by means of a question phrased as a "fact," or planting the desired answer in the question and then eliciting a "yes" answer by asking "do you recall that?"
Q. Okay. And do you recall when you learned - I'm sorry - how you learned that things were not as they seemed? Let me ask you a different question.

We have, and you've heard recordings of phone calls between Colleen Averill and the folks at New York Life or Mainstay Investments; right? You have to answer out loud.

A. Yes.

Q. Okay. If this matter gets to the point of being a lawsuit, those items will be in evidence at some point. Among the phone calls, there's a phone call from you in the spring of 2009 where you are told that there's almost no money in your account. Do you recall that phone call?

A. Yes.

Q. Is that the first time you learned that Colleen Averill had been taking money from you?

A. Yes.

Q. And do you recall what else, what that phone call was about and how you learned that you had no money or basically no money left in your account?

A. I think, if I recall right, that I got something in the mail.

Little Decl. at ¶ 20, at p. 13-14.
Q. Okay. Did you, in fact, start working with Colleen Averill as a financial advisor?

A. Yes.

Id. at p. 8.
Q. You started working with Colleen Averill as your financial advisor shortly after you met her; correct? You have to answer out loud.

A. Not right after.

Q. I don't want to put words in your mouth, but I think we know that Colleen was working with you back in 2003 and 2004. We have, we've seen checks and whatnot, an indication that she was working with you back then. Does that refresh your recollection at all as to when you may have met, started working with Colleen as your financial advisor?

A. Yes.

Q. When was that? I'm sorry. I'm confusing you because I'm ill-prepared, obviously. We do not have checks going back to 2003. I apologize for that. The checks we have in question start in 2006.

A. Six.

Q. So is that, you earlier mentioned that you believe you started working with Colleen Averill as a financial advisor in 2006?

A. Yeah.

Q. Is that consistent with your recollection?

A. That makes sense.

Little Decl. at ¶ 20, at p. 9-10.
Q. Okay. And it looks like it was deposited into an OnPoint Community Credit Union. Did you believe you were depositing this check for -

A. No.

Q. - $15,000 into an OnPoint Credit Union account?

A. No.

Id., at p. 29.
Q. Again it says “for deposit only” up above your signature. Did you believe you were depositing those funds for $20,000 into an OnPoint Community Credit Union account?

A. (No audible response.)

Id. at p. 29-30.
Q. Okay. And to your knowledge, we see a number of checks here that were not signed by you, either coming out of investment accounts or checking accounts. The checking accounts you said before were, you believed you were writing them to yourself so she could buy certificates of deposits and other investments; right?

A. Yes.

Q. At any time did you authorize her to sell any of your investments and liquidate the assets in those?

A. No.

Q. So if your signature appears on any of these checks from Mainstay Investments or New York Life, was, was the intent to actually liquidate those assets for to roll them over into other investments?

A. Roll them over.

Q. Okay. And to your knowledge they were not rolled over into other investments, were they?

A. To roll them over in other investments.

Q. Okay. And she told you that that, that that's what she was doing?

A. Pardon?

Q. Did she tell you that that's what she was doing?

A. Yes.

Little Decl. at ¶ 20, at p. 33-34.

At other times, cases, counsel reprimanded the witness to try to elicit a different response.
Q. Right. But let me back up again. Just please answer the question, the specific question I'm going to ask you. And that is, did you ever have a bank account, a joint bank account with Colleen Averill -

A. No.

Id. at p. 16.

And yet in another glaring instance, the witness failed to provide the "desired answer" as to supposed statements of inducement and reliance, so counsel took a break, and then, when the recording resumed, the answers were significantly changed:
Q. Okay. And do you recall, before I move off this exhibit, do you recall Colleen Averill ever telling you why you were signing these checks, what these checks were for?

A. To be deposited.

Q. Deposited -

A. Or... I can't recall right now.

Q. Okay. Do you need to take a break? Do you need to take a break?

A. Yep.

Q. Okay.

(Break taken from 5:00 to 5:09)

Little Decl. at ¶20, at p. 20.

After the break, Plaintiff's counsel worked around again to elicit the answer that had been sought before the break:
Q. Okay. Did she tell you why you were writing checks to yourself out of the US Bank account?

A. I was putting, supposedly they were supposed to go to CD's

Q. Okay. And she was representing you again as your broker when she was doing this? She was acting as your broker when she was asking you to do this?

A. Yeah.

Q. So she told you that she was going to buy CD's with the

A. Yeah.

Q. - CD's being certificates of deposit, not music CD‘s, correct?

A. Yeah.

Q. And it looks like by the endorsements and the cancellations on the back of the checks, each of them was deposited, in fact, into an OnPoint Credit Union account?

A. (No audible response.)

Q. Do you know whether she ever bought CD's with these funds?

A. (No audible response.)

Q. Let me back up. Do you know whether she ever bought CD's for you with these funds?

A. Yeah.

Q. Yes, she did buy CD's or no, she didn‘t?

A. No.

Little Decl. at ¶ 20, at p. 24-26.

As demonstrated by circumstances of the last-minute deathbed deposition of Ms. Pence and by the words on the transcript itself, a number of considerations have tainted the probative value of transcript and thus necessarily compel its exclusion. Aside from the improper timing, the questionable conditions, and the lack of an opportunity for Defendants to attend or cross examine Ms. Pence, the transcript makes clear that most of the answers were elicited by leading questions or some other technique intended to yield the desired response. Given these defects, the transcript is not admissible under the catch-all provision of Evidence Rule 804(3)(h). Indeed, any other result would reward Plaintiff for having spoiling evidence central to his claims.

V. CONCLUSION

Because Ms. Pence's recorded statement is inadmissible, the Court should find in Defendants' favor, exclude the May 13 Transcript from evidence at summary judgment and prohibit Plaintiff from any and all references and citations to Ms. Pence's recorded statement.

DATED: May 17, 2012

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