IN THE SUPREME COURT OF FLORIDA

IN RE: ESTATE OF
HARVEY S. WARWICK,
Deceased.

CASE NO. 74,349

JULIA W. CARSWELL,

Petitioner,

vs.

WARWICK, CAMPBELL, BURNS,
SEVERSON & BANISTER, P.A.

Respondent.

FILED
SID J. WHITE
JUL 24 1989
CLERK, SUPREME COURT
By ______ Deputy Clerk

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

On Review from the District Court
of Appeal, Fourth District
State of Florida

JAMES E. WEBER, P.A.
Attorneys for Respondent
Suite 502 Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 832-2266

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	1-2
JURISDICTIONAL STATEMENT	2
ARGUMENT	
I. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 470 So.2d 1145 (Fla. 1985).	2-5
II. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN DE LOACH V. WESTMAN, 506 So.2d 1142 (Fla. 2d DCA 1987) AND BRADY V. WILLIAMS, 491 So.2d 1160 (Fla. 2d DCA 1986).	5-7
CONCLUSION	7
CERTIFICATE OF SERVICE	7
APPENDIX	ATTACHED

TABLE OF CITATIONS

CASES — Page

Brady v. Williams
491 So.2d 1160 (Fla. 2d DCA 1986) 1, 2, 5, 6, 7

De Loach v. Westman
506 So.2d 1142 (Fla. 2d DCA 1987) 1, 2, 5, 6, 7

Florida Patient's Compensation Fund v. Rowe
472 So.2d 1145 (Fla. 1985) 1, 2, 3, 4, 5, 6

Quevedo vs. State
436 So.2d 87 (Fla. 1983) 6

STATUTES AND OTHER AUTHORITIES

Section 733.106(3), Florida Statutes (1987) 6

Section 733.617, Florida Statutes (1987) 2, 3, 4, 5

Section 768.56, Florida Statutes (1981) 2

Disciplinary Rule 2-106(b), The Florida Bar
Code of Professional Responsibility 4

STATEMENT OF THE CASE AND FACTS

Respondent desires to clarify the Statement of the Case and Facts as set forth in Petitioner's Brief. The Co-Personal Representatives (the Petitioner being a personal representative) employed the Respondent as the attorney to perform legal services for the estate administration. No contingent fee was involved. There was no adversary proceeding of any kind. Further, this is not a situation where a fee is to be paid to an attorney by a party who did not, in fact, employ the attorney to perform the legal services.

The characterization of the testimony of the Respondent in the trial court is oversimplified. However, the trial record is not being considered in this jurisdictional brief. Therefore, the oversimplification is not germane to this proceeding.

SUMMARY OF ARGUMENT

The issue in this jurisdictional brief is whether the case at bar directly and expressly conflicts with Rowe, De Loach and Brady. Rowe does not conflict because it is distinguishable from the case at bar in view of the fact that it involves a contingent fee in a medical malpractice action to be paid for by the party who did not employ the attorney and set forth methodology to

determine the fee which is inconsistent with the applicable probate statute. There is no conflict with De Loach because De Loach deals with an adversary probate proceeding and does not involve Section 733.617, Florida Statutes. There are not sufficient facts set forth in the Brady per curiam opinion to determine whether there is a conflict or not, and in such a case, conflict cannot be presumed in order to accept jurisdiction.

JURISDICTIONAL STATEMENT

Respondent agrees with the Jurisdictional Statement set forth in Petitioner's Brief.

ARGUMENT

I. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND V. ROWE, 470 So.2d 1145 (Fla. 1985).

The Rowe case is easily distinguishable from the case at bar. Significant differences are:

1. Rowe was not a probate case, but rather was a medical malpractice case.

2. Rowe did not have anything to do with Section 733.617, Florida Statutes. In fact, Rowe was concerned with the constitutionality of Section 768.56, Florida Statutes, which directs

the trial court to award "reasonable attorney fees" to the prevailing party in a medical malpractice action.

3. Rowe discussed the methodology to award an attorney fee in a medical malpractice case when a plaintiff employed an attorney on a contingent fee basis and is the prevailing party thereby causing the defendant who did not employ the attorneys to be responsible for attorney fees of the plaintiff.

In the case at bar, we have a totally different kind of case and situation. In a normal probate case, a personal representative employs an attorney to represent him, her or it to perform legal services for the estate administration. A specific Florida Statute covers this situation. Section 733.617(1), Florida Statute, states the following:

> "(1) Personal representatives, attorneys, accountants, and appraisers and other agents employed by the personal representative shall be entitled to reasonable compensation. Reasonable compensation shall be based on one or more of the following: (emphasis supplied)
>
> "(a) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the service properly.
>
> "(b) The likelihood that the acceptance of the particular employment will preclude other employment by the person.
>
> "(c) The fee customarily charged in the locality for similar services.
>
> "(d) The amount involved and the results obtained.

"(e) The time limitations imposed by the circumstances.

"(f) The nature and length of the professional relationship with the decedent.

"(g) The experience, reputation, diligence, and ability of the person performing the services."

The criteria set forth in the Statute under subparagraphs (a) through and including (g) does not include any consideration for a contingent fee.[1] The Statute sensibly omits this as a criteria because normal probate administration does not lend itself to contingent attorney fees as in a personal injury action. In Rowe, the contingency risk is weighed in order to enhance the fee. Rowe utilizes the contingency risk as a multiplier of the "lodestar". On page 1151 of the Rowe opinion, it is stated:

"The number of hours reasonably expended, determined in the first step, multiplied by a reasonable hourly rate, determined in the second step, produces the lodestar, which is an objective basis for the award of attorney fees. ...

"The contingency risk factor is significant in personal injury cases. ... Based on our review of the decisions of other jurisdictions and commentaries on the subject, we conclude that in contingent fee cases, the lodestar figure calculated by the court is entitled to enhancement by an appro-

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[1]The criteria in Disciplinary Rule 2-106(b) of The Florida Bar Code of Professional Responsibility includes the criteria of whether the fee is fixed or contingent as well as all of the criteria set forth under Section 733.617, Florida Statutes.

priate contingency risk multiplier in the range from 1.5 to 3. When the trial court determines that success was more likely than not at the outset, the multiplier should be 1.5; when the likelihood of success was approximately even at the outset, the multiplier should be 2; and, when success was unlikely at the time the case was initiated, the multiplier should be in the range of 2.5 and 3."

Thus, if Rowe is applied to a normal probate administration, not an adversary proceeding, then there can be no enhancement of "lodestar" as defined in Rowe. In essence, the attorney for the personal representative will be limited to an hourly rate which has the effect of negating all of the criteria, other than time, in Section 733.617, Florida Statutes. There was no such express holding in Rowe.

Thus, the case at bar does not expressly and directly conflict with Rowe.

II. THE DECISION OF THE DISTRICT COURT OF APPEAL IN THIS CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS OF THE SECOND DISTRICT COURT OF APPEAL IN DE LOACH V. WESTMAN, 506 So.2d 1142 (Fla. 2d DCA 1987) AND BRADY V. WILLIAMS, 491 So.2d 1160 (Fla. 2d DCA 1986).

The per curiam opinion in De Loach reveals that the attorney fee in question did not involve a situation where a personal representative employed an attorney to perform services for the normal estate administration. In fact, the attorney performed

work to revoke a will and remove the personal representative. This was clearly an adversary proceeding.

Another statute to be considered in awarding attorney fees covers a situation where an attorney benefits the estate and is entitled to fees even though he was not employed by the personal representative. Section 733.106(3), Florida Statutes, states the following:

> "(3) Any attorney who has rendered services to an estate may apply for an order awarding attorney fees, and after informal notice to the personal representative and all persons bearing the impact of the payment the court shall enter its order on the petition."

Whether attorney fees in an adversary proceeding can or should be covered by Rowe is an issue that is not involved in the case at bar. Clearly, De Loach is distinguishable from the case at bar in this most important respect.

The Brady opinion is per curiam and does not set forth sufficient facts to determine whether there is any conflict. Where it cannot clearly be shown that a decision expressly and directly conflicts with a decision of another district court of appeal, there is no jurisdiction. Quevedo vs. State, 436 So.2d 87 (Fla. 1983).

For the above reasons, the decision of the case at bar does not expressly and directly conflict with De Loach and Brady.

CONCLUSION

This court should deny jurisdiction.

JAMES E. WEBER, P.A.
Attorneys for Respondent
Suite 502 Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(407) 832-2266

By
JAMES E. WEBER
Florida Bar No. 085584

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to LOUIS L. HAMBY III, ESQ., Alley, Maass, Rogers, Lindsay & Chauncey, 321 Royal Poinciana Plaza, Palm Beach, FL 33480, this 21st day of July, 1989.

By
JAMES E. WEBER
Florida Bar No. 085584

IN THE SUPREME COURT OF FLORIDA

IN RE: ESTATE OF
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APPENDIX TO
RESPONDENT'S ANSWER BRIEF
ON JURISDICTION

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INDEX TO APPENDIX

Document	Page
Quevedo vs. State, 436 So.2d 87 (Fla. 1983)	A1 - A2

Note: Section 733.106(3), Florida Statutes (1987), is quoted on page 6.

Note: Section 768.56, Florida Statutes (1981), is quoted on page 1146 in Rowe.

Since the Court is disinclined to recognize the overbreadth of *Villery,* I must dissent from the majority's conclusion here that the sentences imposed upon the petitioners do not deprive them of due process. I would remand to the trial court with instruction that, in the absence of evidence of identifiable conduct on the part of petitioners occurring after the time of the original sentences, petitioners' sentences be reduced to the term of incarceration originally imposed.[3]

Pedro QUEVEDO, Petitioner,

v.

STATE of Florida, Respondent.

No. 62092.

Supreme Court of Florida.

July 28, 1983.

Application was made for review of decision of District Court of Appeal, 413 So.2d 136, affirming judgment allowing joinder in criminal trial of charges against two defendants in single information. The Supreme Court, Boyd, J., held that it could not clearly be shown that decision below expressly and directly conflicted with decision of another District Court of Appeal, and therefore there was no jurisdiction to review decision.

Ordered accordingly.

Adkins, Ehrlich and Shaw, JJ., dissented.

Criminal Law ⚷1017

Intermediate court's decision, which stated that "any violation" of procedural rule arising from joinder in same trial of second-degree murder count against defendant, and charge of attempted murder of same victim against defendant's brother, appeared to be entirely harmless, did not say whether rule was violated or whether alleged violation was of character or gravity requiring reversal; therefore, it was not clear that such decision expressly and directly conflicted with decision of another District Court of Appeal, and there was no jurisdiction to review decision. West's F.S.A. RCrP Rule 3.150(b).

Bennett H. Brummer, Public Defender, and Alan R. Dakan and Elliot H. Scherker, Asst. Public Defenders, Eleventh Judicial Circuit, Miami, for petitioner.

Jim Smith, Atty. Gen., and Penny H. Hershoff, Asst. Atty. Gen., Miami, for respondent.

BOYD, Justice.

We accepted jurisdiction of this case to review the decision of the district court of appeal, *Quevedo v. State,* 413 So.2d 136 (Fla. 3d DCA 1982). The petition for review was grounded upon the assertion that the decision below conflicted with the decision in *Wilson v. State,* 298 So.2d 433 (Fla. 4th DCA 1974), *cert. dismissed,* 327 So.2d 35 (Fla.1976).

The decision of the district court of appeal in the instant case was announced in an opinion which reads in its entirety as follows:

> It affirmatively appears that any violation of Fla.R.Crim.P. 3.150(b) in the joinder in the same trial of the second degree murder count against the appellant Quevedo, and a charge of attempted murder of the same victim, occurring during the same barroom brawl, against Quevedo's brother, was entirely harmless. The judgment under review is therefore affirmed. Sec. 924.33, Fla.Stat. (1979); see,

3. Of course the proper thing for this Court to do is to revisit that erroneous portion of *Villery* discussed above and remand these cases with instructions to reinstate the original sentences imposed.

Zeigler v. State, 402 So.2d 365 (Fla.1981); *Harris v. State*, 414 So.2d 557 (Fla. 3rd DCA 1982); *Damon v. State*, 397 So.2d 1224 (Fla. 3rd DCA 1981); compare *Wilson v. State*, 298 So.2d 433 (Fla. 4th DCA 1974), cert. dismissed, 327 So.2d 35 (Fla. 1976); *Paul v. State*, 385 So.2d 1371 (Fla. 1980).

In *Wilson v. State* it was held that the joinder of charges against two defendants in a single information was improper because the joinder of defendants met none of the criteria set forth in Florida Rule of Criminal Procedure 3.150(b). In response to the state's harmless error argument the court said "The state's argument that appellant has failed to show any prejudice resulting from the joint trial misses the mark. Procedural rights such as this are not to be granted or denied in the discretion of the court. They are vested rights the denial of which constitutes reversible error." 298 So.2d at 435.

The opinion of the court below in the instant case merely says that "any violation" that may have occurred in the joinder of charges against the two defendants "affirmatively appears" to have been harmless. 413 So.2d at 137. The opinion does not say whether there was a violation of the rule. We cannot tell from the face of the district court's opinion whether the alleged violation was of the same character or gravity as the error found in *Wilson.* Therefore, it cannot be clearly shown that the decision below expressly and directly conflicts with a decision of another district court of appeal.

Having concluded that we do not have jurisdiction to review the decision below, we must also conclude that the petition for review should not have been accepted. The petition for review is therefore denied.

It is so ordered.

ALDERMAN, C.J., and OVERTON and McDONALD, JJ., concur.

ADKINS, EHRLICH and SHAW, JJ., dissent.

THE FLORIDA BAR, Complainant,

v.

Glenn T. HARRIS, Respondent.

No. 62236.

Supreme Court of Florida.

July 28, 1983.

Disciplinary proceeding was brought. The Supreme Court held that failure to appear at appointed date, time, and place, as required by subpoena duces tecum, failure to deliver funds held in trust as deposit under real estate contract, conversion to own use of part of cash which was to be held in trust as and for deposit under real estate contract, failure to provide clients with title insurance policy for real property they purchased and to return to clients portion of funds which was to be applied to premium for title insurance policy, and allowing default judgment to be entered against client warrants disbarment.

Disbarment ordered.

Attorney and Client ⇐58

Failure to appear at appointed date, time, and place, as required by subpoena duces tecum, failure to deliver funds held in trust as deposit under real estate contract, conversion to own use of part of cash which was to be held in trust as and for deposit under real estate contract, failure to provide clients with title insurance policy for real property they purchased and to return to clients portion of funds which was to be applied to premium for title insurance policy, and allowing default judgment to be entered against client warrants disbarment.

John F. Harkness, Jr., Executive Director, and Stanley A. Spring, Staff Coun-

sel, Tallahassee, M
Counsel, Fort Lau
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PER CURIAM.

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