IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 74,793

FOURTH DCA CASE NO. 88-0436

IN RE: ESTATE OF LESTER PLATT, Deceased

PATRICIA PLATT FAULKNER and BARBARA PLATT SWANSON,

Petitioners

vs.

GEORGE A. PATTERSON and NCNB NATIONAL BANK OF FLORIDA,

Respondents

RESPONDENTS' BRIEF ON JURISDICTION

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

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STATEMENT OF THE FACTS

In their Statement of the Facts, the Petitioners, PATRICIA PLATT FAULKNER and BARBARA FAULKNER SWANSON, set forth numerous statements of facts without any reference to the record on appeal or to a supporting Appendix. This is contrary to the provisions of Rule 9.210(b)(3), Fla.R.App.P., which requires that there be references to the appropriate pages of the record or transcript to support the statement of the facts. See Island Harbor Beach Club v. D. of Nt. Resour., 471 So.2d 1380 (Fla.1st DCA 1985).

In fact, the only matters included in Petitioners' Appendix to the Brief on Jurisdiction are the Opinion of the Fourth District Court of Appeal in this case, together with three other cases which Petitioners rely on for conflict. Petitioners' Appendix does not include any portion of the record on appeal which was before the Appellate Court. Furthermore, in order for the Court to determine whether there is conflict between the decision of the Appellate Court and a decision of the Florida Supreme Court or another Appellate Court, the conflict must appear within the four corners of the decision of the Appellate Court. Reaves v. State, 485 So.2d 829 (Fla.1986); Commerce Nat. Bank in Lake Worth v. Safeco Ins. Co., 284 So.2d 205 (Fla.1973).

Petitioners may not rely on either a dissenting opinion or on the record itself to establish jurisdiction in the

Florida Supreme Court. Reaves, supra; Jenkins v. State, 385 So.2d 1356 (Fla.1980). It is therefore inappropriate for the Petitioners to set forth facts as they have done in their Statement which are not set forth in the opinion of the Fourth District Court of Appeal in this case, and Petitioners' Statement of the Facts should therefore be disregarded.

The decision of the Fourth District Court of Appeal in this case is included in Petitioners' Appendix to their brief on jurisdiction (A 1), and it is reported at, In Re: Estate of Lester Platt, 546 So.2d 1114 (Fla.4th DCA 1989).

The Appellate Court's decision in this case is a limited one in which the Court affirmed the attorneys' fees and personal representatives fees' awards on the basis of its earlier decision in the case of In Re: Estate of Warwick, 543 So.2d 449 (Fla.4th DCA 1989), in which the Court had held that Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla.1985) is not applicable to the determination of attorneys' fees and personal representatives' fees under Sec. 733.617, F.S. 1987 (A 1).

The Fourth District Court of Appeal further found that the testimony presented by the experts in the case demonstrated a basis under the statute for the attorneys' and personal representatives' fees awarded by the lower Court, and that the trial Court's decision would not be disturbed on appeal, absent a clear showing that it was contrary to the manifest weight of the evidence. Ibid, (A 1). Aside from those statements, the Fourth District Court of Appeal did not

set forth any further facts or statements in its opinion affirming the trial Court's award of attorneys' fees and personal representatives' fees.

SUMMARY OF THE ARGUMENT

In their brief on jurisdiction, Petitioners contend there is an express and direct conflict between the decision of the Fourth District Court of Appeal in this case and the decision of the Florida Supreme Court in Rowe, supra, and the Second District Court of Appeal in Brady, infra, and DeLoach, infra. In order for there to be conflict jurisdiction in the Florida Supreme Court, the Appellate Court must either set forth an announcement of a rule of law which conflicts with a rule previously announced by the Florida Supreme Court or another appellate court, or the Appellate Court must apply a rule of law to produce a different result in a case which involves substantially the same controlling facts as in a prior case.

In this case, the Fourth District Court of Appeal determined that it had previously held in an earlier decision that the decision in Rowe, supra, is not applicable to a determination of attorneys' fees and personal representatives' fees under Sec. 733.617, F.S. 1987, and the Appellants had not established that the fees awarded under said statute in the lower Court was contrary to the manifest weight of the evidence (A 1). In effect, the Fourth District Court held that the Legislature had determined that fees to be awarded to an attorney for the estate and to the personal representatives of an estate are to be set in accordance with the

various factors set forth in said statute, and the Court's decision is this case is not in conflict with any of the above decisions of the Florida Courts.

ARGUMENT

ISSUE I

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THIS COURT IN FLORIDA PATIENT'S COMPENSATION FUND v. ROWE, 470 So. 2d 1145 (Fla.1985)

In their argument under Issue I, Petitioners contend that the decision of the Fourth District Court of Appeal is in direct conflict with Florida Patient's Compensation Fund v. Rowe, supra, and that such conflict provides the conflict jurisdiction in this Court to review the decision of the Fourth District Court of Appeal in this case.

The Florida Supreme Court has previously announced the basis of its conflict jurisdiction to review the decisions of Appellate Courts. The Court has stated that conflict jurisdiction occurs when (1) there is an announcement of a rule of law which conflicts with a rule of law previously announced by the Florida Supreme Court or another Appellate Court or (2) there is an application of a rule of law which produces a different result in a case which involves substantially the same controlling facts as a prior decision disposed of by the Florida Supreme Court or another Appellate Court. Chase Federal Sav. & Loan Ass'n. v. Schreiber, 479 So.2d 90 (Fla.1985); Nielsen v. City of Sarasota, 117 So.2d

731 (Fla.1960); Florida Power & Light v Bell, 113 So.2d 697 (Fla.1959). Also see England and Williams, Florida Appellate Reform One Year Later, Fla.St.L.Rev. 221 (1981).

It is respectfully submitted that the Fourth District Court of Appeal did not set forth a rule of law which conflicts with the rule of law previously announced by the Florida Supreme Court in Florida Patient's Compensation Fund, supra, nor are the facts in this case the same as the controlling facts in the earlier decision in the Rowe case, supra.

In this case, the Fourth District Court of Appeal held that the decision in Rowe, supra, is not applicable to the determination of attorneys' fees and personal representatives' fees under Sec. 733.617, F.S. 1987, and that the award of fees was supported by the testimony in the case. In a footnote to its decision, the Fourth District Court stated as follows:

> "Section 733.617, Florida Statutes (1987), provides that reasonable compensation shall be based upon 'one or more of the following' criteria set forth in the statute. Appellant contends that the trial court must look at all the criteria before setting the fee. However, it appears that the Legislature specifically rejected that approach when it passed Chapter 76-172 adding the quoted language to the statute. The title to that act states as follows:
>
> An Act relating to the Florida Probate Code: amending §733.617, Florida Statutes, providing that personal representatives [and] attorneys...may receive reasonable compensation based upon one or more criteria rather than upon the entire list of current requirements."

Similar conclusions as to other statutes which set forth the criteria in the setting of attorneys' fees, were reached by the Appellate Courts. The First District Court of Appeal held in What An Idea, Inc. v. Sitko, 505 So.2d 497 (Fla.1st DCA 1987), rev.den., 513 So.2d 1064 (Fla.S.Ct. 1987) and in Rivers v. S.C.A. Services of Florida, Inc., 488 So.2d 873 (Fla.1st DCA 1986) that the Rowe decision is not applicable to award of attorneys' fees under the statute governing workmens' compensation cases. The Fourth District Court of Appeal held in Division of Administration v. Ruslan, Inc. 497 So.2d 1348 (Fla.4th DCA 1986) that the Rowe decision is not applicable to an award of attorneys' fees in condemnation cases under the statute governing such cases, and the Fourth District Court of Appeal held that the Rowe decision is not applicable to the award of attorneys' fees under F.S. 733.617 (1987). In re: Estate of Warwick, supra.

Respondents also suggest that the Fourth District Court of Appeal's decision is supported by the recent modification of F.S. 733.617, where the Legislature again restated that the reasonable compensation of personal representatives and professionals of an estate is to be based on one or more of the criteria set forth in said statute. In Paragraph 1(e), the Legislature set forth one of those criteria as follows:

> "The nature and value of the assets of the estate, the amount of income earned by the estate, and the responsibilities and potential liabilities assumed by the person." Sec.733.617, F.S. 1988.

Consequently, by the amendment to the statute, the Legislature specifically provided that the award of compensation to the personal representatives and other professionals of an estate may be based upon any one of the various factors set forth in said statute.

Respondents would also suggest that the decision of the First District Court of Appeal in Stabinski, Funt & De Oliveira v. Alvarez, 490 So.2d 159 (Fla.3rd DCA 1986), rev.den., 500 So.2d 545 (Fla.1986) likewise indicates that the Rowe case, supra, is not applicable in this situation.

In Stabinski, supra, the Third District Court of Appeal held that the Rowe case did not apply to an action between an attorney and his client and the Court stated the Rowe decision applies only to fees imposed ancillary to the primary action against a non-client, either under common law principles or pursuant to statutory authorization. In Stabinski, the Third District Court determined that the loadstar method would only be applied to situations where someone other than a client is to pay the fee.

The Legislature has set forth a method of determining fees which are to be paid by an estate (the client) and it has set forth the different factors upon which the Probate Court is to determine the appropriate fee as to a personal representative, attorney or other professional.

It is respectfully submitted that there is no direct and express conflict between the decision of the Court in this

case and the decision of the Florida Supreme Court in Rowe, supra.

ISSUE II

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS 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).

In their argument under Issue II, Petitioners contend that the decision of the Fourth District Court of Appeal in the instant case is in direct conflict with the decisions of the Second District Court of Appeal in Brady, supra, and in De Loach, supra (A 2-3).

It is respectfully submitted that a review of the decisions of the Second District Court of Appeal will reveal that the question of whether the Rowe decision is applicable to an award of attorneys' fees under Sec. 733.617, F.S. 1987 was not considered by the Second District Court in either case.

In Brady, supra, an appeal was taken by the personal representative of the estate, joined by the attorneys for the estate, because the trial Court had reduced the requested fee of the attorneys by some $5,000.00 and the Appellants contended that the trial Court had failed to comply with Rowe. The Second District Court did not even refer to Sec. 733.617, F.S. 1987, and it does not appear that the evidence as to attorneys' fees was based upon one or more of the factors set forth in the statute.

In DeLoach, supra, thee was also no reference to the statute, nor was it shown that the statute would be applicable to the award of attorneys' fees in that case because the attorneys' fees award was for the services rendered by an attorney for a beneficiary who had obtained a revocation of a Will and the removal of the personal representative appointed pursuant to the Will. The Appellate Court did not even discuss the applicability of F.S. 733.617 to the award of attorneys' fees in that case.

In Dept. of Health v. Nat. Adoption Counseling, 498 So.2d 888 (Fla.1986), the Court stated as follows with respect to its conflict jurisdiction:

> "...As we recently noted in Reaves v. State, 485 So.2d 829,830, (Fla.1986), '[c]onflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority decision.' In other words, inherent or so called 'implied' conflict may no longer serve as a basis for this Court's jurisdiction." (P. 889).

There is no direct conflict between the decision of the Fourth District Court of Appeal in this case and the Second District Court of Appeal in Brady, supra, and DeLoach, supra, and Petitioners have failed to set forth the jurisdictional basis for this Court to review the decision of the Fourth District Court in this case.

CONCLUSION

It is respectfully submitted that there is no express and direct conflict between the decision of the Fourth District Court of Appeal in this case and the decisions cited by the

Petitioners in their brief. It is therefore respectfully suggested that the Court does not have the conflict jurisdiction to review the decision below and that Petitioners' application for review should be denied.

Respectfully submitted this 25th day of October, 1989.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was furnished by mail to SAMUEL S. SMITH, Esq., Ruden, Barentt, McClosky, Smith, Schuster & Russell, P.A., counsel for Petitioners, 701 Brickell Avenue, Suite 1900, Miami, Florida 33131, and ROBERT J. FRIEDMAN, Esq., P. O. Box 88, Hallandale, Florida 33309, this 25th day of October, 1989.

_____
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