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FILED

SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

MAR 10 1997

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SALLY SMEDLEY TEAGUE,

Petitioner

CASE NO. 89,733

vs.

District Court of Appeal,
5th District - No. 96-727

ESTATE OF HERBERT D.
HOSKINS, Deceased,

Respondent

ANSWER BRIEF ON THE MERITS OF RESPONDENT

✓

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TABLE OF CONTENTS

Table of Contents..... i

Table of Citations.....i.

Statement of Facts of Case 1

Summary of Argument

Argument..... .

Conclusion

Certificate of Service.....1 0

TABLE OF CITATIONS

Cases

Board of Commissioners of Leon County v. State,
118 So. 313 (Fla. 1928) 96 Fla. 495.....8

Bridges v. Williamson, 449 So.2d 400
(Fla. 2nd DCA 1984).....6

In Re Estate of Grillo, 393, So.2d 578
(Fla. 4th DCA 1981).....3

In Re The Estate of Kulow, 439 So.2d 280
(Fla. 2nd DCA 1983).....5

McDonald v. Roland 65 So.2d 12 (Fla. 1953).....8

Metropolitan Dade County v. Bridges,
402 So.2d 417.....5

Prudential Insurance Company of America v. Lamm,
218 So.2d 219 (Fla. 3rd DCA 1969).....3

Schumann v. Weathers, 643 So.2d 690
(Fla. 5th DCA 1994).....5

Swenszkowski v. Compton, 662 So.2d 722
(Fla. 1st DCA 1995).....4

Tillman v. Smith, 533 So.2d 928, 929
(Fla. 5th DCA 1988).....3, 6, 7

Florida Statutes

Section 731.201(4), FLA. Stat. (1995).....4

Section 733.619 Fla. Stat. (1995).....5

Section 733.707(1), Fla. Stat. (1995).....3, 4

Section 768.79(1), Fla. Stat, (1995).....3, 4

STATEMENT OF FACTS AND OF THE CASE

The manner in which the Petitioner has stated the facts and the case is not entirely clear and accurate.

Following entry of an order on the amount of attorney's fees and costs awarded Petitioner under Section 768.79: F.S.A., Petitioner filed a petition asking the Probate Court to enter an order directing the Respondent, the personal representative of the estate of the decedent, to pay the sums awarded immediately from the estate assets. The Court ruled against the Petitioner. The Petitioner objected to the form of the order submitted to the Court as it included findings regarding priority of the sums awarded.

Petitioner subsequently filed a petition asking the Probate Court to establish the priority of her claim. Her petition was not denied. The Court ruled the costs awarded were a class 1 priority and the attorney's fees awarded were class 8.

The Petitioner appealed the ruling and the Fifth District Court of Appeal affirmed the lower court's ruling, The appellate court did not affirm a denial of a motion.

The appellate court certified the following question to this Court:

Are attorney's fees assessed against the personal representative of an estate an expense of administration and thus class 1 priority or are they "other claims " granting them class 8 status?

SUMMARY OF ARGUMENT

The award of attorney's fees awarded Petitioner are not costs, expenses of administration, or the personal representative's attorney's fees. They are damages; a claim based on an obligation arising from ownership or control of the decedent's estate.

Attorney's fees assessed against a personal representative in pursuing a claim of the estate are "other claims" thus, . entitled to a class 8 status.

ARGUMENT

The **sole issue before this** Court is whether attorney's fees awarded against a personal representative in pursuing the claim of a decedent's estate are entitled to a class 1 or a class 8 priority under Section 733.707(1) of the statutes.¹

The Petitioner relied on a number of cases from Florida and New York, primarily Estate of Grillo,² to convince the trial court, the appellate court and now this court that attorney's fees are costs and, therefore, entitled to a class 1 priority. Grillo was a case involving an award of costs only. In the present case the Courts below construed Section 733.707(1) to allow the costs awarded to Petitioner class 1 priority as in Grillo and the attorney's fees class 8, as in Tillman v. Smith.³ In the present case attorney's fees are not costs as attorney's fees are considered costs only when provided by statute, otherwise they must be treated as damages.⁴ Section 768.79(1),⁵ the statute under which Petitioner was awarded fees, expressly states that under the appropriate circumstances, "... the Defendant shall be entitled to recover reasonable costs and

¹ Section 733.707(1) Fla. Stat. (1995)

² In Re Estate of Grillo, 393 So.2d 578 (Fla. 4th DCA 1981)

³ Tillman v. Smith, 533 So.2d 928 (Fla. 5th DCA 1988)

⁴ Prudential Insurance Company of America v. Lamm, 218 So.2d 219 (Fla. 3rd DCA 1969)

⁵ Section 768.79(1) Fla. Stat. (1995)

attorney's fees...⁶ [emphasis added]. The statute clearly states that attorney's fees are not costs. It separates the two. Had the legislature intended attorney's fees awarded under the statute to be considered costs, it could have, and would have so provided in the statute.

Faced with the fact that attorney's fees are not costs, Petitioner argues they must be an expense of administration as used in 733.707(1)(a) because damages awarded against or incurred by a personal representative are not included in the definition of "claims" in 731.201(4).⁷ However, the definition of "claims" in 731.201(4) is not all inclusive. That definition does not include judgments or decrees rendered against the decedent during his lifetime, excesses in funeral expenses and last illnesses, or debts acquired in continuing the decedent's business after his death. Yet a priority is established for each in 733.707(1).⁸

Section 733.707(1)(h) states, "all other claims" and means just that: Claims for reimbursement for mortgage payments made after decedent's death paid to the personal representative Swenszkowski v. Compton;⁹ claims for insurance refund paid to a

⁶ Supra

⁷ Section 731.201(4) Fla. Stat. (1995)

⁸ Section 733.707(1) Fla. Stat. (1995)

⁹ Swenszkowski v. Compton, 662 So.2d 722 (Fla. 1st DCA 1995)

personal representative; In Re The Estate of Kulow;¹⁰ contracts of the personal representative or torts committed in the course of administration. Section 733.619(3) states "claims [emphasis added] based ...on obligations arising from ownership or control of the estate, may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity..."¹¹ which is exactly what Petitioner did in seeking the award of attorney's fees under Section 768.79. The clear language of Section 733.619(3) is as much a part of the Probate Code as 731.201. A law should be construed together and in harmony with any other statute relating to the same purpose. Sections 731.201, 733.619 and 733.707 must be read in *pari materia*.¹² The damages suffered by Petitioner in attorney's fees are no different than damages suffered by Arno Schumann.¹³ Petitioner's damages, the attorney's fees awarded against a personal representative, are not expenses of administration, but rather one of all other claims and unequivocally a class 8 priority.

In Tillman v. Smith the Fifth District discerned that the Statute 733.707(1) clearly distinguishes between costs, expenses of administration and attorney's fees, and recognized the only

¹⁰ In Re The Estate of Kulow, 439 So.2d 280 (Fla. 2nd DCA (1983))

¹¹ Section 733.619 Fla. Stat. (1995)

¹² Metropolitan Dade County v. Bridges, 402 So.2d 417

¹³ Schumann v. Weathers, 643 So.2d 690 (Fla. 5th DCA 1994)

attorney fees the legislature placed in class 1 are those that are compensation for the personal representative's attorney. With sound reasoning and citation of authority that court states, "Had the legislature intended any attorney fee taxable against the estate to have a class 1 priority, it would have been a simple matter to say so."¹⁴

Such language invites the legislature to act if it does not concur with the court's construction of the statute. The legislature has revisited 733.707 twice since Tillman. In 1993, it specifically dealt with the priority portion of (1). It added (f) class 6 and changed (f) to (g) and (g) to (h). The legislature did not alter the clear language of (a), even though Tillman had been published for better than four (4) years. The legislature again visited 733.707 in 1995, and still it made no change to (1)(a). **For** the Petitioner to state or imply that the legislature was unaware of Tillman, its language, and its clear import is to discredit the wisdom and capacity of the legislature and is contrary to law. The legislature is presumed to be cognizant of the judicial construction of a statute when contemplating changes in the statute.¹⁵ Had the legislature disagreed with the Court's construction of the statute in Tillman or had it wanted to limit or restrict it in any way, "it would

¹⁴ Tillman v. Smith, 533 So.2d 928, 929 (Fla. 5th DCA 1988)

¹⁵ Bridges v. Williamson, 449 So.2d 400 (Fla. 2nd DCA 1.984)

have been a simple **matter** to say so."¹⁶

The purpose of Section 768.79 **may** be to encourage settlements, but it is not to force a party to accept any offer **submitted**. **It is** not to put an estate into a position in which it would be deterred from pursuing claims believed to be legitimate. Petitioner's **argument** sounds **more** like she is unhappy with the lower courts' rulings than **a matter of public policy**.

No public policy would be advanced by treating attorney's fees awarded under 768.79 differently than attorney's fees under **a** contract with a personal representative, **torts committed in the** course of the administration or any other obligations of the personal representative arising from ownership or control of the estate. All of which are "claims" under 733.619 and class 8 priority under 733.707.

Petitioner argues **that such claims** being relegated to a class 8 priority is tantamount to a non-payment of such claims. That has not been established in this case let alone in **most estates**. But in establishing the priorities in 733.707, the legislature indubitably gave full 'consideration to such **possibilities**. In doing so it established the public policy.

Further, where the legislature's **intention** is **discernable** the Court's duty is to **declare** it as it finds it, and it should not modify or shade it, **out of any consideration of** policy or

¹⁶ Tillman, *Supra* at 929

regard for untoward circumstances.¹⁷ Having adopted 733.707(1), and revisited it twice since the Fifth District construed it in Tillman, the legislature has made its intention abundantly clear.

It is a well settled principle that so long as statutory language is unambiguous, departing from its plain language and natural meaning is not justified by any consideration of consequences or public policy.

It is also well settled that where a statute is incomplete or defective because the case in question was not foreseen or contemplated, it is not the province of the Courts to supply the omission, even though as a result the statute may appear unfair, unpolitic or even a complete nullity.¹⁸ It is the purview of the legislature to make whatever modification it deems necessary.

¹⁷ McDonald v. Roland, 65 So.2d 12 (Fla. 1953)

¹⁸ Board of Commissioners of Leon County v. State, 1.18 So, 313 (Fla. 1928) 96 Fla. 495

CONCLUSION

The clear language of the statutory sections cited when read in pari materia, the Fifth District's construction in Tillman, and the legislature's acting upon 733.707(1) without modifying its clear import following Tillman irrefutably establishes the Tillman construction is correct. They undeniably establish the legislature has announced the policy of the state as into which priority Petitioner's attorney's fees fall.

The response to the question certified by the Fifth District Court of Appeal must be that attorney's fees assessed against the personal representative of an estate are "other claims", thus, a class 8 status.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to James E. Cheek, III, Esq., P.O. Box 1391, Orlando, Florida 32802-1391, by U.S. Mail this 7th day of March, 1997.



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