In the

Supreme Court of Florida

SALLY SMEDLEY TEAGUE,

Petitioner,

vs.

ESTATE OF HERBERT D. HOSKINS, DECEASED,

Respondent.

Case No. 89,733

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

Petitioner's Initial Brief on the Merits

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STATEMENT OF THE FACTS AND OF THE CASE

This matter arises from a dispute about the priority of a final judgment in favor of Appellant, Sally Smedley Teague (hereinafter, "TEAGUE") for payment by the Estate of Herbert D. Hoskins, deceased, under Section 733.707, *Florida Statutes* (1995).

The parties to this appeal have been in litigation over the same or similar fact issues since 1992. The first conflict occurred when TEAGUE, in her capacity as guardian of the person and property of her mother, filed petitions for homestead and elective share on her mother's behalf in the Herbert D. Hoskins probate case, and Virginia S. Puckett, the personal representative of the Hoskins Estate, contested those petitions. Eventually, TEAGUE prevailed. (Vol. II, R. 248-251) Puckett appealed to the Florida Fifth District Court of Appeal, which issued a *per curium* affirmance of the trial court's decision. *Puckett* v. *Teague*, 620 So. 2d 776 (Fla. 5th DCA 1993).

Subsequently, Puckett in her capacity as personal representative filed suit seeking in excess of $100,000.00 in damages for the Estate against TEAGUE in TEAGUE's individual capacity, claiming breach of an alleged contract to waive TEAGUE's mother's marital rights. TEAGUE prevailed in this second lawsuit, as well, and received a final order against Puckett as personal representative of the

Hoskins Estate awarding damages for attorneys fees and costs, based upon an offer ofjudgment made by TEAGUE which Puckett had rejected. (Vol. II, R. 323-326)

Upon demand from TEAGUE, Puckett failed and refused to pay the amount of the final order. In an effort to obtain payment, TEAGUE filed in the Hoskins probate case a Petition for Order Requiring Payment of Attorney's Fees and Costs by Personal Representative (Vol. II, R. 307-3 15) and a Petition to Determine the Priority of a Final Judgment Awarding Attorneys Fees and Costs Against the Estate. (Vol. II, R. 3 18-326)

TEAGUE's Petitions were denied by the circuit judge of the probate division, and TEAGUE appealed to the Florida Fifth District Court of Appeal. That court affirmed the probate court's denial of TEAGUE's motions, but certified the following question as one of great public importance:

> 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?

TEAGUE timely filed a notice to invoke this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v).

SUMMARY OF THE ARGUMENT

The award to TEAGUE is a Class 1 cost or expense of administration under the Florida Probate Code, Section *733.707, Florida Statutes* (1995), rather than a Class 8 "claim."

The award to TEAGUE cannot be treated as falling under Class 8, Section 733.707(1)(h), because that Class deals by its own terms only with "claims," and the award to TEAGUE is not a "claim" under the statutory definition of that term, or under the case law, because it arose after the decedent's death and was not an obligation of the decedent.

Rather than a "claim" against the Hoskins Estate, the award to TEAGUE is a cost or expense of administration incurred by the personal representative in her effort to collect assets for the Estate, under Class 1 of the Florida Probate Code's priority scheme. The award is an obligation created by the legal act of the personal representative in her effort to increase the assets of the Estate, and, as such, is entitled to Class 1 priority as a cost or expense of administration.

The Fifth District's interpretation of the Probate Code's priority scheme encourages litigation, and shields personal representatives from liability under the offer of judgment rules without any statutory authority for such protection.

ARGUMENT

This appeal involves the application of Section 733.707, *Florida Statutes* (1995) to the final order of the Eighteenth Judicial Circuit awarding attorney's fees and costs to TEAGUE against the Hoskins Estate, and the Florida Fifth District Court of Appeal's order affirming the probate court's application of the statute.

Section 733.707 regulates the order of payment of expenses and obligations from an estate. TEAGUE contends that the award to her should be classified as a Class 1 expense under the statute as a cost or expense of administration. The Estate contends that only part of the award is a Class 1 expense, while the rest is a Class 8 expense.'

There are at least three reasons why TEAGUE's position is correct, and the Estate's position is wrong, and each will be addressed in the following sections.

I. THE AWARD TO TEAGUE IS NOT A "CLAIM" UNDER THE FLORIDA PROBATE CODE, AND THEREFORE CANNOT BE PLACED IN CLASS 8 UNDER SECTION 733.707.

The award to TEAGUE cannot be treated as falling under Class 8, Section 733.707(1)(h), because that Class deals by its own terms only with "claims," and the

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'While the Estate actually took the position that the remainder of the award was a "Class 7" expense, its position was actually that the award to TEAGUE is a Class 8 claim. Under Section 733.707 as amended in 1993, the former Class 7 claims became Class 8 claims. For purposes of this appeal, the Estate's contention was that the remainder of the award was merely an "other claim," which would fall under Class 8 as set out in Section 733.707(1)(h).

award to TEAGUE is not a "claim." Under the statute, Class 8 specifically includes:

> *Class 8.* -- All other claims, including those founded on judgments or decrees rendered against the decedent during his lifetime, and any excess over the sums allowed in paragraphs (b) and (d).

The statutory language indubitably applies only to "claims," so only "claims" can fall into Class 8.

The award to TEAEUE is not a "claim" as a matter of law. Under the general defmitions section for the Florida Probate Code found at Section 73 1.20 1(4), the term "claims" is defined as follows:

> "Claims" means liabilities of the decedent, whether arising in contract, tort, or otherwise, and funeral expenses. The term does not include expenses of administration or estate, inheritance, succession, or other death taxes.

Section 73 1.201(4), *Florida Statutes* (1995). This definition applies to the term "claim" in Section 733.707(1)(h). The award to TEAGUE was not a liability of the decedent. The award arose long after the decedent's death, from an effort to collect funds for the Estate made by the decedent's personal representative. Obligations of an estate which arise after the death of the decedent are consistently held not to be "claims" under the Florida Probate Code. *See Swenszkowski v. Compton, 662 So.* 2d 722, 723 (Fla. 1st DCA 1995)(coobligor's right to reimbursement from personal representative for mortgage payments made not a "claim" under Florida Probate Code

because it did not arise before decedent's death); *In re Estate of Kulow*, *439 So.* 2d 280,282 (Fla. 2d DCA 1983)(insurer's cause of action against personal representative for overpayment of benefits paid to hospital for services rendered to decedent not a "claim" within the Florida Probate Code).

The plain language of the applicable Florida statutes dictates that the Section 73 1.201(4) definition of "claims" must be applied to the interpretation of Section 733.707(1). Section 73 1.201 states that it is applicable "in this code." Section 73 1.005, *Florida Statutes* states:

> **731.005 Short** title.--Chapters 731-735 shall be known and may be cited as the Florida Probate Code and herein referred to as "the code" in this act.

Accordingly, Chapter 73 1 is in "the code," as is Chapter 733. When Section 73 1.201 states that its definitions are to be applicable to those terms as they appear in "the code," Section 733.707(1) is unequivocally included within the scope of the statutes to which the definitions apply. Therefore, the Probate Code's definition of "claims" applies to the priority scheme set out in Section 733.707(1).

In its opinion below, the Fifth District did not address the statutory language set forth above. Instead, the court inferred that a different panel, eight years earlier, "must have found in *Tillman v. Smith,* 533 So. 2d 928 (Fla. 5th DCA 1988) that the definition of 'claim' contained in subsection 73 1.201(4) is not applicable to the

reference to 'claims' found in paragraph 733.707(1)(h)." The court cites no authority for this conclusion, because there is none. There is no indication that either party in *Tillman* raised the argument that the Probate Code's definition of "claim" controlled the priority statute, and based on the published opinion in *Tillman*, the Fifth District did not consider this approach. It does not seem logical to assume, as the Fifth District does in its opinion below, that the *Tillman* panel tacitly considered the Probate Code's definitions and then left the entire discussion out of its opinion as an indication that the definitions did not apply to the priority scheme.

The Fifth District's additional theory that the legislature failed to amend Section *733.707* in *the wake* of *Tillman* is not relevant to the legal analysis here. No party argued below, and the record does not reflect, that the Florida legislature ever considered *Tillman* or its effect. If the legislature did consider *Tillman*, it may well have determined that the case was wrongly decided based on the plain language of the Probate Code's definition section. More likely, however, is that the legislature did not believe *Tillman* would prevent an award of attorney fees against a personal representative made pursuant to the offer of judgment rules from having Class **1** priority. The offer of judgment statute does not exclude personal representatives from its scope; the Probate Code does not insulate personal representatives from offer of judgment liabilities, as it could.

Because the award to TEAGUE cannot be a "claim" under the Florida Probate Code, it cannot be placed in Class 8 under Section 733.707, and the position taken by the Estate, the circuit court, and the Fifth District is incorrect. This error alone is sufficient ground to reverse the order appealed from.

II. THE AWARD TO TEAGUE IS AN OBLIGATION CREATED BY THE LEGAL ACT OF THE PERSONAL REPRESENTATIVE IN AN EFFORT TO INCREASE THE ASSETS OF THE HOSKINS ESTATE, AND IS FOR THAT REASON PROPERLY PLACED IN CLASS 1.

Rather than a "claim" against the Hoskins Estate, the award to TEAGUE is a cost or expense of administration incurred by the personal representative in her effort to collect assets for the Estate, under Class 1 of the Florida Probate Code's priority scheme.

Under Section 733.707(1)(a), Class 1 claims include "costs" and "expenses of administration." Those courts which have examined the question agree that an award created by the legal act of the personal representative in an effort to increase the assets of the estate is a cost or expense of administration.

For example, in *In re Estate of Grillo*, 393 So. 2d 578 (Fla. 4th DCA 198 1), the personal representative of Mr. Erillo's estate, his widow, filed a wrongful death accident arising from Mr. Grillo's death in a truck accident. The case was tried to a

jury and the lone non-settling defendant, General Motors Corporation, received a defense verdict. General Motors successfully moved to tax costs against the estate. Mrs. Grillo appealed, arguing that the award to General Motors was only a "general debt" of the estate. The Fourth District, stating that there was no Florida authority on point and "scant authority elsewhere," *Grillo*, 393 So. 2d at 579, held that an award such as the one made to General Motors:

> is not a debt against the estate rather it is an obligation created by the legal act of the personal representative in his effort to increase the assets of the estate. It is thus a cost or expense of administration.

Grillo, 393 So. 2d at 580. There is no logical or reasonable distinction for purposes of Section 733.707 between the award to General Motors in *Grillo* and the award to TEAGUE involved in this appeal.

The law of other states is in accord with *Grillo*. In Michigan, the expenses of litigating an estate's claim are generally considered expenses of administration, whether or not the claim is successful, and this would include an award of mediation sanctions against the estate. *Ingham Emergency Physicians, P. C. v. Estate of McDivitt*, 425 N.W. 2d 575 (Mich. Ct. App. 1988). *Ingham Emergency Physicians* cites *Grillo* in support of its conclusion that awards to a party sued by a personal representative are expenses of administration. *Ingham,* 425 N.W. 2d at 577. The Michigan Court of Appeals also engaged in the same type of analysis set forth above to determine that

since the mediation sanctions arose after the decedent's death, those sanctions could not be a "claim."

Grillo cites two New York cases, *In re Williams' Estate,* 143 Misc. 527, 257 N.Y.S. 859 (Sur. Ct. 1932), and *In re Groom's Estate,* 193 Misc. 999, 85 N.Y.S.2d 862 (Sur. Ct. 1948), in support of its conclusion. *Williams* clearly holds that costs awarded against an executor in an unsuccessful action brought by him are an expense of administration, because it is "an obligation created by the legal act of the executor in his efforts to increase the assets of the estate. It is, therefore, an expense of administration and entitled to preference over the claims of general creditors." *Williams,* 143 Misc. at 529; 257 N.Y.S. at 861.

Tillman does not support an argument that cost judgments are Class 1 expenses, but that the attorney fee portion of those judgments is only a Class 8 claim, *Tillman* does not deal with a post-decretal award of costs and fees to a party against whom an estate has instituted unsuccessful litigation, but instead with a claim that attorney's fees incurred by a beneficiary benefitted the estate and should be paid as Class 1 expenses. The attorney's fees at issue in *Tillman* were not costs of the estate or expenses of administration. In contrast, the award to TEAGUE was incurred by the Hoskins Estate through its personal representative's efforts to increase the assets of the estate. *Tillman* specifically deals with attorney's fees awarded in the probate case

on the basis that a beneficiary's attorney's services benefitted the estate - a type of "common fund" argument. The award to TEAGUE is quite different in quality, having been incurred by the personal representative herself, not by a beneficiary. TEAGUE is not a beneficiary of the Hoskins Estate. *Tillman* does not govern the classification of the award to TEAGUE.

Another distinction and difference between the type of attorneys' fee award held to be an "other claim" in *Tillman* and the offer-of-judgment award made to TEAGUE is that the personal representative in the case before the Court had the opportunity to avoid paying TEAGUE's attorneys' fees. As a matter of law, when the personal representative rejected the offer of judgment she knowingly and voluntarily took on the responsibility for TEAGUE's attorneys' fees; in other words, she had a choice and chose to take that risk. In the "common fund" situation in which a beneficiary is awarded attorneys' fees, the personal representative may not be presented with such a choice, and would certainly not be presented with an offer of judgment if the beneficiary is attempting to collect assets from some third party, thus triggering the type of choice involved in this case. The personal representative could have entirely avoided the obligation to pay TEAGUE's attorneys' fees, by accepting the offer of judgment. The personal representative's failure to do so is deemed to be "unreasonable," as a matter of law, under the offer of judgment rules and the

circumstances of this case. Accordingly, the "reasonable" choice, as a matter of law, would have been to accept the offer of judgment. The personal representative's intentional failure to make the reasonable choice is an exercise of volition which gave her dominion over TEAGUE's fees. She chose to assume the risk of paying those fees as part of her method of administering the Estate, much like she would assume the risk of losing money on an investment handled for the Estate.

The Estate contended below, and the Fifth District apparently agreed, that the word "costs" in Section 733.707(1)(a) meant "costs awarded to parties who the estate sues unsuccessfully." The authority cited above demonstrates that this is not what the statutory scheme means. The personal representative incurred the award to TEAGUE while attempting to enlarge the estate, and it is therefore a cost or expense of administration entitled to Class 1 priority under the statute. The Fifth District's opinion stating otherwise is in error and must be reversed.

III. PUBLIC POLICY AND THE OFFER OF JUDGMENT SCHEME REQUIRE ATTORNEYS' FEE AWARDS AGAINST PERSONAL REPRESENTATIVES UNDER THE OFFER OF JUDGMENT STATUTE TO BE TREATED AS CLASS 1 EXPENSES

It is indubitable that one of the primary public policies to be served by Florida's offer of judgment scheme is to encourage the settlement of lawsuits. Under the offer

of judgment statutes, plaintiffs are made to bear a certain element of risk when a reasonable settlement offer is made within the scope of the statute by the defendant and is unreasonably rejected by the plaintiff. Under the Fifth District's ruling below, personal representatives have been allowed to escape this risk without any statutory authority for the exception. Personal representatives are free to ignore settlement offers, regardless of the reasonableness of those offers, without any risk that an award of attorneys' fees will take priority over the acknowledged expenses of estate administration, such as the personal representative's own fee and that of the personal representative's attorney. In fact, given the prevalence of the use of trusts and other alternative estate planning devices to minimize probate estates, and the consequent reduction in funds available to pay estate costs, relegation of attorneys' fee awards against personal representatives to Class 8 priority is likely to mean that they do not get paid by the estate at all.

What the Fifth District's opinion encourages, instead, is unreasonable activity by personal representatives who have a grudge or a desire to pursue marginal or baseless litigation against others. This Court's experience no doubt includes numerous instances in which some beneficiaries of an estate or survivors of a deceased are at tremendous emotional and financial odds with the personal representative. Such was the case in the instant situation. The personal representative, as the record shows,

fought tooth and nail to keep Petitioner's mother from realizing her marital rights, and then sued Petitioner individually on the barest of legal rationales in what Petitioner has consistently contended is a spite suit. Under the approach adopted by the Fifth District, personal representatives would be free from any concern about the effect of such statutes as Section 768.79, *Florida Statutes,* Section 57.105, *Florida Statutes,* or other attorney fee award provisions; indeed, personal representatives could at their whim ignore attorney fee clauses in contracts, secure in the knowledge that their own attorneys would be paid first from the estate's assets regardless of the validity of the litigation pursued by the estate. This approach would foster litigation without the tempering factor of a concern about having to pay the price for meritless lawsuits. Neither Section 768.79 nor Section 57.105 provides an exception for personal representatives; when personal representatives invoke the jurisdiction of the general trial courts of this state they are subject to the same rules as other litigants. The Estate has not cited and cannot cite any authority to the contrary.

Public policy would be much better served by an interpretation of Section 733.707(1)'s priority scheme which does not allow personal representatives to escape the effect of the offer of judgment statutes; as set out above, a plain reading of the Probate Code is all that is required for such an interpretation.

CONCLUSION

The probate court and the Fifth District erred in determining that the attorney's fee portion of the trial court's award to TEAGUE was a Class 8 claim, because the award is not a "claim" at all, having arisen after the decedent's death, and because the award is an obligation of the Estate created by the legal act of the personal representative in her effort to increase the assets of the Estate. The opinion appealed from should be reversed, and the circuit court and Fifth District, as applicable, directed to enter an order finding the entire award to TEAGUE to be entitled to Class 1 priority as a cost or expense of administration, to be paid without delay by the personal representative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been provided by Federal Express on this the 17th day of February, 1997, to Robert R. Foster, Attorney for the Estate, P.O. Box 41, DeLand, Florida, 32721-0041.

By: _____
James Edward Cheek, III