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SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 90,074
CONSOLIDATED WITH SUPREME COURT CASE NO. 90,075

STEPHAN BITTERMAN and HOWARD BITTERMAN, as co-personal representatives of the Estate of Irving Bitterman, deceased,

Petitioners,

vs.

ANNETTE BITTERMAN, ET AL=,

Respondents.

FILED
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FOURTH DISTRICT COURT OF APPEAL
CASE NO. 94-0411

RESPONDENTS, PETER MATWICZYK AND METTLER & MATWICZYK'S, BRIEF ON JURISDICTION

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INTRODUCTORY STATEMENT

This is an impermissible attempt by petitioners at a second appeal on the merits, and at the outset it should be emphasized that Supreme Court review is not intended for that purpose. See, e.g., Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958). In any event, respondent PETER MATWICZYK was originally appointed as administrator ad litem of the estate of Irving Bitterman when petitioners STEPHAN BITTERMAN and HOWARD BITTERMAN were at odds over the handling of their father's estate. When it came time for MATWICZYK to collect his fees, STEPHAN BITTERMAN resisted MATWICZYK's effort at every turn. Based on BITTERMAN's own conduct and decisional law from the Second District, the Fourth District affirmed the award to MATWICZYK of the fees he incurred in collecting his compensation (the so-called "fees on fees"). To stay in court, the BITTERMANS assert an alleged conflict relating to obiter dictum of the Fourth District. As such, no conflict jurisdiction has been established under Fla. R. App. P. 9.030(a)(2)(A)(iv) and Fla. Const. Art. V, § 3(b)(3). Discretionary jurisdiction must therefore be denied.

STATEMENT OF THE CASE AND FACTS

Because of the BITTERMANS' self-serving and incomplete statement of the facts, which actually contains erroneous

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conclusions of law, MATWICZYK provides his own statement of facts pursuant to Fla. R. App. P. 9.210(c).[1]

Irving Bitterman died on July 21, 1991, leaving a sizable estate. His two sons, petitioners HOWARD BITTERMAN and STEPHAN BITTERMAN, were named as co-personal representatives of the estate. During the course of administration, considerable disagreement arose between them, leading each to hire an attorney. When they later reached a deadlock over the administration of the estate, they agreed to the appointment of respondent PETER MATWICZYK as the administrator ad litem. MATWICZYK, in turn, hired what was then his law firm -- respondent METTLER & MATWICZYK -- to act as his counsel. As the Fourth District comprehensively explained in its opinion, MATWICZYK experienced considerable difficulty in handling matters regarding the estate due to the "endless discovery games" and repeated attacks by petitioner STEPHAN BITTERMAN.

Fortunately for everyone, the case settled on the eve of trial. Following settlement, MATWICZYK learned that STEPHAN BITTERMAN planned to challenge his fees. MATWICZYK therefore petitioned the court for discharge as administrator ad litem. The court discharged MATWICZYK and reserved jurisdiction to determine fees.

As the Fourth District's opinion reflects, MATWICZYK faced continual resistance from STEPHAN BITTERMAN in attempting to collect his fees. For example, in footnote 3 of the opinion the

[1] Unless otherwise noted, "MATWICZYK" will be used herein to refer to both PETER MATWICZYK and his law firm METTLER & MATWICZYK.

Fourth District observed that after STEPHAN BITTERMAN had obtained "an eleventh hour" continuance of the *first* fee hearing, he fired off a series of thirty-five pleadings all of which necessitated a response from MATWICZYK. The court ultimately awarded MATWICZYK a total of $39,308.04, which included in part his "fees on fees." On appeal, the Fourth District affirmed the award of "fees on fees" on *two separate and independent grounds* -- first, the Second District's decision in In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965), and second, the application of Florida Statute §733.6171(7). Petitioners have requested that this Court accept discretionary jurisdiction on the basis of conflict.

SUMMARY OF ARGUMENT

The BITTERMANS' petition for discretionary review is flawed for several reasons. First, they have improperly failed to limit their argument solely to jurisdiction as required by Fla. R. App. P. 9.120(d). Second, they have raised no sustainable conflict. Third, they improperly attempt to establish conflict based upon dictum. And fourth, they have overlooked a material factual distinction between this case and other cases which they allege to be in conflict.

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ARGUMENT

I

NO INTERDISTRICT CONFLICT

The Second District's opinion in In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965) formed a valid basis for the Fourth District's ruling.[2] In Duval, the court permitted recovery of "fees on fees" where the overly litigious conduct of the legal representative created a situation whereby the lawyer had to devote extraordinary time and effort that otherwise would have been unnecessary. The court in Duval explained why such an award was appropriate:

> [A]ppellees were thereby required to devote extraordinary services in and about this proceeding in order to protect their interest against appellant's assault. The presumption abides that it was the decedent's *intent that his estate shall be administered according to law* and its lawful obligations, including expenses of administration, shall be promptly discharged when due; and *this contemplates that those perfoxming services on behalf of the estate will not be put to unnecessary expense and labor in order to be compensated* therefor. ...

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[2] Curiously, the BITTERMANS state in footnote 6 in their statement of facts that no "Duval fees" were awarded to MATWICZYK. This is belied by the text on page 5 of Fourth District's opinion, which states in pertinent part (emphasis added):

> The court further found justification for the award of the additional fees based on the holding of In re Estate of Duval, 174 So. 2d 580 (Fla. 2d DCA 1965) and the application of section 733.617, Florida Statutes. We agree with the trial court's well-reasoned findings and analysis and affirm the award of additional fees to *both Boose, Casey and Matwiczyk.*

(Emphasis added) As the Fourth District correctly observed, the same problem occurred in this case.

In an effort to somehow "bootstrap" the jurisdictional issue which simply does not exist, the BITTERMANS take the approach that Duval and this decision are not in accord with current probate law. They argue:

> Duval predates [In re Estate of] Platt [586 So. 2d 328 (Fla. 1991)] and all current probate law and Platt and the more recent statutes have rendered Duval totally obsolete.

(BITTERMAN brief at 10) By use of this strange characterization of "conflict", the BITTERMANS are improperly challenging the correctness of the Fourth District's reliance on Duval -- a "merits" argument, rather than a "jurisdictional" argument. As the Supreme Court held in Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962), jurisdiction turns on *conflict* -- not on correctness of the decision. In Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), for example, this Court said:

> [W]e are not permitted the judicial luxury of upsetting a decision of a Court of Appeal merely because we might personally disagree with the so-called "justice of the case" as announced by the Court below. In order to assert our power to set aside the decision of a Court of Appeal on the conflict theory we must find in that decision a real, *live and* vital conflict....

Id. at 734-35; see also Florida Power & Light Co. v. Bell, 1113 So. 2d 697, 699 (Fla. 1959) (only "patently irreconcilable precedents" may justify conflict jurisdiction). The BITTERMANS have therefore failed to establish the jurisdictional threshold.

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II

NO CONFLICT WITH SUPREME COURT DECISION

If what the BITTERMANS are really saying it that Duval conflicts with this Court's decision in Platt, their argument still falls short because Platt addressed a completely different issue. In Platt this Court held that an award of attorney's fees may not be based solely upon a percentage of the estate's value, but rather must be based -- at least in part -- on the "lodestar" method. This, of course, was exactly the approach used by the trial court in establishing the fee here. In fact, to the BITTERMANS' benefit, no multiplier was even used in this case. Because Platt and Duval address different issues, no "express and direct" conflict for jurisdictional purposes exists under Rule 9.030 (a) (2) (A) (iv) and Fla. Const. Art. V § 3(b) (3). See Curry v. State, 682 So. 2d 1091 (Fla. 1996). And, to the extent that the BITTERMANS are attempting to claim a conflict with the unspecified "more recent statutes", as the Court knows, this is not a permissible basis on which to establish a conflict. See Fla. R. App. P. 9.030(a) (2) (A) (iv); cf. Allstate Ins. Co. v. Langston, 655 So. 2d 91 (Fla. 1995) (conflict with procedural rules cannot establish Supreme Court jurisdiction).

III

NO "DICTA CONFLICT"

The BITTERMANS erroneously argue that the Fourth District's opinion in this case conflicts with the decisions in Williams College v. Bourne, 670 So. 2d 1118 (Fla. 5th DCA 1996) ("Williams

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III") and Williams College v. Bourne, 656 So. 2d 622 (Fla. 5th DCA 1995) ("Williams II"), in which the Fifth District reversed an award of "fees on fees" under Section 733.6171(7).[3]

First, there can be no conflict for jurisdictional purposes where there is a material factual distinction between the allegedly conflicting cases. Dep't of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983); Kyle, 139 So.2d at 885. This is precisely the situation here. In Williams College, the "fees on fees" had been awarded by the trial court in May 1991, which was prior to the *effective date of Section 733.6171 in October 1993.* As such, Section 733.6171(8) by its own terms precluded application of the Section 733.6171 including the "fees on fees" provision of subsection (7).[4] By stark contrast, the fees in this case were awarded several months *after* the statute went into effect -- a situation for which the Legislature clearly contemplated that Section 733.6171 would apply. See § 733.6171(8). In light of this material factual distinction between the two cases, the requisite conflict has not been established. As the Supreme Court explained in Kyle:

> The test of our jurisdiction in such situations is not measured simply by our view

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[3] Since the facts of Williams College are fully and adequately set forth in respondent BOOSE CASEY's jurisdictional brief in the consolidated Supreme Court Case No. 90,075, in the interest of brevity they will not be repeated here.

[4] Section 733.6171(8), Florida Statutes, provides that: "This section shall apply to estates in which an order of discharge has not been entered prior to its effective date [October 1, 19931 *but not to those estates in which attorney's fees have previously been determined by order of court after notice."* (Emphasis added)

> regarding the correctness of the Court of Appeal decision. On the contrary, [w]e have said that conflict must be such-that if the later decision and the earlier decision were rendered by the same Court the former would have the effect of overruling the latter. *If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases* axe *not the* **same**, *then no conflict can arise.*

Kyle, 139 so. 2d at 887 (emphasis added; citations omitted). Consequently, the requisite conflict has not been established.

Second, the **BITTERMANS'** argument misses the mark because the application of Section 733.6171(7) formed at best an alternative basis for the Fourth District's decision. As such, it was not necessary to the determination of the case, and was therefore by definition dictum. See Crabtree v. Aetna Cas. & Surety Co., 438 So. 2d 102 (Fla. 1st DCA 1983). And dictum does not form the basis for the jurisdictional conflict. See Padovano, Fla. App. Practice § 2.10 (West 1988) ("dicta conflict cannot exist"). To suggest otherwise would create the paradox of expanding the Supreme Court's jurisdiction by impermissibly redefining the very rule that narrows it. See, e.g., Reaves v. State, 485 So. 2d 829 (Fla. 1986) (dissent cannot establish conflict); Dodi Publishins Co. v. Editorial American, S.A., 385 So. 2d 1369 (Fla. 1980) (per curiam affirmance which merely cites a precedent is not reviewable); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980) (per curiam affirmance is unreviewable; conflict can not be based on an examination of the record).

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CONCLUSION

The BITTERMANS have argued nothing more than what they consider to be an alleged individual injustice created by the Fourth District's opinion. Supreme Court review, however, is not intended for that purpose. Rather, it is intended only to reconcile patently irreconcilable decisions to bring consistency to the law.[5] Discretionary review must therefore be denied.

[5] See, e.g., Florida Power & Light Co. v. Bell, 113 So. 2d 697, 699 (Fla. 1959); Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this 21st day of April, 1997 to: John Beranek, Esquire, AUSLEY & McMULLEN, Post Office Box 391, 227 S. Calhoun Street, Tallahassee, FL 32302; George P. Ord, Esquire, GEORGE P. ORD, P.A., 340 Royal Palm Way, Suite 100, Palm Beach, FL 33480; Stephan Bitterman, Esquire, AUSTRIA BITTERMAN & COHEN, 40 Matthews Street, Goshen, NY 10974; Ronald E. Crescenzo, Esquire and Brian B. Joslyn, Esquire, BOOSE CASEY CIKLIN ET AL., 515 N. Flagler Drive, Suite 1900, West Palm Beach, FL 33401.

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