

FILED  
THOMAS D. HALL  
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IN THE SUPREME COURT OF FLORIDA

CLERK SUPREME COURT

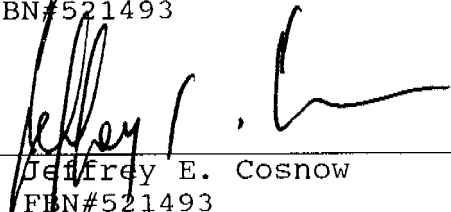
THE FLORIDA BAR, ]  
Complainant, ]  
v. ]  
JEFFREY EVAN COSNOW, ]  
Respondent. ]  
/

CASE NO.: SC96262  
TFB NO.: 1999-10,250 (6A)

This amended answer/initial cross brief is being filed on behalf of Jeffrey Evan Cosnow, Respondent.

The name and address of the attorney filing the ~~brief~~ is as follows:

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BY:   
Jeffrey E. Cosnow  
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Dated: 8-10-00

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STATEMENT OF THE CASE

The Course of the Proceedings:

A complaint was filed with the Florida Bar on August 14, 1998. A response to **the** complaint was **filed** with the Florida Bar.

Upon review of an investigator and selection of a referee, a status hearing was held on September 17, 1999. Thereafter, The Florida Bar sent a Request for Admissions to **the** Respondent, which **were** answered in a timely manner.

A Motion for Summary Judgment along with an Affidavit in support of **the** summary judgment were filed with the Court by the Respondent, and **the** Florida Bar submitted a Cross-Motion for Summary Judgment. At the Summary Judgment hearing on November 8, 1999, **the** referee was inclined to grant **the** Florida Bar's motion for summary judgment and denied the Respondent's motion for summary judgment.

A sanctions hearing was set for December 2, 1999, at which time arguments were heard from both parties. The Court entertained both parties arguments and continued the hearing until January 7, 2000. On January 7, 2000 the Court recommended the sanctions which are included in the referee report.

STATEMENT OF THE FACTS

On September 12, 1997, Ronald Swango, the putative father of Dustin Carroll died in a car accident, in which the other driver was Rita Frappier.

Immediately after the death of Ronald Swango, Sharon Robinson contacted the Respondent requesting that he look into a wrongful death action arising out of the death of Ronald Swango, the putative father of her grandson, Dustin Carroll.

It was explained to the Respondent that Dustin Carroll was the son of the deceased, and of her daughter, Stephanie Carroll.

Sharon Robinson explained to the Respondent that she had custody of the child, and that the natural mother, Stephanie Carroll had no interest in the child, and would not be engaged or be interested in any actions brought on behalf of her natural son Dustin Carroll.

The Respondent made arrangements to have a sample of the **deceased** Ronald Swango's DNA to be acquired, so that paternity could be established as a matter of law.

The Respondent was of the opinion that in order to bring a declaratory action, there must be an adverse party, and all parties interested in the action must be brought into the action.

The purpose of joining the natural mother, Stephanie Reed into the summary judgment was to bring all parties who had an actual or potential interest in the determination of the paternity into the suit.

**The judge in the paternity action dismissed the action sua**

*sponte*, on the grounds that the defendant, Rita Frappier was not a proper party. The action was filed and defended in good faith, **and** no harm was done to anyone involved.

To the best knowledge of the Respondent, Ronald Swango died intestate, and Dustin Carroll was the only lineal decedent. Dustin Carroll was the only beneficiary of the estate of Ronald Swango.

Ms. Reed never discussed with the Respondent any desire to have greater contact with Dustin Carroll, to be his guardian, to have more visitation, or to have primary residential care of the child.

The Respondent filed the Petition for Formal Administration in Probate Court and never purported to represent Ms. Robinson. At all times the Respondent made it clear to all persons, that he has one client, and only one client, Dustin Carroll.

#### **SUMMARY OF THE ARGUMENT**

**Issue I: The Petitioner failed to satisfy the burden for seeking review by demonstrating that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.**

The burden is on the reviewing party to satisfy the burden established in Florida Bar Rule 3-7.7(c)(5). The Initial brief filed by the Petitioner does not demonstrate that the report of the referee is erroneous, unlawful, or unjustified.

## ARGUMENT

**The** initial brief filed by the Petitioner does not demonstrate that the report of the referee is erroneous, unlawful, or unjustified. The Petitioner is recommending suspension for a sentence in a conflict of interest case. Suspension is recommended when the lawyer does not fully disclose to a client the possible effect of a conflict and causes injury or potential injury to a client. Fl Bar Standard 4.32 The Petitioner has not proven any injury or potential injury to the client in this case.

Florida Bar Standard 4.33 states that public Reprimand is appropriate when a Lawyer is negligent is determining whether the representation of a client may be materially affected by the lawyer's own intersts, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

Florida Bar Standard 4.53 states public reprimand is appropriate when a lawyer demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client or is negligent in determining whether the lawyer is competent to handle a legal matter and causes injury or potential injury to a client.

The referee was not in the posture to recommend suspension because there was no finding that the Respondentknew of the conflict and did not fully disclose the conflict to the client.

**There was no harm to anyone and acted diligently in the best**

interests of the child. The Respondent never made any financial gain, in fact he lost expenses in the case.

CONCLUSION

The Respondent seeks review by the Supreme Court to demonstrate that the report of the referee is not erroneous, unlawful or unjustified.



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The purpose of joining the natural mother, Stephanie Reed into the summary judgment was to bring all parties who had an actual or potential interest in the determination of the paternity into the suit.

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sponte, on the grounds that the defendant, Rita Frappier was not a proper party. The action was filed and defended in good faith, and no harm was done to anyone involved.

To the best knowledge of the Respondent, Ronald Swango died intestate, and Dustin Carroll was the only lineal decedent. Dustin Carroll was the only beneficiary of the estate of Ronald Swango.

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The Respondent filed the Petition for Formal Administration in Probate Court and never purported to represent Ms. Robinson. At all times the Respondent made it clear to all persons, that he has one client, and only one client, Dustin Carroll.

#### SUMMARY OF THE ARGUMENT

**ISSUE I: Did the court abuse its discretion when it granted summary judgment in its entirety in favor of the Petitioner when there are genuine issues of material fact.**

Yes, the Petitioner was not entitled to summary judgment as a matter of law, due to an existence of a genuine issue as of material fact. The burden is on the movant to demonstrate conclusively that the nonmoving party cannot prevail. Gomes v.

**Stevens**, 548 So.2d 1163 (Fla. App.2d 1989) If the record reflects the existence of any genuine issue of material fact, or the possibility of any issue, or if the record raises even the slightest doubt that an issue might exist, summary judgment is **improper**. *Snyder v. Cheezem Dev. Corp.*, 373 So.2d 40 (Fla. 1966)

**A. The Petitioner never satisfied the burden of proving that Dustin Carroll does not have standing to sue as a survivor under Florida's Wrongful Death Statute.**

Under Florida's Wrongful Death Act, 768.18(1), Fla. Stat. (1997) a survivor includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless the father has recognized a responsibility for the child's support. Support means contributions in kind as well as money. Ronald Swango did in fact provide some support to his son. This **support** was evidenced at the summary judgment hearing through the use of photographs of the deceased Ronald Swango holding his child Dustin Carroll.

**B. The Petitioner never satisfied the burden by proving the Respondent named Ms. Reed as next friend and guardian in the same proceeding.**

The Respondent, at the summary judgment hearing, stated **that Ms. Reed** was not nominated as guardian, only as next friend in the wrongful death proceedings. The Petitioner stated that the Respondent named Ms. Reed as guardian, which created a conflict of interest. This disputed fact raises a doubt that an **issue might** exist to disallow summary judgment.

C. The Petitioner never satisfied the burden by proving that the Respondent's nomination of Ms. Reed as next friend created a conflict of interest with Ms. Robinson's care, custody, and control of Dustin Carroll.

By definition, next friend, is not a party to the action. When the Respondent nominated Ms. Reed as next friend, this did not affect the care custody and control of Dustin Carroll. As ruled in *Watson v. State Farm Mutual*, 639 So.2d 687, when a minor is represented by a parent as next friend is not a party to the action. The real party in interest is the minor. Ms. Reed was never a client or a party in the action.

#### ARGUMENT

**Issue I:** The trial court abused its discretion by granting summary judgment in its entirety in favor of the Petitioner when there were genuine issues of material fact for the following reasons:

A. The Petitioner never satisfied the burden of proving that Dustin Carroll does not have standing to sue as a survivor under Florida's Wrongful Death Act, 768.18(1), Fla. Stat. (1997)

The Petitioner states in his cross motion for summary judgment that Mr. Swango never recognized a responsibility to financially support Dustin Carroll, never formally acknowledged Dustin Carroll as his offspring, and no legal determination as to paternity had been granted.

The Respondent proved by photographs that the father recognized his child prior to death. The Respondent also proved paternity by having a DNA test performed on the deceased father's body. Under Florida's Wrongful *Death* Act, 768.18 (1), Fla. Stat.

(1997), a survivor includes the child born out of wedlock of a mother, but not the child born out of wedlock of the father unless **the** father has recognized a responsibility for the child's support. Support means contributions in kind as well as money.

The issue of whether the deceased father supported the child is a genuine issue of fact. Furthermore, the Petitioner did not demonstrate that the Respondent cannot prevail on this issue. **Therefore,** it was improper for the court to grant summary judgment in favor of the Petitioner.

**B. The Petitioner never satisfied the burden by proving the Respondent named Ms. Reed as next friend and as guardian in the same proceeding.**

In Petitioner's Cross Motion for Summary Judgment, averment #14 states that Respondent attempted to name Ms. Reed as guardian. Petitioner's supporting evidence was a copy of a motion to substitute Ms. Reed as next friend, not as guardian. **The** Petitioner never attempted to name Ms. Reed as guardian. The Respondent never satisfied the burden of proving that the Respondent created a conflict of interest by naming Ms. Reed as guardian.

**This** is the **core** argument regarding the conflict of interest between the natural mother, Ms. Reed and the grandmother who had temporary custody, Ms. Robinson. The only interest in this matter is the common interests of all persons involved, to serve the best interests of the minor child, in obtaining a settlement from the tortfeasor, Ms. Frappier.

C. The Petitioner never satisfied the burden by proving that the Respondent's nomination of Ms. Reed as next friend created a conflict of interest with Ms. Robinson's care, custody, and control of Dustin Carroll.

When the Respondent nominated Ms. Reed as next friend, this did not affect the care custody and control of Dustin Carroll. As ruled in *Watson v. State Farm Mutual*, 639 So.2d 687, when a minor is represented by a parent as next friend, the parent is not a party to the action. The real party in interest is the minor. Ms. Reed was never a client or party in this action.

The key issues before the court were if the natural mother is nominated next friend, how will this interfere with the care, custody and control of the minor child? The natural mother, Ms. Reed was never a party or a client of the Respondent. The grandmother, Ms. Robinson was nominated guardian to protect the property interest of the child, if the wrongful death settlement was for more than \$5,000. Furthermore, the Respondent never gave any advise or discussed any issues involving care, custody or control of the minor child, Dustin Carroll.

There is no evidence on the record showing a conflict of interest between the natural mother and the grandmother. The Respondent never took any money, goods, or services from either Ms. Reed or Ms. Robinson. The Respondent repeatedly told Ms. Robinson and Ms. Reed that the only one who would benefit from all court proceedings is the minor child, Dustin Carroll.



CONCLUSION

The Respondent seeks review of the errors in the lower courts finding for granting summary judgment in its entirety in favor of the Petitioner. The Respondent requests the Supreme Court to reverse and remand this case for a new hearing before a referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been furnished by U. S. Mail to The Supreme Court of Florida, Debbie Casseaux, Acting Clerk, Supreme Court Building, 500 South Duval, Tallahassee, Florida 32399-1927, and to John Anthony Boqgs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and to Brett A. Geer, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Marriot Hotel, Tampa, Florida 33607 on this 8th day of August, 2000.

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By: 

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