

IN THE SUPREME COURT OF FLORIDA  
CASE NUMBER SC01-1713

BRITTANY AND MARQUIS WIGGINS,  
MINORS,

Petitioners,

5<sup>TH</sup> DCA CASE NO.: 5D00-2878  
DISTRICT OF ORIGIN: FIFTH

LT CASE NO: PR97-1075  
COUNTY OF ORIGIN: ORANGE

vs.

WALTER WRIGHT, SR. AS PERSONAL  
REPRESENTATIVE OF THE ESTATE OF  
APRIL BROWN WRIGHT, DECEASED,

Respondent.

-----/

ANSWER BRIEF

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## STATEMENT OF THE CASE AND FACTS

April Brown Wright died on April 6, 1997 at Orlando Regional Medical Center. [R. 4] At the time of her death, her husband, Walter C. Wright, Sr., a truck driver, was out of town. [R. 1243] Before he could return to Orlando, other family members waived an autopsy of the deceased. [R. 1244] Upon Mr. Wright's return to Orlando and discovering that the autopsy had been waived, he immediately contacted Jack B. Nichols and with his advice and assistance, was able to obtain an autopsy on his wife. [R. 1244] As a result of the autopsy, a medical malpractice case was successfully pursued against Orlando Regional Medical Center. [R. 1252]

Prior to her death, April Brown Wright lived with her husband, Walter C. Wright, Sr. and her four minor children, two children (the Wiggins children by a former marriage) and two children (the Wright children) from her marriage to Walter C. Wright, Sr. [R. 1-3]

When Walter C. Wright, Sr. first employed Jack B. Nichols, P.A. on April 9, 1997 to investigate the matter of his wife's death, he signed a contingency fee contract as "potential personal representative of the estate of April Brown Wright." [R. 1260] Subsequently, after being appointed as the personal representative of the Estate of April Brown Wright, he signed another contingency fee contract with Mr. Nichols in his capacity as personal representative of the Estate of April Brown Wright. [R. 8]

On April 8, 1997, Mr. Wiggins, as father of the two older children, employed

the law firm of Page, Ichenblatt & Perkins, P.A. to represent the children's interest against "ORMC.". [R. 794-796] Linda Schwichtenberg was an associate at that law firm at the time. [R. 1133] Subsequently, Linda Schwichtenberg opened her own office and Mr. Wiggins signed another contingency fee contract with Linda Schwichtenberg to represent the interest of the two older children against "doctors and hospitals." [R. 794-796]

On June 19, 1997, a petition for administration was filed relative to the estate of April Brown Wright. [R. 1-3] On July 1, 1997, Walter C. Wright, Sr. was appointed personal representative of the Estate of April Brown Wright, [R. 8] and letters of administration were issued. [R. 11]

Jack B. Nichols, as attorney for the personal representative, pursued the wrongful death claim, obtained medical records and other documents, obtained expert medical opinions, obtained economic expert opinions, and successfully obtained an offer of settlement of \$1,350,000.00 as a total settlement of all claims. Jack B. Nichols provided Linda Schwichtenberg with whatever information she requested, [R. 1258] and although Linda Schwichtenberg testified that she hired experts to review medical records, that information was not shared with Jack B. Nichols. [R. 1258] There was no association or agreement between Jack B. Nichols and Linda Schwichtenberg relative to the representation of the personal representative or the sharing of fees. Linda Schwichtenberg had indicated a desire to participate if the matter went to litigation. [R. 1258, 1259] The total amount of the settlement was agreeable to all survivors. [R. 952]

On March 24, 1999, a Petition for Court to Approve Settlement of Minors' Claim and Division of Settlement between the Heirs of the Decedent was filed. [R. 34, 35] At the hearing on the Petition for Court to Approve Settlement of Minors' Claim and Division of Settlement between the Heirs of the Decedent, a closing statement reflecting attorney fees and costs was introduced into evidence and admitted by the Court, [R. 979] and there was no objection thereto. The Court order approving the settlement and dividing the settlement amongst the heirs did so on a net basis after attorney fees and costs. (*Appendix, p.7*)

Over six months later, Linda Schwichtenberg filed her Motion for Attorney Fees on the basis of the contract she had with the father of the two Wiggins children. The prayer for relief in her motion states:

“Wherefore, Linda L. Schwichtenberg petitions this Court for an Order granting her contractual attorney fees of 33 1/3% on behalf of her representation of Brittany Wiggins and Marquis Wiggins.”  
(Emphasis Added)

In other words, she was requesting the full contingency percentage upon those portions of the settlement which were awarded to the two Wiggins children, although she had no contract with the personal representative, no authority to bring the action on behalf of the children, and played no part in obtaining the settlement.

A hearing was held on February 9, 2000 [R. 1131-1186] and continued on May 31, 2000 [R. 1187-1338], wherein the Court received testimony from Linda Schwichtenberg, Jack Nichols, the personal representative of the estate, Walter C.

Wright, Sr., expert witnesses, as well as the attorney of record for ORMC, Brad Blystone. There were factual disputes as to what had occurred, as well as differing expert opinions.

The trial court denied Linda Schwichtenberg's Motion for Attorney Fees (*Appendix, p. 1*) [R. 1339-1345], denied her Motion for Rehearing [R. 1346], denied her Motion for Clarification. [R. 1347]

An appeal was taken to the Fifth District Court of Appeal which affirmed the trial court and denied Linda Schwichtenberg's Motion for Rehearing and Rehearing En Banc.

This appeal to the Supreme Court of Florida then ensued.

### **SUMMARY OF ARGUMENT**

Florida Law provides that a claim for wrongful death "...shall be brought by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate, all damages ... caused by the injury resulting in death." See §768.20 Florida Statutes

Walter C. Wright, Sr., as personal representative of the Estate of April Brown Wright, deceased, is therefore the only person who has the right to bring such claim. Likewise, the personal representative is the only person who can employ an attorney to bring the Wrongful Death Claim, and is required by Florida Statute §768.26 to pay his fees and expenses. There is nothing improper, unethical, nor does it violate any rules of the Florida Bar, for the personal representative of the estate to pay the lawyer who pursued the wrongful death claim his contractual fee.

All survivors agreed to the gross settlement figure of \$1,350,000.00,[R. 952]. The probate court approved the settlement and provided for distribution of the net proceeds to each survivor of the decedent, “after attorney fees and costs for the Wrongful Death suit.” [R. 82-83] Linda Schwichtenberg was not employed by the personal representative of the Estate of April Brown Wright, nor did she have a co-counsel agreement of any nature with Jack B. Nichols, nor did she participate in the negotiation resulting in the settlement, and accordingly is not entitled to share any portion of the attorney fees of the attorney representing the personal representative in bringing the Wrongful Death Claim. In fact, the division of fees between lawyers in different firms is prohibited unless “by written agreement with the client.” Rule 4-1.5(g)(2), Rules Regulating the Florida Bar.

Linda Schwichtenberg would be entitled to be paid a reasonable fee for her services out of the awards made to the particular survivors whom she represented. See Florida Statute § 768.26. However, she advised the Court that if the Court ordered that her fee come out of the remains of the children’s share, that she “would not accept that fee.” [R. 1315]

### **ARGUMENT**

- I. THE ISSUE IS WHETHER OR NOT FLORIDA STATUTES §768.20 AND §768.26 CAN BE IGNORED AND WHETHER ATTORNEYS FOR INDIVIDUAL SURVIVORS CAN REQUIRE THE ATTORNEY FOR THE PERSONAL REPRESENTATIVE TO SHARE HIS FEE WITH THEM REGARDLESS OF THEIR LACK OF CONTRACT WITH THE PERSONAL REPRESENTATIVE, LACK OF AGREEMENT AS CO-COUNSEL AND LACK OF PARTICIPATION IN OBTAINING THE SETTLEMENT.**

Florida Statutes § 768.20 provides that a claim for wrongful death “... shall be brought by the decedent’s personal representative...” Florida Statutes § 768.26 requires the personal representative to pay attorney fees and other expenses of litigation and to deduct from the awards to the survivors in proportion to the amounts awarded to them. The statute also provides that expenses incurred for the benefit of a particular survivor of the estate shall be paid from that survivor’s award.

In this matter the Claim for Wrongful Death was brought by the personal representative who employed Jack B. Nichols, not Linda Schwichtenberg, to bring the action. The personal representative of the estate entered into a contingency fee contract with Jack B. Nichols [R.1260], presented a closing statement reflecting those attorney fees and costs [R.979] at the hearing on the Motion to Approve Settlement and Determine Distribution Amongst the Heirs, to which there was no objection, and the Court made distribution on a percentage basis after attorney fees and costs. [R.862-863] At this point Linda Schwichtenberg had not even filed a motion for attorney fees, requested attorney fees, or objected to the attorney fees of Jack B. Nichols. The Petition for Court to Approve Settlement requested the Court “to enter an order approving the settlement on behalf of the minor heirs and determine the amount of the net proceeds of the settlement which should be distributed to each minor child...” [R-34,35] If Ms. Schwichtenberg was going to request attorney fees, she should have done so at that time, as did Mr. Nichols. In fact, Ms. Schwichtenberg had no right to attorney fees, because her contract with the children’s father was an

impossibility. Her first contract (while an associate of the law firm Page, Ichenblatt & Perkins, P. A.) provided for representation “against ORMC,”[R- 794-796] and her second contract after she left the law firm provided for representation against “doctors and hospitals,” [R-794-796 ] both an impossibility, since she was not authorized by law to initiate a suit against either. See F.S. § 768.20.

Florida Statute §768.26 provides that “[a]ttorneys’ fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, . . .” That is exactly what the personal representative did in this case. The statute further provides that “expenses occurred for the benefit of a particular survivor of the estate shall be paid from their awards.” The trial court further found that Linda Schwichtenberg was clearly entitled to compensation for her services, as she did represent them at the apportionment hearing, and represented them adequately. However, she advised the Court that she would not accept a fee from the awards made to the beneficiaries. [R.1315]

Not only did Ms. Schwichtenberg’s Motion for Attorney Fees request 33 1/3% based on the contract she had with the minors’ father, but at the hearing on her motion she testified, “And those fees that I’m entitled to would be in compliance with the contract that Mr. Wiggins signed with me to represent these children.” [R.1155] Her expert witness, Ton LaGrone, likewise testified that she was entitled to the full 33 1/3% contingent fee. [R-1276 ] The Appellants’ position has always been an all or nothing proposition, and Linda Schwichtenberg has never requested the Court

to compensate her on the basis of In Re: Estate of Catapane , 759 So.2d 9 (Fla. 4th DCA 2000), or the more recent case of Perris v. Estate of Perris, 764 So. 2d 870 (Fla. 4th DCA 2000). She provided the Court with no time records, either from her previous law firm or her own office, and insisted upon her contractual fee of 33 1/3%. Accordingly, the trial Court had no alternative but to deny her motion.

The case law does not support Ms. Schwichtenberg's position. Catapane is distinguishable, inasmuch as at the hearing on the Motion to Approve Settlement and for apportionment the two competing law firms sought attorneys fees at that time. In this case, at the Approval and Apportionment hearing, the only request for attorney fees was that presented by Jack B. Nichols, and only after the Court approved the settlement and ordered the distribution on a percentage basis, "after attorney fees and costs," did Linda Schwichtenberg then file her Motion for Attorney Fees, requesting a portion of the fees which had been paid to Jack B. Nichols. As stated by the Catapane court, "[o]ne of the purposes of our present Wrongful Death Act, which was enacted in 1972, was to 'eliminate the multiplicity of suits that resulted from each survivor bringing an independent action,' which could occur under the prior act." Ding v. Johns, 667 So.2d 894, 897 (Fla. 2d DCA 1996). The act obviously contemplates that one lawyer selected by the personal representative will pursue the tort claim for the benefit of the survivors who are entitled to recover damages. In this case the personal representative of the estate selected Jack B. Nichols, not Linda Schwichtenberg.

The Catapane court likewise distinguished Perez v. George, Hartz,

Lundeen, Flagg & Fulmer, 662 So.2d 361(Fla.3d DCA 1995), and Adams v. Montgomery, Searcy, & Denney, P.A., 555 So.2d 957 (Fla. 4th DCA 1990). That distinction also applies to this case. The Perez case was distinguished because the two survivors had negotiated settlements before a personal representative was ever appointed, and the Adams case was distinguished because counsel for the widow had refused to represent the daughter by a prior marriage on the ground that her claim was worthless. Again, that is not the facts in the case before this Court. In this case Mr. Nichols as counsel for the personal representative obtained the settlement on behalf of all beneficiaries, and a settlement which was approved by all beneficiaries as to the gross settlement. At the hearing to approve settlement Mrs. Schwichtenberg stated, "I agree and my client agrees that \$1.35 is an appropriate settlement value for this case." [R-952 ]

Although the Catapane Court did remand for reconsideration of the fee to be paid to the firm representing the beneficiary, but not representing the personal representative, the Court indicated that the fee would be small, as compared to the fee of the attorneys representing the personal representative. Again, that is distinguishable from this case, because at the time of the approval and apportionment there was no request for attorney fees by Linda Schwichtenberg and her request has always been the full contingent fee based on her contract--not for services performed, as provided in the Catapane case.

The Probate Court sitting as the trier of facts heard the testimonies of Mr. Nichols and Ms. Schwichtenburg as to their roles in obtaining the \$1,350,000 settlement, and heard the conflicting opinions of the expert witnesses as to entitlement of fees, then considered the contracts for representation entered into by the parties and made findings of facts and conclusions of law. The trial court entered a detailed order setting forth the basis for his decision, [R. 1339-1345] which was upheld by the Fifth District Court of Appeal. Based upon the facts of this case being distinguished from Adams, 555 So.2d 957; Perez, 662 So.2d 361; Catapane, 759 So.2d 9; and Perris, 764 So.2d 870, the standard of review is whether the record contains competent substantial evidence to support the trial court's findings. Swanigan v. Dobbs House, 442 So. 2d 1026 ( Fla. 1st DCA 1983). The writ should be dismissed as improvidently granted.

We agree that the standard of review for interpretation of a statute is *de novo*. We further submit that the dissent by the Honorable Alice Blackwell White in Catapane is the proper interpretation of the statute. As stated by Judge White, "Florida's probate code supplies remedies to interested parties, including wrongful death survivors, if they believe that a personal representative will inflict injury on their interest by acting improperly, in bad faith, or in a transaction affected by a conflict of interest." Id. at 12. See Sec. 733.609, 733.610, 733.619 and 733.6175.

The issue on this appeal is whether or not an attorney who is not employed by the personal representative, but who is employed by the father of two minor beneficiaries, has a right to enforce that contingent fee contract against the

attorney who was in fact hired by the personal representative, and who successfully resolved the Wrongful Death Claim without any help from that attorney in an amount which was approved by all beneficiaries.

Judge Sawaya's dissent in this case indicates that " a conflict of interest existed at the time the settlement funds were recovered." Assuming that to be true for argument purposes, it does not in any way affect the attorney fee agreement for the attorney who had been successful in obtaining those funds. In a perfect world, Jack Nichols would have withdrawn at that point since his fee was fully earned, each of the survivors could have obtained there own counsel, or proceeded without counsel, and those who did obtain counsel would have been required to pay counsel out of their individual proceeds according to Florida Statute § 768.26, or, as suggested by Judge Sawaya, in accordance with Rule 5.120(a), Florida Probate Rules. In either case it would not affect the fees of the attorney that had recovered the funds.

The dissent also overlooks another very important matter. The report of Frederick A. Raffa, Ph.D. was not some new report solely for the purposes of the allocation hearing, but was the report obtained, prepared and utilized to show the economic losses of all the beneficiaries or survivors, and was certainly influential in obtaining the \$1,350,000.00 settlement. [R. 949. 950] Thus, this was not some report generated by Jack Nichols for purposes of the surviving spouse and two younger children receiving larger shares of the proceeds and creating a conflict of interest. This report does not create a conflict of interest for Mr.

Nichols, but in fact, was a necessary and essential report required in order to obtain such a substantial settlement.

We submit that presenting to the Court at the distribution hearing, the report of the expert obtained for purposes of presenting evidence as to economic losses of all the survivors, does not, and should not, create a conflict of interest. In fact, at the settlement hearing Mr. Nichols advised the Court, “I’m not an advocate here for either side with regard to these children.” [R. 969] There is no conflict that should deprive Mr. Nichols of his contractual fee which had already been completely earned.

In addition, the dissent fails to recognize that the facts of this case differ from the Perris and Catapane cases in that Linda Schwichtenberg has asked for and insisted on her contractual 33 1/3% of the two minors’ recovery. Never did Linda Schwichtenberg request the Court to award her attorney fees under the Perris and Catapane theories, did not present any time records to the Court, never asked the Court to award her a reasonable fee for her services, but always consistently and constantly demanded 33 1/3% of the entire recovery of the two minor children. The Perris and Catapane cases do not support that position.

## CONCLUSION

The facts of this case are distinguishable from Adams, 555 So.2d 957; Perez, 662 So.2d 361; Catapane, 759 So.2d 9; and Perris, 764 So.2d 870, and the Writ of Certiorari should be discharged as improvidently granted. Alternatively, the Court should affirm the Fifth District Court of Appeal and adopt the dissent in the Catapane case. As stated by Judge White, “Any different result would render the language of § 768.26 meaningless.” Id. at 13.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been served by U.S. Mail on **LINDA L. SCHWICHTENBERG, ESQUIRE**, Linda L. Schwichtenberg, P.A., Post Office Box 1567, Orlando, Florida 32802-1567, this 21st day of May, 2002.

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Certificate of Compliance

I HEREBY CERTIFY that pursuant to Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, the font used in this Reply Brief was Times New Roman 14-point.

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Jackson O. Brownlee