SUPREME COURT OF FLORIDA
CASE #: SC01-1713

LOWER TRIBUNAL #: 5D00-2878
DISTRICT OF ORIGIN: FIFTH

COUNTY OF ORIGIN: ORANGE
ORANGE COUNTY #: PR97-1075

BRITTANY WIGGINS AND MARQUIS WIGGINS, MINORS,

Petitioners

vs.

THE ESTATE OF APRIL BROWN WRIGHT,

Respondent
_____/

PETITIONERS' REPLY BRIEF

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I. RESPONDENT'S "ISSUE" FAILS TO APPLY ALL OF THE RULES REGULATING THE FLORIDA BAR.

Respondent's framing of the issue attempts to limit the review of this Court to only one portion of the Rules Regulating the Florida Bar. Respondent's only issue is that there cannot be a division of fees between firms without the express written agreement of the client, per rule 4-1.5(g)(2). Thus framed, the issue avoids the application of other portions of the Rules Regulating the Florida Bar. One cannot cherry-pick the rules to use: a given situation either complies with all the rules, or it is unethical and barred.

Respondent's issue fails to discuss rule 4-1.5(f), which requires a written contingency fee contract with a client in order to take a fee for representation. The PR's attorney had no such contract with the Petitioners. His contract was specifically limited to representing Mr. Wright as the PR, individually, and as father of the two Wright children.

Respondent's argument appears to be that, as PR, he represented all survivors at all times in the proceedings. Assuming for the sake of argument that this is true, then Respondent cannot show that he complied with rule 4-1.7(a). This rule mandates:

> A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless;

(1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and
(2) each client consents after consultation.

Respondent cannot credibly argue that his representation of the PR, and efforts to maximize the Wrights' recovery to the detriment of the Wiggins children, was not “directly adverse to the interests of another client.” Further, Respondent did not ever meet or consult with the Wiggins children, much less obtain “consent after consultation” for his adverse representation.

In addition to ignoring rule 4-1.5(f) and rule 4-1.7(a), Respondent ignores rule 4-1.5(f)(4)(B). This rule sets forth the maximum contingency fees which may be charged absent court approval. Respondent fails to address the violation of rule 4-1.5(f)(4)(B) which is implicit in both the probate court's order and in the Fifth District's decision. Respondent cannot argue that the Wiggins survivors are not paying a double fee, or a fee in excess of what the rule allows, because such an argument is not supported by the facts.

Respondent cannot construe rule 4-1.5(f)(4)(B) and F.S. § 768.26 in pari materia, as doing so will completely defeat Respondent's position. Thus, Respondent simply ignores rule 4-1.5(f)(4)(B) in his brief. Respondent fails to address a survivor's right to have representation without being penalized

by a double fee.

Lastly, Respondent's construction of rule 4-1.5(g)(2) assumes that the “client” did not agree to a fee split between firms. If the only “client” is the PR, then Respondent is correct. If, however, the “clients” are the individual survivors, then a fee split was expressly contemplated, and chosen, by the choice of a separate law firm for the non-PR survivors. The choice of a separate law firm and separate contingency fee contracts is completely in compliance with rule 4-1.5(g)(2).

One cannot chose which rules to apply, and which ones to disregard. Respondent's “issue” fails to address all the applicable rules. Respondent's “issue” fails to comply with the rules he ignores, and arguably fails to comply with the one rule he addresses.

II. THE PR'S STATUS AS THE SOLE CLAIMANT DOES NOT EQUATE TO ONLY THE PR'S ATTORNEY BEING PAID.

Respondent argues that since the Wrongful Death Act and Ding v. Jones 667 So.2d 894 (Fla. 2nd DCA 1996) allow only the PR to bring a claim, then only the PR's attorney can be paid fees. This is only partially correct, in that the PR is, indeed, the only entity who may bring a claim. See Wiggins v. Wright 786

So.2d 1247 (Fla. 5th DCA 2001) at 1249 and 1250:

> [T]he purpose of requiring the action to be brought by the personal representative is to eliminate the possibility of a multiplicity of suits against the wrongdoer, to eliminate the potential for competing beneficiaries to race to judgment, and to prevent preferential treatment of one or more beneficiaries in the disposition of their claims. See Hess v. Hess 758 So.2d 1203 (Fla. 4th DCA 2000); Williams v. Infinity Ins. Co. 745 So.2d 573 (Fla. 5th DCA 1999); Funchess v. Gulf Stream Apartments of Broward County, Inc. 611 So.2d 43 (Fla. 4th DCA 1992).

However, the PR's attorney is not the only attorney to whom fees may be paid. Adams v. Montgomery, Searcy & Denney, P.A. 555 So.2d 957 (Fla. 4th DCA 1990); Perez v. George, Hartz, Lundeen, Flagg & Fulmer 662 So.2d 361 (Fla. 3rd DCA 1995); Catapane v. Catapane 759 So.2d 9 (Fla. 4th DCA 2000); Perris v. Perris 764 So.2d 870 (Fla. 4th DCA 2000); and F.S. §768.26 all approved payment of fees to lawyers hired by survivors, rather than by the PR. The payment issue is thus not whether attorneys for survivors can be paid, but from what fund they should be paid, and at what financial penalty (if any) to the individual survivors.

Respondent argues that only the PR's attorney should be paid, and that other attorneys must superimpose their fees on top of the PR's attorney's fee, to the manifest detriment of the non-PR survivors. This argument is in direct conflict with Adams, Perez, Catapane, Perris, and rule 4-1.5.

Respondent's argument is justifiable only if F.S. §768.26 is read to mandate a double fee, one in excess of rule 4-1.5. Perez found that F.S. §768.26 did not apply to a pre-suit settlement, yet Wiggins uses that same statute to justify its holding in the settlement of a pre-suit claim.

There is no statute, no case law except Wiggins, and no rule which support Respondent's position that only the PR's attorney can be paid attorney's fees.

III. THE ATTORNEY'S FEE CLAIM BY THE SURVIVOR'S ATTORNEY WAS TIMELY.

Respondent's Statement of Facts suggests that Petitioners' claim for attorney fees should be barred due to a lack of timeliness of that claim. This point does not appear in Respondent's argument, and a review of the facts in the record invalidates Respondent's suggestion.

Schwichtenberg made her representation known to Nichols early on, [R-1136] and the lawyers regularly corresponded about the potential wrongful death action and the proposed settlement. [R-1136-1142]. Nichols was well aware that he did not represent the Wiggins children, and that his contract was with the Wright claimants only. [R-347, 348, 1259]. Rule 4-1.5(f) requires a contract with a client. In the absence of a contract with Nichols, there was no reason for the Wiggins children to expect him to make a claim for attorney's fees on their settlement

proceeds.

Florida Probate Rule 5.042 requires “reasonable” notice of any matter to be heard by the court. At no time was there notice of Nichols' fee claim on the Wiggins settlement. The PR filed a “Petition for Court to Approve Settlement of Minors' Claim and Division of Settlement between Heirs of the Decedent.” [R-34,35]. There was no claim for attorney's fees in the Petition. The Notice of Hearing on the Petition did not expand the Petition, or add an attorney's fees claim. [R-38,39]. During the hearing, at no time did Nichols request a specific amount of attorney's fees, or argue for a particular percentage of recovery to be taken as fees. [R-944 to 980].

After the hearing, Nichols filed various letters with the Court. In response, Schwichtenberg filed a Motion to Strike Sham Pleadings [R-54 to 61] which attached copies of her contracts with the Wiggins children, and which referenced the fees set forth in the contracts. Thereafter, Nichols filed a “Verified Emergency Motion of the Personal Representative for an Order Approving Settlement for Minors.” [R-62 to 69]. This Motion for the first time advised that it was Nichols' contention that Schwichtenberg

> has no legal or equitable basis to request that this court award her an attorney's fee from the proceeds of the settlement...If she wants a fee, it should be pursuant to a written contract she has with her

client, not from proceeds which belong to the Estate. [R-65]

The Order Approving Settlement for Minors and Determining Distribution of Settlement Between Minors [R-82,83] made no determination of the amount or recipient of attorney's fees. No Motion for Clarification or Rehearing was filed on the issue of attorney's fees. Nichols subsequently filed an appeal on the Order Approving Settlement which attacked the division of the settlement, and made no reference to attorney's fees.

During the pendency of that appeal, Schwichtenberg filed a Motion for Accounting [R-230 to 232] and discovered that Nichols had received the settlement funds and distributed them to himself and his clients. [R-250, 251]. There was no Order approving any attorney's fee, of any percentage, nor was there an Order approving any attorney's costs. Thereafter, Schwichtenberg filed a Motion for Attorney's Fees. [R-347 to 551]. Until the entry of the Order denying Schwichtenberg's fees, there was no Order approving payment of fees to Nichols. [R-1339 to 1345].

Respondent's suggestion of lack of timeliness of the Motion for Attorney's Fees is not supported by the record. Nichols took a fee without notice, without a hearing, and without an Order granting his claimed fees. Schwichtenberg's claim for fees was implicit before the hearing on the division of the

settlement, and was express upon her filing of the Motion to Strike Sham Pleadings [R-54 to 61]. There is no valid argument that Schwichtenberg's Motion for Attorney's Fees was untimely.

IV. CONCLUSION

The Supreme Court should overturn the Wiggins decision, and should apply either Adams/Perez or Catapane/Perris to set a clear standard for the recovery of attorney's fees to be imposed on non-PR survivors in pre-suit settlements of wrongful death claims.

The standard should be in compliance with both rule 4-1.5 and F.S. §768.26. No survivor should be required to pay attorney's fees in excess of that allowed by rule 4-1.5.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this document has been served by U.S. Mail on Jack B. Nichols, Esq., 801 N. Magnolia Avenue, Suite 414, Orlando, FL 32803; Jackson O. Brownlee, Esq., P.O. Box 2254, Orlando, Florida 32802; and G. Charles Wohlust, Esq., P.O. Box 941690, Maitland, FL, 32794, this 7th day of June, 2002.

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CERTIFICATE OF COMPLIANCE

Comes Now the Attorney for the Petitioners, and pursuant to Florida Rules of Appellate Procedure 9.210(a)(2) certifies that this brief complies with the font requirements of this rule. This brief is printed in Courier New 12-point font.

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Linda L. Schwichtenberg, Esq.