IN THE SUPREME COURT OF FLORIDA

WAGNER, VAUGHAN, McLAUGHLIN
& BRENNAN, P.A.,

Petitioner,

CASE NO: SC08-1525

vs.

LOWER TRIBUNAL
CASE NOS: 2D07-910, 2D07-941

KENNEDY LAW GROUP,

Respondent.
____/

ON PETITIONER'S REQUEST FOR DISCRETIONARY REVIEW
FROM THE SECOND DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

STEVEN L. HEARN
Florida Bar No. 350801
JEANNE Z. MCLEAN
Florida Bar No. 608548
STEVEN L. HEARN, P.A.
625 East Twiggs Street
Suite 102
Tampa, FL 33602
Telephone: (813) 222-0003
Telefax: (813) 222-0004

Attorneys for Respondent

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I. STATEMENT OF THE CASE AND FACTS.

Appellant's Statement of the Case and of the Facts in the "Brief on the Merits" filed in this proceeding contains several statements which are inaccurate, misleading, and unsupported by the record. The Statement is essentially a modified duplication of that presented by the appellants to the Second District Court of Appeal. The Kennedy Law Group statement of the case and facts presented in that underlying appeal clarifies and corrects the statements made by the Appellant and also adds evidence omitted by Appellant but necessary to provide the Court a clear and complete understanding of the proceedings from which this appeal arises. See 2d DCA Answer Brief at pp 1-19. That detailed response is available as part of the record for review by this Court and need not be duplicated here. Nonetheless, certain statements made by the Appellants require further comment in this Answer Brief.

A. Representation of the Parties

This is a consolidated appeal from rulings entered in favor of Appellee The Kennedy Law Group and against Appellant Wagner, Vaughan, McLaughlin & Brennan (the "Wagner Firm") after an evidentiary hearing on a fee dispute between the two firms. The ruling was affirmed by the Second District Court of Appeal. See Wagner, Vaughan, McLaughlin & Brennan, P.A., v. Kennedy Law

Group, 987 So.2d 741 (Fla. 2d DCA 2008).

Throughout these proceedings, the Kennedy Law Group has appeared as attorney for the Personal Representative pursuing wrongful death claims on behalf of all three survivors and the probate administrations for Robert Earl Elmore (case no. 05-CP-1908; R. at 685) and his wife Thelma Lavone Elmore (case no. 05-CP-1907; R. at 197). Both Robert and Thelma died after an automobile accident and left three surviving adult sons, Gary Raymond Elmore, Larry Gene Elmore, and Robert Lynn Elmore. (R. at 371-372; T. at 12).

From the trial court level through the current proceeding, this matter has been a dispute regarding whether the Wagner Firm, as counsel retained by two of the three surviving adults, is entitled to any portion of the contingency fee earned by the Kennedy Law Group pursuant to its contract with the personal representative of the estates of the decedents. See Wagner, 987 So.2d 741, 743. Although the Appellant's Initial Brief on the Merits attempts to couch this dispute as one among counsel "for each of the survivors," (See Merits Brief at p.1), the basis for the Kennedy Law Group entitlement to a contingency fee is its representation of Gary Elmore as personal representative acting on behalf of the Estates and all three survivors and not in its capacity as counsel for Gary Elmore

as survivor.[1]

B. Absence of Conflict or Competing Claims of Survivors

As will be noted below (see infra at III. C.), this Court need not venture past its conflict jurisdiction into questioning the substantial competent evidence supporting the trial court's findings of fact regarding the absence of any competing claims by the survivors. Nonetheless, Kennedy Law Group must briefly respond to several factual issues now being reargued by the Wagner Firm.

The testimony at trial court established the absence of any competing claims between the survivors regarding the amounts or allocation of the proposed settlements. That testimony consistently and repeatedly established that, at all times, the three survivors had agreed to an equal one-third distribution of settlement proceeds and none of the survivors ever made any claims for, or communicated any personal belief that they might be entitled to, more than a one-third share each. (T. at 13, 14, 16, 31, 51, 58, 62-63, 74-75, 77-80, 110, 112, 127, 129-130, 212, 257, 261-263, 264, 283-284). The deposition testimony of Robert and Larry Elmore repeatedly confirmed there had been no prior conflict as

[1] Interestingly, the Wagner Firm went to great lengths at the trial court level and before the Second DCA to argue there existed no contract between the Kennedy Law Group and Gary Elmore individually. See e.g. Tr. at 307; 2d DCA Initial Brief at p5 n.5 and p. 33 n. 18. Their apparent change of position in this proceeding is yet another example of the ongoing changing and inconsistent positions being taken by the Wagner Firm.

to allocation of the settlement proceeds and neither Robert nor Larry had made any claim for more than an equal one-third share. (R. at 541-628, pages 6-7, 14, 47, 49, 60-61, 68; R. at 629-684, pages 8, 9-10, 14, 35, 36). The only evidence of conflicting claims asserted by the Wagner Firm were three letters, all written by the same attorney now seeking contingency fees.

1. The August 2005 Letters

The Wagner Firm has placed great emphasis upon two August 2005 letters (see R.488,471), which it claims establish a conflict or competing interest among the beneficiaries. To the contrary, those letters when viewed in the context of the ongoing settlement proceedings and when viewed in light of statements made and positions taken by the Wagner Firm, simply make demands for a contingency fee to the Wagner Firm and, at best, voice an objection to the fashion in which the probate administration was being handled.

Although Wagner Firm attorney Web Brennan had been formally or informally retained by his clients almost 6 weeks earlier, the August 2005 letters and a telephone conference on the date of the first letter were the first time Brennan disclosed to the estate his appearance on behalf of Larry. (T. at 98; R. at 373-374). There exists no evidence in the record that Brennan at any time prior to the morning of the mediation held 6 months later disclosed he had been acting as

lawyer for Robert during that same time period. There also exists no evidence in the record that either Kennedy Law Group attorney John Malkowski or the estate administration attorney David Whigham had any prior knowledge that the Wagner Firm had any involvement in the proceedings.

The first August 2005 letter was preceded by a telephone call from Brennan to Malkowski. At that point The Kennedy Law Group already had undertaken substantial steps to pursue the wrongful death claims (including investigation of the accident and hiring of experts) and had settled of the direct claim against the tortfeasor. R. at 374. In the initial contact, Brennan claimed entitlement to a portion of the contingency fee and demanded that Malkowski prepare and transmit a fee-sharing agreement. R. at 488. Although Appellant claims "Mr. Brennan proposed the two firms participate equally in handling the wrongful death action" (Merits Brief of Appellant at 6-7), the substance of his telephone conversation and letter contain no such proposal. (T. at 98; R. at 488). More importantly, in his conversation and letter, attorney Brennan never stated any disagreement with the equal three-way distribution of the settlement proceeds and never made any claim that his clients sought a share greater than one third. (T. at 98; R. at 488). In fact, Brennan's conversation and letter contained nothing substantive about the wrongful death claims but instead focused solely upon the Wagner Firm's attempt

to obtain a contingency fee. (T. at 98; R. at 488); See also 2d DCA Answer Brief at 8-10.

The Wagner Firm interpretation of these August letters is inconsistent with the positions taken on appeal and is further explained by later correspondence from attorney Brennan. Throughout these proceedings, the Wagner Firm steadfastly has taken the position that the initial $200,000 settlement was to be allocated 100% to the Estate, and the record contains no evidence of any conflict or competing claims between the Estate and the Survivors on this issue. See e.g. Merits Brief at p. 10 (referring to payment of cost out of the "estates' settlements"); T. at 309-310, 314; R. 489 (August 10, 2006 Brennan letter demanding Malkowski "was to place the original $200,000 settlement in the estate to pay any creditors' claims"). The Wagner Firm admits the estate plans of both decedents provided for an equal one third distribution to each of the three children. Merits Brief at 6. Thus exists no record evidence of any possible basis for objection to an equal one-third distribution. Likewise, there exists no record evidence of any basis for objection to the amount of that initial settlement, as the carrier had tendered policy limits. See Merits Brief at p.6. What remains unclear is the basis for the objection by attorney Brennan in his August 19, 2005 letter. The answer lies in subsequent correspondence from Brennan.

As a follow-up to his August 19, 2005 letter, Brennan sent an August 25, 2005 letter to Malkowski in which he objected to "the disbursement in the manner in which you have made it" and demanded the funds be held by the estate pending the right to make objections pursuant to Brunson v. McKay. R. 473.[2] Conspicuously absent from that letter is any objection to the allocation or the amount of that initial settlement. The only objections were to the distribution of proceeds to beneficiaries without retaining a reserve for payment of medical liens, and to the procedural fashion in which the payments were made. See R. 473.

Almost one year later, in August of 2006, Brennan argued a potential medical lien by Humana Health Care "should have been paid out of the $200,000.00 settlement" and admitted that disbursement of the entire $200,000.00 settlement to his clients "is why we objected to the [$200,000] settlement in the first place." R. 490-91. The Wagner Firm reargues those concerns in this proceeding, see Merits Brief at 10-11, arguing nonpayment of that lien could subject its clients to personal liability. Despite that potential personal liability, Brennan's clients accepted their checks without objection and made no effort to

[2] Brunson v. McKay, 905 So.2d 1058 (Fla. 2d DCA 2005) verifies the requirement of court approval if a survivor objects to a wrongful death settlement pursuant to Florida Statutes section 768.25. Although the Wagner Firm adamantly insisted the statute applied in this proceeding, on appeal they have taken the opposite position and now argue §768.25 "expressly disavows regulation" of pre-suit proceedings. See Merits Brief at 30.

repay the distributed funds to the Estate. (R. 629-684, p. 18; T. 77-78, 263). Brennan later took the opposite position, opining “the survivors of the estate have no legal obligation to any lien holder of the estate.” R. 490. Nonetheless, the August 2006 letter clarifies the true basis for the August 2005 objections did not relate to the apportionment or amount of the settlement, but only to the fashion in which the Estates were handling payment of medical liens. Id.

2. The May 12, 2006 Mediation and Letter

After efforts by the Wagner Firm to remove Larry Elmore as personal representative were stricken as procedurally deficient3 and never re-filed, John Malkowski made demand upon Hartford, as the uninsured motorist carrier, for policy limits. Hartford then contacted counsel for the estate and requested mediation. R. 375 ¶19 (Verified Petition executed by attorney Malkowski). Contrary to the assertions by appellants, the record contains no evidence that attorney Brennan participated in selection or retention of the mediator. See Merits Brief at 12.

Attorney Malkowski attended mediation with Hartford on May 12, 2006. (R. at 375; T. at 75). Attorney Brennan appeared at the mediation and that same

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[3] Those proceedings are discussed in more detail in the 2d DCA Answer Brief at pages 12-13 & 38-40. The removal pleadings did not challenge the amounts or allocation of settlement proceeds.

morning entered into a written contract with Robert Lynn Elmore in the mediator's offices. (R. at 483-487).

As a result of settlement reached by the Personal Representative at mediation, the Estate was to receive $1,230,000.00 in settlement of the uninsured motorist claim. Gary Elmore executed the settlement agreement as personal representative. (R. at 534-535). Robert and Larry did not execute the settlement agreement. (R. at 534-535; T. at 75).

During the trial court proceedings, the court refused to consider evidence regarding communications between counsel the morning of the mediation.4 See R. at 141-152. Nonetheless, the trial court permitted attorney Brennan to proffer the excluded evidence, T. 196-199, and Brennan testified he recalled an agreement that counsel "would have a discussion specifically outside of mediation, specifically so the mediation privilege would not apply; and it was agreed to by all three of us." (T.196 at lines 16-19). Brennan's only other proffered testimony was that:

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[4] The allegations cited by Appellant as grounds for waiver were not communications made during or in furtherance of mediation but rather were statements made by attorney Brennan regarding his retention by Robert Elmore the morning of the mediation, and as a result do not constitute waiver of the privilege. (R. at 371-380, Par. 20). Neither counsel for Appellant nor counsel for The Hartford insurance company have at any time waived the privilege. (T. at 103-105, 140-141, 142-146, 148, 150-151).

> "it was agreed to by all parties that the settlement of this case would be solely for the benefit of the survivors as the estate claim had already been compensated by the $200,000 settlement. It was a claim of $24,000, which is significantly less than the $200,000 paid; therefore, this settlement was only for survivors."

T. 199, at lines 14-19.

The proffered evidence contains no mediation discussions, whether confidential or otherwise, in which Brennan claims to have raised objections regarding the amount or allocation of settlement proceeds, or of any other discussion that would support a finding of conflict among the survivors.

On May 12, 2006, after completion of the mediation, Brennan faxed a letter which for the first time indicated his belief there had existed a disagreement regarding allocation of shares among the beneficiaries. At no time prior to this letter had any of the three brothers claimed entitlement to more than an equal one-third share of any potential settlement. (T. at 13, 31, 51, 58, 74-75, 77, 79-80, 96, 127, 129-130). The letter, rather than creating conflict, simply confirmed the three survivors' long-standing consent to allocation of the settlement proceeds in equal one-third shares. (R. at 466-467).[5]

II. SUMMARY OF ARGUMENT

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[5] The remaining "facts" addressed in the Merits Brief at pages 15-18 are identical to those raised by the Appellants in the Second DCA and are addressed in the Kennedy Law Group's 2d DCA Answer Brief at pages 15-19.

This Court must reconsider its exercise of discretionary "conflict" jurisdiction, as the clear and distinct factual differences between the purportedly conflicting cases, and this Court's decision in Wiggins, nullify any potential conflict that might be implied by the Perez footnote.

The Wrongful Death Act applies to pre-suit activities by a Personal Representative. Any ruling that the Florida Wrongful Death Act springs to life only after the Personal Representative actually files a lawsuit with a court will cause several negative and unnecessary results. First, it will ensure a system in which the multiplicity of claims eliminated by the Act would be restored for the time frame prior to filing a complaint. Second, and more importantly, such a decision would destroy the policies intended to be implemented by the Florida Legislature and would revive the confusion and uncertainty that existed in Florida prior to enactment of the Act.

To construe the Wrongful Death Act to limit compensation of counsel for the Personal Representative, while recognizing the potential pre-suit activities required for the Personal Representative to satisfy its mandate that it "shall" bringing the action for wrongful death, leads to an unfair and absurd result obviously not contemplated by the Florida Legislature. That construction also would inject confusion and uncertainty regarding any pre-suit authority of a

personal representative and create unnecessary incentives favoring filing of legal actions and deterring pre-suit settlements.

Existing Florida law provides appropriate guidance regarding the rights of wrongful death survivors to retain counsel with respect to any conflict of interest among the survivors and the Estate. Likewise, various Florida decisions confirm that in the absence of a properly appointed personal representative or agreement among co-personal representatives, there exists no party with power to bind all parties to a contingency fee contract. These existing authorities adequately protect the rights of wrongful death survivors and their counsel, both at the pre-suit stage of the claim as well as after a lawsuit is filed with a court.

Should this Court elect to consider issues outside the scope of its conflict jurisdiction, the trial court record contains ample and competent substantial evidence to support the evidentiary rulings of the trial court.

III. ARGUMENT

A. This Court Improperly Granted Conflict Jurisdiction

Appellee respectfully requests that this Court reconsider its exercise of discretionary "conflict" jurisdiction, as the clear and distinct factual differences between the purportedly conflicting cases nullify any potential conflict that might be caused by the Perez footnote. Assertion of jurisdiction based upon a perceived

conflict is not supported. See Fla. Const., Art. V, Sec. 3(b)(3); Fla. R. App. Pro. 9.030(a)(2)(A)(iv).

(1) The District Court below expressly distinguished the facts of *Perez*.

The Second District's decision below expressly and directly distinguished Perez. "If the two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). Thus "the record under review is devoid of any jurisdictional conflict..." Toffel v. Baugher, 133 So.2d 420 (Fla. 1961).

The facts of Perez diverge from the present case in crucial aspects. In Perez, divorced parents of a deceased minor each retained separate counsel in their individual capacities to pursue a wrongful death claim. Perez, 662 So. 2d at 362-363. The survivors settled their claims **before** any estate was opened and **before** any personal representative was appointed. Id. No complaint was ever filed. Id. at 364. Not until after the settlement were both parents appointed as co-personal representatives. Id. at 363. The Perez Court reversed a fee award to the mother's attorney on the basis that her attorney could not collect a contingency fee from the father's portion of the settlement because there was no fee contract between the father and the mother's counsel, either individually or by the

co-personal representatives. Id. at 364.

In contrast, in the present case there was a sole, validly appointed personal representative who retained the Kennedy Law Group and settled the wrongful death claim on behalf of all survivors. In Perez , there was no personal representative to exercise the statutory Wrongful Death Act powers. "The facts [of Perez] were thus different from those in the present case, in which there was a personal representative." Catapane,759 So. 2d at 11 (distinguishing Perez).

The Second District expressly distinguished Perez from the instant case, citing to the Catapane decision which had similarly distinguished Perez years earlier. The Court below stated, "As the Fourth District explained [in Catapane], section 768.26 did not apply in Perez because the parents negotiated the settlements before a personal representative was appointed, *not because a suit had not been filed*." Wagner, 987 So. 2d 741, 745-746 (Fla. 2d DCA 2008) (emphasis added).

Quite simply, in the present case (as in Catapane) there was a personal representative with power and authority to file suit and to settle the claims; in Perez there was not. The rule of law is thus clear: in cases where an authorized personal representative obtains pre-suit settlement of a wrongful death claim, Section 768.26 of the Wrongful Death Act applies. See also Catapane 759 So. 2d

9; Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003).

(2) Any potential precedential effect of the Perez footnote was previously eliminated by this Court in Wiggins v. Estate of Wright.

This Court already has considered the point of law alleged as conflict in the present case. When this Court issued its opinion in Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003), it approved the Catapane decision and thus approved the application of Section 768.26 in cases of pre-suit settlement where no wrongful death action was filed.6

In cases based upon conflict jurisdiction, the Florida Supreme Court's concern is the precedential effect of potentially conflicting decisions. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). The constitutional limitation to review of cases with "direct conflict" encompasses the Court's concern with reflecting the correct rule of law as precedent, as opposed to adjudicating rights of particular litigants. Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958); see also Wainwright 476 So. 2d at 670. If the precedential effect of an allegedly conflicting case has been eliminated, review should be denied. See Wainwright 476 So. 2d at 670.

In the present case, the Second District distinguished Perez, stating:

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[6] See fn. 7 infra.

> "[I]n In re Estate of Catapane, the settlement was reached before suit was filed and the court still determined entitlement to fees pursuant to section 768.26. In re Estate of Catapane was approved by the supreme court in Wiggins, 850 So. 2d at 450. Thus, there is no question that section 768.26 applies to provide for fees incurred even in cases that settle before suit is filed." Wagner, 987 So. 2d at 745-46 (citations omitted).

Because the Perez decision is easily distinguishable from this matter, and the rule on this point of law is clear and was approved by the Florida Supreme Court in Wiggins, any precedential effect of the alleged conflict in Perez is non-existent. See Wainwright 476 So. 2d at 670. For those reasons, Appellee respectfully requests that this Court reconsider its grant of discretionary jurisdiction and dismiss review of this matter.

B. The Wrongful Death Act Applies in Pre-Suit Proceedings

The Florida Legislature enacted the Wrongful Death Act to eliminate multiplicity of suits that would result if each survivor acted on their own behalf. Estate of Catapane, 759 So. 2d 9, 11 (Fla. 4th DCA 2000). By requiring the Personal Representative to pursue a single claim, the Act eliminates the potential for competing beneficiaries to race to judgment, preferential treatment of one or more beneficiaries in the disposition of their claims, and multiple claims and lawsuits against the wrongdoer. Funchess v. Gulf Stream Apartments of Broward County, Inc., 611 So.2d 43, 45 (Fla. 4th DCA 1992). To accomplish its goals, the Legislature expressly provided the personal representative of a decedent's estate is

the only person having the power to recover damages on behalf of the estate and the survivors, when a death is caused by negligence, default, or other wrongful action. See §§768.19, 768.20, 768.26, Fla. Stat. (2008); Estate of Catapane, 759 So. 2d 9, 10-11 (Fla. 4th DCA 2000). "The [Wrongful Death] 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." Id.

Should this Court adopt the appellant's position that the provisions of the Florida Wrongful Death Act spring to life only after the Personal Representative actually files a lawsuit with a court, it will cause several negative and unnecessary results. First, it will ensure a system in which the multiplicity of claims eliminated by the Act would be restored for the time frame pre-dating the actual filing of a complaint. Second, and more importantly, such a decision would destroy the policies intended to be implemented by the Florida Legislature and would revive the confusion and uncertainty that existed in Florida prior to enactment of the Act.

(1) The Wrongful Death Act and Case Law Applying the Act Contemplate Actions Both Before and After Filing a Complaint in Court

The Florida Wrongful Death Act, which itself requires that its provisions

"shall be liberally construed," contains no language limiting its application to the time period following the actual filing of a lawsuit by a Personal Representative. See §§768.16-768.26, Fla. Stat. (2008). To the contrary, in several instances throughout the Act, express distinctions are made between "actions" and "pending actions." See e.g. §768.19, Fla. Stat. (2008)(addressing "Right of action" and ability "to maintain an action"); §768.20, Fla. Stat. (2008) (describing an action that "shall be brought", "action for personal injury" versus "any such action pending at the time of death"); and §768.25, Fla. Stat. (2008) (objection to settlement "while an action under this act is pending").

Consistent with the broad scope of the statutory provisions, several courts, including this Court, have interpreted and applied the Wrongful Death Act to factual circumstances in which the Personal Representative had filed no complaint with a court. The Second District Court of Appeal has expressly concluded the Florida Wrongful Death Act applies in pre-suit mediation, even if a complaint has not yet been filed. "[O]nly the personal representative is authorized to bind the estate and the survivors in the pre-suit settlement of a wrongful death claim." Infinity Insurance Co. v. Berges, 806 So. 2d 504, 508 (Fla. 2d DCA 2001), quashed in part on other grounds, Berges v. Infinity Insurance Co., 896 So. 2d 665 (Fla. 2004). The Florida Fourth District Court of Appeal also has applied the

Wrongful Death Act in determining rights to fees regarding a pre-suit settlement. In re: Estate of Catapane, 759 So. 2d 9 (Fla. 4th DCA 2000). In Catapane, a surviving wife was appointed personal representative of her deceased husband's estate and retained counsel to pursue a wrongful death claim. Id. at 10. Her counsel obtained a pre-suit settlement of the claim. Id. After the settlement, the decedent's daughter from a prior marriage disputed the allocation of settlement proceeds. Id. The lower court apportioned a share of the settlement proceeds to the daughter larger than that proposed by the personal representative and determined that counsel for each party would be compensated only from their respective party's portion of the recovery. Id.

The Fourth District Court of Appeal reversed and determined Florida's Wrongful Death Act entitled the personal representative's counsel to a contingency fee allocated from all settlement proceeds, not just the portion of the settlement allocated to the surviving spouse. Id. at 11-12. The court also determined counsel hired by individual survivors, and not by the personal representative, should not receive a fee from the settlement proceeds to the extent there is no conflict of interest. Id. at 12, n.1.

As in this proceeding, the Catapane case involved a pre-suit settlement where no wrongful death action had been filed. Additionally, counsel for the personal representative in Catapane had no fee agreement with the individual

survivors - only with the surviving wife as personal representative. Id. at 11. Notwithstanding the absence of a filed lawsuit, the Catapane Court specifically referenced the Personal Representative's powers under §768.20, Florida Statutes and further relied upon §768.26, to allow payment of the personal representative's counsel from the entire recovery. Id.

Application of the Act to pre-suit activities was endorsed by this Court's approval of Catapane in Wiggins v. Estate of Wright, 850 So. 2d 444 , 450 (Fla. 2003). In Wiggins, this Court reviewed a decision by the 5th DCA which also applied and interpreted §768.26, Florida Statutes to a fact scenario in which a wrongful death action was settled prior to the filing of a complaint with a court.7 After the personal representative's pre-suit settlement of the wrongful death claim, an actual conflict arose regarding allocation of the settlement proceeds among the a surviving spouse, two children from that marriage, and two children from a prior marriage. Id. at 445. The trial court held separate disputed apportionment proceedings and awarded a different apportionment than that proposed by the

[7] Appellants continue to incorrectly represent "it appears a wrongful death action had been filed in [Wiggins]."(See Brief on Jurisdiction, pg. 10, n.4 and Merits Brief at p. 26 n.13). However, as already noted by Appellee in the Answer Brief on Jurisdiction, the briefs filed in Wiggins confirm it was undisputed that "[t]he wrongful death claim settled during the medical malpractice pre-suit screening period of F.S. §766.106, and was never filed as a lawsuit." Wiggins v. Estate of Wright, Petitioner's Initial Brief, pg.6. See Appellee's Appendix.

personal representative. Id.

In resolving the dispute among counsel for the survivors, this Court approved the decision in Catapane and detailed a procedure for determining allocation of attorneys' fees among counsel in cases "[w]hen survivors *have competing claims* and are represented by separate attorneys." Id. at 450 (emphasis added). The Court acknowledged that where there are conflicting claims among survivors, the amount of work performed by separate counsel in "the apportionment proceedings" should be considered when allocating the attorneys' fees. Id. at 448.[8] However, Wiggins did not alter Catapane as it applies in cases where there are ***not*** conflicting claims. See Id. at 450.

As has been done by the Second, Fourth, and Fifth District Courts of Appeal, this Court in Wiggins analyzed and applied §768.26, Florida Statutes in a pre-suit proceeding. There exists no basis under the Florida Statutes, no legislative intent, and no public policy rationale for the Court to now ignore its own precedent and effectively overrule application of Act in the cases it previously approved.

(2) The Wrongful Death Act Must Be Construed Liberally to Allow a Personal Representative to Fulfill Its Powers and Duties

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[8] The Catapane Court acknowledged in cases of competing claims the fee of counsel for the non-personal representative survivor "would be small compared to [counsel for the personal representative's] fee." Catapane, 759 So. 2d at 12.

To fulfill the Wrongful Death Act mandate that the personal representative "shall" bring an action for wrongful death on behalf of the Estate and survivors, the Personal Representative and its counsel must have the ability to take necessary pre-suit actions to fulfill those powers and duties. Under the theory advanced by the appellants, any counsel retained by the Personal Representative must do so with the expectation of being compensated only from recovery allocated to the Estate or from only those shares of survivors represented by the same attorney, and cannot expect to be compensated from the full recovery unless the Personal Representative files a lawsuit. This limitation is not contemplated by the Act and, if imposed, could effectively prevent a Personal Representative from fulfilling its duties to the Estate and to the survivors.

(3) The Florida Statutes and Case Law Contemplate Actions Both Before and After Filing a Complaint in Court

Under the restricted statutory interpretation advanced by the Appellants, a personal representative's power and right to act with respect to a wrongful death claim, and the ability of the attorney for the personal representative to be compensated for representation of the Estate and survivors, does not exist until a lawsuit actually is filed with the court. This position is not supported by existing statutory or case law, and would cause severe and negative consequences in wrongful death matters.

(a) §768.26, Fla. Stat, Must Be Broadly Applied

Use of the term "attorneys fees and other litigation expenses" in §768.26 Florida Statutes does not imply a legislative intent to limit recovery of fees for the Personal Representative's counsel to actions taken after the act of filing of a complaint with a court. That narrow and restricted interpretation of the phrase violates the legislative mandate that the section "shall be liberally construed." See §768.17 Fla. Stat. Furthermore, in light of the duties and powers given a personal representative, the statutory requirements in many instances requiring pre-suit action by the personal representative, and the public policy encouraging settlement of controversies, such a narrow interpretation causes an unreasonable and ridiculous conclusion not contemplated by the obvious legislative intent.

This Court, in applying the liberal interpretation required by the Act, must not limit itself to the simple dictionary definitions cited by the Appellants. This Court previously recognized it does not "make a fortress out of the dictionary." Dom Miele v. Prudential-Bache Securities Inc., 656 So.2d 470, 472 (Fla. 1995). Instead, the court must reference and consider the context in which a term is used in ascertaining the meaning of that term. Id. Every statute must be read as a whole with meaning ascribed to every portion and due regard given to the semantic and contextual interrelationship between its parts. See Florida Department of

Environmental Protection v. Contractpoint Florida Parks, LLC, 986 So.2d 1260 (Fla. 2008). The Statute should be interpreted to accord meaning and harmony to all of its parts and not be read in isolation, but in the context of the entire section. Id.

The title to a particular statute is only one element for determining the legislative intent. That title must be considered in the context of the entire statute, and "significance and effect must be given to every word, phrase, sentence, and part of the statute if possible." Gulfstream Park Racing Association Inc. v. Tampa Bay Downs, Inc., 948 So.2d 599, 606 (Fla. 2006).

In applying the above principles, other courts have defined the term "litigation" to include proceedings other than those involving the filing of a complaint with a court. For example, courts often have interpreted the phrase "litigation" or "action" to include proceedings in arbitration, notwithstanding the fact that arbitration proceedings do not involve a court. See e.g., Par Four Inc. v. Gottlieb, 602 So.2d 689 (Fla. 4th DCA 1992); Consolidated Labor Union Trust v. Clark, 498 So.2d 547 (Fla. 3rd DCA 1986).

While "as a general rule this Court must give effect to the plain and unambiguous language of a statute .. it is equally clear that a literal interpretation is not required when such an interpretation would lead to an unreasonable or

ridiculous conclusion and there are cogent reasons to believe the letter of the law does not accurately reflect the legislative intent." Patry v. Capps, 633 So.2d 9, 11 (Fla. 1994). The court may disregard a literal interpretation which "would lead to an illogical result or one not intended by the lawmakers." Parker v. State, 406 So.2d 1089, 1091 (Fla. 1981). This Court must apply common sense and avoid conclusions which would defy logic or reason. See Duval Asphalt Products, Inc. v. E. Vaughn Rivers, Inc., 620 So.2d 1043, 1046-47 (Fla. 1st DCA 1993).

As argued above (See III. B.1. supra), the Wrongful Death Act necessarily anticipates counsel for the Personal Representative will be taking action prior to the filing of a complaint. Additionally, as noted below, those attorneys could be required to incur substantial effort prior to preparing and filing a complaint. To construe the Wrongful Death Act to require they do so while limiting potential for compensation is an unreasonable conclusion not supported by the Act.

(b) The Personal Representative Must Fulfill Pre-Suit Requirements

The potentially absurd results caused by limitation of compensation to counsel for a personal representative become even more apparent when one considers other potential pre-suit requirements imposed upon a personal representative bringing a wrongful death action. In many instances, both federal and state law required that a party filing a lawsuit must first fulfill pre-suit notice

or investigation requirements. Rather than being simple expenses for "phone calls, photocopies, [or] postage" (see Merits Brief at p33 n.18), those requirements often include expensive investigation and expert witness obligations.

Examples of pre-suit requirements can be found throughout Florida and Federal law. The most potentially onerous of those requirements would arise in conjunction with a wrongful death claim associated with medical malpractice. Chapter 766 of the Florida Statutes mandates extensive pre-suit investigation and expert witness opinion requirements before any claimant[9] can bring an action for wrongful death based upon that medical malpractice. Those pre-suit requirements must be satisfied by the personal representative or persons entitled to be appointed personal representative. See University of Miami v. Wilson, 948 So.2d 774 (Fla. 3rd DCA 2006). See also Apostolico v. Orlando Regional Health Care System, Inc., 871 So.2d 283 (Fla. 5th DCA 2004) (discusses pre-suit investigation and expert requirements).

Several other circumstances arise in which a personal representative contemplating filing a complaint for wrongful death must first comply with pre-suit requirements:

[9] "Claimant" is defined as any person who has a cause of action for damages based on personal injury or wrongful death. §766.201(1), Fla. Stat. In a wrongful

(1) Federal Tort Claims - An action under the Federal Tort Claims Act cannot be instituted until submitted to the appropriate Federal agency and denied by that agency. 28 United States Code § 2675(a);

(2) Wrongful Death actions against an uninsured motorist carrier. See §627.727(6)(a) Fla. Stat.;

(3) Claims against nursing homes for wrongful death pursuant to Florida Statutes, Chapter 400, require pre-suit notice under section 400.0233 (2). See Arch Plaza Inc. v. Perpall, 947 So.2d 476 (Fla. 3rd DCA 2006), where the court discusses the duty of personal representative to deliver pre-suit notice and notes that pre-suit notice statutes, are intended "to promote pre-suit settlement." Id. at 479; and

(4) Claims against the State of Florida or its agencies for death caused by the negligent or wrongful act of any employee are subject to a pre-suit notice requirement. See §768.28(6)(a) Fla. Stat.

In addition to the above referenced statutory requirements, a personal representative must meet minimum standards for pre-suit investigation and substantiation of claims. Failure to do so could subject the personal representative and counsel to sanctions under Florida law pursuant to §57.105,

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death situation, the "true claimant" is the Personal Representative. University of

Fla. Stat. and under federal law pursuant to Rule 11 of the Federal Rules of Civil Procedure.

The above referenced pre-suit requirements contemplate activity far beyond simple "phone calls, photocopies, [and] postage" (see Merits Brief at 33 n.18). To construe the Wrongful Death Act to limit compensation of counsel for the Personal Representative, while recognizing the potential pre-suit activities required for the Personal Representative to satisfy its mandate that it "shall" bringing the action for wrongful death, leads to an unfair and absurd result obviously not contemplated by the Florida Legislature.

(c) A Narrow and Restricted Interpretation of §768.26, Fla. Stat, Would Create Unreasonable and Negative Results Contrary to Policy Stated by the Legislature and this Court

Should this Court determine the Wrongful Death Act does not apply to pre-suit activities by a Personal Representative, the potential negative policy implications are widespread and potentially damaging. Such a ruling would inject confusion and uncertainty regarding any pre-suit authority of a personal representative and create unnecessary incentives favoring filing of legal actions and deterring pre-suit settlements.

(1) Uncertainty Regarding Pre-suit Authority

Miami, 948 So.2d at 780.

The Personal Representative is the party with the power and authority to settle a wrongful death claim pre-suit. See University of Miami v. Wilson, 948 So.2d 774 (Fla. 3rd DCA 2006); Infinity Insurance Co. v. Berges, 806 So. 2d 504, 508 (Fla. 2d DCA 2001), quashed in part on other grounds, Berges v. Infinity Insurance Co., 896 So. 2d 665 (Fla. 2004); In re: Estate of Catapane, 759 So. 2d 9, 10-11 (Fla. 4th DCA 2000). Should this Court determine a personal representative's power arises only after filing a lawsuit, and counsel for that personal representative can obtain fees from the recovery only if the lawsuit is filed, it will inject substantial uncertainty as to the overall power of the Personal Representative, and will create a situation in which wrongful death survivors will attempt to assert multiple individual claims prior to the time a lawsuit is filed with the court.

Under that scenario, multiple competing wrongful death survivors will race to wrongdoers and their insurers to obtain preferential treatment in the disposition of their claims, assert multiple claims and demands for pre-suit payment, and place the wrongdoer, and insurer, in the position of being required to respond to a multiplicity of pre-suit claims and demands without any centralized coordinated process. It is this scenario that the Florida legislature intended to avoid by

Apartments of Broward County, Inc., 611 So.2d 43, 45 (Fla. 4th DCA 1992).

(2) Unnecessary Litigation and Reduction of Pre-Suit Settlements

A ruling by this Court that Florida Statutes §768.26 applies only after the filing of the complaint with a court most likely will cause a change in standard operating procedures for plaintiff's counsel representing estates in wrongful death proceedings. The simple solution will be to file a complaint for wrongful death as quickly as reasonably possible, notwithstanding the potential for pre-suit settlement of the claims. That filing would remove any question regarding the ability of the attorney to receive compensation for services rendered and, most likely, would remove questions regarding the authority of the Personal Representative to settle the pending lawsuit. While the additional filing fee revenues might be welcomed by the clerk's offices throughout the State, a result creating additional unnecessary lawsuits directly contradicts those policies advanced by this Court and the Florida Legislature to avoid unnecessary litigation, prevent waste of judicial resources, and encourage pre-suit settlement of disputes.

Florida courts typically refuse to encourage conduct that results in a waste of judicial resources. See e.g. Kirlin v. Green, 955 So.2d 28, 30 (Fla. 3rd DCA 2007) (rejecting pre-suit bill of discovery); Association for Retarded Citizens-Volusia, Inc. v. Fletcher, 741 So.2d 520, 525 (Fla. 5th DCA 1999) (avoiding additional actions which would not have otherwise been filed and would

require more judicial resources); Spiegel v. H. Allen Holmes,Inc., 834 So.2d 295, 297 (Fla. 4th DCA 2002) (settlement agreements are favored to conserve judicial resources); Feldman v. Kritch, 824 So.2d 274, 277 (Fla. 4th DCA 2002) (settlements are highly favored to conserve judicial resources); Nard, Inc. v. DeVito Contracting & Supply, Inc., 769 So.2d 1138, 1141 (Fla. 2d DCA 2000) (avoidance of needless expenditure of litigant and judicial resources).

No arguments advanced by the Wagner Firm in an effort to obtain an attorney's fee justify this Court's imposition of a standard that will cause unnecessary consumption of additional judicial resources. To the contrary, by affirming the interpretation and application of the Wrongful Death Act in pre-suit proceedings, as has been done by the Second, Fourth, and Fifth District Courts of Appeal, this Court will avoid wasteful and unnecessary consumption of judicial resources.

As a corollary to avoiding waste of judicial resources, the courts and the Florida Legislature have expressed an intent favoring pre-suit and out-of-court settlement of claims. This Court recently confirmed Florida's public policy is to promote settlement. See Saleeby v. Rocky Elson Construction, Inc., 34 Fla. L. Weekly S106 (Florida Supreme Court January 30, 2009). One of the more recent expressions of that policy by the Florida Legislature was its amendment of the

pre-suit arbitration provisions in the Medical Malpractice Act in 2003 to include damages available under the Wrongful Death Act. See discussion in Lifemark Hospitals of Florida, Inc. v. Afonso, 34 Fla. L. Weekly D554 (Fla. 3rd DCA March 11, 2009). That amendment ensured that Personal Representatives, on behalf of survivors, could utilize the pre-suit arbitration option under the Medical Malpractice Act without being limited to those damages only attributable to the Estate.

In addition to the above, the Florida legislature traditionally has promoted and encouraged alternative dispute resolution techniques, including arbitration and mediation, as methods to reduce the strain on judicial resources and encourage out-of-court settlement of claims. See e.g. §682.02 Fla. Stat. (arbitration); §§44.102-104 Fla. Stat. (mediation and arbitration). An unduly narrow construction of the Wrongful Death Act effectively precludes a Personal Representative from attempting to fulfill its duties to the estate and the survivors, from effectively participating in cohesive and focused pre-suit alternative dispute resolution, and certainly limits the ability of the Personal Representative to obtain counsel to represent the Personal Representative prior to filing a complaint with a

court.[10] This result would, in fact, discourage and hamper pre-suit resolution of wrongful death claims despite the strong public policy favoring such pre-suit resolution.

(4) Current Procedures Protect Survivors and Their Counsel

Through this Court's decision in Wiggins and the procedures outlined in Catapane, Florida law provides clear and unambiguous guidance regarding the rights of wrongful death survivors to retain counsel with respect to any actual conflict of interest or competing claims among the survivors and the Estate. Likewise, various Florida appellate decisions consistently affirm that in the absence of a properly appointed personal representative (or in the absence of appropriate exercise of joint authority between co-personal representatives), there exists no party with power to bind all parties to a contingency fee contract. The combination of these two lines of authority clearly and adequately protect the rights of wrongful death survivors and their counsel, both at the pre-suit stage of the claim as well as after a lawsuit is filed with a court.

(a) Resolution of "Competing Claims" and "Conflict of Interest"

The Wiggins Court, through its adoption of Catapane, has provided guidelines

[10] This would be especially true in those circumstances in which the Personal Representative is not also a survivor and, as is not unusual, there are little or no damages to apportion to the Estate per §768.21(6), Fla. Stat.

for allocation of fees when there is an actual conflict of interest created by competing claims among survivors. "When survivors have competing claims" the trial courts are directed to provide for a proportional payment of attorneys fees by all survivors out of their respective awards. See Wiggins, 850 So.2d at 450. This procedure is appropriate "when the survivors do not have a commonality of interest, [which] **may also sometimes** produce conflict... ." Id. at 448 (emphasis added).

Neither Wiggins nor Catapane hold that wrongful death survivors are to be deemed to have automatically competing claims that create conflict. To the contrary, both decisions recognize those instances at various stages of a wrongful death claim in which survivors are in agreement and no conflict exists. See Wiggins, 850 So.2d at 448; Catapane, 759 So.2d at 11-12 & 12n.1. The Wiggins Court even indicated a lack of commonality of interest "may also sometimes" produce conflict rather than establishing a per se standard assuming conflict of interest in all cases. See Wiggins, 850 So.2d at 448 (emphases added).

In the instance of a material and actual conflict between competing survivors, the fee allocation procedures in Catapane are appropriate and result in an equitable allocation of compensation among counsel for the competing beneficiaries. In contrast, and as noted in Catapane, if there exists no competing

claims along beneficiaries that create conflict of interest with respect to the prosecution of the wrongful death action, counsel retained by a survivor "cannot expect to be compensated." Catapane, 759 So.2d at 12n.1.

The courts have provided ample guidance regarding those circumstances in which actual competing claims create a conflict of interest entitling a survivor to retain and compensate independent counsel. See e.g. Butler v. Walker, 932 So.2d 1218 (Fla. 5th DCA 2006) (conflict between divorcing spouses regarding apportionment); Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003) (conflict regarding apportionment to the decedent's children from separate marriage); In re: Estate of Catapane, 759 So. 2d 9 (Fla. 4th DCA 2000) (conflict regarding unequal allocation between the decedent's surviving spouse and daughter); Adams v. Montgomery, Searcy & Denney, P.A., 555 So.2d 957 (Fla. 4th DCA 1990) (conflict arose when counsel for personal representative refused to include a survivor claim for the decedent's daughter from a prior marriage); White v. Roundtree Transport, Inc., 386 So.2d 1287 (Fla. 3rd DCA 1980) (conflict between the decedent's surviving spouse and children).

The above authorities consistently protect competing survivors when actual conflicts arise with respect to the wrongful death action, and provide ample guidance for survivors and their counsel to evaluate their rights in those

circumstances. No authorities require the filing of pleadings to assert the conflicts, only proof of an actual existing conflict of interest related to the wrongful death claims. See e.g. Garces v. Montano, 947 So. 2d 499 (Fla. 3d DCA 2006)

Application of the above principles does not, as argued by the Wagner Firm, negatively impact a survivor's "right" to retain independent counsel. First, under the principles stated in Wiggins and Catapane, a survivor's "right" to retain counsel with respect to a wrongful death action would arise only if that survivor had competing claims causing a conflict of interest preventing counsel for the Personal Representative from appearing on behalf of that survivor. See Catapane, 759 So.2d at 12n.1 (counsel "would still have been precluded, because of conflicting clients, from representing all survivors"). Otherwise, the Florida Legislature has indicated it is the Personal Representative who has the right and authority to retain counsel to represent the estate and survivors in a wrongful death action. Catapane, 759 So.2d at 10-11.

Second, an attorney contacted by a survivor may rely upon Wiggins and Catapane in determining whether that survivor, in fact, requires representation by counsel other than counsel retained by the Personal Representative. If that survivor indicates no desire to pursue competing claims, or otherwise provides no

indication of any potential conflict of interest, counsel simply can refer the survivor back to the attorneys retained by the Personal Representative. If an attorney accepts representation of a survivor on a contingency fee basis with knowledge the survivor does not intend to pursue any competing claims, that attorney must recognize the potential a court will refuse to provide compensation under the guidelines established by Wiggins and Catapane.

In reviewing this issue, one must distinguish between the "right" to representation by independent counsel versus the "desire" to be represented by counsel other than that selected by the Personal Representative. While numerous reasons may exist for a survivor to "desire" to be represented by other counsel, those desires do not necessarily equate with a "right" to retain counsel. For example, in this proceeding the evidence in the trial court was that one of the survivors wanted the Personal Representative to hire the firm the survivor selected - the Wagner Firm - to also represent the estate in the wrongful death claim.[11] See Merits Brief at 4. Nonetheless, the Personal Representative properly exercised his discretion and retained counsel of his choice. See T. at 12, 54. That decision was based not upon any conflict of interest or competing claims but instead upon a simple difference in opinion regarding what firm should be hired.

[11] Apparently regardless of the alleged "bad blood" between the brothers.

Disagreements regarding a personal representative's exercise of its discretionary power to retain counsel are appropriately addressed in the probate proceedings.12 This type of non-conflict difference of opinion is an example of only one of many potential scenarios in which the "right" to retain independent counsel discussed in Wiggins and Catapane must be limited. Otherwise, this Court risks creating an unlimited and unfettered "right" to retain their own counsel based solely upon a survivor's desires or opinions and not upon the need for protection of substantive rights.

The Wagner Firm asks this Court to create a right to retain counsel based upon the premise there will be conflicts of interest, whether disclosed or not, among all survivors. Such an overboard mandate would require separate representation in every case. Additionally, the contractual expectation of the Personal Representative's counsel would always be subject to alteration because of unknown and undisclosed "conflicts." This will enable counsel for survivors to consistently claim fees, as in this matter, by proclaiming "My client had an objection I didn't tell you about, but now has waived it." The equitable and

[12] Even those discretionary powers a personal representative is authorized to exercise without prior court approval, such as the power to retain counsel, must be exercised "acting reasonably for the benefit of interested persons." See §733.612, Florida Statutes (2008). The Personal Representative is personally liable for improper exercise of those powers. §733.609, Florida Statutes (2008).

reasonable approach is to require some minimum disclosure of any conflict. This enables counsel for the Personal Representative to evaluate its ethical duties and address, at the earliest possible moment, any potential issues regarding allocation of the contingency fee.

(b) Absence of Action by Authorized Personal Representative

The second fact circumstance already appropriately addressed by Florida law involves the rights of parties to retain and compensate counsel when no personal representative has been appointed or when no authorized action has been taken by joint personal representatives. In those circumstances, Florida courts consistently and appropriately have refused to apply Florida Statutes §768.26 and have refused to award fees to an attorney from the recoveries of survivors with whom that attorney has no contract.

When exercising fiduciary powers, a "majority" of multiple personal representatives must act jointly. §733.615, Fla. Stat. (2008). In the instance of two personal representatives, that "majority" necessarily requires consent by both personal representatives. See id. This requirement applies to retention of counsel by an estate in a wrongful death action. Costello v. Davis, 890 So. 2d 1179, 1180 (Fla. 2d DCA 2004). In Costello, the decedent's mother and father were divorced and each retained separate counsel for representation in bringing a

wrongful death action. At the time the father filed wrongful death proceedings, both parties had filed competing petitions for appointment as personal representative but no personal representative had been appointed. The probate court subsequently appointed both parties as joint personal representatives. Because the personal representatives failed to act jointly in retaining counsel, the appellate court ruled there existed no contract between the Estate and wrongful death counsel and, therefore, the compensation for each attorney was limited to the recovery for the party with whom that attorney had a specific contract. Id.

A similar result was reached by the Third District Court of Appeal in Perez v. George, Hartz, Lundeen, Flagg & Fulmer, 662 So. 2d 361 (Fla. 3d DCA 1995). In Perez, the divorced parents of a decedent each retained separate counsel for representation in a wrongful death proceeding. Prior to appointment of any personal representatives for the estate, the survivors attended pre-suit mediation and accepted a settlement. Id. at 363. The probate court subsequently appointed both parents as joint personal representatives. The appellate court confirmed that the counsel for the decedent's mother was not entitled to collect a fee from the recovery on behalf of the father "because at no time did [the father] sign a contract with [the mother's counsel] for legal services..." Id. at 364. Thus, in the absence of a contract executed by the father, either individually or with the other

co-personal representative, there could be no valid and binding contract entitling the mother's counsel to compensation from the father's recovery.

Florida law also provides guidance in circumstances in which a personal representative retains counsel, but the probate court later appoints a joint personal representative who retains separate counsel. In Garces v. Montano, the decedent's husband initially was appointed as sole personal representative of the estate. Garces v. Montano,947 So. 2d 499 (Fla. 3d DCA 2006). The personal representative retained counsel who "proceeded with extensive investigations, pre-suit discovery and work on the case, and later filed a wrongful death action." Id. at 501. Long after the initial personal representative retained counsel, the natural father of the decedent's sons retained separate counsel and was appointed as co-personal representative. Id. at 501. After a pretrial settlement, the trial court refused to allow the attorneys retained by the original personal representative to compensation from any recovery on behalf of the children.

On appeal, the Third District Court of Appeal reversed the trial court, expressly finding there was "no legal basis in the record to conclude that a conflict of interest existed...." Id. at 503, and that "the facts raised by [the children's attorney] to bolster its argument that a conflict existed, have no bearing on the issue in the medical malpractice case.. ." Id. at 503. The court remanded the

matter to the trial court for an allocation of fees based upon "the amount of work that each group of attorneys [for each co-personal representative] did on the case." Id. at 504.

The principles within these authorities can be consolidated into a simple bright line test which honors the policies of the Wrongful Death Act while protecting the substantive interests of any competing beneficiaries and their counsel:

Counsel for the Personal Representative is entitled to compensation of the full contingency fee from proceeds obtained, pre-suit or otherwise, pursuant to §768.26, Fla. Stat. but only if (1) a duly appointed Personal Representative (or the majority of multiple personal representatives) enters a written contract with counsel to represent the personal representative to fulfill its duties under §768.20, **and** (2) there are no known or reasonably ascertainable competing claims among the beneficiaries or estate that would preclude counsel for the personal representative from acting on behalf of all parties. If the first condition is not satisfied, §768.26 does not apply because there is no personal representative authorized to act (even if no conflict exists). If the second condition is not satisfied, the allocation procedures described in Catapane and confirmed in Wiggins shall apply.

(5) Wiggins and Catapane Do Not Limit Recovery of Fees for Estate-related Services

Based upon the evidence in the record on appeal, it appears the Wagner Firm provided representation to its clients, in their capacities as Estate beneficiaries, to challenge the initial appointment of the Personal Representative, the qualifications of the Personal Representative, distributions and payments made by the Personal Representative, and other matters related to the Probate Administration. See generally Merits Brief at pp. 4-5, 8-10. Although Wiggins and Catapane both confirm cumulative attorneys fees for representation with respect to the wrongful death claim cannot exceed those maximum levels permitted under rule 4-1.5 of the Rules Regulating the Florida Bar, neither decision proposes limitation of fees other services provided by attorneys.

Implicit in the position of the Wagner Firm is that compensation for the "fair value of [Brennan's] work" in the underlying preceding should include compensation for the estate related services, see Merits Brief at 42, and that the trial court application of Wiggins and Catapane somehow inequitably deprived them of that compensation. To the contrary, had the Wagner Firm been successful in the probate proceedings, they would have been entitled to compensation from the Estates pursuant to §§733.106 & 733.609(2), Fla.

Stat.(2008). Even in the event of failure in those proceedings, the Rules Regulating the Florida Bar do not prevent the Wagner Firm from receiving reasonable compensation from their clients for the services they provided in the probate proceedings (unless, of course, the terms of their engagement provided otherwise). Thus, to a large extent, the Wagner Firm had the ability and opportunity to be compensated for "the work it did on behalf of its clients." See Merits Brief at 43.

C. There Exists No Basis or Need for the Court to Consider Any Issues Other than Those Raised as the Basis for Conflict Jurisdiction

In this proceeding, this Court exercised discretionary jurisdiction based upon the Wagner Firm assertion of a conflict between the holding in the underlying 2d DCA decision and a footnote in the 3rd DCA in Perez. Although, as noted above, appellee maintains its position that the factual distinctions between the cases prevent any interpretation resulting in a conflict, this Court's resolution of that perceived conflict should constitute all judicial labor necessary in this matter.

If this court elects to adopt the Perez footnote and rule that §768.26 applies only after a personal representative files a complaint with a court, any further consideration of the underlying factual evidence is unnecessary. Cf. Merits Brief

at 2. If, on the other hand, this Court reaffirms its prior application of §768.26 in a pre-suit situation (and similar application in the Second, Fourth, and Fifth District Courts of Appeal), there exist no underlying policies or other rationales for this court to second-guess both the trial court's interpretation of the evidence presented and the determination by the Second District Court of Appeal regarding whether that trial court decision was supported by substantial competent evidence.

In discussing the scope of its powers to review decisions of the Courts of Appeal, this Court previously has indicated:

> The scope of review by the Supreme Court of the decision of a Court of Appeal is extremely limited when the ground of asserting jurisdiction is an alleged conflict of such decision with the decision of another appellate court on the same point of law.... . Courts of Appeal are and were meant to be Courts of final appellate jurisdiction in the vast majority of cases, and ... it is only to harmonize and standardize decisions that this Court may presume to interfere. ... 'Sustaining the dignity of the decisions of the district courts of appeal must depend largely on the determination of the Supreme Court not to venture beyond the limitations of its own powers by arrogating to itself the right to delve into a decision of a district court of appeal primarily to decide whether or not the Supreme Court agrees with the district court of appeal about the disposition of a given case.'

South Florida Hospital Corporation v. McRae, 118 So.2d 25, 27, 28 (Fla. 1960) (quoting Justice Thomas in Lake v. Lake, 103 So.2d 639 (Fla. 1958)

This Court clearly has discretion to consider issues outside the scope of conflict which are raised in this appeal. See, e.g., Price v. State, 995 So. 2d 401,

406 (Fla. 2008). On the other hand, as acknowledged by this Court in South Florida Hospital Corporation, that discretion should be exercised in a limited fashion and with appropriate deference to the courts of appeal.

In this proceeding, should the Court affirm the Second District Court of Appeal application of §768.26, Fla. Stat. to a pre-suit situation, there exists no compelling basis for further review of the application by the Trial Court of the policies and principles dictated by Wiggins, and Catapane, and as further explained by Butler, Adams, and White. The Second District Court of Appeal completed that judicial labor and there exists no reason for this Court to repeat that task.

D. The Trial Court Finding of No Conflict is Supported by Competent Substantial Evidence

Should this Court elect to exercise its discretion and consider issues outside the scope of the conflict jurisdiction, the trial court record contains ample and competent substantial evidence to support the evidentiary rulings of the trial court. The trial court below evaluated testimony and other evidence and made a factual finding that no competing claims regarding allocation of settlement proceeds existed among the three surviving brothers. "The standard of review applicable to a trial court decision based on a finding of fact is whether the decision is

supported by competent substantial evidence. If the record on appeal discloses any competent substantial evidence to support the decision of the trier of fact, the order or judgment must be affirmed." The Appellate Process, Standards of Review, §9.6, Decisions of Fact at 139. See also Clegg v. Chipola Aviation, Inc., 458 So. 2d 1186 (Fla. 1st DCA 1984); Abreu v. Amaro, 534 So. 2d 771 (Fla. 3d DCA 1988). The lower court is in a "superior position 'to evaluate and weigh the testimony and evidence based upon its observation of the bearing, demeanor, and credibility of the witnesses.'" Conner v. State, 803 So.2d 598, 607 (Fla. 2001), citing Stephens v. State, 748 So.2d 1028, 1032 (Fla. 1999).

The trial court determined there were no conflicting claims after determining the credibility of the witnesses and interpreting the alleged conflicting evidence. That determination "will not be set aside on review unless totally unsupported by competent substantial evidence." Concreform Systems v. R.M. Hicks Const. Co., 433 So. 2d 50 (Fla. 3d DCA 1983).

The Answer Brief filed in the 2d District Court of Appeal provides a detailed analysis of the record on appeal and the voluminous evidence that supports the trial court's determination that there was no evidence of any competing claims by the survivors. See 2d DCA Answer Brief at pp.24-32 & 38-43. The following summary of that evidence, as well as those facts discussed

in section II, supra, is based upon that detailed discussion and fully supported by references to the record contained in that narrative. See id.

At the fee hearing below, the trial court considered evidence and testimony from both law firms, as well as the testimony of Estate attorney David Whigham and each of the three Elmore brothers. All witnesses, with the exception of Wagner Firm attorney Brennan but including the Wagner Firm's own clients, testified the three brothers had always agreed to an equal three-way allocation of any settlement proceeds and no brother, either himself or through counsel, ever raised any claim to receive more than an equal one-third share. The witnesses contradicted Brennan's attempts to retroactively insert conflict into the case and disagreed with Brennan's characterization of letters he had written. The only objections ever voiced by Brennan to The Kennedy Law Group related to the Wagner Firm's attempts to obtain a portion of The Kennedy Law Group's contingency fee.

The trial court evaluated the credibility of the witnesses and the evidence presented and, in concluding no competing claims existed, rejected the testimony of attorney Brennan. The record contains substantial competent evidence to support the lower court's decision. The Second District Court of Appeal gave

appropriate deference to that decision and properly affirmed in favor of The Kennedy Law Group.

IV. CONCLUSION

Because of the absence of an actual and direct conflict, this Court should dismiss its review of this proceeding. In the alternative, this Court should affirm its prior broad application of the Wrongful Death Act and permit compensation of counsel for the Personal Representative in the absence of actual and material conflicts among competing beneficiaries, pursuant to Florida Statutes §768.26. This construction will preserve the intent of the Legislature and advance policies encouraging reduction of litigation and pre-suit settlement of controversies.

For the above reasons, Appellee Kennedy Law Group requests that the Court dismiss review of the underlying decision or, alternatively, affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

STEVEN L. HEARN, P.A.
625 East Twiggs Street, Suite 102
Tampa, FL 33602
Phone (813) 222-0003
Fax (813) 222-0004
Attorneys for Respondent

____
STEVEN L. HEARN
Florida Bar No. 350801

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by United States mail upon David L. Whigham, Esquire, Whigham Law Group, P.A., 220 E. Madison Street, Suite 1140, Tampa, FL 33602; Weldon E. Brennan, Esquire, Wagner, Vaughan, McLaughlin & Brennan, P.A., 601 Bayshore Blvd., Suite 910, Tampa, FL 33606-2786; and Stephen F. Rosenthal, Podhurst Orseck, P.A., 25 West Flagler Street, Suite 800, Miami, FL 33130, this _____ day of ________, 2009.

____

Steven L. Hearn

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief complies with the font requirements of Rule 9.210 (2), Fla. R. App. P.

____

Steven L. Hearn