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 JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES, AND RULES

I. STATEMENT OF THE CASE AND OF THE FACTS.

Petitioner Wagner, Vaughan, McLaughlin & Brennan, P.A. (the "Wagner Firm") seeks this Court's discretionary review following a consolidated appeal from rulings in favor of Respondent The Kennedy Law Group ("KLG") which were affirmed by the Second District Court of Appeal. The rulings were entered in Hillsborough County probate proceedings for the Estates of Robert Earl Elmore and Thelma Lavone Elmore who died after an automobile accident leaving three surviving adult sons.

One of the three sons, Gary Elmore, was appointed as sole Personal Representative of both of his parents' Estates, and in that capacity he retained KLG to pursue wrongful death claims. Before filing suit, KLG obtained a $200,000.00 settlement from the tortfeasor's insurance carrier and, after a pre-suit mediation, the decedents' insurance carrier settled for an additional $1.23 million. The net proceeds from both settlements were distributed in equal shares to the three surviving brothers. Because of the settlements, the Personal Representative filed no wrongful death lawsuit.

The Wagner Firm was retained by the Personal Representative's two brothers (who were not personal representatives) and appeared in the probate proceedings to assert a claim for two-thirds of KLG's contingency fee. The

Wagner firm claimed entitlement to the two-thirds share as counsel for two of the three survivors.

After an evidentiary hearing the probate court determined there were no conflicting claims among the brothers. Thus, the Court ruled, KLG as counsel for the Personal Representative was entitled to receive its entire contingency fee earned in connection with the wrongful death claims and the Wagner firm was entitled to no portion of KLG's earned fee.

The Wagner Firm for the first time on appeal argued the attorney fee provision of the Wrongful Death Act (Section 768.26, Florida Statutes) does not apply in cases involving a settlement accomplished before a wrongful death lawsuit is filed.[1] The Wagner Firm based its argument upon a footnote contained in Perez v. George, Hartz, Lundeen, Flagg & Fulmer, 662 So. 2d 361 (Fla. 3d DCA 1995).

The Second District Court of Appeal affirmed the trial court's ruling, citing Estate of Catapane, 759 So. 2d 9 (Fla. 4th DCA 2000). Catapane applied Section 768.26, Florida Statutes in a pre-suit wrongful death settlement case and

[1] It is no surprise this argument was not made at trial. The Wagner Firm's co-counsel at trial (Linda L. Schwichtenberg) was herself the attorney seeking fees in the Wiggins decision issued by this Court - a case which involved a pre-suit settlement and in which she successfully argued Section 768.26 **does** apply. See infra. n.5.

established the method for determining attorneys' fees in wrongful death cases involving competing claims of survivors. This Court expressly approved Catapane in Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003), a case in which this Court also applied Section 768.26 where no wrongful death action had been filed. (See *infra* n.5). In the instant case, the Second DCA followed Catapane and Wiggins and also found Section 768.26 applicable. Despite the request by Petitioner's counsel at oral argument that the court below certify a conflict with Perez, the Second DCA apparently declined to do so and instead expressly distinguished Perez on the same grounds cited by the Fourth DCA in Catapane.

II. SUMMARY OF ARGUMENT.

The 1995 Perez decision does not conflict with the later rulings of the Fourth DCA in Catapane or the Second DCA in the present case. In finding Section 768.26 of the Wrongful Death Act applicable in pre-suit settlement cases, the Fourth DCA and Second DCA expressly distinguished Perez. The Perez decision is not controlling because the parties in Perez had negotiated wrongful death settlements **before** appointment of a personal representative (the sole entity authorized under the Wrongful Death Act to bring and settle a wrongful death claim), not because settlements were obtained before filing a lawsuit.

Additionally, to the extent there might previously have been any argument

that Section 768.26 did not apply in cases of pre-suit settlement (based upon Perez or otherwise), the issue already has been determined by this Court. In Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003), this Court approved Catapane and applied 768.26 to a pre-suit settlement case. (See Wiggins and *infra*. n.5).

As a result of the Wiggins ruling, the opinion below does not expressly or directly conflict with Perez on the same question of law. Additionally, any prior precedential effect of the Perez footnote was eliminated by this Court's decision in Wiggins, and there is no jurisdictional basis to review this case.

III. ARGUMENT.

Discretionary jurisdiction of this Court requires an express and direct conflict between District Courts on the same question of law. Art. V, § 3(b)(3), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv). This Court must deny review because the present case contains no express or direct conflict with the Perez decision, and is factually distinguishable from Perez. Additionally, the Second District Court of Appeal decision in this matter is consistent with this Court's prior review and approval of the relevant point of law at issue.

A. The Second District expressly distinguished the facts of *Perez*.

The Second District Court of Appeal decision below is not in express or direct conflict with the Perez decision and, to the contrary, expressly distinguished

Perez. If 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). Petitioner has attempted to create a conflict by citing to a Perez opinion footnote having no impact upon the Court's decision on the relevant point of law. This Court must look at the decision, rather than a conflict in the opinion, to find it has jurisdiction. Niemann v. Niemann, 312 So. 2d 733, 734-5 (Fla. 1975) citing Gibson v. Maloney, 231 So. 2d 823 (Fla. 1970). If the District Court distinguished the instant case from the prior allegedly conflicting decision, then the record under review is devoid of any jurisdictional conflict. Toffel v. Baugher, 133 So.2d 420 (Fla. 1961). Thus, review of this case must be denied.

The Perez facts diverge from the present case in several material 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 parents later settled the claim before any estate was opened and before any personal representative was appointed. Id. No party filed a complaint. Id. at 364. Both parents subsequently were appointed as co-personal representatives. Id. at 363. The trial court awarded the mother's attorney the entire contingency fee earned in settlement of the claim. Id. The Perez court reversed the fee award on

the basis that the mother's attorney could not collect a contingency fee from the father's portion of the settlement because the father did not sign a written contract with the mother's counsel.[2] Id. at 364.

In contrast, in the present case Gary Elmore was the properly appointed sole Personal Representative who retained KLG and settled the wrongful death claim on behalf of all survivors. The Wrongful Death Act vested Gary Elmore as Personal Representative with power to bring and settle the wrongful death claims. See §768.26, Fla. Stat.; Catapane, 759 So. 2d at 10-11. In contrast, the parties in Perez reached a settlement before appointment of any personal representative having the power to retain counsel or settle the matter in a representative capacity. The conclusion of the Catapane court is equally applicable in this matter: "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.

The Second District Court of Appeal expressly distinguished Perez from the instant case, citing to the Catapane decision which had similarly distinguished

[2] Under the Wrongful Death Act, "[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). Unlike Perez, in cases where there is a personal representative who can settle the case the personal representative is the only person with whom the attorney need sign a contract. Catapane, 759 So. 2d at 11.

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*." Slip Op. at 7 (emphasis added).

Petitioner's attempts to create a conflict based upon the cited footnote from Perez overlook the actual factual basis of the decisions in the cases at issue.[3] Those cases consistently turn on the fact of whether a personal representative was in place to secure an authorized settlement under the Wrongful Death Act. Quite simply, in the present case (and as in Catapane) there was a personal representative; in Perez there was not. The rule of law is 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 Catapane 759 So. 2d 9; Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003). The precedent is clear and there is no express or direct conflict among the decisions. Thus there is no jurisdictional basis for review.

B. Any prior precedential effect of the *Perez* footnote was eliminated by

[3] The footnote regarding Section 768.26 appears in the Perez court's analysis of whether the "common fund rule" applied in that case. Id. at 364, n.1. The legal doctrine of the "common fund rule" was not raised and was never at issue in the present case. Thus, the cited footnote did not even impact the court's decision with respect to the threshold legal issue about which Petitioner now claims conflict.

this Court in *Wiggins v. Estate of Wright*.

This Court already considered the point of law alleged as conflict in the present case. This Court in Wiggins v. Estate of Wright, 850 So. 2d 444 (Fla. 2003), approved the Catapane decision[4] and thus approved application of Section 768.26 in cases of pre-suit settlement where no wrongful death action was filed.[5] Wiggins is controlling authority and eliminated any potentially conflicting precedential effect of the Perez footnote.

The precedential effect of potentially conflicting decisions forms the basis for the Florida Supreme Court's concern in cases based upon conflict jurisdiction. Wainwright v. Taylor, 476 So. 2d 669, 670 (Fla. 1985). The constitutional limitation to review of cases with "direct conflict" enables the Court to clarify the

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[4] Petitioner attempts to restrict the Wiggins approval of Catapane only to the "method of allocating fees" (Petitioners Brief on Jurisdiction, pg. 9), but the opinion contains no such limitation. The Wiggins Court broadly stated, "we...approve of the Fourth District's holding in Catapane" without any expressed limitation. Wiggins, 850 So. 2d at 450.

[5] Petitioner incorrectly hypothesizes, "it appears a wrongful death action had been filed in [Wiggins]," based upon the Court's references to an "action." (Petitioners Brief on Jurisdiction, pg. 10, n.4). However, the briefs filed in Wiggins confirm "[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, *Petitioner's Initial Brief*, pg.6 www.floridasupremecourt.org/clerk/briefs/2001/1601-1800/01-1713_ini.pdf); cf. Wiggins v. Estate of Wright, 786 So. 2d 1247, 1251 (Fla. 5th DCA 2001) (Sawaya, J. dissenting) (refers to "the potential medical malpractice action").

correct rule of law to be used 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 below based the portion of its opinion at issue upon the Catapane decision and the Wiggins Court approval of that decision. In distinguishing Perez, the Second District stated:

> "[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." Slip Op. at 7 (citations omitted).

Because the rule on this point of law is clear and was approved by the Supreme Court in Wiggins, any precedential effect of the alleged conflict in Perez is non-existent and review must be denied. See Wainwright 476 So. 2d at 670.

IV. CONCLUSION

This Court is without jurisdiction to review this case. There is no direct or express conflict among decisions about the same point of law. Fundamental facts of the allegedly conflicting cases are materially different, and the Court below

expressly distinguished those facts. To the extent of any possible perceived conflict with Perez, this Court eliminated the potentially conflicting precedent by its decision in Wiggins. Therefore, review must be denied.

Respectfully submitted,

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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 September, 2008.

J. Richard Caskey

CERTIFICATE OF COMPLIANCE

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

J. Richard Caskey