IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-1525

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

Petitioner,

vs.

KENNEDY LAW GROUP,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT
COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

OTHER

I. THE BASIS FOR CONFLICT JURISDICTION EXISTS AND KLG'S REQUEST FOR RECONSIDERATION SHOULD BE REJECTED

KLG asks the Court to reconsider its acceptance of jurisdiction over this case because, it argues, no conflict actually exists between the case under review and *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361 (Fla. 3rd DCA 1995). KLG asserts that "factual differences" between the cases preclude the existence of a true conflict. Answer Brief ("AB") at 12. They essentially reiterate the Second District's rationale in its attempt to distinguish *Perez* on its facts. *See id.* at 13-14. We laid bare the flaw in this attempt in our jurisdictional brief, which we presume was persuasive, and respectfully direct the Court to that discussion. *See* Petitioner's Brief on Jurisdiction ("Juris. Br.") at 8-9. There is nothing new in KLG's argument about the facts of this case versus the facts in *Perez* that detracts from the legitimate conflict that exists between the Second and Fourth Districts, on the one hand, and the Third District on the other.

KLG also argues that this Court's decision in *Wiggins* "eliminated" this conflict because the Court "already has considered the point of law alleged as conflict" here. AB at 15. However, nothing in the *Wiggins* opinion evidences that the Court considered the question of whether § 768.26, Fla. Stat. applies at all to a pre-suit settlement. The Court plainly focused on competing methodologies for

the allocation of fees between separate counsel involved in a wrongful death case. The opinion merely takes it as a given that § 768.26 applied.

In fairness, the brief from *Wiggins* that KLG has filed does indicate that *Wiggins* involved a settlement which occurred after the initiation of a medical malpractice pre-suit proceeding, but before a wrongful death action was filed. This was news to us, since the published opinions in *Wiggins* seem to indicate otherwise. *See* Appellant's Brief on the Merits ("Br.") at 26 n.13; Juris. Br. at 10 n.4. Nonetheless, this new information only strengthens our conviction that the Court in *Wiggins* did not focus on the narrow question presented here. The brief KLG attaches emphasized the need for a fee-allocation rule which would not double tax the survivors. That is plainly the problem which the Court addressed in *Wiggins*. Given the absence in the *Wiggins* opinion of any analysis of § 768.26 and whether it applies to a pre-suit settlement, the most that could be inferred from the opinion is that the Court *assumed* that it does apply. The Court certainly did not address the issue. Thus, *Wiggins* does not stand as an obstacle to this Court's resolution of that issue squarely presented here.

In any event, the Second District's misapplication of *Wiggins* provides an independent basis of jurisdiction, *see Engle v. Liggett Group, Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006) (citing Fla. Const. art. V, § 3(b)(3)), and the Court has

discretion "to consider other issues properly raised and argued," *Price v. State*, 995 So. 2d 401, 406 (Fla. 2008). Thus, the Court has jurisdiction to consider both the § 768.26 issue and the question of the proper interpretation of *Wiggins*' fee-allocation rule.

II. SECTION 768.26 ONLY APPLIES ONCE SUIT HAS BEEN FILED

KLG presents no meaningful response to the textual analysis presented in our Brief. The statute is subject to only one reasonable interpretation, and KLG's scatter-shot policy arguments raise misguided and exaggerated concerns that do not warrant judicial rewriting of the statute.

A. The Text and Context of § 768.26 Demonstrate That the Section Only Governs Filed Actions

KLG's response to our textual analysis of § 768.26 is unpersuasive. They appear to premise their argument on what they characterize as the absence of any "language [in the Act] limiting its application" to filed lawsuits. AB at 18-19. That perspective requires a blinkered view of the Act, which contains multiple references that plainly contemplate the existence of a filed lawsuit. *See, e.g.*, § 768.20 ("The action shall be brought by the decedent's personal representative . . ."); § 768.25 ("[w]hile an action under this act is pending," court approval is required for contested settlements). The provision at issue, § 768.26, itself

classifies attorney's fees it as an "expense[] of litigation." Given this statutory language, the appropriate focus is not on what the Act does *not* say, but upon the meaning of what is *does* say.

In response to our textual analysis (Br. at 26-30), and that of the Third District, KLG offers several responses. It contends that the Act draws "express distinctions between 'actions' and 'pending actions.'" AB at 18. This distinction, however, does not exist. The phrase "pending actions" does not appear in the Act. The phrase KLG references in § 768.20, "any such action pending at the time of death," refers to an "action for . . . personal injury," not a wrongful death action. And the phrase "[w]hile an action under this act is pending" in § 768.25 only underscores that the Act does not purport to reach settlements that take place prior to the filing of a wrongful death action.

KLG derides our reliance on the plain meaning of the statutory terms "litigation" and "action," and argues that they should be viewed in context. AB at 23. We agree that the statutory context is relevant, *Miele v. Prudential-Bache Securities, Inc.*, 656 So. 2d 470, 472 (Fla. 1995), and our interpretation of § 768.26 expressly invoked the context of that provision in the Act. *See* Br. at 27-29. That context reinforces the conclusion that the attorney's fee provision applies only to a filed wrongful death "action." *See id.* at 27-28. KLG implies that

consideration of the statutory "context" would call for "defin[ing] the term 'litigation' to include proceedings other than those involving the filing of a complaint with a court." AB at 24. Yet they reference no statutory provisions that supposedly furnish that "context."[1] There are none that would support that reading of the statute.[2]

The attorney's-fee provision addresses fees incurred in "litigation" and is part of a statute that creates a wrongful death "[r]ight of action," § 768.19, and sets

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[1/] Instead, KLG points to two courts' holdings that "litigation" or "action," in other contexts, can encompass arbitration proceedings. AB at 24 (citing *Par Four, Inc. v. Gottlieb*, 602 So. 2d 689, 690 (Fla. 4th DCA 1992) (contract provision); *Consol. Labor Union Trust v. Clark*, 498 So. 2d 547 (Fla. 3rd DCA 1986) (ERISA)). These cases are of dubious value since this Court subsequently held in *Miele*, 656 So. 2d at 472, that the reference to a "civil action" in § 768.73, Fla. Stat. (1991) did not encompass arbitration. Whether or not an "action" includes arbitration is really beside the point, since this case does not involve arbitration, but only pre-suit mediation. Notably, this Court reached its holding in *Miele* over a dissent arguing for a broader definition of a "civil action" because "mediation and arbitration are simply alternative methods of addressing civil disputes." *Miele*, 656 So. 2d at 474 (Overton, J., dissenting).

[2/] KLG invokes § 768.17, which reminds that the Act is "remedial and shall be liberally construed," to argue for a interpretation of "litigation" that goes beyond its "simple dictionary definition[]." AB at 23. Attorneys, however, are not the constituency whom the Legislature had in mind when it emphasized the remedial nature of the Act; it was the survivors of the decedent for whose benefit the comprehensive scheme of the Act was created. *See* § 768.17. In fact, because the aspect of § 768.26 which confers on the counsel for the personal representative the entitlement to a fee on all survivors' recoveries alters the common law (Br. at 26), that aspect of the statute must be narrowly construed. *See, e.g., Allstate Ins. Co. v. Rudnick*, 761 So. 2d 289, 293 (Fla. 2000).

forth rules governing that action. This statutory context confirms the plain meaning of the attorney's fee provision: that the provision applies only once a wrongful death action has been filed. *Cf. Miele*, 656 So. 2d 470 (looking to definition of "action" in § 768.73, and fact that other provisions of that statute contemplated proceedings in court, to hold that statute did not encompass arbitration).

In light of this unambiguous statutory meaning, the numerous policy arguments KLG advances for its preferred reading of the statute are irrelevant. The Legislature has clearly delineated when § 768.26 applies. Still, for good measure, we point out in the section which follows that KLG's parade of horribles is mistaken and exaggerated.

B. Applying § 768.26 to Filed Actions Is Workable and Equitable

KLG asserts that *Perez*'s reading of § 768.26 is inconsistent with the personal representative's "power and right to act with respect to a wrongful death claim" (AB at 22) and that it would create "uncertainty" concerning that power (*id.* at 29). This argument confuses the personal representative's power with the collateral issue at hand, the scope of the attorney's right to collect a fee. How § 768.26 is interpreted has no bearing on the powers of the personal representative, which are enshrined separately elsewhere. *See* §§ 733.608, 733.612. Those

powers include the right to settle claims, § 733.612(24), compromise the decedent's contracts (*e.g.*, insurance policies), § 733.612(2), and hire counsel, § 733.612(19). This case, therefore, does not implicate the personal representative's authority to settle a wrongful death claim prior to the filing a lawsuit. *See* AB at 28 (asserting otherwise).[3]

To be sure, "the Personal Representative and its counsel must have the ability to take necessary pre-suit actions to fulfill those powers and duties" (AB at 22), but limiting the attorney to compensation from the recoveries of the estate and his survivor client(s) in the event of a pre-suit settlement in no way restricts the client's freedom to act during this period of time. Thus, there is really no question that the personal representative and its counsel have the authority to comply with the various pre-suit requirements imposed by different statutory regimes KLG

[3/] The power to settle pre-suit emanates from the Probate Code (ch. 733), not the Wrongful Death Act. While it may be true that "only the personal representative is authorized to bind the estate and the survivors in the pre-suit settlement of a wrongful death claim," *Infinity Ins. Co. v. Berges*, 806 So. 2d 504 (Fla. 2nd DCA 2001), *quashed*, *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004), that does not mean, as KLG contends, that "the Florida Wrongful Death applies in pre-suit mediation." AB at 18. Nor should this statement be mistaken to mean that individual survivors lack the capacity to settle their own wrongful death claims pre-suit. *Cf. Pearson v. DeLamerens*, 656 So. 2d 217, 220 (Fla. 3rd DCA 1995) (survivor may settle own claim, even after wrongful death action filed, "so long as the partial settlement does not prejudice the claims of any nonsettling survivors").

lists, such as in medical malpractice cases, Federal Tort Claims Act cases and the like.

The real issue to KLG seems to be the expense of such pre-suit procedures. *See* AB at 26-27. In such cases, where the a personal representative is also the only survivor, the attorney taking the case fully anticipates the burden of those costs at the outset. In such cases involving multiple survivors, if the attorney signs up a number of survivors, the risk-reward ratio improves. Even where the personal representative's counsel does not represent all of the survivors, these up-front costs are common liability costs that are likely to be shared by all survivors' counsel.[4] To be sure, the attorney's *ex ante* calculation of the risk-reward ratio of accepting a case might be simpler if the only fee variable were whether he had a fee agreement with the personal representative, but that cannot and should not drive the interpretation of the statute.

In arguing that counsel for the personal representative "can obtain fees from the recovery only if the lawsuit is filed" (AB at 29), KLG neglects the most obvious and traditional mechanism for the recovery of attorney's fees: the fee contract. The standard contingency fee agreement permits a fee in the event of a

[4/] Even in the tough situation involving a case with small damages to the estate and a non-survivor personal representative (AB at 32 n.10), the attorney may still

pre-suit recovery. *See* R. Reg. Fla. Bar 4-1.5(f)(4)(B)(i)(a). We do not see how this commonplace arrangement "limits the ability of the Personal Representative to obtain counsel." AB at 32. Indeed, under the common-fund rule, an attorney whose work creates a common fund benefitting multiple parties may only recover a fee from parties with whom he does not have a fee agreement if, among other things, litigation was commenced. *Perez*, 662 So. 2d at 364. In other words, under the common law, an attorney who brokers a pre-suit settlement is only entitled to a fee based on his own clients' recovery.

KLG makes conflicting predictions on the impact the literal interpretation of the statute would have on pre-suit settlements. On the one hand, they argue that allowing aggregate fees only after suit has been filed will encourage settlement by survivors. KLG predicts that competing survivors "will race" to enter into settlements "to obtain preferential treatment" and that tortfeasors and their insurers will be besieged by "a multiplicity of pre-suit claims." AB at 29. Yet individual survivors already have the right to settle their claims individually, "so long as the partial settlement does not prejudice the claims of any nonsettling survivors." *Pearson v. DeLamerens*, 656 So. 2d 217, 220 (Fla. 3rd DCA 1995). Encouraging pre-trial settlements would hardly be a drawback. *See Berges*, 896 So. 2d at 675.

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be able to sweeten the pot to make the outlay worthwhile by signing a survivor as

On the other hand, KLG contends that a literal interpretation of the statute would discourage settlements. They predict (AB at 29) that counsel for the personal representative will be incentivized to file suit as quickly as possible to lock in the benefit of the recovery-aggregation rule of § 768.26. This prediction is misguided and exaggerated. It is misguided because it presumes a background fee-allocation rule which insulates the personal representative's attorney from having to share much of the fee with the survivors' separate counsel. However, it that rule were that survivors' counsel are entitled to a reasonable fee for their services (as we interpret *Wiggins*), the rule would counteract any perverse incentive for premature filing.

KLG's prediction is exaggerated because the incentive would only apply in a small subset of cases.[5] And within that subset, the personal representative's counsel's own self-interest may dictate a more deliberate approach. Cases which settle pre-suit tend to involve clear-cut liability and/or the limited asset of an

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a client as well.

[5] It would not inhere in the vast majority of scenarios: cases involving a single survivor who is also the personal representative; those where a parent is killed and the attorney represents the surviving spouse who is also the natural guardian of the surviving minor children; those with multiple adult survivors who agree upon the same lawyer and waive any potential conflict of interest; and those where different survivors hire their own attorneys, but are able to work out a fee-sharing arrangement.

insurance policy. Filing suit prematurely may actually be counter-productive toward reaching a settlement. Some defendants wish to avoid the adverse publicity of a lawsuit and many become less flexible in negotiating when placed in an adversarial posture, whether as a result of human nature or corporate policy. Moreover, a lawyer is duty-bound to explore the possibility of pre-suit settlement if it will benefit the client.

Accordingly, construing § 768.26 in accordance with its natural meaning will not produce the "ridiculous" results KLG prophesies.

III. THE COURT SHOULD CLARIFY THAT ITS FEE-ALLOCATION RULE ENSURES SURVIVORS' SEPARATE COUNSEL A REASONABLE FEE

A stronger case for the need for clarification of the *Wiggins* fee-allocation rule could not be made than by the fact that KLG can read *Wiggins* to be consistent with its view that "a survivor's 'right' to retain counsel" in a wrongful death case exists "only if that survivor had competing claims causing a conflict of interest preventing counsel for the Personal Representative" from representing him. AB at 35. This contention would stand the Act on its head, since survivors remain the real parties in interest in wrongful death litigation, notwithstanding the

Act's conferral of sole plaintiff status upon the personal representative. *See, e.g.*, *Wiggins v. Estate of Wright*, 786 So. 2d 1247, 1250 (Fla. 5th DCA 2001) (Sawaya, J., dissenting), *quashed*, 850 So. 2d 444 (Fla. 2003). When this Court stated in *Wiggins* that "survivors are still entitled to be represented by counsel of their choice," 850 So. 2d at 449, it did not condition that "entitle[ment]" to circumstances in which conflicts arise.

Similarly, when discussing the scope of the work upon which a survivor's counsel may collect a fee, the Court did not limit it to the portion of the case in which the personal representative's counsel had a conflict of interest. Br. at 38. It is this portion of *Wiggins* that requires clarification. While the Court's statement that the survivors' counsel are entitled to be "reasonably compensate[d] . . . for their services in representing those survivors in the proceedings," the cross-reference to "the *Catapane* method of allocating fees," 850 So. 2d at 450, breeds confusion. KLG takes the Court's statement, "[w]hen survivors have competing claims," *id.*, quite literally, as a mandatory precondition limiting the scope of the equitable rule the Court announced. *See* AB at 33. According to KLG, the trigger which activates a survivor's counsel's right to any compensation is an actual conflict of interest. *Id.* at 34-35. We read *Wiggins* differently. We understand the Court to have acknowledged the "potential for conflict" inherent in many

wrongful death cases involving separately represented survivors, *Wiggins*, 850 So. 2d at 449, and to have adopted a more flexible rule by which all counsel are "reasonably compensate[d]" for their services, *id.* at 450, irrespective of whether an actual conflict of interest arose in the case. *See Garces v. Montano*, 947 So. 2d 499, 503-04 (Fla. 3rd DCA 2006) (also interpreting *Wiggins* this way).

In response to our point that the Second District's restrictive reading of *Wiggins* would imperil a survivor's ability to retain independent counsel (Br. at 42), KLG argues that an attorney can discern *ex ante* whether the circumstances are such that a conflict of interest will arise and the attorney will have an opportunity to get paid. AB at 36. That is unrealistic. The twists and turns in litigation can rarely be seen from the outset of the case, and it is impossible to predict whether a simmering lack of trust between survivors will boil over into an actual conflict. The Wagner firm reasonably viewed the tension between the Elmore brothers as a conflict waiting to happen, but the probate court and the Second District disagreed that any conflict actually arose and, under their interpretation of *Wiggins*, denied the firm any fee.

KLG's approach also fails to account for the situation, present in this case, where a survivor simply does not trust the personal representative (and by extension, his chosen counsel) and therefore wants separate representation. *See*

R4:649-684 at 41. While the Act mandates a single lawsuit, by a single plaintiff, nothing in the Act disentitles a survivor from hiring separate counsel within that single case. If that attorney collaborates with the counsel for the personal representative in a joint effort to maximize the recovery from the defendants (or putative defendants in an unfiled case), even if no actual conflict of interest arises in the process, it is unclear why that attorney should not be fairly compensated for his work. KLG does not say what authority would entitle the attorney for the personal representative to reap a windfall from the other lawyer's work.[6]

KLG exaggerates that compensating survivors' counsel based on their work as part of a team rather than solely out of the conflicted portion of the case would "require separate representation in *every* case." AB at 37. That is not so. There are plenty of cases where "all of the survivors have a commonality of interests," *Wiggins*, 850 So. 2d at 448, and feel comfortable being represented by the personal representative's attorney. Even when conflicts do arise, survivors can waive those conflicts if they are happy with the personal representative's counsel.

6/ KLG's contention that the Wagner firm could have obtained some compensation through the Probate Code for successful challenges to the administration of the estate (AB at 42) is beside the point. Such payments would not address the key issue of the Wagner firm's collaboration in helping to settle the prospective wrongful death claims for $1.23 million.

As this discussion demonstrates, the *Wiggins* opinion has not resolved the uncertainty over attorneys' entitlements to fees in wrongful death cases. This uncertainty continues to foster satellite litigation like the present case. The Court should take this opportunity to clarify the fee-allocation rule it adopted in *Wiggins*.

IV. EVEN IF *WIGGINS* REQUIRES AN ACTUAL CONFLICT OF INTEREST, THERE WAS ONE IN THIS CASE

KLG's factual defense of the Second District's ruling relies on the assertion that "there was no evidence of any competing claims by the survivors." AB at 46. KLG invokes the principle of deference to a fact-finder who has heard live testimony and made credibility determinations. However, the question of whether or not a conflict existed between the Elmore brothers depends not upon the testimony of witnesses but upon documents in black and white. Specifically, Mr. Brennan penned a letter on behalf of Larry Elmore in August 2005 which objected to the "distribution apportionment" of the $200,000 settlement with the liability insurer. R3:471. This letter clearly evidences a "competing claim" between the brothers concerning apportionment of settlement proceeds, even though Larry subsequently agreed to take an even one-third share.[7] From that point forward,

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[7] This letter also belies KLG's unsavory attempt to characterize the Wagner firm's position as an "attempt[] to retroactively insert conflict into the case." AB at 47. Estate counsel Whigham's contemporaneous interpretation of the August

KLG was on notice of an actual conflict of interest between Larry and Gary Elmore. Even if the Wagner firm's entitlement to a fee consists only of the work it did in the area in which KLG had a conflict, it still should have been awarded a fee for that work from that point forward. The trial court's denial of any fee at all to the Wagner firm cannot be supported by this record.

CONCLUSION

The Court should quash the decision of the Second District, clarify the law in this area, and award the Wagner firm the fee to which it is legally and equitably entitled.

2005 letter as an objection to "the proposed three-way apportionment of the current proceeds" (R3:472) further undermines KLG's spin on the letter.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 9.210(a)(2)

I hereby certify that the type style utilized in this brief is 14 point Times New Roman proportionally spaced.

s/Stephen F. Rosenthal
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 4th day of May, 2009, to: Steven L. Hearn, Esquire, 625 East Twiggs Street, Suite 102, Post Office Box 1192, Tampa, FL 33601-1192, Attorneys for Respondent; David L. Whigham, Esq., Whigham Law Group, P.A., 220 E. Madison Street, Suite 1140, Tampa, FL 33602; and Weldon Earl Brennan, Esq., Brennan & Kavouklis, 115 S. Newport Avenue, Tampa, FL 33606.

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