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 BRIEF ON THE MERITS

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I. STATEMENT OF THE CASE AND FACTS

Wagner, Vaughan, McLaughlin & Brennan, P.A. ("the Wagner firm") appeals a probate court order denying it any fee for its representation of two of the three survivors of Mr. and Mrs. Robert Earl Elmore, the unfortunate victims of a head-on collision which occurred when a driver crossed the median into the path of their oncoming vehicle on June 27, 2005.[1] The deaths of Mr. and Mrs. Elmore left three adult brothers, Robert, Gary and Larry, as the survivors. Gary Elmore retained the Kennedy Law Group ("KLG"), Respondent here, and was appointed sole personal representative of his parents' estates. Larry and Robert Elmore retained the Wagner firm. No suit was ever filed, and the survivors' potential claims were resolved at a pre-suit mediation for $1.23 million. The probate court awarded the entire attorney's fee for all three brothers' recoveries to KLG. The Wagner firm got nothing.

The facts pertinent to the primary issue raised in this appeal -- whether § 768.26, Fla. Stat. (1972) applies to a pre-suit settlement -- can be stated very briefly. No suit was ever filed in this case.[2] The lawyers for each of the survivors

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[1] Mrs. Elmore was killed in the collision; Mr. Elmore died a week later from his injuries. R2:384-85.

[2] *See* Tr. at 43, 110, 227. "Tr." refers to the consecutively paginated transcript of the January 11, 2007 attorneys' fee hearing appearing at Volumes 5-6 of the record. Citations to the record are designated "R[volume]:[pages]."

had written contingency fee agreements with their clients. Larry Elmore hired the Wagner firm on June 28, 2005, the day after the accident. R3:479-482; R4:541-628 at 5. Gary Elmore signed up with KLG on the same day. Tr. at 54-55, 63-64. Robert Elmore sought counsel from Weldon ("Web") Brennan of the Wagner firm as early as September 2005 (R4:541-628 at 6, 62; Tr. at 161, 205, 267, 270), but he waited nine months until the morning of the mediation, to sign a fee agreement. R3:483-487. At the pre-suit mediation which produced the $1.23 million settlement, Mr. Brennan represented Larry and Robert, and Jon Malcowksi of KLG represented Gary. R2:371-380, ¶ 20; Tr. at 105.

If the Court resolves the first issue on appeal in the Wagner firm's favor, it need not consider the following additional facts, which relate to the third issue on appeal, concerning the conflict between the Elmore brothers.

A. Bad Blood Between the Brothers

Well before the accident, Gary Elmore had become estranged from his brothers. By the time of the accident, Robert and Gary had not been speaking to each other for seven to eight years. Tr. at 279. Robert "didn't trust Gary" because he believed Gary had tried to kill him by trying to run him over with a car. Tr. at 267, 272. Larry wasn't fond of Gary either; he still harbored resentment against Gary for refusing to apologize to him for destroying his car thirty years

beforehand. Tr. at 254-55, 264. When the brothers were forced together by the tragic circumstances of the accident, the old fault lines between Gary and his brothers reopened.

On the night of the accident, Gary and Larry met at the hospital where their father was still in the intensive care unit, clinging to his life. Larry testified that when they arrived at the hospital, "the first thing Gary wanted to do immediately" was to "shut off" their father's life support. Tr. at 255. Larry disagreed strenuously, as did the physicians caring for Mr. Elmore. R4:629-684 at 8-9, 29-30.[3] According to Larry, even after the chief trauma surgeon told Gary that it would be premature to discontinue life support, Gary argued with the doctor in an effort to have the "plug" pulled on his father. Tr. at 256. The surgeon refused to do so absent proof that Mr. Elmore had signed a "do not resuscitate" order. *Id*. Larry testified that Gary lied to the chief trauma surgeon that other doctors had examined their father and told them that he is "brain dead" when, in fact, no such tests had actually been done. *Id.* Mr. Elmore's condition never did improve, though, and he passed away within a week. Gary's behavior at their father's death bed upset Larry (R4:629-684 at 30) and truly outraged Robert, who felt that "Gary

[3] This citation is to Larry's deposition transcript, which was taken for purposes of the fee hearing. It was admitted in evidence by stipulation of the parties at the fee hearing. So was the deposition of Robert Elmore. *See* Tr. at 139.

should be tried for murder for murdering my father." R4:541-628 at 68; *see also id*. at 65.

Robert never came to the hospital because, he testified, Gary "banned" him from going there. Tr. at 266. Later, he also refused to tell Robert where the funeral was and threatened to have him arrested if he showed up. Tr. at 177, 258, 266.

The day after the accident, Larry retained Mr. Brennan of the Wagner firm to represent him in a potential wrongful death action. *Id*. at 5; R3:479-482 (fee agreement). Mr. Brennan had come recommended by Mr. and Mrs. Elmore's family business attorney. R4:649-684 at 8. Larry had urged Gary to sign on with Mr. Brennan, but Gary chose to hire separate counsel. *Id*. On the same day, Gary signed the first of four fee agreements with KLG. Tr. at 54-55, 63-64.[4]

In their wills, Mr. and Mrs. Elmore had named a family friend as both executor and trustee of a pour-over trust. *See* R1:32-111, Ex. A. They had named Gary as the first alternate executor and trustee. David Whigham, a probate attorney whom KLG associated to handle the estate and whom Gary retained (Tr.

[4] In none of those agreements did Gary seek representation in his individual capacity, only as attorney in fact or legal guardian of his parents and, later, as personal representative of his parents' estates. *Id.* at 64-68. Mr. Malcowski testified, however, that it was his intent to represent Gary as a survivor as well. Tr. at 73.

at 20-21), contacted the family friend and ascertained that he did not wish to serve as executor. R1:135-136. After facilitating his withdrawal as executor, Mr. Malcowski filed papers with the probate court in July 2005 requesting that Gary be appointed sole personal representative.

In connection with that effort, Gary approached each of his brothers to procure their signatures on the forms approving his appointment. Each reluctantly signed. According to Larry, he signed "under duress" because Gary told him that "if you don't sign them, you won't get no money. . . . We have to go through my attorney[.]" Tr. at 251. Robert recounted a similar exchange with Gary. He received the forms in the mail but "refused to sign" them. Tr. at 266. Gary then repeatedly called him, telling Robert that he needed to sign them. *Id.* Robert protested, "I'm not signing anything you hand to me." *Id.* But when Gary told him "it's either you sign it or you don't get a dime," Robert ultimately relented. *Id.* On August 3, 2005, the probate court appointed Gary as the sole personal representative of Mr. and Mrs. Elmore's estates. Tr. at 10-11; R1:10-13; R1:224-227.

B. Conflicts Surrounding the Estate's Settlement With the Tortfeasor's Liability Insurer in August 2005

In July 2005, KLG ascertained that the tortfeasor carried $200,000 in bodily injury liability insurance. R1:22-31, ¶¶ 2-3. Mr. Malcowski asked Gary to speak to his brothers to secure their agreement to make a demand for the policy limits. *Id.* ¶ 1. Mr. Malcowski did not speak to Robert or Larry himself. *See id.* Gary reported back that his brothers were in agreement. *Id.* & Ex. 1 (Gary Elmore Aff.), ¶¶ 6-7. Mr. Malcowski thereafter sent a demand letter in late July, and a week later the insurance company offered to tender the $200,000 policy limit. *Id.* ¶¶ 3-4. On August 15, 2005, KLG distributed the net proceeds of the settlement, $133,333.33, to Gary. *Id.* ¶ 6 & Ex. A, ¶ 9. The Elmore trust provided that excess estate assets were to be shared by the three brothers equally. R1:32-111, Ex. A at 17 (¶ 7.09). Gary then obtained two cashier's checks in the amount of $44,444.66 each, representing a third of the net proceeds, and distributed them to his brothers. *Id.*, Ex. A, ¶ 11.

Robert thought it was "wrong" that his check had been drawn on an account in Gary's name, so at Larry's recommendation he contacted Mr. Brennan and sought legal representation. R4:541-628 at 6; Tr. at 267, 270. Although he held off signing a fee agreement for another nine months, Robert testified that he considered Mr. Brennan to have been acting as his lawyer since roughly August 2005. *See* R4:541-628 at 6, 62. Mr. Brennan provided him advice and information

from that point forward. Tr. at 161, 205, 270. Robert finally signed a fee agreement with the Wagner firm on the morning of the mediation. *See* R3:483-487.

On August 17, 2005, Mr. Brennan, who had not been given any notice of and was thus unaware of the settlement, wrote to Mr. Malcowski to inform him that he represented Larry Elmore and to propose a fee-sharing arrangement between their law firms for the anticipated wrongful death action. R3:488. Mr. Brennan proposed that the two firms participate equally in handling the litigation and split the attorney's fees earned by whatever recovery could be obtained for Gary and Larry Elmore. *Id*. When he spoke to Mr. Malcowski later that day, Mr. Brennan learned that KLG had already consummated a settlement with the liability insurer on behalf of the estates and that the proceeds were in the process of being disbursed to the Elmore brothers. Tr. at 164; R3:471.

Two days later, Mr. Brennan wrote Messrs. Malcowski and Whigham to inform them that Larry "*does not approve of the distribution apportionment.*" R3:471(emphasis added); Tr. at 93. Mr. Brennan added:

> By copy of this letter to John D. Malcowski, I am requesting that he immediately stop payment on the checks and immediately provide an explanation in writing as well and I am demanding that he take no further action in pursuit of this claim until these matters are settled or until a court of law determines the appropriate course.

R3:471. Larry Elmore was copied on the letter. Mr. Brennan spoke to Mr. Whigham after sending this letter and made clear to him his strenuous objection to the unilateral manner in which the settlement had proceeded. Tr. at 168-69. Mr. Whigham then wrote his co-counsel, Mr. Malcowski, on August 23, 2005 to inform him of the significance of Larry Elmore's objection:

> I was recently contacted by Weldon E. Brennan, Esq., who represents Larry Elmore, in regards to the wrongful death of Thelma and Robert Elmore. *Mr. Brennan is not in agreement with the proposed three-way apportionment of the current proceeds from the action*. Absent an agreement among all survivors, any apportionment of survivorship proceeds must be approved by the Probate Court.
>
> It is my understanding that you have already disbursed the net proceeds to the survivors. It is imperative that the disbursement be undone to the greatest extent possible pending an apportionment hearing before the court.

R3:472 (emphasis added); Tr. at 94.

After a week passed without response from Mr. Malcowski, Mr. Brennan faxed him another letter, with a copy to Larry, in which he reiterated Larry's objection to the disbursement. Tr. at 95, 168; R3:473. The letter stated, in part:

> . . . [T]hese funds must be placed in the probate court and notice be given to the survivors so that they can timely object to the disbursement and have a fair and adequate resolution as to the amounts of the disbursement. Your actions in this matter have been improper . . . . *Rest assured, my client does not agree with the disbursement in the manner in which you made it* and moreover, you are not entitled to give the check to the personal representative and ask the personal representative to split the money between the

> survivors. . . . [W]e object to your unilateral actions without the benefit of our input. You have known for quite some time that Larry Elmore was represented by counsel and despite that fact, *you have taken actions to his detriment*. Please cease and desist immediately in that regard.

R3:473 (emphasis added); *see* Tr. at 168.

C. Larry's Effort to Disqualify Gary As Personal Representative

On the same day, Mr. Brennan filed a petition in the probate court on behalf of Larry to remove Gary as personal representative and to compel the return of the settlement proceeds to Mr. Whigham's trust account. *See* R1:124-134. Mr. Brennan sought an "emergency hearing" on the petition. *Id*. (cover letter). In an amended petition filed several days later, Mr. Brennan served notice of the specific improprieties that Larry was accusing Gary of having committed. R1:32-111. Those included an allegation that Gary had removed property from their parents' house without an accounting to his brothers (*id*. ¶¶ 1, 5), sold the parents' organ for $500 cash and kept the money himself (*id*. ¶ 5), sold his father's car to Larry for $2,500 but forced Larry to write a check to Gary rather than to the estate (*id*. ¶ 6), threatened Larry that if he disagreed with any of Gary's actions that Larry would be entitled to nothing under the will (*id*. ¶ 7), and presented a document to Larry to sign away his right to one-third of the value of his parents' home and threatened

that if Larry did not sign it he would be thrown out of the estate (*id*. ¶ 8). The petition also stated that Larry had found the original will and trust of Mr. and Mrs. Elmore in the trash in the garage of his parents' home and alleged that Gary had thrown it away in a ploy to become the personal representative. *Id*. ¶¶ 2-4.[5]

On August 31, 2005, the probate court held a telephonic status conference but denied Larry's petition because it was procedurally deficient. *See* Tr. at 25, 202. After the conference, in defense of the propriety of his handling of the estate, Mr. Whigham wrote the probate court a letter in which he divulged for the first time (to Mr. Brennan) the actions that were taken to relieve Mr. and Mrs. Elmore's friend as designated executor of the wills, the process that led to Gary Elmore's appointment as personal representative, and the reason that the estate was opened with a copy of the will rather than the original. R1:135-136. The Wagner firm did not renew the petition to disqualify Gary as personal representative.

D. The Wagner Firm's Objections to KLG's Handling of the Estates' Settlement

Mr. Brennan continued to place KLG on notice that concerns remained about their failure to satisfy all of their costs out of the estates' settlement proceeds

[5] The Wagner firm did not assert any claim to an entitlement to attorney's fees for the $200,000 estate settlement, which was accomplished prior to their involvement. R3:397-463 at 7. KLG took a fee of $66,000 from the estate settlement. R2:371-380, ¶ 13.

and their failure to hold back money in escrow in the estates to pay any liens that may be asserted by the hospital for Mr. Elmore's treatment. As Mr. Brennan had alerted KLG in the petition, the hospital would "undoubtedly" be asserting liens for medical care of Mr. Elmore, and the failure to retain funds from the settlement to cover those liens "potentially expos[ed] the survivors . . . to personal liability." R1:124-134, ¶ 15.

As it turned out, Mr. Elmore's health insurer, Humana, eventually did assert a lien against the estate for $18,996.06 in payments it made for care Mr. Elmore received at Tampa General Hospital. *See* R3:497-501. Because Messrs. Malcowski and Whigham had not retained funds from the settlement in their trust accounts for that eventuality, they subsequently sought to apply the lien against a second settlement reached eight months later in May 2006 with Mr. and Mrs. Elmore's uninsured motorist ("UM") carrier. That settlement however was to be allocated solely to the survivors' claims, not to the estates. *See* R3:492-496.[6]

KLG conceded that the firm had neglected to net out several thousand dollars of its costs associated with the $200,000 estates' settlement before distributing the proceeds. Tr. at 28 (stipulation). One such cost item was a $2,000

[6] Fortunately for the Elmore brothers, it later turned out that Humana had failed to assert its claim properly in the estate, so the probate court rejected it. *See* Tr. at 39.

bill to an economist named Fred Raffa, which was billed and paid by KLG on August 3, 2005, more than a week before the firm disbursed the net proceeds of the estate settlement. Tr. at 121. Even though those were estate costs, KLG sought to tax those costs against each of the Elmore brother's individual recoveries out of the May 2006 UM settlement. *See* R3:492-96 (closing statement listing $8,052.49 in costs). Mr. Brennan objected to KLG taxing those costs to his clients, but they did so anyway. *See* R2:371-380, ¶ 38(c). The probate court nonetheless later approved that taxation of costs. R1:197, ¶ E.

E. Conflicts Surrounding the $1.23 Million Settlement With the Uninsured Motorist Carrier

Mr. and Mrs. Elmore had carried a $2 million UM policy with the Hartford Insurance Company. At some point after the August 31, 2005 conference with the probate court on Larry's petition to disqualify Gary as personal representative, KLG sent a demand to Hartford for its UM insurance proceeds. R2:371-380, ¶ 19. In the Spring of 2006, still prior to any suit having been filed, Hartford requested a pre-suit mediation. *Id*. Mr. Brennan actively participated in this process. He and Mr. Malcowski, along with counsel for Hartford, jointly selected a mediator, and the mediation was scheduled for and took place on May 12, 2006. *See* R3:474-475.

Mr. Brennan attended the mediation, along with both Larry and Robert Elmore. Tr. at 105; R2:371-380, ¶ 20. Just before the mediation session began, Mr. Brennan met with Mr. Malcowski and Hartford's counsel to clarify that the upcoming settlement discussions would pertain to the survivors' claims only, not to the estate, because its interests had been fully satisfied by the August 2005 settlement. *See* Tr. at 102. The parties subsequently disagreed concerning whether any such conversation occurred inside or outside of mediation.[7] In any event, Mr. Whigham testified that the resulting $1.23 million settlement "only involve[d] the survivors," and the money was intended to go "outside of the estate." Tr. at 19, 43. *See also id.* at 199 (Mr. Brennan); R3:397-463 at 4.[8]

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[7] KLG took the position that it was part of and in furtherance of the mediation and thus covered by the confidentiality provisions of § 44.403, Fla. Stat. They objected to the Wagner firm's attempt at the subsequent fee hearing to elicit testimony from Mr. Malcowski concerning the substance of that conversation. Tr. at 103-105. The probate court agreed and refused to permit testimony on the subject. *See Id*. at 105, 142, 146.

Relatedly, KLG filed a memorandum in anticipation of the fee hearing which effectively waived the mediation privilege, *see* § 44.405(b), concerning the fact that at the mediation Mr. Brennan once again offered to enter into a fee-splitting agreement with KLG on a 50%-50% basis, but Mr. Malcowski again refused. R2:371-380, ¶ 20.

[8] Because Mr. and Mrs. Elmore died close in time to one another, their adult sons could bring claims for lost parental companionship, instruction, guidance and pain and suffering. *See* § 768.21(3), Fla. Stat.

The mediation produced a settlement of $1.23 million, but the allocation between the brothers remained unresolved until later that day. Mr. Brennan memorialized his clients' positions in a letter to Mr. Malcowski at the end of the day following the mediation. R3:466-467. He stated that "this case could have and should have settled for significantly more than $1.23 million dollars." *Id*. After "extensive discussions with [his] clients," however, Mr. Brennan informed Mr. Malcowski that Larry and Robert were "willing to approve the settlement . . . on the express condition that each receive one-third out of the total amount (or $410,000.00) out of the settlement proceeds." *Id*. He added that his clients believed "that their individual survival action would have been higher at trial than Gary's, due to the facts of this case," but that "they have instructed [Mr. Brennan] to agree to the distribution of one-third to each brother (or a total of $410,000.00 to each)." *Id*. Mr. Whigham admitted that upon receipt of a copy of this letter, he understood that Larry and Robert had offered to "compromise . . . their position" and "settle for a one-third share" "in order to obtain family harmony." Tr. at 30-31, 33, *see also id*. at 294 .

The testimony at the fee hearing confirmed that both Larry and Robert believed that their claims were worth more than Gary's, for a variety of reasons. Larry testified that he believed his claim was worth more than Gary's because he

still lived with his parents and had a very close relationship with them. Tr. at 252-54. He believed Gary's claim was worth less than his because Gary "wanted the life support shut off of [their] father" right after the accident. *Id*. at 255. Even though Larry "didn't agree with" the result of the mediation, he "reluctantly . . . agreed to it just so we could try to get a peaceful resolution between us three boys to keep our family life together, because at a time here when we need each other, we're so distant apart." R4:629-684 at 25-26; *see also* Tr. at 259-60.

Robert was dissatisfied with the value of the settlement. He felt that his parents "were worth a whole lot more" than the $1.23 million and that "Gary sold my mom and dad short on this" because he "was looking for a quick settlement." R4:541-628 at 40-41, 63-66. Robert testified that he believed that his claim had greater value than Gary's because he would always lend his parents money when they needed it to help them with their business, because Gary had a criminal record, and because Gary had prevented him from attending their parents' funeral. Tr. at 271-73. He told Gary this early on. Tr. at 282. Like his brother Larry, Robert decided to accept less than what he believed to be his fair share of the settlement proceeds out of a desire to obtain a harmonious resolution of the whole matter. R4:541-628 at 68; Tr. at 284.

Mr. Brennan's professional opinion was that the case was worth more than $1.23 million. R3:466-467. As he testified, it was a "100 percent defendant liability case"; the tortfeasor's "car ran across the median and hit the parents head on." Tr. at 195. He fully expected that if suit were brought, the defendant would admit liability and try the case only on damages. *Id*. Thus, he felt that the distinct factors bearing upon each brother's pain and suffering claim would loom large. Most importantly, he believed that discovery would inevitably reveal to the defendant significant negative evidence concerning Gary's claim: that he was a convicted felon, that he had sought to "pull the plug on his father over the strenuous objection of the treating surgeon," that Gary threatened to have Robert arrested if he attended their parents' funeral, and that Gary had "absconded with some of the assets of the estate and their family." Tr. at 175-177. Contrasted against this negative evidence about Gary, Mr. Brennan thought that Larry's claim in particular would benefit from the fact that he was "the baby of the family" and "the beloved one," and that he was the only brother who frequently visited the parents' grave sites. Tr. at 176-77.[9] Nonetheless, Mr. Brennan echoed Larry and

[9] In fairness, Robert's claim would likely have suffered a hit as well, at least relative to Larry's, because his mother had once obtained an injunction against him for domestic violence. Tr. at 213.

Robert: they agreed to "negotiate down" their competing claims because "[t]hey specifically wanted to have . . . harmony amongst the family." Tr. at 128.

After the mediation, Mr. Brennan requested that due to the brewing dispute over attorney's fees and to facilitate payment to the survivors, Hartford pay the settlement sum by issuing separate checks for each survivor and another check representing the amount of the disputed attorney's fees and costs. R3:397-463 at 4; Tr. at 147. As a condition to doing so, Hartford's counsel required that Larry and Robert also execute releases of their individual claims against it. R3:397-463 at 4 & Ex. D (thereto) at 1 (referencing the signed releases). They did so (R3:474-475), and Hartford ultimately issued separate checks. R3:397-463, Ex. D (letter of July 14, 2006); Tr. at 147.

In the weeks following the mediation, Mr. Brennan collaborated with Messrs. Whigham and Malcowski in drafting a Petition for Approval of Settlement in which they took pains to specify that the proceeds were intended for the survivors' claims, as opposed to the estates.[10] The petition also reflected the three

[10] Paragraph 4 of the version Mr. Malcowski initially drafted (Tr. at 81) said that "[t]he Personal Representative, on behalf of the survivors, reached a settlement with the tortfeasor in the amount of $1,230,000.00." R3:468-470. After Mr. Brennan's input, the Petition read instead: "A settlement was reached on behalf of the survivors with the tortfeasor in the amount of $1,230,000." *Id*. (showing edits); R3:514-15 (final version). The reference to "the tortfeasor" was an error. *See* R3:502-513 at 7-8.

brothers' ultimate positions that the equal division of the net proceeds of the settlement was "fair." R3:514-515, ¶ 6.

The probate court held a hearing to approve the settlement on June 14, 2006. *See* R3:502-513 (transcript). Mr. Brennan, Mr. Whigham and Mr. Malcowski were all in attendance. Mr. Brennan explained to the court that "this payment is paid directly to the survivors, it does not go through the estate"; it is "outside of the estate." *Id.* at 6-7. Mr. Malcowski responded that he was "not sure what [Mr. Brennan was] saying," and asserted that "the estate settled the case pursuant to the statute." *Id*. at 9; *see also* Tr. at 80. The court clarified: "All right. The point is that this money doesn't go through the estate. Nobody is disputing that." R3:502-513 at 9. There was no further objection. The probate court then issued an order approving the settlement and the equal apportionment of the net proceeds to each of the brothers. The order accurately reflected that there were no longer any "competing claims" to the proceeds. R3:516.

F. The Fee Hearing in the Probate Court

On January 11, 2007, the probate court conducted an evidentiary hearing on fees.[11] At the hearing, the court bifurcated the issues of entitlement and allocation and only took evidence on the former. Tr. at 8; 100-101. Much of the questioning

of witnesses centered upon whether or not Mr. Malcowski or Mr. Whigham knew that Larry and/or Robert had competing claims for greater than a one-third share of the UM settlement proceeds. The Wagner firm's counsel pointed to the various disagreements Mr. Brennan had voiced throughout the case in an effort to establish that Messrs. Malcowski and Whigham knew or should have known that Larry and Robert did, in fact, have discordant interests from their brother Gary. KLG's counsel sought to show that Larry and Robert's beliefs about the value of their claims were never communicated to them. They argued that those beliefs went "unexpressed" and existed only "in the minds of" Larry, Robert and Mr. Brennan. Tr. at 306.

At the conclusion of the hearing, the probate judge ruled from the bench in favor of KLG. Tr. at 317-318. She articulated her reasoning as follows:

> I don't find here that there are competing claims as I understand them in probate. I think the cases [the parties argued] are distinguishable, factually very distinguishable; and essentially, I think [KLG's counsel's] argument is correct because . . . you could have a personal representative appointed, go along . . . settle the case . . . and have the other survivors hire a lawyer and then just say we have a competing claim because there's always inherently family issues that surface when somebody dies, as we've heard here today unfortunately . . . .

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[11] Counsel for both sides then submitted memoranda concerning their positions. R3:397-463; R2:371-380; R2:384-85.

Id. She subsequently issued orders in each of the parent's estates awarding KLG "the entire contingency fee amount from the settlement proceeds in this matter" and finding that the Wagner firm "is not entitled to any portion of the contingency fee amount from the settlement proceeds in this matter." R1:197. She further approved all of KLG's costs. *Id.* Thus, KLG was awarded $395,666.67 in fees and $8,056.48 in costs from the proceeds of the UM settlement. *See* R3:492-496 (closing statements). The Wagner firm filed timely notices of appeal of the two orders, which the District Court of Appeal consolidated.

G. The District Court of Appeal's Decision

The Wagner firm raised the same three issues it asserts in this Court before the District Court of Appeal: that the issue of fee entitlement should have been decided by reference to contracts, since no wrongful death action was ever filed and § 768.26, Fla. Stat., was never triggered; that *Wiggins v. Estate of Wright*, 850 So. 2d 444 (Fla. 2003), ensures that a survivor's attorney should at least be paid for the fair value of his labor; and that the probate court abused its discretion in failing to acknowledge the existence of such a conflict in this case.

The District Court, in an opinion by Judge Stringer, rejected each of these arguments. It ruled that § 768.26 "applies to provide for fees incurred even in cases that settle before suit is filed." *Wagner, Vaughn, McLaughlin & Brennan,*

P.A. v. Kennedy Law Group, 987 So. 2d 741, 746 (Fla. 2nd DCA 2008). In so doing, it purported to distinguish the Third District's opinion in *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361 (Fla. 3rd DCA 1995), which had held that § 768.26 does not apply unless a wrongful death suit is filed. *See Wagner*, 987 So. 2d at 745. The District Court went on to construe *Wiggins* as limiting the survivor's attorney to the right to collect a fee for work done only on the portion of the case in which the attorney for the personal representative has a conflict of interest. *Id.* at 745-46 (relying on *In re Estate of Catapane*, 759 So. 2d 9, 12 n.1 (Fla. 4th DCA 2000)). It further found that although "there was certainly *potential* conflict of interest between Larry and Robert and KLG, an *actual* conflict never arose because Larry and Robert never objected to the amount or apportionment of the UM settlement." *Id*. at 746. It thus held that they "waived any objection to the settlement by accepting their equal shares." *Id*.

This Court subsequently accepted conflict jurisdiction.

II. ISSUES ON APPEAL

A. WHETHER § 768.29, FLA. STAT., APPLIES TO SETTLEMENTS REACHED IN A CASE WHERE NO SUIT IS EVER FILED

B. IF § 768.29, FLA. STAT., DOES APPLY, WHETHER *WIGGINS v. ESTATE OF WRIGHT* LIMITS THE FEE OF A SURVIVOR'S ATTORNEY TO THE VALUE OF WORK DONE IN JUST THE PORTION OF THE CASE IN WHICH

THE PERSONAL REPRESENTATIVE'S ATTORNEY HAS A CONFLICT OF INTEREST

C. IF *WIGGINS* IMPOSES SUCH A RESTRICTION, WHETHER THE PROBATE COURT ABUSED ITS DISCRETION IN DENYING THE EXISTENCE OF A CONFLICT

III. SUMMARY OF ARGUMENT

A. The probate court and the District Court of Appeal erred in allowing the attorney for the personal representative, KLG, to collect a fee on the recoveries of Larry and Robert Elmore, with whom KLG had no fee contracts, because no wrongful death action was ever filed. The text and context of the Wrongful Death Act confirm that it is the filing of a wrongful death action by the personal representative, on behalf of all of the survivors of the decedent, that activates the Act's broad attorney's fee provision, § 768.26, Fla. Stat., which then entitles the personal representative's attorney to collect a fee on *all* of the survivors' recoveries. *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361, 364 (Fla. 3rd DCA 1995) *rev. denied*, 666 So. 2d 143 (Fla. 1995). Because the $1.23 million settlement in this case was reached prior to the filing of any suit, the probate court lacked any legal basis to award fees from Larry and Robert's recoveries to KLG. Absent wrongful death litigation, the question of fees is governed by contract. Larry and Robert were the Wagner firm's clients; they had

valid fee agreements with the firm; and the firm represented them through the occurrence of the contingency in the contracts. Consequently, the Wagner firm earned its contractual fee on Larry and Robert's recoveries, but the probate court mistakenly awarded it entirely to KLG.

B. In the event that the Court determines that the Wrongful Death Act still regulates attorney's fees even absent the filing of a wrongful death action, it should still quash the District Court's affirmance of the probate court's rejection of the Wagner firm's fee petition and remand for an evidentiary hearing concerning the quantum of fees. Both lower courts erred in their interpretation of the equitable formula this Court established in *Wiggins v. Estate of Wright*, 850 So. 2d 450 (Fla. 2003), for assessing the amount of fees allocable to separate counsel for the personal representative and survivors in a wrongful death action. The lower courts misinterpreted *Wiggins* to restrict the right of the survivor's attorney to earn a fee solely on the portion of the case in which the personal representative's counsel has a conflict of interest with the survivor. The Court's formula was not that restrictive and was more accommodative of all attorneys' rights to be fairly compensated for their labor. Specifically, it prescribed an assessment of the relative value of the "work" of the attorneys to provide them "reasonabl[e] compensat[ion] . . . for their services in representing those survivors." *Wiggins*, 850 So. 2d at 450. The probate

court failed to undertake that assessment, irrespective of its view of whether an actual conflict of interest arose. The Court should clarify how *Wiggins* should be read.

C. It so happens that an actual conflict of interest did arise between the Elmore brothers, and even if this Court were to construe *Wiggins* as narrowly as the District Court did, a quashal and remand would still be required to determine the amount of fees the Wagner firm should have been awarded for its efforts in representing Larry and Robert Elmore. The probate court awarded the firm no fee at all since it believed that no actual conflict of interest arose. The District Court affirmed because it ruled that Larry and Robert Elmore "waived" the potential conflict of interest by abandoning efforts to disqualify Gary as personal representative and agreeing to accept an equal division of the $1.23 million settlement. However, a survivor's conduct after a conflict of interest manifests itself does not erase the fact that the conflict arose, and even under a restrictive rule allowing for a survivor's attorney to recover a fee for just the conflicted portion of the proceedings, the Wagner firm should not have been deprived of a fee for its labor just because it helped its clients avoid contentious intra-family litigation in the probate court.

IV. ARGUMENT

A. Section 768.26, Fla. Stat., Only Governs Attorney's Fees in Cases in Which a Wrongful Death Suit Has Been Filed, So the Wagner Firm Should Have Been Awarded a Fee Based on Its Fee Agreements

Because the recovery at issue in this case involved the insurance proceeds from the decedents' uninsured motorist carrier, obtained via settlement in the absence of any wrongful death action, the attorney's fee allocation should have been decided as a matter of pure contract law, with each law firm earning a contingency fee in accordance with the terms of its fee agreements with its client(s). However, both the probate court and the District Court purported to apply fee-allocation rules from § 768.26, Fla. Stat., which govern fees and costs attendant to wrongful death *litigation*. *Wagner*, 987 So. 2d at 745-46. In holding that § 768.26 applies in the absence of a filed wrongful death case, the District Court gave short shrift to the text and purpose of the Wrongful Death Act, which only regulates attorney's fees and costs arising out of a wrongful death action. Its errant holding should be reversed.[12]

1. The Statutory Basis of the Personal Representative's Attorney's Right to a Fee in Wrongful Death Actions

[12] This Court reviews *de novo* issues of statutory interpretation. *Borden v, East-European Ins. Co.*, 921 So. 2d 587, 591 (Fla. 2006).

We preface our discussion by noting that there is nothing in the Wrongful Death Act that speaks directly to the allocation of attorney's fees between separate counsel involved in a wrongful death case. The only provision of the Act that addresses attorney's fees is § 768.26, entitled "Litigation expenses," which states:

> Attorneys' fees and other expenses of litigation shall be paid by the personal representative and deducted from the awards to the survivors and the estate in proportion to the amounts awarded to them, but expenses incurred for the benefit of a particular survivor or the estate shall be paid from their awards.

This provision establishes how the expenses of litigation are to be shared by the various interested parties in a wrongful death case, but it provides no such allocation rule as between multiple attorneys for such parties.

It does, however, provide that the personal representative "shall . . . pa[y]" the attorney's fees and costs. Given that the Act confers exclusive standing to bring the wrongful death action on the personal representative, § 768.20, Fla. Stat., the attorney's fee provision implicitly confers on the attorney for the personal representative the right to collect a fee from the aggregate recovery of all beneficiaries. The Fourth District recognized this effect of the statute in *In re Estate of Catapane*, 759 So. 2d 7, 9 (Fla. 4th DCA 2000), and this Court subsequently embraced it in *Wiggins*, 850 So. 2d at 447, though without express discussion. It is important to recognize that, as it has been construed, § 768.26

creates an exception to the general rule requiring an attorney to have a written fee agreement from any client from whom he seeks to collect a contingency fee. *See* R. Reg. Fla. Bar 4-1.5(f)(2); *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 185 (Fla. 1995) (absent contract which complies with Rule 4-1.5, attorney cannot collect contingent fee).

In *Wiggins*, the Court wrestled with the question of how to adapt § 768.26's implicit authorization of the personal representative's attorney to collect a fee from the aggregate amount of all survivors' and the estate's recoveries to a case in which a survivor hires independent counsel. The case never presented the separate question, posed here, of whether or not § 768.26 applies at all in the absence of the filing of a wrongful death action.[13] If it does not, then the statutory presumption upon which the *Wiggins* Court implicitly premised the equitable rule it adopted is lacking.

2. Section 768.26 Applies Only Where a Wrongful Death Action Has Been Filed

[13] It is not perfectly clear from either this Court's opinion in *Wiggins* or that of the district court in that case, but it appears that a wrongful death action *had* been filed there. *See Wiggins*, 850 So. 2d at 445 (framing the question as how to allocate attorneys' fees "in a wrongful death *action*") (emphasis added); *Wiggins v. Estate of Wright*, 786 So. 2d 1247, 1248 n.1 (Fla. 5th DCA 2001) (referring to the existence of a "malpractice action").

"It is a fundamental principle of statutory interpretation that legislative intent is the 'polestar' that guides th[e] Court's interpretation." *Borden v. East-European Ins. Co.*, 921 So. 2d 587, 595 (Fla. 2006). The Court looks first to "the actual language used in the statute" to discern legislative intent. *Id.* "When the statute is clear and unambiguous, courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent. In such instance, the statute's plain and ordinary meaning must control, unless this leads to an unreasonable result or a result clearly contrary to legislative intent." *Daniels v. Florida Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005) (citations omitted).

The text of § 768.26 reveals that it was intended to regulate attorney's fees in a wrongful death action. The section is entitled "Litigation expenses," and it classifies the attorney's fees it regulates as those incurred in "litigation." § 768.26 ("[a]ttorney's fees and other expenses of litigation"). There is no ambiguity in the term "litigation," which unquestionably contemplates a filed lawsuit. *See* Black's Law Dictionary 944 (7th ed. 1999) ("litigation" means "[t]he process of carrying on a lawsuit"; "a lawsuit itself"); *Perez v. George, Hartz, Lundeen, Flagg & Fulmer*, 662 So. 2d 361, 364 (Fla. 3rd DCA 1995) ("litigation" commences with the filing

of a complaint). Thus, by its own terms, § 768.26 simply does not apply absent a filed wrongful death action.

This reading of § 768.26 jives perfectly with its statutory context. The Wrongful Death Act was largely a procedural innovation designed to consolidate into a single lawsuit what had previously been a tangle of conflicting survival and wrongful death actions by the estate and each beneficiary.[14] Other provisions of the Act reflect that purpose. It created a cause of action for damages, § 768.19, which it vested exclusively in the hands of the person appointed as personal representative of the decedent's estate: "*The action shall be brought* by the decedent's personal representative, who shall recover for the benefit of the decedent's survivors and estate all damages, as specified in this act, caused by the injury resulting in death." § 768.20 (emphasis added). This provision plainly refers to the filing of a lawsuit. The "definition of 'action' clearly contemplates a proceeding filed in a court." *Miele v. Prudential-Bache Securities, Inc.*, 656 So. 2d 470, 472 (Fla. 1995); *see also Theodoru v. Burling*, 438 So. 2d 400, 402 (Fla. 4th DCA 1983) ("An action is '[t]he legal and formal demand of one's right . . . made

[14] *See Martin v. United Security Servs., Inc.*, 314 So. 2d 765, 768 (Fla. 1975) (the Wrongful Death Act was "intended to merge the survival action for personal injuries and the wrongful death action into one lawsuit"); *McKibben v. Malloy*, 293 So. 2d 48, 54 (Fla. 1974) ("The purpose of the Legislature . . . was to consolidate the wrongful death statutes of Florida into one cohesive scheme wherein an action will be brought by the personal representative . . .").

and insisted on in a court of justice'") (quoting Black's Law Dictionary 49 (4th ed. Rev. 1968)).

The provision of the Act regulating settlements, another part of the Legislature's "cohesive scheme," *McKibben*, 293 So. 2d at 54, reinforces the point that the scheme applies only once litigation has commenced: "*While an action under this act is pending*, no settlement as to amount or apportionment among the beneficiaries which is objected to by any survivor . . . shall be effective unless approved by the court." § 768.25 (emphasis added). The Act simply does not purport to regulate settlements, like the one reached here, which take place in the absence of any "action under this act." Thus, particularly when viewed as a part of this integrated statutory scheme, the reference in § 768.26 to attorney's fees as an expense of "litigation" evidences an intent to regulate such fees only in those cases in which a wrongful death action has been filed.

The District Court did not engage in a meaningful analysis of the statutory text. It treated § 768.26 as though only its "heading," "'Litigation expenses,'" were the only textual clue as to its intended scope. *Wagner*, 987 So. 2d at 745 (quoting § 768.26). Even if the title of a statute had no interpretative value, the provision itself classifies attorney's fees as an expense "of litigation." § 768.26.[15]

[15] Of course, "[t]he title [of a statute] is more than an index to what the section is about or has reference to; it is a direct statement by the legislature of its

As the Third District has recognized, this phrase conclusively demonstrates that the provision is intended to regulate attorney's fees incurred in a wrongful death *action*. *See Perez*, 662 So. 2d at 364 n.4 (holding that § 768.26 "does not apply" where "no action for wrongful death [was] filed or litigated").[16] The only other way that fees might arise short of the filing of an action would be through a pre-suit settlement, but the provision of the Act governing settlements expressly disavows regulation prior to a suit being filed. It expressly limits its reach to "[w]hile an action under this act is pending." § 768.25.

The District Court tried to sidestep the Third District's holding in *Perez* that § 768.26 does not govern attorney's fees in a pre-suit settlement. As we discussed briefly in our Brief on Jurisdiction (at pp. 8-9), the District Court's efforts are unpersuasive. It purported to distinguish *Perez* along the same line that the Fourth District attempted in *In re Estate of Catapane*, 759 So. 2d 9 (Fla. 4th DCA 2000) -- based on the timing of the settlement in relation to the appointment of the personal

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intent." *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 948 So. 2d 599, 605 (Fla. 2006) (quoting *State v. Webb*, 398 So.2d 820, 825 (Fla.1981)).

[16] In *Perez*, "[p]re-suit mediation" produced a settlement between the survivors and the tortfeasor. *Id.* at 363. A dispute arose between the attorneys for different survivors, with one firm seeking to charge a fee against all of the survivors' combined recovery. The trial court awarded that firm its requested fee on the entire recovery, reasoning that § 768.26 authorized it. *Id.* at 363. The Third District reversed, expressly rejecting the trial court's theory on the textual ground above.

representative. *Wagner*, 987 So. 2d at 745. In *Perez*, the settlement occurred prior to the appointment of a personal representative, whereas in *Catapane* (and in this case) the personal representative had already been appointed at the time of the settlement. *See Catapane*, 759 So. 2d at 11.

There are two problems in viewing this rationale as offering a meaningful distinction from the holding in *Perez*. First, it simply misstates the basis of the Third District's decision as to why § 768.26 did not apply, which was that no wrongful death action had been filed in the case. *Perez*, 662 So. 2d at 364 n.4. Nothing in *Perez* suggests that the timing of the appointment of the personal representative in relation to the settlement was material to its conclusion.

Second, even if the District Court's explanation did accurately capture the *Perez* court's rationale, it would still not serve to distinguish that case. In *Perez*, a pre-suit settlement was reached, but the probate court subsequently appointed the settling parents of the decedent child as co-personal representatives. *Perez*, 662 So. 2d at 363. This subsequent appointment in *Perez* effectively renders it indistinguishable from *Catapane* and this case in any material respect. That is because "the legal acts of a personal representative relate back after court appointment, thereby validating the previous acts of the personal representative on behalf of the estate." *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 675 (Fla. 2004).

Therefore, in each of these cases, the settlements involved attorneys who represented a personal representative. The question therefore squarely arose in each case whether § 768.26's fee-entitlement rule applies in the absence of a suit or not. The Fourth District in *Catapane* essentially ducked the question. The Second District below confronted it but tried to use *Catapane* to distinguish *Perez*, an ineffectual maneuver, since the Fourth District in *Catapane* misjudged the rationale of *Perez* and failed to confront the question of statutory interpretation at play in *Catapane* itself, which involved a pre-suit settlement.

More importantly, whether or not a personal representative has been appointed at the time of a pre-suit settlement has no bearing on the plain meaning of the word "litigation" in § 768.26. In a statute intended to apply only in the event of litigation having been filed, it is completely consistent for it to call for litigation expenses to be "paid by the personal representative." After all, the personal representative is the only party on whom the Legislature conferred standing to file a wrongful death action. *See* § 768.20.[17]

The District Court also stated, without citation to authority, that "[p]re-suit negotiations are an important part of wrongful death litigation, and Section 768.26

[17] Although the personal representative is the nominal plaintiff, the survivors entitled to recover damages remain the real parties in interest. *See Wiggins*, 850 So. 2d at 446. As such, "survivors are still entitled to be represented by counsel of their choice." *Id.* at 449.

does not limit recoverable fees to those incurred subsequent to filing suit." *Wagner*, 987 So. 2d at 745. No doubt the District Court is correct that pre-suit negotiations can be important, but its reasoning ignores the meaning of the term "litigation." Because § 768.26 pertains to fees and costs incurred in litigation – *i.e.*, after suit has been filed -- it naturally *does not* address fees and costs incurred if suit is never filed. *See Perez*, 662 So. 2d at 364 n.4. Fees and costs in those cases remain subject to the terms of the survivors' contracts with their attorneys.[18]

Leaving attorney's fees and costs in pre-suit settlements as a matter of contract does no disservice to any of the purposes of the Wrongful Death Act. Judge Sawaya aptly summarized those purposes in his dissent in *Wiggins*, which this Court later embraced:

> the purpose of requiring the [wrongful death] action to be brought by the personal representative is to eliminate the possibility of a multiplicity of suits against the wrongdoer, to eliminate the potential for competing beneficiaries to race to judgment, and to prevent

[18] The circumstance of a case where an attorney spends time and expends costs on pre-suit negotiations which are unsuccessful and then files suit requires a somewhat different analysis. An attorney handling a wrongful death case on a contingency-fee basis, as is almost always the case, would receive his fee based on the occurrence of the contingency and thus would be compensated for all of his efforts. To the extent that any costs are expended on items unique to the pre-suit negotiations (like phone calls, photocopies, postage), as opposed to items that get re-used in the subsequent litigation (such as demonstrative exhibits), those *de minimis* costs arguably would not fall within § 768.26's definition of expenses "of litigation," so they would, absent an agreement between all survivors and their counsel, be borne by each survivor pursuant to his or her fee agreement.

> preferential treatment of one or more beneficiaries in the disposition of their claims.

Wiggins v. Estate of Wright, 786 So. 2d 1247, 1249 (Fla. 5th DCA 2001) (Sawaya, J., dissenting), *quashed*, 850 So. 2d 444 (Fla. 2003). None of these policies is compromised by acknowledging that in a pre-suit settlement, attorney's fees and costs are governed by the contractual terms between each survivor and his or her attorney.

To summarize, § 768.26 does not apply in the absence of the filing of a wrongful death action. The statute itself does not even address the allocation of fees between attorneys for separate survivors, and nothing in this Court's decision in *Wiggins*, which fashioned an equitable rule to govern such allocation in wrongful death cases (discussed in detail in the next section of this Brief), addressed the subject of pre-suit settlements short of litigation. The fees and costs of such settlements should be borne by each survivor as a matter of contract with his separate attorney. Stripped of the benefit of § 768.26, KLG lacks any authority to seek a fee from Larry and Robert Elmore's recoveries.

By contrast, Larry and Robert each separately signed contracts with the Wagner firm providing for a 33 1/3% contingent fee. *See* R3:479-483; R3:483-487. The Wagner firm represented them in preparation for the mediation with the UM insurer, at the mediation, through their subsequent compromise as to the

amount of the total settlement and the allocation of the net proceeds, and through the probate court's approval of that award. Having earned its fee under the terms of those contracts, the Wagner firm should now be paid its bargained-for fee, as both Larry and Robert agree. *See* Tr. at 260, 275. Each brother recovered $410,000 from the UM settlement, so the Wagner firm should have been awarded a fee of $273,060.

B. If § 768.26 Does Apply in the Absence of a Suit, the Survivor's Attorney's Right to a Fee Is Not Restricted to Instances Where the Personal Representative's Attorney Develops an Actual Conflict of Interest

Both the probate court and the District Court misconstrued the equitable rule regarding allocation of fees between counsel in a wrongful death action that this Court adopted in *Wiggins*. The probate court insisted that a prerequisite to the Wagner firm's entitlement to any fee was its clients' filing of a "competing claim" at some point in time. Tr. at 317. The District Court read *Wiggins* to afford a survivor's counsel the right to a fee only for that portion of the representation where the personal representative's counsel has an actual conflict of interest. *Wagner*, 987 So. 2d at 746 (citing *Catapane*, 759 So. 2d at 12 n.1). However, this Court in *Wiggins* did not adopt a system that relegated survivors' counsel to the breadcrumbs that fall from the personal representative's attorney's table, and only then in the event of an actual conflict of interest.

This Court envisioned a far more equitable division of fees between participating counsel, based upon the fair value of their work:

> When survivors have competing claims, and are represented by separate attorneys, *awarding attorneys' fees from a wrongful death suit in a manner commensurate with the attorneys' work* properly provides for proportional payment of attorneys' fees by all survivors, out of their respective awards. *For example, if there are two competing survivors represented by separate attorneys throughout the litigation who successfully prosecute a claim to judgment, the fees should ordinarily be awarded out of the respective recoveries.* This will always be subject to the caveat that where it can be demonstrated that one attorney played a greater role in securing the total award, a larger fee may be proper. In no instance, however, should a survivor be penalized for hiring separate counsel by having to pay a fee for recovery of the same amount twice.
>
> We agree with and approve of the *Catapane* method of allocating fees, whereby a trial court determines the attorneys' fee awards by compensating the personal representative's attorney out of the total settlement proceeds, *reduced by the amount necessary to reasonably compensate the other survivors' attorneys for their services in representing those survivors in the proceedings*.

Wiggins, 850 So. 2d at 450 (emphasis added).

This allocation methodology tasks a trial court with evaluating the relative contributions of all counsel in the case to determine how much of the personal representative's percentage-based fee should be subtracted to reasonably compensate the survivors' attorneys. *See Garces v. Montano*, 947 So. 2d 499, 504 (Fla. 3rd DCA 2006) (understanding *Wiggins* to require a distribution of fees

"proportionately based on the amount of work that each group of attorneys did on the case").

The District Court read *Wiggins* more restrictively than this Court intended. Although it recognized *Wiggins*' command that "the fees for the attorney for the personal representative [shall] be reduced by the amount needed to compensate the other survivors' attorneys for their efforts in representing those survivors in the proceedings," *Wagner*, 987 So. 2d at 745, the District Court turned in the next breath to a footnote in *Catapane* to narrow the scope of that inquiry to just those circumstances where a conflict of interest arises. *See id.* (stating that survivors' counsel "'cannot expect to be compensated for work on those aspects of the case on which counsel for the personal representative has no conflict of interest'") (quoting *Catapane*, 759 So. 2d at 12 n.1); *id*. at 746 (repeating the point). This use of *Catapane* to narrow the approach enunciated in *Wiggins* was mistaken, as it works a substantial change that actually conflicts with this Court's holding.

The *Wiggins* Court never quoted the *Catapane* footnote which the District Court relied upon.[19] The narrow focus of that footnote is inconsistent with the principle adopted in *Wiggins*. In the footnote, the district court in *Catapane*

[19] This Court quoted the portion of *Catapane* to which the Fourth District court appended the footnote, but deliberately "omitted" the footnote from the quotation. *See Wiggins*, 850 So. 2d at 447.

adopted a zero-sum approach to attorney's fees, entitling the survivor's counsel to a fee only in those aspects of the case where the personal representative's attorney has a conflict of interest. *See Catapane*, 759 So. 2d at 12 n.1. Although this Court stated that it was embracing "the Fourth District's *Catapane* analysis," 850 So. 2d at 447, it went on to specify a broader approach. As noted earlier, the Court characterized "the *Catapane* method of allocating fees" as "compensating the personal representative's attorney out of the total settlement proceeds, reduced by the amount necessary to *reasonably compensate* the other survivors' attorneys *for their services in representing those survivors in the proceedings*." *Id*. at 450 (emphasis added).[20] It made no reference to limiting those services to the portion of the case for which the personal representative's attorney had a conflict of interest.[21]

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[20] The Court's approval of "the *Catapane* method of allocating fees," 850 So. 2d at 450, involves somewhat ambiguous language that may invite courts to look past the formula set out in *Wiggins* and to pull passages of their choosing from *Catapane* (like footnote 11), even though they are inconsistent with this Court's formula.

[21] Nor did the Court advert to any such limitation earlier in the opinion when it explained that the methodology from *Catapane* it was embracing allocates attorney's fees "proportionately by the amount of work that the attorneys do on (1) the lawsuit brought on behalf of the estate, and (2) the apportionment proceedings." *Id*. at 448. Since *Catapane* itself involved only a conflict of interest that arose at the apportionment proceedings, this summary shows that the Court was embracing a broader principle.

Moreover, if the Court had intended to adopt the Fourth District's restrictive view of the survivor's attorney's right to compensation, it would not have acknowledged the potential relevance of the survivor's attorney's work during the liability phase of the *Wiggins* case. In *Wiggins*, "a conflict of interest developed over the allotment of the proceeds of the settlement." *Id*. at 449 (internal quotation marks omitted). There was no indication that the personal representative's attorney had an actual conflict of interest any earlier in the case. Nonetheless, the Court suggested that the "part [that the survivor's attorney] Schwichtenberg played in securing the overall settlement" – *i.e.*, the liability phase of the case – was relevant to evaluating her fee on remand. *Id*. The scope of that inquiry encompasses each lawyer's "services in representing" their clients in all phases of the "proceeding*s*," *id*. at 450 (emphasis added), again, a notion broader than the District Court here allowed.

The District Court's restrictive reading of *Wiggins* is also inconsistent with the way this Court factored conflicts of interest into the equitable rule it fashioned. The Court recognized that survivors may not have a "commonality of interest" whereby "a single attorney can represent those interests." 850 So. 2d at 448. Unlike cases in which "a parent-spouse is killed and the surviving spouse and children are represented by the same attorneys," *id*., cases involving more complex

and often fractured family relationships create a greater potential for conflict among survivors. *Wiggins* itself involved the death of a divorced mother survived by her second husband, her children by him, and her children of a prior marriage. *Id*. at 445. The children of the prior marriage retained separate counsel. *Id*. The Court noted that anytime "separate survivors hire separate counsel to prosecute a claim for the damages that each is entitled to under the statute," a "potential conflict of interest . . . is created." *Wiggins*, 850 So. 2d at 448.

In *Wiggins*, it became clear that the survivors' competing claims ripened into an actual conflict at the allocation-of-settlement-proceeds stage of the case. *Id*. at 449. The district court in that case had tried to avoid the impact of this conflict on the personal representative's attorney's fee by reasoning that "'Nichols earned his contingency fee before any potential conflict arose.'" *Wiggins v. Estate of Wright*, 786 So. 2d 1247, 1249 (Fla. 5th DCA 2001). This Court found this temporal focus on when an actual conflict arose to be an unrealistic way of accommodating for the potential conflict of interests inherent in such cases. It explained:

> [I]t was apparent from the outset that all of the survivors were entitled to compensation, including the two children from the previous marriage represented by Schwichtenberg, and their respective claims evaluated prior to settlement. Yet Nichols represented the surviving and competing survivors from the outset without any express agreement. While Nichols obviously acted in good faith to secure the largest possible total settlement, *the potential conflict between the competing interests of the individual beneficiaries was ever present*.

Id. at 449 (emphasis added).

The Court thus adopted a rule which takes this potential conflict as a given and compensates survivors' counsel based on the work they performed in the case. Where it is clear that an actual conflict has matured, then the Bar rules preclude the personal representative's counsel from collecting a fee for any work ostensibly done from that point forward on behalf of the survivors. *See id*. at 450 (disentitling Nichols from any fee for that work).[22]

The *Wiggins* rule of fair compensation of all of the attorneys based on the value of their work is an equitable one. It balances an attorney's independent right to compensation for his labor with the limitation on fees set forth in Rule 4-1.5(f) of the Rules Regulating the Florida Bar. The *Wiggins* Court's primary motivation for adopting "the *Capatane* methodology" was the concern that a free-market

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[22] There is some ambiguity in the Court's language on this point. It said that due to Nichols' conflict with the other survivors during the allocation phase, "he would not be entitled to a fee *on their portions of the recovery*." *Id*. at 450 (emphasis added). Does this mean that he was restricted to collecting a fee on the personal representative's recovery alone and on no portion of the survivor's recovery? That result would not seem consistent with the thrust of the Court's opinion, but some ambiguous language in the Court's summary of its holding lends some credence to this interpretation. *See id*. at 450 ("if there are two competing survivors represented by separate attorneys throughout the litigation who successfully prosecute a claim to judgment, *the fees should ordinarily be awarded out of their respective recoveries*.") (emphasis added). If this was indeed the Court's intent, then the District Court's restrictive reading of *Wiggins* in this case was certainly incorrect.

model, whereby each attorney may charge his full contractual fee, risked "requir[ing] the non-personal representative survivors to pay a fee in excess of those allowed by rule 4-1.5." 850 So. 2d at 447. The Court thus backed away from a contract-based model to a flexible approach based upon the "reasonabl[e]" value of each "attorney's work." *Id.* at 450. This equitable approach is harmonious with the rule that an attorney working pursuant to a contingent fee agreement has a "right to adequate compensation for work performed." *Rosenberg v. Levin*, 409 So. 2d 1016, 1019 (Fla. 1982). An assessment of the value of the survivor's attorney's work – particularly in a case where that attorney represented his client "throughout the litigation," *Wiggins*, 850 So. 2d at 450 – requires a broader focus than just upon "'those aspects of the case on which counsel for the personal representative has no conflict of interest.'" *Wagner*, 987 So. 2d at 745 (quoting *Catapane*, 759 So. 2d at 12 n.1).

To restrict the survivors' attorney to compensation only for that portion of the case where the personal representative's attorney has a conflict of interest would imperil the ability of survivors to obtain counsel of their choosing during the liability phase of a wrongful death case. Unless the attorney is able to broker a fee-splitting deal with the personal representative's counsel at the outset of the representation – something the Wagner firm attempted to do in this case but KLG

rebuffed, R3:488; R2:371-380, ¶ 20 – he has no assurance whatsoever that he will ever get paid for his work on the common liability and damages phases of the case, even if the contingency in his fee contract occurs. Under such a restrictive approach, the attorney has little incentive to get involved, and the survivor is effectively deprived of the right to obtain independent counsel. Moreover, compensating the survivor's counsel for the fair value of his work does not take away from the personal representative's attorney anything to which is equitably entitled. Indeed, the latter receives a windfall if he gets the benefits of the survivor's attorney's labor on the liability phase of the case and does not have to pay for it. The *Wiggins* Court struck the right balance.

The probate court therefore erred in imposing as a precondition to the Wagner firm's entitlement to a fee the existence of a "competing claim" litigating some conflict between the Elmore brothers. Under *Wiggins*, the Wagner firm was at least entitled to a fee based upon the work it did on behalf of its clients.

C. Even If a Survivor's Attorney Were Only Entitled to Compensation for Work on the Portion of the Case Where the Personal Representative's Attorney Has a Conflict of Interest, the Wagner Firm Should Have Been Awarded a Fee in This Case

Assuming the District Court did not err in focusing only upon "the aspect of the case in which KLG had a conflict of interest," *Wagner*, 987 So. 2d at 746, it erred in concluding that the potential conflict of interest did not ripen into an actual

conflict because the Wagner firm's clients abandoned or waived their adverse positions to KLG's client, Gary. The District Court reasoned as follows:

> It is true that the Wagner firm's objection to the apportionment of the bodily injury settlement would have established a conflict of interest between Larry and KLG had it been pursued. However, Larry abandoned his objection to the apportionment after his petition to remove Gary was dismissed. While there was certainly a *potential* conflict of interest between Larry and Robert and KLG, an *actual* conflict never arose because Larry and Robert never objected to the amount or apportionment of the UM settlement. Larry and Robert may have believed that the settlement was a bit low and that they were entitled to a greater portion of the settlement proceeds, but they waived any objection to the settlement by accepting their equal shares.

Id. This insistence upon the actual litigation and non-abandonment of a competing claim by a survivor as a prerequisite to a recognition that an actual conflict of interest exists is problematic in several respects.

Larry Elmore's objection to the apportionment of the bodily injury settlement evidenced an actual conflict of interest regardless of whether he later "abandoned" that objection. Mr. Brennan unambiguously wrote Gary's counsel that Larry Elmore did "not approve of the distribution apportionment" of the $200,000 settlement with the liability insurer, (R3:471), and filed a petition in the probate court to disqualify Gary as personal representative, R1:32-111. That petition alleged that Gary had misappropriated estate assets, treated him unfairly and lied and schemed to become the sole personal representative. R1:32-111;

R1:124-134. It is difficult to see how such adverse posturing by one survivor against another could not signify an actual conflict of interest, particularly where they are separately represented in connection with pre-suit settlement discussions which necessarily implicate how much each survivor stands to recover out of limited insurance proceeds. The fact that Larry subsequently decided that it was not worth fighting about the $200,000 settlement does not in any way erase the adversarial alignment of the two survivors' interests.[23] This was more than a "*potential* conflict of interest," as the District Court characterized it. *Wagner*, 987 So. 2d at 746.

The District Court's assessment of the brothers' interests concerning the allocation of the proceeds of their parents' $2 million uninsured motorist insurance policy is equally troubling. The District Court effectively held that unless Larry or Robert litigated over the division of those proceeds, no conflict of interest could have existed between the brothers *vis-a-vis* KLG's client, Gary. But this hindsight-based rule is under inclusive: it fails to account for situations in which survivors with competing claims – and an actual conflict of interests – manage to resolve their differences short of litigation with the assistance of their separate counsel.

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[23] While the Wagner firm did not seek a fee on Larry's recovery for that settlement, since it was KLG who negotiated it before Mr. Brennan got involved, the adversarial posture of Larry versus Gary had to be taken into consideration going forward.

That is precisely what happened in this case. Although the record is silent concerning the brothers' respective positions during the mediation itself,[24] there is evidence that both Larry and Robert Elmore initially wanted more than just one-third of the UM insurance proceeds. Immediately after the mediation, Mr. Brennan wrote Mr. Malcowski to document his position that the UM claim should have settled for "significantly more than $1.23 million dollars" and that Larry and Robert believed "that their individual survival action would have been higher at trial then Gary's, due to the facts of this case," but that they were "willing to approve the settlement . . . on the express condition that each receive one-third out of the total amount (or $410,000.00) out of the settlement proceeds." R3:466-467. Although this letter did not itself communicate all of the specific reasons Larry and Robert believed their claims to be more valuable than their brother Gary's, it certainly documented the existence of the conflict on that position.[25] The lawyer

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[24] The Wagner firm sought to introduce testimony during the fee hearing concerning the positions Mr. Brennan articulated to the other attorneys at a meeting just prior to the mediation session, but KLG asserted the mediation privilege of § 44.403, Fla. Stat. to prevent that testimony from coming into evidence. Tr. at 103-05. The probate court sustained the objection as to several witnesses. Tr. at 105, 142, 146. The record therefore contains no evidence reflecting the positions which Larry and Robert took just before and during the mediation.

[25] At the fee hearing and in their depositions made a part of that record, Larry and Robert articulated with specificity the views which they held concerning why each believed that his claim was worth more than Gary's claim. *See* Tr. at

for the estates, Mr. Whigham, testified that upon receipt of a copy of Mr. Brennan's letter, he understood that it reflected that Larry and Robert had each been of the mind that he was entitled to *more* than a one-third share of the net proceeds, but was willing to "settle for a one-third share" for the sake of "family harmony." Tr. at 30-31, 33.

The District Court's insistence upon the litigation of competing interests as the prerequisite to the finding of an actual conflict of interest also creates perverse incentives. The law generally favors settlements and the voluntary resolution of disputes, and part of a lawyer's responsibility toward his or her client is to encourage such conciliation where appropriate. The District Court's rule refuses to compensate the survivor's counsel for such good-faith efforts. Aside from that inequity, it also creates a perverse incentive for the survivor's attorney to adopt an overly aggressive posture and to push a client already predisposed to fight with competing survivors to litigate in the probate court for a greater share of the recovery. For, under the District Court's rule, only in the event of such an extant dispute will that attorney clearly delimit the portion of the proceedings for which

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252-55, 271-73; R4:541-628 at 40-41, 63-66; R4:629-684 at 25-26. Mr. Brennan echoed those views from the perspective of a veteran trial lawyer. To summarize, he believed that a jury would have heard significant damaging evidence concerning Gary's claim which would have devalued his damage award more than that of either of his brothers. *See* Tr. at 175-177.

he is entitled to a fee. Moreover, counsel for the personal representative should not be incentivized to ignore borderline conflicts of interest in order to aggrandize his fee, particularly in cases where the competing survivors are represented by separate counsel. The law should not structure such perverse incentives when a more equitable alternative readily exists. Courts can identify such a conflict through typical evidence of a divergence of interests; the conflict need not be memorialized in litigation.

A conflict of interest arose between KLG's client, Gary, and Larry from the point in time that Larry objected through his counsel to the apportionment of the $200,000 settlement. A similar conflict arose between KLG and Robert when Robert chose to sign a fee agreement with the Wagner firm and not KLG on the eve of the mediation with the UM carrier. The fact that a client who plainly does not trust and is at odds with the personal representative (who is also a competing survivor) ultimately chooses to settle in the interest of "family harmony," as both Larry and Robert Elmore did here, should not deprive their attorney of the right to reasonable compensation for his work.

At a minimum, this case should be remanded to the probate court for an evidentiary hearing concerning the work each attorney did in connection with the

$1.23 million settlement, and the Wagner firm should be awarded a fee for the reasonable value of its work.

V. CONCLUSION

Heeding the plain language of § 768.26, the Court should hold that the Third District in *Perez* was correct that the provisions of the Wrongful Death Act do not apply until such time as a wrongful death action is filed. In addition, regardless of the way the Court decides the statutory interpretation question, it should utilize this case as an opportunity to clarify the scope of its equitable allocation rule in *Wiggins*, which is not a model of clarity. Doing so will eliminate confusion among the Bar and reduce collateral litigation over attorney's fees. In the end, the Wagner firm should be awarded appropriate compensation for its representation of its clients.

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 17th day of February, 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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