

67,643

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO.

BARNETT BANK OF PALM
BEACH COUNTY,

Petitioner,

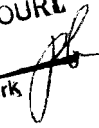
vs.

THE ESTATE OF LEON HENRY
READ, JR., Deceased,

Respondent.

_____ /

PETITIONER'S BRIEF ON CONFLICT JURISDICTION

FILED
SID J. WHITE
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STATEMENT OF THE CASE AND FACTS

This brief is solely on the issue of jurisdiction pursuant to Rule 9.120(d). Petitioner, BARNETT BANK OF PALM BEACH COUNTY, filed its notice to invoke jurisdiction in the Fourth District Court of Appeal on September 6, 1985. The decision sought to be reviewed was issued by the Fourth District Court on July 10, 1985, and rehearing was denied by order of August 8, 1985. This brief is accompanied by an appendix containing the District Court's opinion, the motion for rehearing and the order thereon. Also included are copies of all cases relied upon for the conflict arguments.

SUMMARY OF ARGUMENT

The decision of the Fourth District Court in this case is in express and direct conflict with decisions by other District Courts and this Court on the issues directly addressed in the opinion of July 10, 1985. The Fourth District held that a late filed claim in an estate under §733.701 and §733.702, Florida Statutes (1983) is a nullity and that the personal representative need not reply to such a claim in any way whatsoever. The court further held that the filing of a separate Petition for Payment and Enforcement of Claim along with formal notice pursuant to Rule 5.040 did not subject the personal representative to jurisdiction sufficient to require any response to the

separate Petition. The court ruled that such a Petition for Enforcement based upon a late filed claim was also a nullity requiring no action by the personal representative. The District Court also ruled that the trial court had a duty to detect and enforce unpled defenses. This decision is in conflict with numerous other decisions and this court should accept jurisdiction.

JURISDICTIONAL ISSUE

WHETHER THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IS DIRECTLY AND EXPRESSLY IN CONFLICT WITH OTHER DECISIONS OF THE DISTRICTS AND THIS COURT.

ARGUMENT

The majority opinion of the Fourth District Court of Appeal holds that a late filed claim in a probate matter is a nullity. The decision further holds that a separate Petition for Payment to Enforce Claim is also a nullity and that formal notice on the personal representative does not vest the court with jurisdiction over the personal representative so as to require him to file any sort of a response. As pointed out by the dissent the majority opinion holds §733.702 to be a "jurisdictional statute of nonclaim." Under the decision, once the claim is late it is fundamental error for a trial court to consider it or act upon it. The opinion seems to require that a late filed

claim anticipate the possible affirmative defense of lateness. The court's opinion totally abrogates the concept of legal and factual estoppel as applicable in such cases.

As Judge Hurley has pointed out in his dissent §733.702 is a statute of limitations rather than a jurisdictional statute of nonclaims. Coe v. ITT Community Development Corporation, 362 So.2d 8 (Fla. 1978), addresses this issue. There this court explored the distinctions and ruled that a statute of limitations is an affirmative defense which must be raised. A jurisdictional statute of nonclaim is an absolute bar to the filing of the claim. Numerous cases hold that §733.702 is a statute of limitations. See Harbour House Properties, Inc. v. Estate of Stone, 443 So.2d 136 (Fla. 3d DCA 1983), Stern v. First National Bank of South Miami, 275 So.2d 58 (Fla. 3d DCA 1973) and other cases holding estoppel arguments to be valid to overcome the statute of limitations. Picchione v. Asti, 354 So.2d 954 (Fla. 3d DCA 1978) and Miller v. Nolte, 453 So.2d 397 (Fla. 1984). The majority opinion is in conflict with each of the above cited cases.

As Judge Hurley has succinctly pointed out, if this statute were jurisdictional then estoppel would not apply. The decision of the Fourth District is in conflict with all

cases on estoppel in estate matters. A statute of limitations must be pled as an affirmative defense and the failure to so plead constitutes a waiver. Tuggle v. Maddox, 60 So.2d 158 (Fla. 1952). The Fourth District's decision is also in conflict with this well established principle of law as stated in the Tuggle opinion.

The District Court's opinion also says estoppel is not indicated by this record. As pointed out in the Petition for Rehearing, this is inaccurate in fact because a letter showed the personal representative agreed no claim should be filed when the estate was first opened. In any event, -- the record should contain no affirmative indication of estoppel at this point in the pleadings. The only thing before the Probate Court was an unanswered claim and an unanswered Petition. Under these circumstances the Probate Judge was held to have committed fundamental error because he "failed to note the late filing of the claim." Judge Hurley points out this would require the judge to "detect and enforce" unpled defenses. Clearly the bank should at least be given the chance to reply and litigate the unpled issue. Foreclosing litigation on the issue of estoppel is a denial of due process and the ruling thus conflict with Fickle v. Adkins, 394 So.2d 461 (Fla. 3d DCA 1981).

The District Court's opinion also makes it quite clear that in addition to filing a claim in the estate that the bank also filed a Petition for Payment and Enforcement of Claim and gave formal notice pursuant to Rule 5.040. Under Nardi v. Nardi, 390 So.2d 438 (Fla. 3d DCA 1980), this vested the court with jurisdiction and a failure to respond allowed for further proceedings ex parte. Also see Feather v. Estate of Sanko, 390 So.2d 746 (Fla. 5th DCA 1980). The opinion of the District Court herein is also in direct conflict with the Nardi and Sanko holdings. The Fourth District's opinion specifically holds that no response was required to the Petition for Enforcement. Because the initial claim was late, the personal representative did not have to answer or respond in any way to the separate Petition.

CONCLUSION

Based upon the conflict between the decisions of the Fourth District, Third District and this court jurisdiction exists. The court should accept jurisdiction and determine the matter on the merits. The conflict in decisions is amply demonstrated by the dissent.

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By 
JOHN R. BERANEK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 16th day of September, 1985, to:
RODERICK F. COLEMAN, 1030 Ingraham Building, 25 S.E. Second Avenue, Miami, Florida 33131.


JOHN R. BERANEK