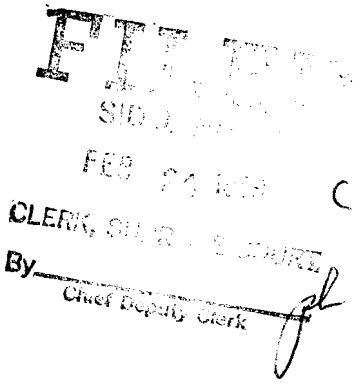
O/a 5-7-86

IN THE SUPREME COURT OF FLORIDA

Tallahassee, Florida

CASE NO. 67,643



BARNETT BANK OF PALM BEACH COUNTY,

Petitioner,

vs.

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

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

CROMWELL & REMSEN and
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2001 Broadway - 6th Floor
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PREFACE

Petitioner, Barnett Bank of Palm Beach County, petitions this court for an order quashing the decision of the Fourth District Court of Appeal and reinstating the circuit court's final order. Petitioner will be referred to as either petitioner or Barnett Bank. Respondent, Richard Ralph, as personal representative of the Estate of Leon Henry Read, Jr., will be referred to as either respondent or personal representative. All emphasis is supplied.

The following symbol will be used:

R - Record on appeal.

STATEMENT OF THE CASE

Petitioner Barnett Bank filed a claim on an unpaid note against an estate and subsequently filed a Petition for Payment and Enforcement of the Claim. Both the Claim and the Petition were filed in the Probate Division of the Circuit Court for Palm Beach County (R 34-38). The circuit court entered an order on March 22, 1984, directing payment of the claim (R 50-51). The Personal Representative, who is also the lawyer for the estate, appealed and the Fourth District reversed the order and thereafter denied rehearing on August 8, 1985. In re Estate of Read, 472 So.2d 1271 (Fla. 4th DCA 1985). Petitioner filed a notice to invoke

the jurisdiction of this court on September 6, 1985, on the basis of conflict, and this court accepted jurisdiction on January 23, 1986. The present brief is submitted on the merits.

POINTS ON REVIEW

POINT I

THE FOURTH DISTRICT ERRED IN REVERSING THE CIRCUIT COURT'S ORDER DIRECTING PAYMENT OF THE CLAIM AGAINST THE ESTATE WHERE THE PERSONAL REPRESENTATIVE FILED NO OBJECTION TO THE CLAIM OR PETITION AND THE CREDITOR PROVED THAT THE FULL AMOUNT OF THE CLAIM WAS DUE AND OWING.

POINT II

PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE PERSONAL REPRESENTATIVE WAS ESTOPPED TO ASSERT THE STATUTE OF LIMITATIONS.

STATEMENT OF THE FACTS

In February, 1983, the decedent, Leon Henry Read, Jr., executed a promissory note in the amount of $100,000 in favor of Barnett Bank (R 37-38). Read died on April 5, 1983; Richard Ralph was appointed personal representative of the estate on April 28, 1983; and the notice of administration was first published on April 29, 1983 (R 15, 26). Mr. Ralph also became the lawyer for the estate and sometime shortly after becoming personal representative/lawyer went to the bank and discussed the estate and the note in

question. These discussions occurred with the bank's president and vice president. At that time he told both of them the claims would be paid without the bank's filing a formal claim.

On October 21, 1983, after expiration of the 3-months claims period, the personal representative wrote the following letter to the vice-president of Barnett Bank. It is important to note that this letter confirmed an earlier conversation very close to the opening of the estate:

21 October 1983

Mr. Lou Marotta
Vice President
Barnett Bank of Palm Beach
P.O. Box 4444
West Palm Beach, Florida 33402

Re: Leon Henry Read, Jr., Deceased
Notes 01-5608155-55 and
01-5608155-56
Our File No. 83-28 RR

Dear Mr. Marotta:

In line with telephone conversation of 12 October 1983, at which time you advised the $100,000.00 note had accrued interest of $6,147.97 through Monday, 17 October 1983, and a per diem rate of $30.14 thereafter, and that the $32,000.00 note had accrued interest through Monday, 17 October 1983 of $1,832.50 at a per diem of $9.64 thereafter, please find enclosed Estate check No. 140 payable to Barnett Bank in the sum of $33,899.98 for satisfaction of the $32,000.00 principal note and interest of $1,832.50 through 24 October 1983.

Kindly arrange to furnish me with the referred to note.

I wish to further confirm that we are hopeful of satisfying the note in the principal amount of $100,000.00 in the near future, as soon as we are able to reach a final evaluation of some corporate stocks subject to a buy-back agreement.

I wish to further confirm my advices to you and Mr. Garrison at the time I opened the estate account, that the estate would recognize the proper amounts due under these notes without the necessity of the bank filing a formal claim.

Inasmuch as I have received on 17 October 1983 correspondence dated 14 October 1983 from Mr. Barner of Messrs. Cromwell & Remsen, I am furnishing him with a copy of this letter.

Yours faithfully,
CONFORMED COPY:
RICHARD F. RALPH

RICHARD F. RALPH
(See Record p. 48)

RFR/lg
Encl.
cc:
Cromwell & Remsen
Barnett Bank Building
Riviera Beach, Florida 33404
Attn: Freeman W. Barner, Jr., Esq.

Despite this letter and other inquiries from the bank payment was not made and on February 17, 1984, Barnett Bank filed a Statement of Claim based on the unpaid $100,000 promissory note executed by Read (R 31-32). The claim was served by the Clerk of the Court on the personal representative/lawyer and went unanswered. On February 20,

1984, Barnett Bank filed a separate Petition for Payment and Enforcement of Claim and served Formal Notice By Mail on the personal representative, as provided by Rule 5.040(a)(1), Florida Rules of Probate and Guardianship Procedure (R 34, 39, 50). This Formal Notice specifically required the personal representative to serve and file his written defense within twenty days of service of the petition (R 50). The formal notice specifically advised that the relief demanded would be ordered absent a timely response. The personal representative chose not to respond in any manner.

On March 22, 1984 an ex parte hearing on the petition was held, wherein Barnett Bank proved the unpaid note and also introduced into evidence the personal representative's October 21, 1983 letter which acknowledged the $100,000 debt plus interest, and confirmed that there was no need to file a claim in the estate (R 48). The circuit court found the full amount of the claim due and owing and granted the petition and ordered the personal representative to pay Barnett Bank $112,165.50 (R 50). This order of March 22 was served on the personal representative who again did nothing until April 20 when a tardy motion for rehearing was filed. The District Court pointed out that this motion was denied

because it was well beyond the 10 day limit under Probate Rule 5.020(d).

Without ever having properly raised a single issue in the trial court the personal representative/lawyer appealed asserting for the first time that the claim was untimely. On appeal, the Fourth District reversed and held that the circuit court had no authority to order payment. It held that Barnett Bank was forever barred from filing its claim since it did not do so within three months of publication of the notice of administration. Further, it found "no suggestion that the personal representative created an estoppel by [his] conduct. ..." In re Estate of Read, 472 So.2d 1271, 1273 (Fla. 4th DCA 1985).

Barnett Bank invoked this court's jurisdiction based on conflict between the Fourth District's decision and decisions of other district courts and of this court.

SUMMARY OF ARGUMENT

Although Barnett Bank's claim against the estate was not timely filed, the personal representative who was also the lawyer for the estate made no objection to it. At the hearing on an unanswered Petition for Payment and Enforcement of Claim, Barnett Bank proved that the full amount of

the claim was due and owing and also introduced evidence of estoppel against the personal representative. At this point the Bank was under no obligation to present such estoppel evidence but did so out of an abundance of caution. The circuit court properly ordered payment of the claim.

If the personal representative had objected to the claim based on lateness, Barnett Bank would have had an opportunity to fully litigate the estoppel issue and to show that the personal representative's own conduct estopped him from asserting the statute of limitations. Barnett Bank was at least entitled to a hearing on the issue of estoppel.

The absence of any objection from the personal representative effected a waiver of the affirmative defense of lateness. The District Court found the trial court in "fundamental error" because "it failed to detect and enforce the unpled affirmative defense". (Hurley, J. dissenting) In so ruling the DCA placed the petitioner in a fundamentally unfair position. The court preempted an issue which the Bank never had an opportunity to litigate.

ARGUMENT

POINT I

THE FOURTH DISTRICT ERRED IN REVERSING THE CIRCUIT COURT'S ORDER DIRECTING PAYMENT OF THE CLAIM AGAINST THE ESTATE WHERE THE PERSONAL REPRESENTATIVE FILED NO OBJECTION TO THE CLAIM OR PETITION AND THE CREDITOR PROVED THAT THE FULL AMOUNT OF THE CLAIM WAS DUE AND OWING.

Section 733.702, Florida Statutes (1983) entitled Limitations on presentation of claims provides:

> (1) No claim or demand against the decedent's estate that arose before the death of the decedent ... shall be binding on the estate, on the personal representative, or on any beneficiary unless presented:
>
> (a) Within 3 months from the time of the first publication of the notice of administration, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise.

The Fourth District held the above provision to be a jurisdictional statute of nonclaim, so that Barnett Bank's claim was automatically barred since it was not timely filed. However, §733.702, Florida Statutes is not a jurisdictional statute of nonclaim but rather a statute of limitations that must be affirmatively pled.[1] The personal

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[1] Section 733.702 is in terms of "Limitations" and the same word "Limitations" is used in Chapter 95 governing the general subject.

representative took no action to object to the claim even though he was served with formal notice of the Petition for Payment and Enforcement of Claim. At the hearing on the petition, Barnett Bank showed that the full amount of the claim was due and owing. The circuit court therefore properly ordered payment of the claim. Without ever raising the issue of lateness in the probate court the personal representative was allowed to appeal and to prevail.

In Goggin v. Shanley, 81 So.2d 728 (Fla. 1955), Shanley filed a claim against an estate in May 1952. In February 1953 the executrices moved to strike the claim on the ground that it was barred by the statute of limitations. The probate court agreed with the executrices and ruled that the claim was barred by the statute of limitations. The circuit court, on appeal, reversed and held that the probate judge was without authority to adjudicate Shanley's claim but could do no more than order payment of the claim since the executrices failed to raise any objection to its payment. The Florida Supreme Court affirmed the circuit court and said:

> ...It appears that the validity of the Shanley claim turned on the determination of conflicting evidence which could have been determined by a jury if the executrices had seasonably objected to it. Miss Shanley's right to sue certainly was not forfeited because there was no objection to her claim.

> The Circuit Judge correctly found the basic point in the case to be that the personal representatives of decedent and not the Probate Judge is charged with responsibility for administering the estate and is liable for his acts of omission. Had the claim in question been objected to and suit timely brought, payment could have appropriately been rejected, regardless of its merits. The executrices should not now be permitted to ignore the statute of limitations and in the same breath implore the court to raise it against the creditor. Failure of the personal representatives to act should not be permitted to destroy Miss Shanley's right to compensation. 81 So.2d at 729.

In Harbour House Properties, Inc. v. Estate of Stone, 443 So.2d 136 (Fla. 3d DCA 1983), creditor untimely filed a claim against the estate, to which the personal representative responded with a motion to strike. On appeal from the trial court's order granting the motion, the Third District reversed and held:

> Section 733.702, Florida Statutes (1981) and its predecessors are not nonclaims statutes but guidelines for judicial procedure which may be relaxed in the sound discretion of the probate court for good cause shown. See In re Jeffries' Estate, 136 Fla. 410, 181 So. 833 (1938). In Davis v. Evans, 132 So.2d 476, 482 (Fla. 1st DCA 1961), that court acknowledged that circumstances may exist which will excuse a creditor from the apparently absolute bar on the face of the statute. That is the principle which governs disposition of the present controversy. 443 So.2d at 137.

See also In re Estate of Peterson, 433 So.2d 1358 (Fla. 4th DCA 1983) where the court recognized that even if a claim

against an estate is untimely filed, certain exceptions such as estoppel preserve the claim and toll the statute of limitations.

In Stern v. First National Bank of South Miami, 275 So.2d 58 (Fla. 3d DCA 1973), a creditor filed a complaint against decedent for breach of a lease agreement. The personal representative filed a motion to dismiss the complaint, stating that no claim had been filed against decedent's estate pursuant to §733.16(1), Florida Statutes (now §733.702, Florida Statutes). The trial court dismissed the complaint. The appellate court reversed the dismissal and said:

> ... it was reversible error for the trial court to dismiss appellant's complaint based on failure of appellant to comply with the provisions of §733.16, Fla.Stat., F.S.A. If the appellee desired to take advantage of this alleged statutory bar, he should have pleaded the same as an affirmative defense. Then, if the appellant desired to show that the statute was not applicable to his cause of action, he would be privileged to file additional pleadings raising such questions. ... 275 So.2d at 61.

Similarly, in Phillips v. Ostrer, 418 So.2d 1104, 1106 (Fla. 3d DCA 1982), rev. denied, 429 So.2d 6 (Fla. 1983), the court held:

> It was ... error for the trial court to grant a summary judgment on the affirmative defense of statute of limitations ... when this affirmative defense was not pleaded. Affirmative defenses not pleaded are deemed to be waived.

It is clear from the foregoing cases that Section 733.702, Florida Statutes, is not a jurisdictional statute of nonclaim but rather a statute of limitations which must be affirmatively pled. A personal representative cannot stand by and take no action when a claim against the estate is untimely filed and further simply choose not to answer a Petition for Payment and Enforcement of Claim. Rather, he must file a motion to strike or other objection. Such a motion or objection will be granted unless the creditor can demonstrate a legal basis for excusing the lateness of the claim. Only through this procedure will a creditor have an opportunity to show that an exception to the statute of limitations exists. If an exception does exist, the claim is preserved even though it is untimely. In re Estate of Peterson, supra. Contrary to the Fourth District's holding, the circuit court in this case was well within its authority to order payment of the claim, since the personal representative took no action to object to the claim or to the Petition for Payment and Enforcement of Claim. In fact, the circuit court would have erred had it not ordered payment

since Barnett Bank proved that the full amount of the claim was due and owing.

The District Court's opinion also erred in relying on the doctrine of fundamental error to circumvent the legal requirement of pleading an affirmative defense. Judge Hurley's dissenting opinion is an excellent discussion of this issue. As he points out:

> Florida has a host of cases, including several from this court, which hold that section 733.702 is a statute of limitations. Some of these cases are explicit. See, e.g., Harbour House Properties, Inc. v. Estate of Stone, 443 So.2d 136, 137 (Fla. 3d DCA 1983); Grossman v. Selewacz, 417 So.2d 728 (Fla. 4th DCA 1982); In re Estate of Gay, 294 So.2d 668, 669 (Fla. 4th DCA 1974); Stern v. First National Bank of South Miami, 275 So.2d 58 (Fla. 3d DCA 1973). Other cases implicitly designate section 733.702 a statute of limitations because they permit claimants who assert valid estoppel arguments to overcome the statutory bar. See, e.g., In re Estate of Peterson, 433 So.2d 1358 (Fla. 4th DCA 1983); Picchione v. Asti, 354 So.2d 954 (Fla. 3d DCA 1978); North v. Culmer, 193 So.2d 701 (Fla. 4th DCA 1967), overruled on other grounds, Rinker Materials Corp. v. Palmer First National Bank and Trust Co. of Sarasota, 361 So.2d 156 (Fla. 1978). If the statute were a jurisdictional statute of non-claim, an estoppel argument could not be asserted to prevent application of the statutory bar. Miller v. Nolte, 453 So.2d 397, 401 (Fla. 1984).
>
> Thus, it is inescapable that section 733.702 is a statute of limitations. As such, it is an affirmative defense which must be pled. See Rule 1.110(d), Fla.R.Civ.P.

Because it was not asserted by the personal representative the defense of statute of limitations was waived. The Fourth District's decision is not a legally correct result nor is it a practical result. If this decision stands all late filed claims (3 months and 1 day) should be simply filed and the probate court should do nothing with them. A personal representative, before the court on other related estate matters, should remain totally silent. Even if an order requiring payment is entered after notice to him, the personal representative should do absolutely nothing before the probate judge but should instead proceed directly on appeal. Here the personal representative will be able to argue the absence of estoppel and there would be no evidence on this issue in the record. This simply should not be the law. It is particularly noteworthy here that the personal representative is also the attorney for the estate. As stated by Judge Hurley, the majority decision "effectively overrules established principles of law and sets an unwieldly and ... unsound precedent."

POINT II

PETITIONER WAS ENTITLED TO AN EVIDENTIARY HEARING ON THE ISSUE OF WHETHER THE PERSONAL REPRESENTATIVE WAS ESTOPPED TO ASSERT THE STATUTE OF LIMITATIONS.

The Fourth District found that there was no suggestion in the record that the personal representative created an estoppel by his own conduct so as to toll the statute of limitations. This holding was in error for two reasons. First, Barnett Bank did not have a duty or opportunity to plead or prove estoppel because the personal representative filed no objection to the claim. Second, the record did contain evidence of conduct by the personal representative which was sufficient to invoke the doctrine of estoppel. This evidence was in a letter from the personal representative where he confirmed an earlier conversation with bank officials about the lack of necessity for filing the claim.

In Harbour House Properties, Inc. v. Estate of Stone, 443 So.2d 136, 138 (Fla. 3d DCA 1983), the court held:

> ... the conduct of the personal representative was such that the creditor manifestly was entitled to an evidentiary hearing to determine whether the acts, representations, and conduct of the personal representative and his agent had lulled the creditor into a false sense of security concerning the need for the presentation of a claim and whether the personal representative ought therefore be estopped to deny the presentation of the claim. Davis v. Evans.

> For the foregoing reasons, the order appealed from is reversed with directions to afford the creditor an evidentiary hearing upon his claimed excuse for not timely and properly presenting the claim against the decedent's estate.

In Davis v. Evans, 132 So.2d 476 (Fla. 1st DCA), cert. denied, 136 So.2d 348 (Fla. 1961), the court recognized the time period for filing claims against an estate. Nevertheless it held that the doctrine of estoppel operates to toll the statute of limitations in cases wherein the following elements are present:

> (1) a representation by the party estopped to the party claiming the estoppel as to some material fact, which representation is contrary to the condition of affairs later asserted by the estopped party; (2) a reliance upon this representation by the party claiming the estoppel; and (3) a change in the position of the party claiming the estoppel to his detriment, caused by the representation and his reliance thereon. 132 So.2d at 481.

In the instant case, the personal representative told the president and vice-president of Barnett Bank, at the time that he opened the estate account shortly after the death of the decedent, that the estate would recognize the proper amounts due without the necessity of the bank's filing a formal claim. He subsequently wrote a letter confirming his statements (R 48). Barnett Bank relied on that affirmative misrepresentation, did not timely file its

claim, and as a result changed its position to its detriment. Barnett Bank is at least entitled to an evidentiary hearing on the issue of whether the personal representative's conduct was sufficient to invoke the doctrine of estoppel. If there are deficiencies in Petitioner's proof of estoppel it is not surprising. It was never called upon to prove it and introduction of the letter of October 21, 1983, was merely an exercise of noteworthy caution on counsel's part.

CONCLUSION

The decision of the Fourth District should be quashed and the order of the circuit court reinstated or, in the alternative, the cause should be remanded to the circuit court for an evidentiary hearing on the issue of estoppel. The personal representative should not have been allowed to raise the statute of limitations on appeal when it was never raised in the probate court.

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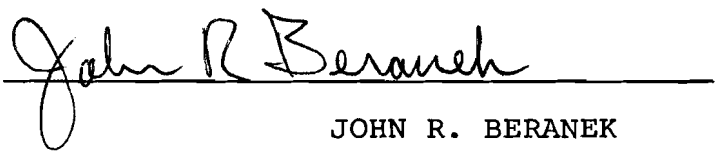
By 

JOHN R. BERANEK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, this 20th day of February, 1986, to: RODERICK F. COLEMAN, 1030 Ingraham Building, 25 S.E. Second Avenue, Miami, Florida 33131.

John R Beranek

JOHN R. BERANEK