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IN THE SUPREME COURT OF FLORIDA

JANET W. SPOHR,

Petitioner,

vs.

ANNA M. SPOHR, WILLIAM E. SPOHR
JR., JOAN A. GARDNER and
JOHN C. BERRYMAN as Personal
Representative of the Estate
of William E. Spohr.

Respondents.

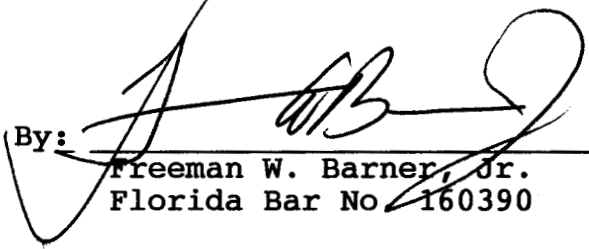
Fourth District Court of
Appeal Case No. 89-1766

Supreme Court
Case No. 76,526

Petitioner's Brief on Conflict Jurisdiction

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Preface

Petitioner JANET W. SPOHR, was the Defendant in the Trial Court through intervention. She was an Appellee in the District Court of Appeal. She will also be alternatively referred to as Petitioner and the "surviving spouse". Respondents ANNA M. SPOHR, WILLIAM E. SPOHR, JR. and JOAN A. GARDNER were Plaintiffs in the Trial Court and the Appellates in the District Court. They will be referred to alternatively as "claimants" and "ex-wife and children". JOHN C. BERRYMAN, as Personal Representative of the Estate of William E. Spohr, was a Defendant in the Trial Court and an Appellee in the District Court of Appeal. He will be referred to as "Personal Representative".

The Appendix is referred to as "(App. ____)."

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Issue Presented For Review

WHETHER THE DECISION OF THE DISTRICT COURT IS IN EXPRESS AND DIRECT CONFLICT WITH THE DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS ON THE SAME QUESTIONS OF LAW, IN DETERMINING THAT A CLAIM BASED UPON A DECEDENT'S AGREEMENT TO MAKE A WILL IS NOT REQUIRED TO BE FILED AS REQUIRED BY SECTION 733.702(1) (1987) OF THE FLORIDA PROBATE CODE, AND IN ADJUDICATING UPON APPEAL AN ISSUE THAT PREVIOUSLY WAS WAIVED BY APPELLANTS THEREIN.

the filing requirements of such claims are concerned, there is no material difference between section 733.702 and its predecessor, section 733.16, pursuant to which were decided cases that were based upon similar claims as in the instant case and with which the decision of the District Court is in express and direct conflict.

Likewise, the decision is in express and direct conflict with cases that hold an appellant waives issues not raised on appeal and that a court should not entertain such issues. The District Court adjudicates the appeal on an issue never raised by appellant, was not briefed or the subject of oral argument. Moreover, the issue upon which the appeal was decided was not based upon any jurisdictional or fundamental error exception.

ARGUMENT

Claim - Filing Requirements - The issue is whether the claim in the instant case was required to be filed within the time and manner provided in the Florida Probate Code, section 733.702 (1987). The District Court found that it was not. In so holding, the decision is in express and direct conflict with another decision of this Court and of other District Courts on the same question of law.

Section 733.702(1)(1987) provides that various categories of claims against a decedent's estate are not binding on the estate, the personal representative or any beneficiary unless presented within three (3) months of the first publication of the "notice of administration". Sub-section two (2) of that statute further provides that no cause of action survives the death of the person against whom the claim may be made unless the claim is filed in the

manner and within the time provided. "Claims" are defined by the Probate Code as liabilities of the decedent, whether arising in contract, tort or otherwise. Fla. Sta. }731.201(4)(1987).

In Hofer vs. Caldwell, 53 So.2d 872 (Fla. 1951), this Court previously determined that actions to enforce an agreement to execute a will are within the definition of those claims that must be filed within the time provided in section 733.16, the predecessor to section 733.703 (1987), or the suit will be barred. Id., at 873. In Hofer this Court found that such a cause of action, Id.:

... was clearly within the intendment of the Legislature in enacting that portion of the statute ..., in accordance with its general policy of providing for the speedy settlement of estates.

Bonner vs. Atlantic National Bank of Jacksonville, 18 Fla. Supp. 150 (Cir. Ct. Duval County 1961) expresses a similar result for the same reason. In the case the Court notes as significant that such a claim has its foundation in a contract with the decedent. Id., at 153.

Similar to the Hofer and Bonner cases is Van Sciver vs. Miami Beach First National Bank, 88 So.2d 912 (Fla. 1956). In that case the issue was whether the claim of a former wife against her deceased ex-husband's estate, which arose out of a separation agreement and trust agreement executed prior to their divorce, was required to be filed in the manner and the time provided in section 733.16. No claim was filed for the monies due under the agreement until after expiration of the period prescribed in section 733.16. The Court in Van Sciver found that the obligation was a contractual

one arising out of a promise decedent made during his lifetime with the intention of binding his executor after his death. Id., at 914. The Court affirmed dismissal of Plaintiff's complaint since it was not filed within the time specified by the statute. Id., at 915.

The Trial Court relied on Hofer and Bonner in dismissing the Complaint in the case and holding that a claim such as in the instant case was required to be filed within the period of limitations contained in section 733.702(1)(1987). (App. C., p.3). The District Court, though, determined this to be error because these were two older cases decided under the prior Probate Code section 733.16. The District Court agreed that this statute, as it existed at the time of the Hofer and Bonner decisions, would have been applicable and operate to bar the claims of the Plaintiff's in the Trial Court. Nevertheless, the District Court found that the revision of the statute in the current version of the Probate Code limited its applicability to claims arising prior to a decedent's death and, therefore, it was inapplicable to the instant case. On this basis the summary judgment for Defendant's was reversed. (App. D).

In reaching its decision the District Court determined that the Appellant's claims arose after decedent's death. For this reason it held these claims not to be statutorily required to be filed within the period of limitations required by section 733.702 (1987). The Court further established a very broad point of law in the Opinion, that the existing version of section 733.702 is

limited in its application only to claims arising prior to a decedent's death.

As is revealed by a comparison of section 733.16 with section 733.702, the claims within the parameters of both statutes, and which must be filed, are exceeding broad. Claims encompassed within both versions are those whether due or not; direct or contingent; liquidated or unliquidated; claims for damages including those founded upon fraud or other wrongful act or omission of a decedent; as well as various other claims. As is evident, claims within section 733.702 (1987) are not merely those claims that arise before a decedent's death, as the District Court suggests, but there are numerous other categories of claims as well. As a separate and distinct category from claims arising before the death of a decedent, section 733.702 requires there to be filed any claim for damages. (e.s.). The damages claims required to be filed are not determined by the time when they arose, and these claims are dissociated in the statute by a semi-colon from the category of claims arising prior to death. A claim such as in the instant case could be categorized as a damages claim and one that is contingent, as well. The claim here also certainly is an obligation of the decedent that had its basis in a contractual agreement prior to decedent's death.

The District Court further appears to interpret "claim" within the intendment of section 733.702 (1987) as one that could have been enforced against the decedent while living and that could have been reduced to judgment against him while alive. This has been

judicially determined otherwise, however, and in this respect the decision is in conflict with Gates Learjet Corp. vs. Moyer, 459 So.2d 1082, 1084 (4th DCA Fla. 1984). This interpretation by the District Court also is in conflict with Van Sciver, supra, with regard to the "contingent" nature of claims that are required to be filed by section 733.702. The Van Sciver court placed in the category of "contingent claims" those claims such as in the instant case and the statute in that regard is unchanged today.

There have been no changes in the Probate Code from former section 733.16 which could be the basis for changing the result from the Harper, Bonner and Van Sciver cases. These cases control the decision in the instant case and the District Court's Opinion is in conflict with them. Section 733.702 is an all-inclusive claims statute. The legislative intent has been for the statute to be broadly applied to bring claims within its confines. Gates Learjet Corp., supra, at 1084. The statute applies to claims that arise after a decedent's death, Id., at 1083-84, and even to claims that are unknown by a creditor at the time of death-notwithstanding harsh results that might arise. Id. It clearly applies to the claim in the instant case. If it didn't claims based upon agreements to make a will, that could change distribution of an entire estate, might be filed in civil proceedings against a Personal Representative up until the time an estate was closed. Such a result never could have been intended. Waiver Of Issue On Appeal - The Opinion of the District Court characterized the issue on appeal as, (App. D, pgs. 1-2),:

... whether the timely filing of a complaint in a civil proceeding satisfies the probate statutory requirement that claimants must file their claims in the decedent's probate proceedings within a prescribed time frame and manner. {733.702, Fla. Stat. (1987).

This issue on appeal was neither adjudicated nor discussed in the Opinion. The Court proceeded to adjudicate the appeal on an entirely separate issue - whether section 733.702 applied to the claim in the instant case at all. The Court further observed in the Opinion that it wrote to address the issue even though it was not argued by the parties on appeal. Id.p.2.

In not raising on appeal the Trial Court's adjudication that section 733.702 was applicable to the claims in the Trial Court Claimants, Appellants in the District Court and Plaintiff's in the Trial Court, waived any error relating to this issue. Atrio Consolidated Industries, Inc. vs. Southeast Bank, 434 So.2d 349 (3rd DCA Fla. 1983). See, Sag Harbour Marina, Inc. vs. Fickett, 484 So.2d 1250, 1256 (1st DCA Fla. 1986). Even though this issue was raised by Claimants in the Trial Court, it is not cognizable on appeal if it is not included in Appellant's brief. Mcdonald vs. Pickins, 544, So. 2d 261, 264 (1st DCA Fla. 1989). Moreover, and importantly, as the Fifth District Court noted in Norris vs. Edwin W. Peck, Inc., 381 So.2d 353, 354-55 (5th DCA Fla. 1980):

1 In the decision the District Court suggested that the matter upon which the appeal was decided was not argued because the Trial Court found that the statute barred the claim. (App. p.2). Petitioner fails to understand why the ruling of the Trial Court on the issue could not have been made an issue in the appeal by the Appellant-it was in the Trial Court. If it had been, it would have been briefed and argued by both of the parties.

...this Court should not address portions of orders which have not been raised on appeal and about which the parties are not complaining.

Since the Appellants in the District Court waived the issue upon which the District Court decided the appeal, the District Court was in error in adjudicating the appeal on that issue. In the circumstances the Opinion of the District Court, as reflected on its face, is in conflict with the previously cited cases.

In addition to the more obvious reasons behind a rule that precludes an appellant relief which he has not sought, this rule co-exists with other appellate principals. The purpose of an appellee's answer brief is to respond to points raised by an appellant in his initial brief. See, Denny vs. Denny, 334 So.2d 300, 302 (1st DCA Fla. 1986). In this manner an appellee discharges his responsibility to support the ruling of the trial court. In this case the issue decided on appeal was not briefed or even the subject of discussion at oral argument. As such, there really was no appropriate or fair opportunity for Petitioner here to address and brief the issue decided by the District Court.

Even though the ex-wife and children waived the issue upon which the appeal was decided, Petitioner Spohr recognizes that there are circumstances, very limited, in which in the interest of justice an appellate court may decide an issue not raised in the proceedings where there is a jurisdictional or fundamental error apparent in the record on appeal. Pittman vs. Roberts, 122 So.2d 333, 334 (2nd DCA Fla. 1960). This is not one of those cases, however, and in the respect the decision of the District Court is

in conflict with other decisions of this state.

Nowhere in its decision did the District Court express that the Trial Court's application of section 733.702 (1987) was a jurisdictional or fundamental error, although from a legal standpoint this appears to be the only basis upon which consideration of the issue would be supportable. Nevertheless, it is apparent that the District Court did not consider any matter of personal or subject matter jurisdiction in reaching its decision. As far as section 733.702 is concerned, whether that statute is jurisdictional previously has been raised and decided in this court in Barnett Bank vs. The Estate of Read, 493, So.2d 447 (Fla. 1986). In that case this court expressly held that section 733.702 is not a jurisdictional statute of non-claim but a statute of limitations. Id., at 448. In so finding, this court held that the failure to plead section 733.702 as a statute of limitations constitutes a waiver of the statute as a defense. Interestingly, this decision of the Supreme Court overruled the Fourth District's decision In re: The Estate of Read, 472 So.2d 1271 (4th DCA Fla. 1985), which found it was "fundamental error" for the Trial Court not to apply the period of limitations in section 733.702 to bar the claim presented, even though it was not raised as a defense in the Trial Court.

Assuming, arguendo, that the Trial Court was incorrect in determining that the claim was governed by section 733.702, this still was not "fundamental error" which would justify the District Court's intervention on this issue. Section 733.702 is an

affirmative defense to a claim such as the claimants here. In such context, if a Trial Court misapplies a statute of limitations should this be treated as "fundamental error" by an Appellate Court and an appeal decided on this issue even though not raised by the parties? If so, and this is what the District Court did, this is in direct conflict with Boatwright vs. The City of Jacksonville, 334 So.2d 339 (1st DCA Fla. 1976). That case stands for the proposition that the application of a statute of limitations may not be considered by an appellate court where it is not raised on appeal. Id., at 341. This is consistent with other decisions that hold that courts should not address portions of orders which have not been raised on appeal, although there may be involved the application of a statute that may change the result of the litigation. See, Norris, supra at 354, see, U.S. vs. Harris and Co. Adv., Inc., 149 So.2d 384, 385 (3rd DCA Fla. 1963).

Conclusion

This Court should exercise its discretion and grant jurisdiction and entertain the case on the merits. Issues are raised in the District Court's decision which need to be resolved and which are of great public importance to the people of the state of Florida as well as the trial bar. The nature of the claims that must be filed in a decedent's estate within proscribed times must not be in doubt, so that settlement of estates can be expedited and facilitated. Moreover, there likewise must not be uncertainty surrounding the issues upon which an appeal will be briefed and adjudicated so the parties will address them in the proceedings.


Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Leonard J. Adler, Esquire, Shapiro & Bergman, P.A. at 777 South Flagler Drive, Suite 310 East, West Palm Beach, Florida and Peter Matwiczuk, Esquire, at 140 Royal Palm Way, Room 206, Palm Beach, Florida 33480 by mail, this 27th day of August, 1990.

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JANET W. SPOHR,)
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JOHN C. BERRYMAN, Personal)
Representative of the Estate)
of William E. Spohr, ANNA M.)
SPOHR, WILLIAM E. SPOHR, JR.,)
and JOAN A. GARDNER,)
)
Respondents.)
_____)

CASE NO. 76,526

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to
PETITIONER'S BRIEF ON CONFLICT JURISDICTION

<u>Exhibit</u>	<u>Document</u>
A	<u>Complaint</u> of Anna M. Spohr, Joan E. Gardner & William E. Spohr, Jr. (April 7, 1987)
B	<u>Answer to Complaint, Affirmative Defenses</u> of Janet W. Spohr (May 25, 1988)
C	<u>Summary Final Judgment for Defendants</u> (May 11, 1989)
D	<u>Opinion</u> of 4th District Court of Appeal (July 18, 1990)

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Peter Matwiczuk, Esquire, Attorney for Plaintiffs, at 140 Royal Palm Way, Suite 206, Palm Beach, Florida 33480, to Leonard J. Adler, Esquire, Attorney for Personal Representative, at SHAPIRO & BREGMAN, Phillips Point, Suite 310 East Tower, 777 South Flagler Drive, West Palm Beach, Florida 33401, by mail, this 27th day of August, 1990.

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