

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC13-2536
DCA CASE NO. 4D12-2094

CAROL ANN JONES, as Personal Representative
of the Estate of Harry Bruce Jones

Petitioner,

v.

EDWARD I. GOLDEN, as
Curator of the Estate of Katherine Jones,

Respondent.

ANSWER BRIEF

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

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INTRODUCTION

This matter is on discretionary review from the Fourth District Court of Appeal after certification of conflict with decisions from the First and Second District Courts of Appeal.

The Petitioner, Carol Ann Jones, is the Personal Representative of the Estate of Harry Bruce Jones and will be referenced herein as the “Petitioner” or the “Personal Representative”.

The Respondent, Edward I. Golden, Esq., is the Curator of the Estate of Katherine E. Jones pursuant to Amended Letters of Curatorship issued May 27, 2010 in Miami-Dade County Circuit Court Case No. 10-0319 CP 01. Edward I. Golden, Esq. as Curator of the Estate of Katherine E. Jones will be referenced herein as the “Respondent” or “Curator”.

The references to the Record are to the original Record on Appeal as assigned by the Clerk of the Circuit Court and will be referred to herein as (R:Page-Page).

By Order of the Fourth District Court of Appeal dated December 31, 2012, the Former Wife’s Motion to Compel Former Husband to Comply with the Terms of the Parties’ Marital Settlement Agreement / Modification of Marital Settlement Agreement and for Order Enforcing Same, originally filed February 17, 2006 in the Broward County Divorce Action Katherine E. Jones v. H. Bruce Jones, Case No. 99-13968 (42) (hereinafter the “Former Wife’s Motion to Compel”), was made a

supplement to the Record on Appeal and appears as Tab A in the Index in this action.

The Former Wife's Motion to Compel will be referred to herein as

(Supp:Page:Line-Page:Line).

STATEMENT OF THE FACTS OF THE CASE

The parties hereto are the Estate of Katherine E. Jones, Edward I. Golden, Esq., Curator (Respondent), and the Estate of Harry Bruce Jones, Carol Ann Jones, Personal Representative (Petitioner). Katherine E. Jones died on January 16, 2010. Prior to her death on January 16, 2010, Katherine E. Jones was an adjudicated mentally incapacitated adult pursuant to a Miami-Dade County Guardianship, Miami-Dade County Circuit Court Case No. 08-4473 GD (01) (hereinafter the “Guardianship Action”). Prior to Katherine E. Jones’ death, Anthony Romano (hereinafter the “Guardian”) was appointed the Guardian of Katherine E. Jones pursuant to Letters of Emergency Temporary Guardianship entered September 16, 2008, Amended Letters of Emergency Temporary Guardianship entered November 14, 2008, and Letters of Plenary Guardianship entered November 25, 2008 in the Miami-Dade County Guardianship Action.

Prior to her adjudication of mental incapacity, Katherine E. Jones was married to Harry Bruce Jones. Katherine E. Jones and Harry Bruce Jones were divorced in Broward County Circuit Court Case No. 99-13968 (42) (hereinafter the “Divorce Action”) by Final Judgment of Dissolution of Marriage dated December 18, 2003. As part of the Divorce Action, Katherine E. Jones and Harry Bruce Jones entered into a Marital Settlement Agreement dated November 19, 2003 (hereinafter the “MSA”) (R:91-147) and a Modification of Marital Settlement Agreement dated

November 19, 2003 (hereinafter the “Modified MSA”) (R:148-171). At the time of the divorce, as stated in the Modified MSA, Harry Bruce Jones, a physician, was not only the Husband, but was also the fiduciary, trustee and administrator of two retirement plans, to wit, the H. Bruce Jones M.D.P.A. Money Purchase Pension Plan (hereinafter the “Money Purchase Plan”) and the H. Bruce Jones M.D.P.A. Profit Sharing Plan (hereinafter the “Profit Sharing Plan”). (R:157). The Money Purchase Plan and the Profit Sharing Plan, collectively, will be referenced herein as the “Retirement Plans”. The Marital Settlement Agreement and Modification of Marital Settlement Agreement provided that Katherine E. Jones was to receive certain assets which Harry Bruce Jones represented to have been held by the Retirement Plans. (R:164-165). Pursuant to the settlement agreement, Harry Bruce Jones was to prepare Qualified Domestic Relations Orders (QDROs) to roll over one-half of the Retirement Plans to an IRA in the name of the Wife. (R:99-100). Two QDROs were issued by the Court on August 21, 2005; one order addressed the Money Purchase Plan (Supp.11), and the second order addressed the Profit Sharing Plan (Supp:20). Upon information and belief, the assets were never placed in the Retirement Plans by Harry Bruce Jones.

By February of 2006, Harry Bruce Jones, as fiduciary, trustee and administrator of the Retirement Plans, had not complied with the QDROs by transferring assets to Katherine E. Jones as required by the MSA, the Modified

MSA, and the QDROs. Upon information and belief, Harry Bruce Jones intentionally and fraudulently utilized those assets for his own benefit to the detriment of Katherine E. Jones in violation of the MSA and the Modified MSA. At that time, Harry Bruce Jones was represented by attorney Michael Jones, Esq. in post dissolution litigation in the Divorce Action. Michael Jones, Esq. is the natural son of father Harry Bruce Jones (the former husband/Petitioner Estate herein) and mother Katherine E. Jones (the former wife/Respondent Estate herein). Michael Jones, Esq. also signed as a witness to both the MSA (R:132) and the Modified MSA (R:162). On February 17, 2006, Sandor F. Genet, Esq., as attorney for Katherine E. Jones in the Divorce Action, served Michael Jones, Esq., as attorney for his father, Harry Bruce Jones, in the Divorce Action, the *“Former Wife’s Motion to Compel Former Husband to Comply with the Terms of the Parties’ Marital Settlement Agreement/Modification of Marital Settlement Agreement and for order Enforcing Same”* (hereinafter the “Former Wife’s Motion to Compel”) (Supp:1-28). In the Former Wife’s Motion to Compel, Katherine E. Jones directly advised Michael Jones, Esq. (her son), as counsel for his father, Harry Bruce Jones, that Katherine E. Jones had not received her portion of the assets alleged to have been in the Retirement Plans. (Supp:2). The Former Wife’s Motion to Compel, served on Michael Jones, Esq. (her son), as counsel for his father, Harry Bruce Jones, in the Divorce Action, stated, inter alia, that “the Former Husband has not caused the

Former Wife's interest in [the Retirement Plans] to be rolled over into the accounts specified as requested by the Former Wife." Upon information and belief, during his lifetime, Harry Bruce Jones fraudulently and intentionally utilized those funds, which were represented to have been contained in the Retirement Plans and which were the subject of the QDROs, over which Harry Bruce Jones, personally, had dominion and control. Those funds believed to have been appropriated and embezzled by Harry Bruce Jones, personally, were the rightful property of the Former Wife.

Harry Bruce Jones died on February 16, 2007. On April 24, 2007, an Amended Petition for Administration was filed in the Estate of Harry Bruce Jones, Broward County Circuit Court Case No. PR-C-07-0001771. (R:1-3). Carol Ann Jones was appointed as Personal Representative of the Estate of Harry Bruce Jones. Michael Jones, Esq., the son of Katherine E. Jones (your Respondent Estate) and Harry Bruce Jones (Petitioner Estate), and formerly the divorce attorney for his father, Harry Bruce Jones (Petitioner Estate), is also the attorney for the Personal Representative of this Estate of Harry Bruce Jones, the Petitioner in this action.

Michael Jones, Esq. is a substantial beneficiary of the Estate of his father, Harry Bruce Jones. Michael Jones, Esq., having litigated against his mother, Katherine E. Jones, on behalf of his father, Harry Bruce Jones, in the Divorce Action, was fully aware of all aspects of the Divorce Action when he began

representing Carol Ann Jones as Personal Representative of the estate of his father, Harry Bruce Jones. More specifically, prior to his appearance as attorney for the Personal Representative of his father's estate, Michael Jones, Esq. had been served with the Former Wife's [Katherine E. Jones'] Motion to Compel (Supp:1-28) which directly notified Michael Jones, Esq. that his mother, Katherine E. Jones, was a known creditor of the Estate of his father, Harry Bruce Jones.

Because Michael Jones, Esq., as attorney for the Personal Representative, had actual knowledge that his mother, Katherine E. Jones, was a creditor of the Estate of his father, Harry Bruce Jones, Michael Jones, Esq. was required by §733.2121(3)(a), Fla. Stat. (2006) to promptly serve Katherine E. Jones with a copy of the Notice to Creditors. Notwithstanding his actual knowledge that his mother was a creditor of his father's estate, Michael Jones, Esq., attorney for the Personal Representative, failed or refused to serve Katherine Jones, or the Guardian, with the required copy of the Notice to Creditors in violation of §733.2121(3)(a), Fla. Stat. (2006).

On August 17, 2007, Michael Jones, Esq., as attorney for the Personal Representative, filed his Notice of Filing Proof of Publication of Notice to Creditors. (R:04). Notwithstanding that Katherine E. Jones was a known creditor, Michael Jones, Esq. did not serve a copy of the Notice to Creditors on Katherine E. Jones or the Guardian of Katherine E. Jones. On January 14, 2008, approximately 17 months after the expiration of the 3 month publication period (for unknown

creditors), and less than two years after the death of Harry Bruce Jones, the Guardian filed a Statement of Claim on behalf of Katherine E. Jones for monies owed to Katherine E. Jones by virtue of the MSA and Modified MSA. (R:5) The monies owed to Katherine E. Jones which are the subject of the Statement of Claim are the same monies which were the subject of the Former Wife's Motion to Compel (Supp:1-28) which was served on Michael Jones, Esq. in the Divorce Action. No Objection to the Guardian's Statement of Claim was ever filed in the Estate.

Katherine E. Jones died on January 16, 2010. On December 2, 2011, the Curator filed his Motion to Compel Payment of Share Value Pursuant to Marital Settlement Agreement. (R:07-66). That Motion sought payment of the Guardian's Claim and stated, inter alia, that Katherine Jones was a known or reasonably ascertainable creditor, her Statement of Claim was filed within two (2) years of the Decedent's death, and no Objection to the Claim was filed. On February 10, 2012, Michael Jones, Esq., on behalf of the Personal Representative of the Estate of Harry Bruce Jones, filed his Motion to strike Guardian's Statement of Claim and Motion to Strike Curator's Motion to Compel Payment. (R:73-87). In that Motion, Michael Jones, Esq., as attorney for the Personal Representative, asserted that, while the Guardian's Statement of Claim was filed within two years of the Decedent's death as required by §733.710 Florida Statutes (2006), the Claim is barred because the Guardian "failed to take the first step in seeking to assert a claim

in this action by their failure to seek an extension pursuant to Fla. Stat. §733.702(3) [Florida Statutes (2006)].” (R:75). On March 14, 2012, the Curator filed a Petition for Order Declaring Statement of Claim Timely Filed and/or for Enlargement of Time to File Statement of Claim, Nunc Pro Tunc. (R:172-181). A hearing on the Curator’s “Motion to Compel Payment of Share Value Pursuant to Marital Settlement Agreement” and “Petition for Order Declaring Statement of Claim Timely Filed and/or for Enlargement of Time to File Statement of Claim, Nunc Pro Tunc”, was scheduled for April 21, 2012. Before the Curator’s motions were heard, a hearing was held on April 19, 2012 on the Personal Representative’s Motion to Strike Guardian’s Statement of Claim and Motion to Strike Curator’s Motion to Compel Payment.

On May 2, 2012, the trial court entered its order Striking the Guardian’s Claim as “untimely”. That May 2, 2012 order was appealed before the Fourth District Court of Appeal and the opinion was rendered therein at *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013). The Fourth District Court of Appeal entered its opinion reversing the trial court’s order and remanding, and certified conflict with *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2nd DCA 2012) and *Morgenthau v. Andzel*, 26, So. 3d 628 (Fla. 1st DCA 2009).

Summary of the Argument

In the trial court order from which this action arises, the trial court struck the Respondent's Statement of Claim in the estate before a determination could be made as to whether the creditor was known or reasonably ascertainable. The trial court struck the claim because (a) it was filed after the 3 month creditor's claim period, or "publication period", imposed on "unknown creditors" by §733.702 Fla. Stat. (2006), and (b) because no motion for "extension to file the Claim" was sought by the Respondent creditor within two (2) years of the Decedent's death. In its order, the trial court stated that it relied on *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012), and *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) in striking the Claim.

Lubee and *Morgenthau* are jurisprudentially flawed and both opinions are erroneous. The decision in *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012) is based upon erroneous conclusions of law which are summarized in the following excerpt:

"Because he was not served with a copy of the notice to creditors, Mr. Lubee was required to file his claim in the probate proceeding within the three-month window following publication.

Alternatively, Mr. Lubee could seek an extension from the probate court pursuant to section 733.702(3) within the two year window of section 733.710." *Lubee v. Adams*, 77 So. 3d 882, 884 (Fla. 2^d DCA 2012)

The first sentence is erroneous because it fails to take into consideration

whether Mr. Lubee was a known or reasonably ascertainable creditor. §733.702 Fla. Stat. (2006) provides two (2) distinct and different statutes of limitations for creditors; one for “known or reasonably ascertainable creditors” and a second for “unknown creditors.” Pursuant to §733.702(1) Fla. Stat. (2006), only “unknown creditors” must file a Statement of Claim within 3 months of the Personal Representative’s publication of the Notice to Creditors in a newspaper. Pursuant to §733.702(1) Fla. Stat. (2006), a “known or reasonably ascertainable creditor” must file a Statement of Claim within 30 days of receipt of a copy of the Notice to Creditors, which copy must be “immediately” served by the Personal Representative pursuant to §733.2121 Fla. Stat. (2006). By the plain language of §733.702(1) Fla. Stat. (2006), if a creditor is “known”, he cannot be bound by the 3 month publication period limitation imposed on “unknown creditors.”

“Because he was not served with a copy of the notice to creditors, Mr. Lubee was required to file his claim in the probate proceeding within the three-month window following publication.” *Lubee v. Adams*, 77 So. 3d 882, 884 (Fla. 2^d DCA 2012)

That first statement is incorrect. If Mr. Lubee was an “unknown creditor”, he would have been “required to file his claim in the proceeding within the three-month window following publication” as the case states, but not “because he was not served with a notice to creditors”: He would have been bound by that 3 month window “because” of the plain language of §733.702(1) Fla. Stat. (2006) pertaining to “unknown creditors.” If, on the other hand, Mr. Lubee was a “known or reasonably ascertainable creditor,” he would not have been bound by the 3 month

“window following publication”, but rather would have been bound by the 30 day window following receipt of an actual copy of the Notice to Creditors; an absolute requirement imposed upon the Personal Representative by §733.2121 Fla. Stat. (2006). As more specifically set forth herein, if no copy of the Notice to Creditors is served by the Personal Representative on a “known creditor”, there is no limitation imposed by the plain language of §733.702(1) Fla. Stat. (2006).

The second erroneous statement in, *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012) is as follows:

“Alternatively, Mr. Lubee could seek an extension from the probate court pursuant to section 733.702(3) within the two year window of section 733.710.” *Lubee v. Adams*, 77 So. 3d 882, 884 (Fla. 2^d DCA 2012

This second statement is also incorrect for a couple of reasons. First, there is no provision in §733.702 Fla. Stat. (2006), §733.710 Fla. Stat. (2006), or any other statute, to impose a 2 year limitation on the filing of a “motion to extend time to file a statement of claim.” Second, until the trial court makes a determination as to whether the creditor was known or reasonably ascertainable, based upon evidence presented at a hearing, it cannot be determined whether an extension of time is necessary. In other words, if the creditor is “unknown” and bound by the 3 month publication period, there is no statutory limitation to prevent the filing of a motion to extend time to file that claim so long as the Claim, itself, is filed within 2 years of death; and if

the creditor is “known” (as in this case), no motion for extension is necessary if a copy of the Notice to Creditors was not served by the Personal Representative, because the 30 day window imposed by §733.702(1) Fla. Stat. (2006) does not begin to run until the date of service of that Notice to Creditors. If the Notice to Creditors is never served, no limitation period ever begins to run and, by extension, no §733.702(1) Fla. Stat. (2006) limitation period can expire. Under those circumstances, the “known” creditor is only bound by the 2 year filing limitation imposed by §733.710 Fla. Stat. (2006). This was the finding of the Fourth District Court of Appeals in *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013).

For these reasons, the opinions of *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012), *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) are erroneous and this honorable Court should resolve conflict in favor of the reasoning set forth in *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013): Where the Notice to Creditors is not served on a known or reasonably ascertainable creditor, then the applicable limitations period of Section 733.702(1) [Fla. Stat. (2006)] never begins to run and the known or reasonably ascertainable creditor is bound only by Section 733.710’s two-year statute of repose. *Id.* at 391.

Argument

I. WHERE THE NOTICE TO CREDITORS IS NOT SERVED ON A KNOWN OR REASONABLY ASCERTAINABLE CREDITOR, THEN THE APPLICABLE LIMITATIONS PERIOD OF SECTION 733.702(1) NEVER BEGINS TO RUN AND THE KNOWN OR REASONABLY ASCERTAINABLE CREDITOR IS BOUND ONLY BY SECTION 733.710's TWO-YEAR STATUTE OF REPOSE. HENCE, NO MOTION FOR ENLARGEMENT OF TIME TO FILE IS REQUIRED IF THE CLAIM IS FILED WITHIN TWO YEARS OF DEATH

In this action a known creditor, who was NOT served with a copy of the Notice to Creditors, filed a Statement of Claim outside the three (3) month publication period which limits only “unknown creditors” as described in §733.702(1) Fla. Stat. (2006), but within two (2) years of the Decedent’s death as permitted by §733.710 Fla. Stat. (2006). Petitioner moved to strike the Claim as untimely asserting that the Guardian had not applied for or obtained an order of the trial court to extend the time to file the allegedly “untimely” Claim within the two (2) year Statute of Repose period imposed by §733.710 Fla. Stat. (2006). The trial court did not hold any hearing to determine whether the Respondent was a known or reasonably ascertainable creditor and did not make any finding of fact on that issue. In the Order Striking Untimely Filed Claim, from which this appeal is taken, the trial court Judge stated, in a footnote, that the decision was based upon *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012), *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009), *Comerica Bank & Trust F.S.B. v. SDI Operating Partners, L.P.*, 673

So. 2d 163 (Fla. 4th DCA 1996)¹, *Faerber v. D.G.*, 928 So. 2d 517 (Fla. 2^d DCA 2006)², and *May v. Illinois Nat'l Ins. Co.*, 771 So. 2^d 1143 (Fla. 2000)³.

(R:457-458). *Lubee v. Adams*, 77 So. 3d 882, and *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009) stand for the proposition that any creditor, known or unknown, who files a Statement of Claim outside the three (3) month publication

¹ *Comerica Bank & Trust F.S.B. v. SDI Operating Partners, L.P.*, 673 So. 2d 163 (Fla. 4th DCA 1996) is not applicable to this case. In *Comerica*, the Decedent died on June 20, 1992 and no Statement of Claim was filed within two years of the date of death. Under those circumstances, §733.710 Fla. Stat., a statute of repose, would absolutely bar the filing of any claim after 2 years. In the instant action, the Statement of Claim was filed within 2 years of the Decedent's death. Hence, *Comerica Bank & Trust F.S.B.* does not apply.

² *Faerber v. D.G.*, 928 So. 2d 517 (Fla. 2^d DCA 2006) does not support the trial court's order, and is inapplicable here. In that case, a Decedent died, the Personal Representative published notice to unknown creditors, and the Creditor filed a Statement of Claim outside the publication period, but within the 2 year statute of repose imposed by §733.710 Fla. Stat. The trial court granted an extension of time to file the Statement of Claim without evidence that the Creditor was known or reasonably ascertainable. The Second District Court of Appeal remanded the case back to the trial court for an evidentiary hearing to determine whether the Creditor was known or reasonably ascertainable. The opinion in *Faerber* does not support the striking of your Respondent's Statement of Claim, which is the subject of this appeal, prior to an evidentiary hearing to determine whether the Respondent was a known or reasonably ascertainable creditor. In fact, *Faerber* supports the Respondent's assertion that a trial court must determine that a creditor was not known or reasonably ascertainable before it can strike a Statement of Claim as untimely.

³*May v. Illinois Nat'l Ins. Co.*, 771 So. 2^d 1143 (Fla. 2000) clarifies that §733.702 Fla. Stat. is a statute of limitation and §733.710 is a statute of repose, or non-claim statute. This Supreme Court opinion is not at odds with the argument contained in this appeal and does not support the striking of the Statement of Claim at issue in this appeal for the reasons set forth herein.

period described in §733.702 Fla. Stat. (2006) must seek an extension of time within which to file his claim, and that motion to extend must be filed within two years following the decedent's death. *Lubee v. Adams*, 77 So. 3d 882, 883 (Fla. 2^d DCA 2012), *Morgenthau v. Andzel*, 26 So. 3d 628, 633 (Fla. 1st DCA 2009)⁴. Both *Lubee* and *Morgenthau* are legally erroneous for the following reasons:

§733.710 Fla. Stat. (2006) stands alone as a statute of repose. It states only that a creditor who does not file a Statement of Claim within two (2) years of death is barred from filing any claim thereafter. No extensions to this two (2) year statute of repose can be granted by any court. Every statute of limitation or statute of repose has a commencement date, or what I call a “trigger date”; the date of the event when the countdown begins. The trigger date for §733.710 Fla. Stat. (2006) is the date of death. Every statute of repose and statute of limitation involves a calculation to determine the expiration date of the limitation period. As a mathematical

⁴ The recently decided *Souder v. Malone*, 143 So. 3d 486 (Fla. 5th DCA 2014) espouses the same erroneous reasoning as *Lubee*. Predicated entirely on the existence of language in §733.702(3) Fla. Stat. authorizing extensions of time to file claims based on insufficient notice, and making no distinction between known and unknown creditors, *Souder* states that “creditors who are not served a copy of the notice to creditors are required to file their claims within the three-month window following publication or, alternatively, may seek an extension from the probate court pursuant to section 733.702(3) within the two-year window set forth in section 733.710. Citing *Lubee v. Adams*, 77 So. 3d 882, 883 (Fla. 2^d DCA 2012). Your Respondent refutes this opinion and its reasoning for the reasons set forth herein.

expression, the date certain of expiration of any statute of limitation or statute of repose is calculated as follows:

$$\text{Trigger Date ("T")} + \text{duration ("D")} = \text{Expiration ("E")}$$

As an example, §95.11(3)(o) Fla. Stat. (2014) provides for a four (4) year statute of limitation on the filing of actions founded on battery. The Trigger Date ("T") is the date of the battery. The Duration ("D") is four (4) years. The Expiration ("E") is calculated by adding the Duration ("D") to the Trigger Date ("T"). If a battery occurred on April 5, 2000, the Statute of Limitation would expire on April 5, 2004 as follows:

$$\text{Trigger Date (4/5/2000)} + \text{Duration (4 years)} = \text{Expiration (4/5/2004)}$$

Due process requires that a litigant be able to calculate the termination date of his or her limitation period if he or she is to be deprived of property on procedural grounds. Pursuant to the Statute of Repose contained in §733.710 Fla. Stat. (2006), all creditors must file Statements of Claim within two years of the death of the Decedent or be forever barred. The expiration of that statute of repose is calculated as follows:

$$\text{Trigger Date (Date of Death)} + \text{Duration (2 Years)} = \text{Expiration Date ("E")}$$

Harry Bruce Jones died on February 16, 2007. Hence, §733.710 Fla. Stat. (2006) requires that all Statements of Claim shall be filed in his Estate on or before February 16, 2009. All claims filed after that date are absolutely barred by §733.710 Fla. Stat. (2006) as per the calculation.

§733.702 Fla. Stat. (2006) imposes a completely separate and different statute of limitation (not a statute of repose) on Creditors of an estate for the filing of Creditor's Claims. §733.702 Fla. Stat. (2006) is independent in every way from §733.710 Fla. Stat. (2006) and addresses the limitation on the filing of Claims by creditors who are not barred by the two (2) year statute of repose imposed by §733.710 Fla. Stat. (2006). If a claim is filed more than two years after death, §733.710 Fla. Stat. (2006) bars it and §733.702 Fla. Stat. (2006) does not apply in any way. If the claim is filed within two years of death, §733.702 Fla. Stat. (2006) governs and §733.710 Fla. Stat. (2006) does not apply in any way. There is no valid basis to impose any provision or time requirement contained in §733.710 Fla. Stat. (2006) upon any other provision or time requirement contained in §733.702 Fla. Stat. (2006) or vice versa, and to do so would be unfounded and erroneous.⁵

⁵ While the Respondent asserts, and the Fourth District agrees, that no motion for enlargement of time to file a claim is required in the Respondent's circumstances, it is worth pointing out that the imposition of a 2 year limitation on the filing of such a Motion for Enlargement of Time to File a Claim or any order thereon is an erroneous superimposition of one statute over another completely unrelated statute: It improperly lays the 2 year statute of repose (applicable ONLY to the filing of

The provisions of the Statute of Limitation contained in §733.702 Fla. Stat. (2006) pertains to three (3) categories of creditors. The current case law in Florida is erroneous because it does not address these three (3) separate categories of creditors, but incorrectly applies one rule to all three categories. The Respondent in this action falls into the third (3rd) category:

CATEGORY I - UNKNOWN CREDITORS

Unknown Creditors only receive notice of the administration of an estate through the publication of notice to creditors in a newspaper pursuant to §733.2121 Fla. Stat. (2006). Publication is made in a newspaper published in the county where the estate is administered. §733.2121(2) Fla. Stat. (2006). Pursuant to the Statute of Limitation contained in §733.702(1) Fla. Stat. (2006), “unknown creditors” must file Statements of Claim within “3 months after the time of the first publication”. The Expiration Date of the Statute of Limitation for this first category of creditors is calculated as follows:

claims) contained in §733.710 Fla. Stat. (2006) OVER the provision for extensions of time to file claims contained in §733.702(3) Fla. Stat. (2006), the latter statute imposing no express time limit for the filing of any motion or the granting of any order of extension in its plain language. Your Respondent did file a Motion for Extension of time to file the claim on April 2, 2012. (R:182-186).

Trigger Date (Date of Publication) + Duration (3 Months) = Expiration (“E”)

If an unknown creditor seeks to file an “untimely” Claim after the Statute of Limitation imposed by §733.702 Fla. Stat. (2006) (the 3 month publication period) (“E”), but within the two (2) year statute of repose imposed by §733.710 Fla. Stat. (2006), he must obtain an extension pursuant to §733.702(3) Fla. Stat. (2006). “Any Claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed.” §733.702(3) Fla. Stat. (2006). Such an extension granted by the trial court would extend the statute of limitation imposed by §733.702 Fla. Stat. (2006) beyond the Expiration Date (“E”), but could not permit the filing of the Statement of Claim after the 2 year limitation imposed by the separate statute of repose contained in §733.710 Fla. Stat. (2006). There is no time limit imposed by §733.702 Fla. Stat. (2006) on the filing of a motion for enlargement of time or the entry of an order authorizing such an extension and there is no legal basis to associate §733.710 Fla. Stat. (2006) (the 2 year statute of repose) with extensions to file claims in any way.

CATEGORY II - KNOWN OR REASONABLY ASCERTAINABLE CREDITORS WHO ARE SERVED WITH THE NOTICE TO CREDITORS

The Personal Representative of an Estate is required by §733.2121(3)(a) Fla. Stat. (2006) to “promptly” serve a copy of the Notice to Creditors on all reasonably ascertainable creditors of the Decedent in the form prescribed by §733.2121(1) Fla. Stat. (2006). §733.702 Fla. Stat. (2006) specifically states that Known or Reasonably Ascertainable Creditors are not bound by the 3 month Statute of Limitation (publication period) imposed on unknown creditors, but, rather, have their own separate and distinct Statute of Limitation in §733.702(1) Fla. Stat. (2006). Specifically, the statute of limitation for filing of claims by Known or Reasonably Ascertainable Creditors who ARE served with the Notice to Creditors as required by §733.2121(3)(a) Fla. Stat. (2006) is thirty (30) days after the date of service of the copy of the Notice to Creditors on the Known or Reasonably Ascertainable Creditor.⁶ The Expiration Date of the Statute of Limitation for this second category of creditors is calculated as follows:

⁶ “...no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent, is binding on the estate, on the personal representative, or on any beneficiary unless filed in the probate proceeding on or before the later of the date that is 3 months after the time of the first publication of the notice to creditors or, as to any creditor required to be served with a copy of the notice to creditors, 30 days after the date of service on the creditor, even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise.”

Trigger Date (Date of Service of Notice) + Duration (30 Days) = Expiration (“E”)

If a Known or Reasonably Ascertainable Creditor who IS served with a copy of the Notice to Creditors as required by §733.2121(3)(a) Fla. Stat. (2006) seeks to file an “untimely” Claim after the 30 day Statute of Limitation imposed by §733.702 Fla. Stat. (2006), but within the two (2) year statute of repose imposed by §733.710 Fla. Stat. (2006), he must obtain an extension pursuant to §733.702(3) Fla. Stat. (2006). “Any Claim not timely filed as provided in this section is barred even though no objection to the claim is filed unless the court extends the time in which the claim may be filed.” §733.702(3) Fla. Stat. (2006). Such an extension granted by the trial court would extend the statute of limitation imposed by §733.702 Fla. Stat. (2006) beyond the Expiration Date (“E”), but could not permit the filing of the Statement of Claim after the 2 year limitation imposed by the separate statute of repose contained in §733.710 Fla. Stat. (2006). Once again, no time limit is imposed on the motion seeking, or the order granting extension.

CATEGORY III - KNOWN OR REASONABLY ASCERTAINABLE CREDITORS NOT SERVED WITH THE NOTICE TO CREDITORS

This third category of creditors is the subject of this appeal. In this case, Katherine Jones and the Guardian were Known Creditors, but were NOT served

with a copy of the Notice to Creditors as required by §733.2121(3)(a) Fla. Stat. (2006). *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012), and its ilk, would impose upon members of this Third Category an obligation to file a ‘motion to extend time to file a creditor’s claim’ if the Statement of Claim is filed beyond the 3 month statute of limitation (publication period) imposed on Unknown Creditors (described as Category I herein). That requirement is contrary to the plain language of the statute, flies in the face of due process, and there is no legal or rational basis for the imposition of this limitation on this category of creditors. *Lubee, Id.*, goes on to further impose that such a ‘motion to extend’ must be filed within two years of the date of the Decedent’s death – a time limit completely unfounded by the plain language of §733.702 Fla. Stat. (2006) and/or §733.710 Fla. Stat. (2006).⁵

The imposition of any limitation on this third category of creditors beyond the 2 year statute of repose prescribed by §733.710 Fla. Stat. (2006) is erroneous, unconstitutional, and a mathematical impossibility. It is mathematically impossible because there is no “Trigger Date” in this category, which renders the calculation of an “Expiration Date” impossible. The Known or Reasonably Ascertainable Creditor cannot be bound by the 3 month Publication Period imposed on “unknown creditors” by §733.702(1) Fla. Stat. (2006). When a Known or Reasonably Ascertainable Creditor does NOT receive a copy of the Notice to Creditors as required by §733.2121(3)(a) Fla. Stat. (2006) to trigger the beginning of the 30 day

limitation period described in §733.702(1) Fla. Stat. (2006), then no Statute of Limitation can begin to toll, as there is no “Trigger Date”. In the absence of a “Trigger Date”, the limitation imposed by §733.702(1) Fla. Stat. (2006) cannot begin to run on this third class of creditor and no Expiration Date can be calculated. Logically, there can be no “motion to extend time to file” if the time to file under §733.702 Fla. Stat. (2006) does not “Expire”, and such a creditor can only be limited by the filing requirement of the two (2) year Statute of Repose contained in §733.710 Fla. Stat. (2006) which states, in part:

“This section shall not apply to a creditor who has filed a claim pursuant to §733.702 within 2 years after the person’s death and whose claim has not been paid or otherwise disposed of pursuant to §733.705.” §733.710(2) Fla. Stat. (2006).

Contrary to *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012), by the plain language of §733.702 Fla. Stat. (2006), there is no statutory limitation on a known creditor who is NOT served with a copy of the Notice to Creditors. *Lubee v. Adams*, 77 So. 3d 882 (Fla. 2^d DCA 2012) is incorrect as it requires a motion seeking an extension beyond a non-existent “limitation” date which cannot be mathematically calculated and is a nullity. Your Respondent asserts that, if the law imposes a limitation period where the Expiration (“E”) of the limitation period on creditors which cannot be determined because of the absence of a Trigger Date (“T”), then such an imposition would be an unconstitutional violation of procedural

due process. Your Respondent asserts, by extension, that *Lubee v. Adams*, 77 So. 3d 882, 884 (Fla. 2^d DCA 2012) and all similar cases which precede and follow it, are erroneous because the plain language of §733.702 Fla. Stat. (2006) does not impose any limitation on a known creditor who does NOT receive a copy of the Notice to Creditors as required by §733.2121(3)(a) Fla. Stat. (2006) and such a creditor can only be bound by the 2 year filing requirement imposed by §733.710 Fla. Stat. (2006).

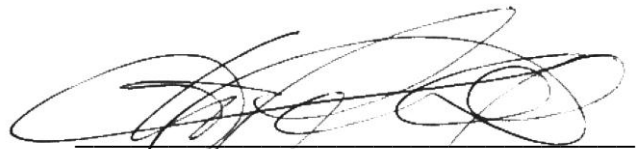
CONCLUSION

Michael Jones, Esq. had actual knowledge that his father owed money to his mother, Katherine E. Jones. Michael Jones, Esq., as attorney for the Personal Representative of the Estate of his father, willfully and intentionally failed to serve a Notice to Creditors upon his mother, a known creditor, in violation of the requirements of the Florida Statutes. Unknown creditors may seek an extension to file claims beyond the 3 months publication period. Known creditors served with actual Notice to Creditors may seek an extension to file claims more than 30 days after receipt of the Notice to Creditors. But where the KNOWN creditor is NOT served with actual notice as required by §733.702(1) Fla. Stat. (2006) and §733.2121 Fla. Stat. (2006), your Respondent contends that the only bar to the filing of the Statement of Claim is the two (2) year limitation imposed by §733.710 Florida Statutes (2006) and, as such, if the Claim is filed within those two (2) years after

death, no motion for extension of time is necessary. The Respondent requests that this honorable Court uphold the decision of the Fourth District Court of Appeal and remand this matter to the trial court requiring an order validating the Statement of Claim without the necessity of extension if the Respondent is found to be a known or reasonably ascertainable creditor.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by e-mail and U.S. Mail on this 15th day of October, 2014 to: Robin F. Hazel, Esq., 15800 Pines Blvd., Suite 3005, Pembroke Pines, Florida 33027, robinhazel_esq@yahoo.com, hazellawpa@gmail.com, The Real Property Probate Trust Law Section of the Florida Bar, Amicus Curiae, jlittle@gunster.com, alackey@gunster.com, eservice@gunster.com, rgoldmen@gfsestatelaw.com, jatkinson@gfsestatelaw.com, and kbell@gunster.com.



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CERTIFICATE OF COMPLIANCE WITH FONT SIZE AND PAGE LIMIT

Respondent, EDWARD I. GOLDEN, ESQ., as Curator of the Estate of Katherine E. Jones, certifies that this Answer Brief of the Respondent is within the page limit prescribed by 9.200 Fla.R.App.P. and is typed in Times New Roman, 14 point type.