

IN THE SUPREME COURT OF FLORIDA

Case No. SC13-2536

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

Petitioner,

v.

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

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

Conflict of Decisions Certified by the Fourth District Court of Appeal
Case No. 4D12-2094; Circuit Court Case No.12-13101 (25)

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PREFACE

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

The Petitioner, CAROL ANN JONES, as Personal Representative of the Estate of Harry Bruce Jones, will be referred to herein as "Jones" or "Personal Representative."

The Respondent, EDWARD I. GOLDEN, as Curator of the Estate of Katherine Jones, will be referred to herein as "Golden" or "Curator."

The references to the Record are to the volume and page number of the original record as assigned by the Clerk of the Circuit Court.

The transcript of the April 19, 2012, hearing will be referred to as "T._."

STATEMENT OF THE FACTS AND THE CASE

Harry B. Jones ("Harry") died on February 16, 2007, and his Estate was opened in April 2007. R. 187. On June 5, 2007, a notice to creditors was first published pursuant to section 733.702(1), Florida Statutes. R. 4, 197.

On January 14, 2009, nearly two years after Harry's death, Anthony Romano, Guardian of the Guardianship of Katherine E. Jones ("Guardian"), filed a pleading entitled "Statement of Claim" in the probate court. R. 5. Katherine E. Jones ("Katherine") was Harry's former wife. R. 177. The couple divorced on November 22, 2002, and, as part of that divorce, the couple entered into a Marital Settlement Agreement. R. 187. The Marital Settlement Agreement is the purported basis for the Guardian's Statement of Claim. R. 5. The Statement of Claim, which was neither preceded nor accompanied by a motion for extension of time under section 733.702(3), alleged that Katherine was entitled to payment of monies due under the Marital Settlement Agreement. R. 5. The Statement of Claim did not specify the amount allegedly owed or the basis for the claim that money was owed.

Katherine died after the Statement of Claim was filed and Golden was appointed as Curator of her estate. On November 23, 2011, Golden filed a Motion to Compel Payment of Share Value Pursuant to Marital Settlement Agreement

("Motion to Compel Payment"). R. 7-66. The Motion to Compel Payment was amended in March 2012. R. 88-171.

On March 14, 2012, more than five years after Harry's death, 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 ("Petition"). R. 177-182. The Personal Representative responded to the Petition by denying certain allegations contained therein and asserting as affirmative defenses, the time limits set by sections 733.702 and 733.710, Florida Statutes. R. 184-185.

Section 733.702, Florida Statutes, states, in relevant part:

(1) If not barred by s. 733.710, no claim or demand against the decedent's estate that arose before the death 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.

. . . .

(3) 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. An extension may be granted only upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless an extension has been granted by the court. If the personal representative or any other interested person serves on the creditor a notice to file a petition for an extension, the creditor shall be limited to a period of 30 days

from the date of service of the notice in which to file a petition for extension.

. . . .
(6) Nothing in this section shall extend the limitations period set forth in s. 733.710.

§ 733.702(1), (3), (6), Fla. Stat. (2007). Section 733.710(1) states:

Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

§ 733.710(1), Fla. Stat. (2007).

On April 5, 2012, the Personal Representative filed an Amended Motion to Strike Guardian's Statement of Claim and Motion to Strike Curator's Motion to Compel Payment ("Amended Motion to Strike"). R.187-195. The Amended Motion to Strike argued that the Court should strike the Statement of Claim and Motion to Compel Payment because the claims are barred by sections 733.702 and 733.710, Florida Statutes, and existing case law. R. 189-194.

A hearing on the Amended Motion to Strike was held on April 19, 2012. Counsel for the Personal Representative presented the court with the applicable sections of Chapter 773, Florida Statutes, and case law interpreting those sections of the statute, including *Lubee v. Adams*, 77 So 3d 882 (Fla. 2d DCA 2012) and *Morgenthau v. Andzel*, 26 So. 3d 628 (Fla. 1st DCA 2009). On the other hand, counsel for the Curator argued that the law presented by the Personal

Representative was wrongly decided and asked the probate court to essentially rewrite the statute and find that "[w]hat these courts need, what the statute needs . . . is not a provision that says you can file for an extension of time, it needs to say you can file for a hearing to determine whether or not you are ascertainable." T. 32-33.

The probate court rejected Golden's argument and on May 2, 2012, the court entered the Order Striking Untimely Filed Claim ("Order"). Citing to *Lubee v. Adams*, 77 So 3d 882 (Fla. 2d 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); *Faerber v. D.G.*, 928 So. 2d 517 (Fla. 2d DCA 2006) and *May v. Illinois National Insurance Co.*, 771 So. 2d 1143 (Fla. 2000), the probate court ruled that the Statement of Claim was untimely under sections 733.702 and 703.710, Florida Statutes. R. 457.

On appeal, the Fourth District reversed the probate court's decision, holding that if a claim is filed by someone who claims to be a known or reasonably ascertainable creditor, the claim is timely if filed within two years of the decedent's death, and the claimant does not need to file a motion for extension of time under section 733.702(3). The Fourth District certified conflict with *Lubee* and *Morgenthau*. *Golden v. Jones*, 126 So. 3d 390 (Fla. 4th DCA 2013).

SUMMARY OF ARGUMENT

The probate court did not err in striking the Respondent's Statement of Claim because the claim was untimely. Section 733.702(1), Florida Statutes, provides that where a creditor was not served with a notice to creditors, that creditor is required to file his or her claim within three months of publication of the notice to creditors. Alternatively, the claimant must seek an extension of time from the court pursuant to section 733.702(3) within two years of the decedent's death. Here, the Respondent was not served with the notice to creditors. Therefore, the Respondent was required to file his statement of claim within three months of June 5, 2007, the date of first publication. Alternatively, the Respondent was required to file a motion for extension of time within two years of the decedent's death. The Respondent did neither of these things.

The Respondent did not file a claim until January 14, 2009, well outside of the three-month period following publication and failed to seek an extension of time within two years of Harry's death as required by section 733.702(3). Rather, the Respondent waited more than five years after Harry's death to seek an extension from the probate court. Because section 733.710, Florida Statutes, is a statute of repose that places an absolute bar on all claims against an estate that are filed more than two years after the decedent's death, the probate court was without jurisdiction to grant the Respondent's untimely motion for extension of time.

The Fourth District's decision below is at odds with *Lubee*, *Morgenthau*, and most recently, *Souder*, *infra*. These cases all agree that a correct interpretation of section 733.702(1) and (3) requires a claimant to request an extension of time if that claimant is not served with actual notice and does not file a claim within 30 days of first publication of notice to creditors. On the other hand, the Fourth District's decision improperly disregards the extension provision for any claimant that claims to be known or reasonably ascertainable. In order to give meaning to every section of the statute, a claimant, even one who claims to be known or reasonably ascertainable, must be required to file a request for extension of time under the circumstances presented in this case. The Fourth District's decision should be reversed.

ARGUMENT

I. RESPONDENT'S CLAIM WAS UNTIMELY BECAUSE IT WAS FILED OUTSIDE OF THE THREE-MONTH PERIOD FOLLOWING FIRST PUBLICATION OF THE NOTICE TO CREDITORS AND WAS NOT ACCOMPANIED BY A MOTION FOR EXTENSION OF TIME UNDER SECTION 733.702(3), FLORIDA STATUTES.

Ordinarily, a probate court's decision to strike a claim against an estate is reviewed for abuse of discretion. *Morgenthau v. Andzel*, 26 So. 3d at 630. However, when a case involves issues of statutory interpretation, the decision is reviewed *de novo*. *BellSouth Telecommunications, Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003). In construing a statute, the court's purpose is to give effect to the Legislature's intent. *Id.* (citation omitted). To do so, the court looks to the actual language used in the statute. *Id.* (citation omitted). Only if the statutory language is unclear will a court apply rules of statutory construction or look to the legislative history to determine legislative intent. *Id.* (citations omitted).

Any alleged creditor, even one who claims to be a reasonably ascertainable creditor entitled to actual notice, must comply with the provisions of section 733.702 (1), (3), Florida Statutes. *Lubee v. Adams*, 77 So. 3d at 884. Section 773.702(1), Florida Statutes, provides, in relevant part:

. . . no claim or demand against the decedent's estate . . . is binding on the estate . . . 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.

§ 733.702(1), Fla. Stat. (2007) (emphasis added).

In *Lubee*, the alleged creditor filed a lawsuit to secure payment for services rendered to the decedent approximately 14 months after first publication of the notice to creditors, but within two years of the decedent's death. *Lubee*, 77 So. 3d at 883. However, the creditor did not ask the probate court for an extension of the time in which to file his claim. *Id.* Therefore, the personal representative sought summary judgment on the basis that the claim was untimely. The creditor argued that summary judgment was improper because he was a reasonably ascertainable creditor, entitled to actual notice, and, therefore, the three month period stated in section 733.702(1) did not apply to him. *Id.*

The Second District rejected the creditor's argument and held that because the creditor was not served with a copy of the notice to creditors, he was required to file his claim in the probate proceedings within the three-month window following publication. *Lubee*, 77 So. 3d at 884. Alternatively, the creditor was required to seek an extension from the probate court under section 733.702(3). *Id.* Because the creditor failed to comply with either provision of the statute, the Second District found that his claim was barred as untimely and "the issue of whether or not [he] was a readily ascertainable creditor was immaterial. . . ." *Id.*

In *Morgenthau v. Andzel*, the First District addressed facts similar to this case and concluded that a claim is untimely where an alleged creditor, who does not receive actual notice, fails to file a claim within the three-month window following publication and fails to seek an extension under section 733.702(3) within two years of the decedent's death. *Morgenthau*, 26 So. 3d at 632. In *Morgenthau*, the death occurred on November 28, 2007, and a notice to creditors was first published on March 13, 2008. *Id.* at 629. On April 13, 2009, 13 months after the publication, the alleged creditor filed a statement of claim in the probate proceeding alleging that he was a readily ascertainable creditor and the holder of a note executed by both the decedent and the personal representative. *Id.* The personal representative moved to strike the claim as untimely. *Id.* The lower court agreed and struck the claim as untimely. *Id.* at 629-630.

On appeal, the First District affirmed the probate court's decision, finding that section 733.702 bars untimely claims unless an extension is granted. *Id.* at 631. The court concluded,

Under the plain language of the statute, once appellant's claim fell outside the three month claim period, regardless of his arguments for delay, his claim could only be considered after the probate court's grant of an extension. Because appellant chose to file only a Statement of Claim and never requested an extension of time to file that claim, the probate court was bound by the relevant statutes to deny the claim. § 733.702(1)-(3), Fla. Stat. (2007).

Id. at 632.

Here, first publication of the notice to creditors occurred on June 5, 2007. R. 4, 197. The Respondent was not served with a copy of the notice to creditors. Therefore, under section 733.702(1), the Respondent was required to file his Statement of Claim within three months of June 5, 2007. If he failed to file his claim within that three-month period, then section 733.702(3) allowed the Respondent to seek an extension from the court within two years of Harry's death. If requested, such an extension could be granted on the basis of fraud, estoppel or insufficient notice of the claims period. §733.702(3), Fla. Stat.

The Guardian filed the Statement of Claim on January 14, 2009, 23 months after Harry's death and 19 months after first publication of the notice to creditors. However, the Statement of Claim was not accompanied by a motion for extension of time under section 733.702(3). If the Respondent thought that he was a reasonably ascertainable creditor entitled to actual notice, he should have made that claim of insufficient notice of the claims period in a motion for extension of time as required by the statute within two years of Harry's death. Instead, the Respondent waited until March 14, 2012, more than five years after Harry's death and more than three years after the Statement of Claim was filed, to request an extension of time from the Court.

The probate court was without jurisdiction to grant the Respondent's request for an extension of time that was made more than two years after Harry's death.

Section 733.710, Florida Statutes, is a statute of repose or non-claim that serves as an absolute bar to claims on an estate "that the court lacks the power to avoid."

Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P., 673 So. 2d at 164.

Section 733.710 provides:

Notwithstanding any other provision of the code, 2 years after the death of a person, neither the decedent's estate, the personal representative, if any, nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

§ 733.710(1), Fla. Stat. (2007). Therefore, even though section 733.702(3) allows a probate court to extend the time to file a claim, the court lacks the authority to do so if that request is made more than two years after a person's death. § 733.702(5), Fla. Stat.; *Comerica Bank*, 673 So. 2d at 166. Thus, when the Respondent filed his Petition requesting an extension of time more than five years after Harry's death, the probate court recognized that it lacked jurisdiction to grant that request and struck the Statement of Claim as untimely.

Under the plain language of sections 733.702(1), (3), (6) and 733.710(1), if the Respondent wished to file a claim against the Estate, because he was not served with actual notice, he was required to either file his claim within three months of first publication or seek an extension of time from the probate court within two years of Harry's death. Because the Respondent failed to comply with either requirement, his claim is untimely.

Both *Lubee* and *Morgenthau* relied on this Court's decision in *May v. Illinois Nat. Ins. Co.*, and are consistent with this Court's reasoning. On the other hand, the Fourth District's opinion below overlooks a portion of this Court's reasoning in *May* and disregards a significant provision of section 733.702.

In *May*, the claim of a creditor, although filed within two years of the decedent's death, was found to be untimely under section 733.702(1) because it was filed before publication of the notice to creditors rather than after publication as required by the statute, and, there was no "extension or pending request for extension in any probate court." *May*, 771 So. 2d at 1161. In reaching this conclusion, this Court analyzed the language of section 733.702(1), as amended in 1988, and concluded:

In light of our analysis regarding the petition and counter-petition, it is clear that Mr. Prockup satisfied the two-year nonclaim period set forth in section 733.710. This is so because Mr. Prockup's petition and counter-petition setting forth the claim in detail against the Bradley Estate were both filed within two years after the date of Mr. Bradley's death. The same cannot be said, however, with regard to satisfying the limitation period set forth in section 733.702(1). Specifically, section 733.702(1) requires that a claim be filed "within the later of three months *after* the time of first publication of the notice of administration or, as to any creditor required to be served with a copy of the notice of administration, 30 days *after* the date of service of such copy of the notice on the creditor." § 733.702(1), Fla. Stat. (1991) (emphasis added). The Legislature very specifically added the word "after" in 1988, substituting it for the word "from." *See* ch. 88–340, § 6, at 1805, Laws of Fla. (amending section 733.702(1)(a), Florida Statutes). As the word "after" is used in the statute, we have no choice but to ascribe to the word its plain meaning.^{FN16} Although it may seem somewhat formalistic to strictly apply the word "after,"

such was the specific legislative intent. While requiring a creditor to file a claim after publication or service runs counter to the general proposition that claims filed before notice is given to creditors may sufficiently state a claim against an estate, *see In re Estate of Tanner*, 288 So.2d 578, 581 (Fla. 2d DCA 1974) (permitting the filing of a claim prior to the publication of valid notice to creditors); *see generally* Dag E. Ytreberg, Annotation, *Validity of Claims Against Estate Filed Prior to Publication of Notice to Creditors*, 70 A.L.R.3d 784 (1976 & 1999 Supp.), such a result is nonetheless mandated by the clear language used by the Legislature in section 733.702(1). *Accord Roberts v. Jassy*, 436 So.2d 394, 395 (Fla. 2d DCA 1983) (decrying inequitable and harsh result required by application of section 733.702(1), Florida Statutes (1981)).

May, 771 So. 2d at 1161 (emphasis in original).

Unlike the Fourth District, this Court did not require the probate court to hold a hearing to determine whether the creditor was a known or reasonably ascertainable creditor, neither did the Court provide a blanket two-year period in which a known or reasonably ascertainable creditor could file a claim. Rather, this Court focused on the plain language of the statute, particularly the 1988 amendment to section 733.702(1). In the 1988 amendment, the legislature replaced the word "from" with the word "after", so that the statute now requires a creditor to file a claim three months "after" first publication or 30 days "after" service of notice to the creditor. § 733.702(1), Fla. Stat. This Court was clear: merely filing a claim at any time within two years of a decedent's death is unacceptable under the plain language of the statute.

It is noteworthy that the creditor in *May* was arguably a known or reasonably ascertainable creditor because he was the husband of the woman killed in the same automobile accident that killed the decedent, and he had a pending wrongful death action against the estate at the time of publication of the notice to creditors. Nevertheless, this Court focused only on the plain language of the statute in finding that the creditor's claim should have been filed within thirty days *after* publication. This Court's focus on the Legislature's addition of the word "after" to the statute highlights that, in the absence of a timely motion for extension of time, whether a claim is timely is determined by the two statutory markers – whether the claim was filed *after* publication or *after* service of notice. The Court expressly found that merely filing a claim at any time within two years of a decedent's death is insufficient under the statute. *May*, 770 So. 2d at 1161.

Interestingly, under the Fourth District's decision below, the claim of the creditor in *May* would be timely simply because it was filed within two years of the decedent's death by someone who claimed to be a known or reasonably ascertainable creditor, irrespective of the date of publication of the notice to creditors. Applying the holding of the decision below to facts similar to *May* highlights the flawed reasoning of the Fourth District's decision, which also seemingly disregards the extension provision of section 733.702(3). Under the Fourth District's decision, the Respondent (or any similarly situated claimant) need

not file a motion for extension of time if he claims to be an ascertainable creditor. *Golden*, 126 So. 3d at 393. The Fourth District does not reconcile its holding with section 733.702(3), which specifically provides that an extension may be granted for insufficient notice of the claims period.

Recently the Fifth District in *Souder v. Malone*, 2014 WL 3756356, 39 Fla. L. Weekly D 1611 (Fla. 5th DCA August 1, 2014), agreed with the decisions in *Lubee* and *Morgenthau* and disagreed with the Fourth District's decision below. The Fifth District focused on the extension provision of section 733.702(3) and stated:

Subsection (3) expressly provides that a probate court may grant a petition to extend the time in which to file a claim where there was "insufficient notice of the claims period." Thus, construing subsections (1) and (3) together, we believe that the Legislature has determined that where a personal representative has failed to serve a copy of the notice to creditors on a known or reasonably ascertainable creditor, that creditor's remedy is to petition the probate court for an extension of time.

Id. at *2.

Indeed, the *Morgenthau* court noted that in "[a]ll Florida cases since *May* dealing with the forgiveness of a timeliness issue as to a creditor's claim where the creditor asserts he or she was a reasonably ascertainable creditor subject to actual notice [,] [the courts] reach[ed] the issue through review of the creditor's *request for an extension*, not through creditor's filing of a statement of claim." *Morgenthau*, 26 So. 3d at 632 (emphasis in original) (citing *Faerber v. D.G.*, 928

So. 2d 517, 518 (Fla. 2d DCA 2006); *Simpson v. Estate of Simpson*, 922 So. 2d 1027 (Fla. 5th DCA 2006); *Longmire v. Estate of Ruffin*, 909 So. 2d 443 (Fla. 4th DCA 2005); *Strulowitz v. Cadle Company, II, Inc.*, 839 So. 2d 876 (Fla. 4th DCA 2003) and *Miller v. Estate of Baer*, 837 So. 2d 448 (Fla. 4th DCA 2003)).

Moreover, the Fourth District's decision requires the probate court to hold a hearing to determine whether a claimant is a reasonably ascertainable creditor even where the alleged creditor's claim is facially untimely and no motion for extension of time has been filed. There is no support for this requirement in the plain language of the statute. Indeed, counsel for the Respondent acknowledged that the statute lacks this requirement when he asked the probate court to essentially write this requirement into the statute. T.32-33.

Because the Respondent's claim was filed more than three months after first publication of the notice to creditors, and he failed to file a motion for extension of time within the time limits set by sections 733.702 and 733.710, the probate court did not have the authority to hold a hearing to determine whether he was an ascertainable creditor and properly struck his claim as untimely.

CONCLUSION

For the foregoing reasons, the Petitioner, CAROL ANN JONES, as Personal Representative of the Estate of Harry Bruce Jones, respectfully requests that this Court reverse the decision of the Fourth District Court of Appeal and reinstate the probate court's Final Order finding the Respondent's Statement of Claim untimely under Sections 733.702 and 733.710, Florida Statutes.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was served via E-Mail on William H. Glasko, Esq., Golden & Cowen, P.A., Counsel for Respondent, Palmetto Bay Law Center, 17345 South Dixie Highway, Miami, Florida 33157, at bill@palmettobaylaw.com and John W. Little, III, The Real Property Probate Trust Law Section of the Florida Bar, Amicus Curiae, jlittle@gunster.com and kbell@gunster.com on this 27th day of August, 2014.

/s/ Robin F. Hazel

Robin F. Hazel, Esq.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that TIMES NEW ROMAN, 14 pt., is used in this brief.

/s/ Robin F. Hazel

Robin F. Hazel, Esq.