

FILED
COURT OF APPEALS
DIVISION II

NO. 37726-8-II

CE 587 OR 7/15/11

STATE OF WASHINGTON

BY: *cm*

DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHERRY JOHNSTON, as Personal Representative of the Estate of
GRACE D. MATTSON,

Respondent,

vs.

ROD VAN HOUCK, as Personal Representative of the Estate of
GEORGE T. MATTSON; and LARRY McCONNELL and JANE DOE
McCONNELL, his wife, and their marital community,

Appellants

BRIEF OF RESPONDENT

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 ORIGINAL

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ISSUES PRESENTED FOR REVIEW

In a probate proceeding, is a party's claim barred by RCW 11.40.100 if that party properly presents the claim, the Estate rejects the claim, but the party files suit to prosecute the claim before the Estate rejects the claim?

STATEMENT OF FACTS

The Respondent does not dispute the Statement of Facts as described in the Appellant's brief.

ARGUMENT

A. Standard of Review

Respondent concurs that the standard of review is *de novo*.

B. RCW 11.40.100 does not require rejection of a creditor's claim as long as suit is filed prior to the expiration of 30 days after notification of rejection of the claim.

Appellant's brief correctly states that there are no cases on point answering the questions presented in this case. RCW 11.40.100 states, in pertinent part:

If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection, or the claim is forever barred.....

RCW 11.40.100 does not state:

If the personal representative rejects a claim, in whole or in part, the claimant must bring suit against the personal representative within thirty days after notification of rejection, or the claim is forever barred, but no suit shall be brought until the notification of rejection is received by the clamant.....

By contrast, RCW 4.92.110, the statute at issue in Schmitz v. State, 68 Wn. App. 486, 843 P.2d 1109 (Div. 1, 1993), a case involving the state tort claim statute, states:

No action shall be commenced against the state for damages arising out of tortious conduct until sixty days have elapsed after the claim is presented to and filed with the risk management office. The applicable period of limitations within which an action must be commenced shall be tolled during the sixty-day

period.

The contrast between RCW 11.40.100 and RCW 4.92.110 is clear. The former is worded to bar claims that are not timely; the latter is worded to bar claims that are prematurely filed.

Appellant's reliance upon Wagg v. Estate of Dunham, 146 Wash. 2d 63, 42 P.3d 968 (2002) is not persuasive because that case involved a party who did not even file a timely creditor's claim to begin with. Appellant's reliance upon Marguam v. Ellis, 27 Wn. App. 913, 621 P.2d 190 (Div. 3, 1980) is curious in view of the fact that the court in Wagg held that the statutory provisions at issue in that case were to be interpreted for "the protection of the claimant." By contrast, the Appellant in the case at bar wishes to utilize the probate statutes to deny the ability of a creditor to present a claim.

In Re Kruger's Estate, 145 Wash. 379, 260 P. 248 (1927) is also distinguishable because, as in the Wagg case (*supra*), the claimant had sued without first filing a claim with the Estate.

At page 12 of its brief, Appellant argues that the Estate "was involved in time consuming litigation before any opportunity to either accept or reject" the creditor's claim in this case. The fallacy of this argument is self-evident from the fact that Appellant concedes that the Estate filed and served a notice of rejection of claim (page 6 of

Appellant's brief). The alleged premature filing of the lawsuit was only one of several grounds listed for contesting the claim. Time consuming litigation ensued in this case because the Estate denied the claim on substantive grounds, not because the denial of the claim occurred after the filing of the lawsuit. Appellant's argument in this regard raises a red herring. In the hypothetical case where a claimant files suit for a claim that the Estate had no intention of contesting, the Estate has the obvious remedy of seeking an award of costs and attorney fees under Civil Rule 11.

Villegas v. McBride 112 Wn. App 689, 50 P. 3d 678 (Div. 1, 2002) is also distinguishable from the case at bar. The Villegas court held the probate claim barred because of the claimant's total failure to provide statutorily prescribed information. That is, the case did not involve information that was provided prematurely or in an imprecise or incomplete fashion. Rather, the failure was total. By contrast, in the case at bar, the claimant did fail to file a claim nor fail to file a lawsuit within the statute of limitations.

C. Costs and Attorney Fees.

In the unlikely event that the court holds the claim barred in this case based on the early filing of the lawsuit against the Estate, it should not award attorney fees to the Appellant nor order that the Superior Court

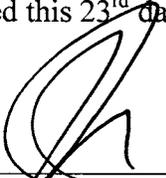
award attorney fees to the appellant. As noted above, the Estate filed a notice of rejection of the claim on multiple grounds. Therefore, the claim was contested on its merits, not on mere procedural grounds.

If the court upholds the trial court's decision, respondent requests an award of attorney fees pursuant to RAP 18.1 and RCW 11.96.150.

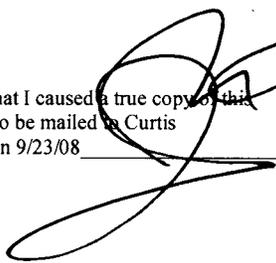
CONCLUSION

The court should uphold the trial court's denial of summary judgment. The Respondent timely filed a notice of claim with the Estate. The early filing of suit by Respondent caused no prejudice, delay or expense on the part of the Estate since the issues below were contested on a substantive basis, not a mere procedural one.

Dated this 23rd day of September, 2008



James Bendell, WSBA 20820
Attorney for Respondent Sherry Johnston



I certify that I caused a true copy of this
pleading to be mailed to Curtis
Johnson on 9/23/08