

**DIVISION III COURT OF APPEALS
STATE OF WASHINGTON**

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 320511

In Re the Estate of Patrick Herrin, Deceased

GLORIA AGUILAR, APPELLANT

V.

THE ESTATE OF PATRICK HERRIN, RESPONDENT

RESPONDENT'S BRIEF

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I. STATEMENT OF FACTS

Patrick Herrin and Gloria Aguilar lived together between 2005 and 2007. *CP 67 - 68*. In May 2008, Aguilar filed a Complaint for 'Distribution of Assets and Liabilities of a Non-Marital (Meretricious) Relationship', cause number 08-2-02387-1. *CP 81- 83*. The parties spent several years litigating the issue of meretricious property division contained in the complaint. *CP 42 – 43; CP 60; CP 66*.

Prior to the conclusion of litigation, Mr. Herrin died on August 22, 2011. *CP 1*. A probate was opened on October 28, 2011 issuing letters testamentary. *CP 9-10*. Ms. Aguilar filed a creditor's claim in the probate on April 17, 2012. *CP 14*. Ms. Aguilar's creditor's claim states: "*please take notice that Gary Stenzel, attorney for Gloria Aguilar hereby filed a Creditor's Claim in the above entitled matter, in an amount to be determined for her "community interest" in the deceased estate for her share of any and all property acquired during her meretricious relationship with the deceased (See Cause no. 08 2 02387 1, filed in this court). Any and all payments, objections, motions or otherwise, regarding this claim should be served upon her counsel Gary R. Stenzel....This claim is for an amount to be determined by the court.*" *CP 14*.

Ms. Aguilar's meretricious relationship lawsuit was dismissed with prejudice on August 2, 2013 for the failure to timely substitute the

personal representative for the deceased.¹ *CP 94*. Five days later, on August 7, 2013, the personal representative filed a Motion for Summary Judgment seeking to dismiss Ms. Aguilar's creditor claim in the probate. *CP 50; CP 69*. Oral arguments were held on September 20, 2013 and the court in its oral ruling granted the Estate's summary judgment motion dismissing Ms. Aguilar's creditor's claim; the order granting summary judgment was entered on October 4, 2013. *CP 93-96*. Ms. Aguilar filed a Notice of Appeal to the Court of Appeals, Division III on November 4, 2013. *CP 97*.

Summary Judgment Motion

The Estate filed summary judgment seeking the dismissal of Ms. Aguilar's creditor's claim based upon two legal theories; first, the statute of limitations applicable to Ms. Aguilar's creditor's claim had expired (RCW 11.40.051); and second, Ms. Aguilar did not follow RCW 11.40.070(1) by failing to provide a statement of facts and circumstances constituting the basis of her claim and amount of her claim. *CP 51-56*. The court found the creditor's claim was a separate claim different from Ms. Aguilar's prior meretricious lawsuit (that had been dismissed with prejudice), and dismissed the creditor's claim under both of the argued legal theories. *CP 93-96*. The Estate offered as evidence in support its legal theories copies of Mr. Herrin's and Ms. Aguilar's deposition. *CP 60-*

¹ The final order dismissing cause number 08-2-02387-1 was never appealed.

64; CP 66-68. The only evidence supplied by Ms. Aguilar, was a copy of Ms. Aguilar's complaint for her meretricious relationship lawsuit and a copy of her creditor's claim. CP 81-83; CP 85.

II. LAW AND ARGUMENT

A. Ms. Aguilar's creditor's claim for unjust enrichment, joint venture, or contract implied in law is barred by the applicable three year statute of limitation.

The first assignment of error argued by Ms. Aguilar is that the trial court should have required the Personal Representative to reject her creditor's claim so she could have filed a new lawsuit before the trial court dismissed her claim.

Two probate code sections explain why a personal representative cannot accept a creditor's claim when the statute of limitations has already expired related to the claim. RCW 11.40.051(1) states:

"a person having a claim against the decedent is forever barred from making a claim or commencing an action against the decedent. if the claim or action is not already barred by an otherwise applicable statute of limitation, unless the creditor presents the claim in the manner provided in RCW 11.40.070."

RCW 11.40.090(4) states, "a claim may not be allowed if it is barred by a statute of limitations."

The undisputed facts show Ms. Aguilar and Patrick Herrin ended their relationship in September 2007 and that Ms. Aguilar filed a lawsuit against Mr. Herrin on May 20, 2008 (meretricious relationship). CP 81-83. Ms. Aguilar's creditor's claim for unjust enrichment (and other

equitable theories) was based upon purchases made during their relationship, so the facts and basis of her claim was known in May 2008. Therefore, the applicable three year statute of limitation for unjust enrichment expired, at the latest, on May 20, 2011.

Further, because the statute of limitations expired before Mr. Herrin's death, Ms. Aguilar was prohibited from filing a creditor's claim or bringing an action against the estate. Therefore, the trial court properly dismissed her claim on summary judgment. Applying RCW 11.40.090(4), the claim is properly dismissed due to expiration of the statute of limitations prior to the death of the decedent.

B. The trial court lacks personal jurisdiction over the Personal Representative of the Estate in instances where the plaintiff failed to have the Personal Representative substituted in actions pending against the decedent.

The second and third assignments of error argued by Ms. Aguilar are that the trial court failed to follow its prior ruling joining equitable claims from the dismissed lawsuit with her creditor's claim. Because the Estate was not a party to the prior lawsuit it is immune from claims or issues litigated against the decedent.

1. No claims or issues were transferred from Ms. Aguilar's prior lawsuit thereby joining claims or issues with her creditor's claim.

The Personal representative objects to any statement or consideration of the final order dismissing cause number 08-2-02387-1.

when Ms. Aguilar failed to appeal the order in a timely fashion; RAP 2.4(b) does not revive a final order not appealed. *Ron & E. Enterprises, Inc., v. Carrara, LLC*, 137 Wn.App. 822, 825, 155 P.3d 161 (2007). Moreover, the Estate was not a party to the prior lawsuit and it would therefore be prejudicial to allow its inclusion. (see argument below).

Ms. Aguilar argues certain claims *survived* the dismissal of her prior meretricious lawsuit including issues to divide “community like property”, “financial issues of that meretricious relationship”, and being considered a “meretricious partner”. However, to establish her argument would require the review of a final order that was never appealed. The prior meretricious lawsuit was dismissed in its entirety, which included any claim related in any fashion to the question of whether or not a meretricious relationship existed or whether any of the property is community like and required division. *CP 81-83*.

Moreover, five days after her meretricious lawsuit was dismissed the Personal Representative filed a motion for summary judgment detailing the Estate’s arguments and theories why Ms. Aguilar’s creditor’s claim should be dismissed, which placed her on notice that the order dismissing her 2008 lawsuit did not transfer or join issues with the creditor’s claim. *CP 50*. Ms. Aguilar decided not to appeal the order dismissing her lawsuit, notwithstanding the legal arguments being made in the Estate’s Motion for Summary Judgment.

Consequently, Ms. Aguilar's prior lawsuit against Mr. Herrin was dismissed and no part of it survived or joined her creditor's claim for unjust enrichment.

2. The Estate of Patrick Herrin is a different "party" than the deceased Patrick Herrin and open litigation in the name of Patrick Herrin has no effect upon the estate unless substitution is allowed under CR 25 and RCW 11.40.110.

Generally speaking, proper service of a summons and complaint is essential to invoke personal jurisdiction over a party. *In re Marriage of Markowski*, 50 Wash.App. 633, 635, 749 P.2d 754 (1988). When a person dies and they are a party to litigation the court may order substitution of the proper parties (to obtain personal jurisdiction over the person substituted). CR 25(a). A plaintiff shall, within four months after appointment of the personal representative, serve a petition to have the personal representative substituted. RCW 11.40.110. Further, CR 25(a) states, if substitution is not granted within the time authorized by law, the action may be dismissed as to the deceased party. Finally, CR 18 only allows joinder of claims whether an original claim, counterclaim, cross claim, or third party claim, as she has against an opposing party (the same party).

A defendant who dies before being served is not a proper party before the court; the proper party is the decedent's estate. *Craig v. Ludy*, 95 Wn.App. 715, 717, 976 P.2d 1248 (1999), review denied, 139 Wn.2d 1016 (2000) see also, *Sutton v. Hirvonen*, 113 Wn.2d 1, 6, 775 P.2d 448

(1989). The statutes concerning claims against estates and the survival of actions against deceased tortfeasors only contemplate actions against personal representatives. See RCW 11.40; RCW 4.20.046; RCW 4.20.050.

Ms. Aguilar's lawsuit was filed against Patrick Herrin the individual and she was required to substitute the personal representative of the estate if she desired to continue her litigation. Ms. Aguilar filed an untimely motion for substitution, which was denied and the action was dismissed as to the deceased party. *CP 94*. See also, CR 25(a). By not granting substitution the court lacks personal jurisdiction over the Estate in that matter.

Because Ms. Aguilar failed to have the personal representative substituted in her lawsuit, the following consequences result for not having the Estate connected to the lawsuit: 1) The Personal Representative is not a party to her lawsuit; 2) Language contained in the final order dismissing the lawsuit is not binding on the Estate; 3) There are no court orders connecting the lawsuit and the creditor's claim; 4) The claims from the lawsuit cannot be joined to claims in the estate; 5) The lawsuit does not toll a statute of limitations for a new claim against the estate; 6) Questions related to whether or not the parties had meretricious property is irrelevant to the nature of the creditor's claim.

3. The claims being litigated as creditor's claims are not the same being litigated in the meretricious lawsuit; therefore, the lawsuit cannot act as notice of Ms. Aguilar's creditor's claim under RCW 11.40.070(1), making the creditor's claim substantially misleading.

Ms. Aguilar's creditor's claim did not include a statement of the facts or circumstance constituting the *basis of her claim for unjust enrichment* or the *amount of the claim* as required by RCW 11.40.070(1)(c)&(d). *CP 14*. Either, the failure to include the facts or circumstances of an unjust enrichment claim or the amount expended is a fatal flaw to her creditors claim. Both errors are beyond misleading, but preclude the claim.

In her opening brief, Ms. Aguilar argues her meretricious lawsuit is the basis of her creditors claim for unjust enrichment. The problem with this reasoning is twofold; first, the meretricious lawsuit litigates issues related to questions about the meretricious relationship and property division of marital like property, whereas unjust enrichment arises when consideration for the acquisition of property is furnished by one party and title is taken in the name of another so that retention of the property would result in unjust enrichment². And second, Ms. Aguilar seeks appellate

² See, *Yates v. Taylor*, 58 Wn.App. 187, 191, 791 P.2d 924 (1990).

review of a final order dismissing cause number 08-2-02387-1, which was never appealed and where the Estate was never a party³.

If the description of the claim is not correct, but is not ‘substantially misleading’ the claim may survive. RCW 11.40.070(1)(e). A similar question of missing information was address in *Villegas v. McBride*, where the court held the ‘substantially misleading’ exception did not cure the *omission* of required information. 112 Wn.App. 689, 695, 50 P.3d 678 (2002) (*emphasis added*). The court reasoned that omitting required information is neither misleading nor non-misleading, it is simply absent. *Id.* at 692. Thus, the omission of essential information required by the statute is fatal to the validity of the creditors claim. *Id.* at 692.

In another case, a claimant filed a creditor’s claim for unreimbursed contributions to the decedent’s real estate under a theory of quasi-contract and constructive trust. *Yates v. Taylor*, 58 Wn.App. 187, 191, 791 P.2d 924 (1990). The claimant listed the facts and circumstances of the basis of her claim as well as the amount being claimed when she filed her creditor’s claim. *Id.* There the parties never questioned whether or not the creditor’s claim was filed incorrectly. *Id.*

Ms. Aguilar was required to include facts and circumstance as the basis of her claim for unjust enrichment, joint venture, or contract implied in law and to include a specific amount of money she contributed to be

³ See, *Ron & E. Enterprises, Inc., v. Carrara, LLC*, 137 Wn.App. 822, 825, 155 P.3d 161 (2007) holding RAP 2.4(b) does not revive a final order not appealed.

incompliance with the statute. Instead she stated a claim for, “her share of any and all property acquired during her meretricious relationship with the deceased.” Because she failed to include both required items her creditor’s claim was properly dismissed.

4. RCW 4.16.170 does not toll the statute of limitation in this situation.

Ms Aguilar misunderstands the application and use of RCW 4.16.170. This rule tolls the applicable statute of limitation in cases where a complaint is filed before the expiration of the limitation period and gives the plaintiff an additional 90 days to complete service.

This tolling rule is not applicable in our case because no lawsuit has been filed for unjust enrichment, contract implied in law, or joint venture before the three year limitation period expired on May 20, 2011 against the Estate.

5. The Estate never raised the issue whether or not Ms. Aguilar was an easily ascertainable creditor, or whether she filed her creditor’s claim late.

The Estate never argued, in its motion for summary judgment that her creditor’s claim should be dismissed because Ms. Aguilar filed her creditor’s claim late and was not an easily ascertainable creditor. RCW 11.40.051(b)(2). The fact Ms. Aguilar filed her creditor’s claim within twenty-four months of the date of death is sufficient with the Estate. However, once she filed her claim and the period for doing so has

experienced, Ms. Aguilar does not get multiple opportunities to keep filing new or additional claims.

C. Because Ms. Aguilar was currently litigating her claims with the decedent at his death she was not required to file a creditor's claim, unless she had different claims against the Estate, rather she needed to move for substitution.

The fourth assignment of error argued by Ms. Aguilar is that her creditor's claim was not a "normal probate claim", was not governed by filing requirements found in RCW 11.40.070, and that the court failed to apply *Witt v. Young*, 168 Wn.App. 211, 275 P.3d 1218 (2012).

In *Witt v. Young*, Julie Witt and Danny Young moved in together, held themselves out as a married couple, and acquired real and personal property over the course of their nineteen year relationship. *Id.* at 213. The couple was living together when Danny died. *Id.* Danny's brother was appointed personal representative of the estate. *Id.* Julie filed a creditor's claim for a one-half interest in all the real and personal property owned by the Estate. *Id.* The personal representative rejected her claim. *Id.* at 214. After thirty days Julie filed a complaint for Partition of Real and Personal Property against the estate. *Id.* The personal representative moved for summary judgment claiming the non-claim statute prevented Julie from proceeding with her lawsuit because she failed to file it in a timely fashion. *Id.* at 215. The trial court denied summary judgment and the estate appealed. *Id.* at 216. The appellate court upheld the trial court's

decision holding the non-claim statute did not apply because Julie's claim was against the property of the estate and not a claim against the decedent. *Id.* at 222. In the end Julie was allowed to continue her lawsuit against the estate. *Id.*

Assuming Ms. Aguilar is correct that she did not need to file a creditor's claim, what was she required to do⁴? Ms. Aguilar's situation is different because, unlike Julie, she was already litigating the property division issue with Mr. Herrin when he died.

The answer is found in CR 25(a) and RCW 11.40.110, where Ms. Aguilar is required to have the personal representative substituted in place of the deceased within four months of the personal representative being appointed. But because her motion for substitution was denied, her only remaining hope was the fact she actually *did file* a creditor's claim.

Now that the Estate is attacking the correctness of her creditor's claim, Ms. Aguilar wants to argue she is exempt from the specific requirements of RCW 11.40.070 the non-claim statute.

Because the creditor's claim referenced the lawsuit, the personal representative waited to see whether or not Ms. Aguilar would file a motion for substitution. Eventually a motion was filed, but it was extremely late and the trial court denied the motion. Once the lawsuit was

⁴ Ms. Aguilar does not specifically explain what she is required to do in a situation where there is pending litigation against the decedent, where a creditor's claim is concurrently filed, and why filing a creditor's claim advances her position if she didn't need to file one in the first place.

dismissed the creditor's claim that referenced the lawsuit was left with little meaning. The trial court was correct to dismiss it.

D. Ms. Aguilar's creditors claim should be dismissed under the theory of res judicata.

Res judicata prevents Ms. Aguilar from having two opportunities to litigate claims or issues that should have been litigated in her 2008 lawsuit. Res Judicata encompasses the concepts of both *claim preclusion* and *issue preclusion*. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn.App 320, 327-328, 941 P.2d 1108 (1997). The doctrine puts an end to strife, produces certainty as to individual rights, and gives dignity and respect to judicial proceedings. *Marino Prop. Co. v. Port Comm'rs*, 97 Wn.2d 307, 312, 644 P.2d 1181 (1982). The general doctrine applies, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment upon, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. *Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 441-42, 423 P.2d 624, (1967). It has been held that a matter should have been raised and decided in the prior matter if it is merely an alternate theory of recovery or an alternate remedy. *Kelly-Hansen* at 356.

Ms. Aguilar argues aggressively that her creditor's claim for unjust enrichment and her prior lawsuit for a meretricious relationship are closely

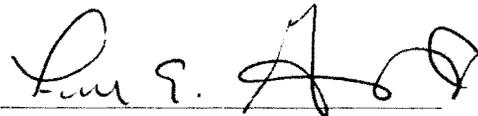
related to one another. Ms. Aguilar reasons that the close relationship preserves certain issues or claims and somehow transfers them from her prior lawsuit to her creditor's claim, bypassing other legal requirements.

The reality is Ms. Aguilar's creditor claim for unjust enrichment is an issue or claim that belonged with her first lawsuit. Consequently, res judicata prevents her from litigating unjust enrichment as a creditor's claim in the probate.

III. CONCLUSION

For the foregoing reasons, the Estate respectfully requests that the Court affirm the trial court's decision in granting summary judgment in favor of the Estate.

DATED this 24th day of October, 2014



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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October 2014, I caused to be served the foregoing by the method indicated below, and addressed to the following:

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