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Appellate Case No. 69244-5-1

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Appeal from Probate No. 10-4-01364-0
IN THE SUPERIOR COURT OF WASHINGTON
FOR SNOHOMISH COUNTY:

In the Matter of the Estate of
KARL O. MOLCK,
Deceased.

LAWRENCE REED,
Appellant,
v.
THE ESTATE OF KARL MOLCK
and
KAREN SCHICKLING
(as personal representative and in her individual capacity),
Respondents

AMENDED OPENING BRIEF OF APPELLANT

November 8, 2013

Submitted by
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11/14/13

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A. INTRODUCTION

The appellant, Lawrence Reed, is appealing a dispositive order that summarily dismissed his creditor's claim against the Estate of Karl Molck ("the Estate") and also imposed a judgment in the amount of \$2,035 against Mr. Reed and in favor of the Estate and the Estate's Personal Representative ("PR") on the ground that Mr. Reed's filing of his TEDRA summons and petition for enforcement of his creditor's claim had failed to satisfy RCW 11.40.100(1), which requires that "[i]f 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."

The specific purported grounds for dismissal of Mr. Reed's petition under RCW 11.40.100(1) were the following two: (a) that Mr. Reed's petition was brought as an incidental part of the relevant probate action rather than being brought as a completely separate action (as had been required prior to the enactment of TEDRA); and (b) that the Court Clerk's office did not collect any filing fee in connection with the filing of Mr. Reed's petition and summons. As indicated both in the dismissal motion brought by the Estate's PR and in the Superior Court's order, the date of filing of Mr. Reed's petition undisputedly occurred within 30 days of the Estate PR's rejection of his creditor's claim.

Mr. Reed challenges both the order and the judgment on both substantive and procedural grounds. The substantive challenge is based on the Superior Court's errant reliance on the misinterpretations and misrepresentations made by the Estate PR's attorney in seeking the dismissal and the judgment. As is

explained below, the only published authority relied upon by the Estate's PR and the Superior Court in interpreting the relevant TEDRA provisions and other probate statutes was inapplicable *pre-TEDRA* case law. The only other authority relied upon by the Estate's PR and the Superior Court was an unpublished Court Commissioner's decision that the Estate PR's attorney grossly misrepresented in a successful effort to deceive and mislead the Superior Court.

Mr. Reed's procedural challenge against the dismissal order and the judgment is based on gross procedural impropriety in the Estate PR's noting and convening of the hearing through which the order and judgment were issued. Because the dismissal and judgment sought and obtained by the Estate's PR were undisputably dispositive and were therefore undisputably subject to Civil Rule 56 (the rule regarding summary judgment), the Estate's PR was obligated to submit her motion to Mr. Reed a full 28 days before the hearing as required by CR 56(c). Furthermore, as provided by the applicable Snohomish County Court local rules and as affirmed on the calendar-note form that the Estate PR's attorney used to set the hearing, the motion should have been placed on the Probate/Guardianship Calendar. But what the Estate PR's attorney did instead was to have the motion heard on the Superior Court's regular Civil Motions Calendar (rather than the Probate/Guardianship Calendar) and to submit the motion only seven days before the hearing (rather than the 28 days required by CR 56).

B. ASSIGNMENTS OF ERROR

*Error 1. The Superior Court erred in ruling that Mr. Reed's filing of his summons and petition for enforcement of his rejected creditor's claim was

improper and invalid and merited dismissal with prejudice for the reason that the filing was submitted as part of the relevant probate action rather than as a separate action.

*Error 2: The Superior Court erred in treating the Court Clerk's non-collection of a filing fee as a basis for treating the filing as having merited dismissal with prejudice. (If non-collection and non-payment of the filing fee were indeed improper, then the proper remedy would have been an order for Mr. Reed to pay the filing fee within a specified period of time, with dismissal occurring only if the fee were not paid within the specified time.)

*Error 3: It was a double procedural error for the hearing to be held and for any dispositive order to be issued because (a) the hearing was improperly set and held only seven days after the Estate's PR submitted her motion in violation of CR 56(c)'s 28-day requirement; and (b) the hearing was held on the Superior Court's regular Civil Motions Calendar rather than the Probate/Guardianship Calendar in violation of the Court's local rules.

*Error 4: Even if dismissal of Mr. Reed's creditor's claim had not been improper and even if not for the procedural improprieties that constituted Error 3 above, the \$2,035 award of attorney fees was hugely excessive under the circumstances and should be eliminated or substantially reduced.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

Issue 1 (pertaining to Error 1): Under RCW 11.40.100(1), RCW 11.96A.090-.100, and other applicable law, must a TEDRA petition such as Mr. Reed's for enforcement of a rejected creditor's claim be filed as a separate civil action (as argued by the PR's attorney and apparently held by the Court in the July 27 order or dismissal), or can it alternatively be filed

within the relevant probate proceeding as an incidental part of it (which is what Mr. Reed did)?

Issue 2A (pertaining to Error 2): Was a filing fee required in connection with Mr. Reed's petition, and if so how much and under what section of the RCW?

Issue 2B (pertaining to Error 2): If a filing fee was required, should Mr. Reed's nonpayment of the fee be treated as grounds for rejecting the filing as being completely invalid, or should the nonpayment of the fee be treated instead as grounds for requiring Mr. Reed to pay the fee within a specified time as an alternative to dismissing his claim?

Issue 3 (pertaining to Error 3): In view of CR 56's 28-day requirement and in view of the local rule requiring probate matters to be heard on the Probate/Guardianship Calendar, did the Superior Court act improperly in holding a hearing on the Estate PR's dismissal motion as part of a different calendar—the regular Civil Motions Calendar—only seven days after the Estate PR's submission of the dismissal motion? If the hearing and the issuance of the dismissal order and judgment at that hearing were improper, are they invalidated by that impropriety?

Issue 4A (pertaining to Error 4): Was the Superior Court's entry of the \$2,035 judgment against Mr. Reed and in favor of the Estate and the Estate's PR reasonable and appropriate, or should the judgment be reduced or completely stricken?

Issue 4B: If the Superior Court's entry of the dismissal order and the judgment against Mr. Reed was improper, should Mr. Reed be granted a judgment compensating him for attorney fees and costs reasonably incurred

in this appeal? If Mr. Reed is entitled to such a judgment, should the judgment be enforceable solely against the Estate and its PR, or should the judgment also be enforceable against Kevin Copp, who is the attorney who acted on behalf of the Estate and its PR in submitting the motion and setting the hearing that led to the dismissal order and judgment now being appealed; and against Mr. Copp's law firm?

D. STATEMENT OF THE CASE

The *complete* set of facts and legal conclusions relied upon by the Superior Court is as set forth in the findings presented at pages 2-3 of the Superior Court's July 27, 2012 "Order to Dismiss Petition for Enforcement of Creditor's Claim"^{1/}:

1. Karl O. Molck ("decedent") a resident of Snohomish County, Washington, died on October 1, 2010, leaving an estate subject to the jurisdiction of this court. An order appointing Karen Schickling as personal representative to serve without bond and nonintervention powers was entered on October 21, 2010.
2. On February 25, 2012, Lawrence I. Reed ("Claimant"), filed a creditor's claim against the estate in the amount of \$9,500.00.
3. On January 9, 2012, the personal representative rejected in full the creditor claim of Lawrence I. Reed.
4. On February 6, 2012 [less than 30 days after the rejection of his creditor's claim], Lawrence I. Reed filed a petition for enforcement of creditor's claim **in same action, and failed to pay the filing fee as required by statute.** [Emphasis added.]

The Superior Court's order did not contain any other findings of fact or conclusions of law beyond those contained in the quotation immediately

1. CP 17-18.

above. The text of the order did not cite any specific statutory provisions or any specific cases.^{2/}

In her motion for dismissal, the Estate's PR presented two and only two arguments for dismissal of Mr. Reed's TEDRA petition. First, the Estate's PR argued that Mr. Reed's filing of his petition violated RCW 11.40.100(1) because the filing was made as an incidental part of the probate proceeding rather than being filed as a completely separate action against the Estate and its PR. The only authority cited by the Estate's PR in support of that argument was a set of pre-TEDRA cases spanning the period from 1910 (*Spokane v. Costello*, 57 Wash. 183, 189-90 (1910)) to 1998 (*Estate of Sette*, 90 Wn.App. 1008 (1998)). See the Estate PR's July 20, 2012 dismissal motion at pages 2-5.^{3/} In the process, the Estate's PR and her attorney completely ignored the relevant TEDRA provisions, RCW 11.96A.090-.100, which were adopted in 1999 and are discussed below.

The second of the Estate PR's two arguments for dismissal was that court records indicated that no filing fee was made or collected when Mr. Reed's summons and petition were filed. The Estate PR's motion did not cite any statutory authority or case law in support of its argument that the non-collection of a filing fee should be treated as grounds for invalidating the filing without first giving the petitioner, Mr. Reed, an opportunity to pay the fee if one was owed.^{4/} Nor was there any evidence presented or argument made to establish that the nonpayment of a filing fee was anything other than

2. See Order to Dismiss, CP 17-19.

3. Motion to Dismiss, CP 24, 26-28.

4. *Id.* t 29.

a matter of Mr. Reed's attorney being told by a clerk at the filing counter that no fee was owed and that the court would provide notice if it turned out that any fee was owed after all. (That scenario is actually what happened. Despite being asked by Mr. Reed's attorney, the court never indicated that any filing fee was owed until the issuance of the dismissal order now being appealed.)

It has always been undisputed that the filing of Mr. Reed's TEDRA petition occurred within 30 days of the Estate PR's notice of rejection of Mr. Reed's claim against the Estate. It has also always been undisputed that service of Mr. Reed's TEDRA petition and summons on the Estate's PR and her attorney were properly and timely executed. The Estate's PR and her attorney have never claimed otherwise. Instead, they argued that the filing was improper for the two reasons described above.

Unfortunately, no transcript for the oral argument at the July 27, 2012 hearing exists. This is because the Snohomish County Court never has a court reporter perform any recording or transcript from any hearing on the regular Civil Motions Calendar unless special arrangements are made in advance. No such special arrangements were made.

The Estate PR's dismissal motion and its calendar note setting the hearing for July 27, 2012 were both dated and submitted seven days earlier, on July 20, 2012.^{5/}

5. See the filing stamps on the first pages of the Calendar Note, CP 21; and the Motion to Dismiss, CP 24.

E. LEGAL AUTHORITY AND ARGUMENT

Regarding Issue 1: Under the portions of TEDRA codified as RCW 11.96A.090-.100, there was nothing wrong with Mr. Reed's petition being

filed within the above-captioned probate rather than as a separate civil action.

In its entirety, RCW 11.96A.090 (entitled "Judicial proceedings") states:

(1) A judicial proceeding under this title is a **special proceeding under the civil rules of court**. The provisions of this title governing such actions control over any inconsistent provision of the civil rules. [Emphasis added.]

(2) A judicial proceeding under this title [*i.e.*, RCW title 11] **may be commenced as a new action or as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset**. [Emphasis added.]

(3) Once commenced, the action may be consolidated with an existing proceeding or converted to a separate action upon the motion of a party for good cause shown, or by the court on its own motion.

(4) The procedural rules of court apply to judicial proceedings under this title only to the extent that they are consistent with this title, unless otherwise provided by statute or ordered by the court under RCW 11.96A.020 or 11.96A.050, or other applicable rules of court.

RCW 11.96A.100(2) unambiguously reaffirms the propriety of Mr. Reed's TEDRA petition having been filed as part of the above-captioned probate proceeding (rather than being filed as an entirely separate civil action). It does so by stating that "if the proceeding is commenced as an action incidental to an existing judicial proceeding relating to the same trust or estate or nonprobate asset, notice must be provided by summons only with respect to those parties who were not already parties to the existing judicial proceedings."

RCW 11.96A.090 and 11.96A.100 both took effect in 2000 as part of the enactment of TEDRA (the Trust and Estate Dispute Resolution Act), which has been codified as chapter 11.96A RCW. All of the published case law cited by the Estate's PR in the text of its dismissal motion in support of the argument that Mr. Reed was required to file his TEDRA petition as a completely separate civil proceeding rather than as a part of the above-

captioned probate proceeding were *pre-TEDRA* cases spanning the period from 1910 (*Spokane v. Costello*) to 1998 (*Estate of Sette*, 90 Wn.App. 1008, which was issued more than a year before RCW 11.96A.090-.100 and the rest of TEDRA took effect). The effective date of TEDRA was specified to be January 1, 2000 by RCW 11.96A.902 (entitled "Effective date -- 1999 c 42").

Since the January 2000 effective date of TEDRA, courts have consistently interpreted the relevant provisions of TEDRA to allow TEDRA petitioners such as Mr. Reed to file their petitions *either* within the already-existing, relevant probate proceeding (as Mr. Reed did) *or* as a new and separate civil proceeding. See, e.g., *In re Estate of Black*, 116 Wn. App. 492, 498 (2003), *aff'd*, 153 Wn.2d 152 (2004) (affirming that, as set forth in RCW 11.96A.090(2), "a [TEDRA] proceeding may be commenced as a new action or as an action incidental to an existing proceeding relating to the same trust or estate or nonprobate asset").

Regarding Issues 2A-2B: No legal authority has been specifically cited to establish whether and how much Mr. Reed owed as a filing fee, nor has any legal authority of any kind been cited for establishing that dismissal of Mr. Reed's claim was the appropriate remedy for that nonpayment (as distinguished from, for example, issuance of an order requiring that any owed-but-unpaid fee be paid by a specified deadline to avoid dismissal).

The statutory provisions cited in the Estate PR's motion regarding filing fees (RCW 36.18.012 and 36.18.020) provides for each court's clerk to collect various fees and also provides for division of those fees with the state, neither the PR nor the Court's July 27 order identified the specific provision and dollar-amount filing fee that allegedly should have been paid by Mr. Reed in connection with the filing of his petition and summons.

Moreover, even if a filing fee were owed by not paid, there is absolutely no authority that has been cited by the PR or by the Court for treating dismissal of the entirety of Mr. Reed's claim as the proper remedy rather than, alternatively, simply specifying what fee was owed and ordering Mr. Reed to pay it as a condition of moving ahead in seeking to enforce his claim. The latter would be the appropriate remedy if any fee were in fact owed. Dismissal is overly harsh and a miscarriage of justice--especially but not solely in view of the fact that Mr. Reed's attorney specifically asked the clerk who was receiving Mr. Reed's petition and summons what filing fee was owed and refrained from paying any fee because the clerk told him that none was owed and that the Court would contact him if it turned out a filing fee were owed after all. Though no finding to the contrary was ever made, any such finding would have been in violation of CR 56's requirement that all findings on issues of fact relating to summary judgment must be made in the light most favorable to the non-moving party.

Regarding Issues 3: There was no special setting or other justification for the Estate PR's dismissal motion to be adjudicated upon only seven days's notice as part of the regular Civil Motions Calendar rather than after 28 days' notice as part of the Probate/Guardianship Calendar.

As noted above, the July 27, 2012 hearing and the issuance of a dispositive order and judgment at that hearing flagrantly violated CR 56's requirement for at least 28 days to pass from filing and service of a dispositive motion until the hearing.

As also noted above, the holding of the hearing as part of the regular Civil Motions Calendar rather than the Guardianship/Probate Calendar violated the Snohomish County Superior Court's local rule concerning

motions. The Calendar Note form used by the Estate PR's attorney to set the motion for hearing affirmed that rule in the following manner. On page 1 immediately below the case caption, the Calendar Note explicitly stated:

****SEE "WHERE TO NOTE VARIOUS MATTERS" ON PAGE 2, TO DETERMINE WHAT MOTIONS ARE TO BE SET BEFORE THE CIVIL MOTIONS JUDGE VERSUS THE CIVIL MOTIONS COMMISSIONER VERSUS THE PRESIDING JUDGE.**

On page 2 in the last sentence of the "COMMISSIONER CIVIL MOTIONS" portion of the "WHERE TO NOTE VARIOUS MATTERS" section referred to on page 1, the Calendar Note explicitly states: "Probate and Guardianship matters are set on the Probate/Guardianship calendar."^{6/}

Even if not for the substantive legal errors explained above, the dismissal order and judgment should be vacated because they were improperly set for hearing and improperly heard, so that the motions judge who entered the order and judgment did not have proper authority to convene the hearing on the Estate PR's dismissal motion or to grant any of the relief sought by the Estate's PR.

Regarding Issues 4A-4B: Dismissal of Mr. Reed's claim was improper, and so was the related award of attorney fees and costs to the PR. The dismissal should be reversed, and attorney fees and costs should be awarded under RCW 11.96A.150 not to the PR but instead to Mr. Reed.

F. CONCLUSION

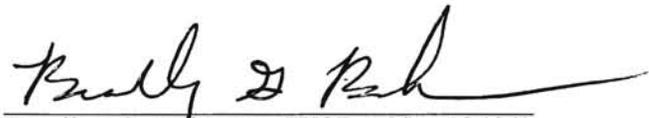
For the reasons presented above, the Snohomish Superior Court's July 27, 2012 granting of the Estate PR's July 20, 2012 motion to have Mr. Reed's creditor's claim dismissed with prejudice and to have a \$2,035 judgement for attorney fees and costs entered against Mr. Reed was thoroughly improper both as a matter of substantive law and also as a matter of proper procedure.

6. Calendar Note, CP 21-22.

Accordingly, the dismissal order and the judgment should both be vacated. In addition, under RCW 11.96A.150 Mr. Reed should be granted an award of compensation for attorney fees and costs reasonably incurred in the course of this appeal.

Finally, Mr. Reed's TEDRA petition for enforcement of his creditor's claim against the Estate should be remanded to the Snohomish County Superior Court for the various adjudicative steps that are required by TEDRA but were short-circuited by the improper granting of the Estate PR's dismissal motion.

Respectfully submitted this 8th day of November, 2013.



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