

74336-8

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No. 74336-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ANNA PASCUA,

Appellant,

v.

SCOTT COLLINS and JOHN GREENWAY,

Respondents.

REPLY BRIEF OF APPELLANT

2016 JUL 27 AM 11:15
COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

The Personal Representative's arguments are self-serving explanations for ignoring Ms. Pascua's potential claims. The Personal Representative argues that no diligence or investigation was required, because Ms. Pascua did not present to the Personal Representative a fully formed "cause of action" or "litigable" claim. A standard that is not supported by the statute. Further, the Personal Representative argues that Ms. Pascua's claim was "conjectural", because the Personal Representative failed to conduct an investigation that would have revealed the basis of Ms. Pascua's claim. However, whether a claim is conjectural or not is based upon the claim itself, not the Personal Representative's purposefully constricted scope of knowledge of the claim. Finally, the Personal Representative argues that he acted with "reasonable diligence" in investigating Ms. Pascua's claims. However, the record shows the Personal Representative conducted with no diligence, and completely disregarded statements the Personal Representative's attorney admits amounted to "emotional and physical abuse by her father in her childhood." Res. Br., p.16. The Personal Representative's myriad of justifications for their inaction are not a substitute for performing the diligence required by the statute.

The simple fact is that the Personal Representative is trying to justify the failure to act by twisted readings of the statute, and arguing multiple inconsistent positions. The Personal Representative has offered no

evidence justifying the failure to investigate Ms. Pascua's claims when she was offering to be interviewed. There is no evidence that the Personal Representative considered Ms. Pascua's claims to be "conjectural", "speculative" or "not litigable". There is no evidence at all. These are merely the Personal Representative's counsel's arguments and speculation asserted on appeal, and insufficient to support summary judgment dismissal of Ms. Pascua's claims.

The evidence in the record is that Ms. Pascua disclosed a number of incidents of "physical and emotional abuse", and made it clear that more details existed. Further, Ms. Pascua disclosed that she would provide further details should the Personal Representative request additional information. Despite having actual notice of instances of "physical and emotional abuse", the Personal Representative declined any further investigation of the potential claims and failed to give Ms. Pascua actual notice of the Notice to Creditors.

Ms. Pascua has presented clear, cogent and convincing evidence that the Personal Representative failed to investigate a reasonably ascertainable claim for childhood sexual abuse by the decedent. The Personal Representative was presented with numerous opportunities to investigate, and elected to hide his head in the sand and avoid learning of the complete extent of Ms. Pascua's claims. This is not condoned or allowed under the statute. Ms. Pascua's claim was properly asserted under RCW 11.40.051(1)(b)(ii), and this Court must reverse the trial court's ruling and remand for further proceedings.

II. REPLY

A. Ms. Pascua Has Rebutted the Presumption That the Personal Representative Performed an Adequate Investigation.

1. There Is No Statutory or Case Law Requiring Ms. Pascua to Present Evidence of a “Litigable” Claim Before Receiving Statutory Notice.

On summary judgment, the Personal Representative relied upon the rebuttable presumption of due diligence under RCW 11.40.040(2) to meet their burden. The Personal Representative presented no evidence other than the bare minimum necessary to create the presumption. To rebut this presumption, Ms. Pascua had to present “clear cogent and convincing evidence” that: 1) the Personal Representative did not exercise reasonable diligence, and 2) her claim was “reasonably ascertainable through the exercise of due diligence.” *Id.*

Here, there is clear, cogent and convincing evidence that the Personal Representative did not exercise “reasonable diligence.” The undisputed evidence is that Ms. Pascua presented the Personal Representative with evidence of childhood “physical and emotional abuse.” Res. Br., p.16. More importantly, the undisputed evidence is that Ms. Pascua told the Personal Representative that there was more evidence of bad acts by her father, but that the Personal Representative was uninterested in hearing her allegations. CP 91-92. This is clear, cogent and convincing

evidence that the Personal Representative had actual notice of potential claims of “physical and emotional abuse” but never took any action to determine if the party that suffered that “physical and emotional abuse” had a claim against the estate. The Personal Representative did not exercise “reasonable diligence” in investigating Ms. Pascua’s claim.

Additionally, there can be no disputing that Ms. Pascua’s claim was “reasonably ascertainable” had the Personal Representative talked to Ms. Pascua further. In their briefing, the Personal Representative admits that “it is true that childhood sexual abuse is most certainly litigable,”¹ and Ms. Pascua’s declaration clearly states that if the Personal Representative had interviewed her she would have disclosed the “complete story” including “the years of sexual and emotional abuse” she endured. CP 91. This testimony is undisputed, and is clear, cogent and convincing evidence that Ms. Pascua’s claim was reasonably ascertainable.

The Personal Representative’s argument is an attempt to justify their failure to investigate by creating an un rebuttable presumption. If it can be argued the Personal Representative did not know enough about Ms. Pascua’s claim, on these facts, that failure rests on the Personal Representative who hid his head in the sand rather than investigate Ms.

¹ This is a higher standard than a “reasonably ascertainable claim”, which does not include any requirement that the Personal Representative have notice of a “cause of action” or a claim that is actually “litigable.”

Pascua's claim. Ms. Pascua has rebutted the presumption under RCW 11.40.040(2), and the Court should reverse the trial court's dismissal of her claims and remand for further proceedings.

2. The Personal Representative's Counsel Relies on Speculation in Arguing That the Personal Representative Was Not on Notice of Ms. Pascua's Potential Claims.

The Personal Representative's counsel claims that the Personal Representative did not have sufficient evidence to determine that Ms. Pascua had a "litigable" claim or a cause of action against the estate. However, there is absolutely no evidence this was the case. The only evidence of the Personal Representative's investigation and knowledge is that the Personal Representative made a search of specific documents, and that those documents did not reveal Ms. Pascua's potential claim. There is no other evidence in the record regarding the Personal Representative's understanding of Ms. Pascua's potential claim.

It is undisputed that Ms. Pascua and Mr. Collins discussed allegations of physical and emotional abuse perpetrated upon her by her father. CP 90-92. These discussions were a reaction to Mr. Collins, as co-personal representative, consistently praising Ms. Pascua's father in his conversations with Ms. Pascua. CP 92. Ms. Pascua made it clear to the Personal Representative that there was more to the story, and that she was willing to be interviewed regarding her father's actions. CP 91. Finally,

the evidence before this Court is that the Personal Representative took absolutely no action to either provide Ms. Pascua notice to creditors, or investigate her claims further. The record is completely devoid of any explanation from the Personal Representative as to why Ms. Pascua's claim was not investigated.

This includes no evidence by declaration, or otherwise, regarding the Personal Representative's understanding of or belief that Ms. Pascua's claims were "conjectural" or that he regarded her claims as not "litigable." The only "reasonable inference" to be drawn from the record is that the Personal Representative ignored Ms. Pascua's claims, and was hoping a claim would not be made during the shorter four month period. Without evidence that the Personal Representative determined that Ms. Pascua's claim was "conjectural", or not a cause of action or "litigable", the Personal Representative's *counsel's* arguments must be taken for what they are: argumentative assertions unsupported by evidence.

The lack of evidence regarding the reason why the Personal Representative failed to investigate Ms. Pascua's claim further supports that Ms. Pascua has rebutted the presumption under RCW 11.40.040(2). There is simply no explanation as to why Ms. Pascua's claim of "physical and emotional abuse" was not pursued by reasonably available means, such as an interview with Ms. Pascua. Ms. Pascua has rebutted the presumption

under RCW 11.40.040(2) that the Personal Representative exercised reasonable diligence, and she was entitled to twenty four months to file her claim under RCW 11.40.051(1)(b)(ii).

B. The Case Law Dictates That Ms. Pascua's Claim Was Reasonably Ascertainable and Not Conjectural.

The Personal Representative disputes that the case law relied upon in Ms. Pascua's opening brief has any bearing on the facts in this case. That is not the case. On their facts alone, the cases cited show that the Personal Representative came nowhere near the standard of care required of them.

The case law comes to a single conclusion: the Personal Representative's sole job is to determine the parties who may have claims and provide them with actual notice. The Personal Representative does not get to decide what claims they believe are "litigable" or comprise a cause of action, and provide notice to only those creditors with litigable claims. Further, the Personal Representative cannot rely upon their ignorance a claim when the means for determining the basis for the claim was accessible to the Personal Representative. However, that is precisely what the Personal Representative is arguing protects them in this case: 1) ignorance of the fact that Ms. Pascua was sexually abused as a child (they claim only knowledge of physical and emotional abuse); and 2) the apparent determination by the Personal Representative that Ms. Pascua's claim was not "litigable" and

therefore was not “reasonably ascertainable.”

1. Pursuant to the Court’s Opinion in *Estate of Austin*, the Personal Representative’s Determination That a Potential Claim Is Not Litigable Has No Bearing on Whether the Claim Is Reasonably Ascertainable.

The Personal Representative has argued that Ms. Pascua was not entitled to notice, because her disclosures of emotional and physical abuse did not constitute a “cause of action”² and/or were not litigable. *See Res. Br.*, p.15-18. The Court in *Estate of Austin*, 389 S.W.3d 168, 173 (Mo. 2013), specifically found:

Whether the children’s claims had legal merit was not [the Personal Representative’s] responsibility to determine. Instead, [the Personal Representative] simply had a duty to provide notice to all reasonably ascertainable creditors.

Id. at 173. The Personal Representative cannot hide behind their argument that Ms. Pascua’s claims were not “litigable” or did not constitute a “cause of action.” *Id.*

The Court’s opinion in *Estate of Austin* is instructive in this case for two reasons. The first is that it demonstrates what a competent investigation of a claim looks like. In *Estate of Austin*, the Personal Representative

² To be fair, a claim of intentional physical abuse (Battery) and emotional abuse (Intentional Infliction of Emotional Distress) are both litigable and causes of action. The Personal Representative is apparently relying on the affirmative defense that those claims would likely be barred by the statute of limitations. The Personal Representative has cited no statute or case law that allows them to make the determination that a potential claim is not entitled to actual notice based upon the strength of the estate’s affirmative defense.

conducted interviews of possible witnesses and at least made an effort to determine what the children's claims were. *Id.* at 170, 173. Here, there was no investigation of Ms. Pascua's claims. In fact, the Personal Representative actively avoided interviewing a witness offering to provide greater detail regarding the claims.

The second is that the Personal Representative's post-hoc argument that they had no notice of a cause of action or "litigable" claim has no bearing on whether she should have received notice. The Court in *Estate of Austin* is clear, it is not for the Personal Representative to decide whether a potential claim is "litigable" or presents a "cause of action." *Id.* at 173. The Personal Representative must investigate and provide notice to all non-conjectural claims. *Id.*

The Personal Representative argues that Ms. Pascua was not entitled to notice, because she did not disclose a "litigable" claim. This is no different than the determination made by the Personal Representative in *Estate of Austin*. *Id.* The Personal Representative's failure to conduct an investigation upon learning of a claim of "emotional and physical abuse" does not then insulate the Personal Representative. At best, the Personal Representative decided that Ms. Pascua's claims would not be meritorious, because they were most likely barred by the statute of limitations for intentional torts. Ms. Pascua was entitled to actual notice under the Court's

ruling in *Estate of Austin*, and the trial court's dismissal of her claims should be reversed.

2. Ms. Pascua's Claim Is Not Conjectural.

The Personal Representative argues that Ms. Pascua's claim is conjectural. Specifically, the Personal Representative argues that "it would be pure conjecture and guesswork on Collins' part to leap from disclosed allegations regarding Sirkin to surmise that there might be a claim for undisclosed childhood sexual abuse." Res. Br., p.18.

It is true that claims that are "merely conjectural" are not entitled to actual notice under the 14th Amendment and Supreme Court precedent. *Mullane v. Central Hanover Bank & Trust, Co.*, 339 U.S. 306, 317, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 490, 108 S. Ct. 1340, 99 L.Ed.2d 565 (1988). Black's Law Dictionary defines conjecture as "a guess; supposition; surmise." CONJECTURE, Black's Law Dictionary (10th ed. 2014). However, there is nothing that would suggest that the Personal Representative's failure to properly investigate a claim can make the claim "merely conjectural", as the Personal Representative has argued.

As a basis, the Personal Representative has admitted that Ms. Pascua's claim for "childhood sexual abuse" is a "litigable" claim. Res. Br., p.18. It is undisputed that the Personal Representative did not investigate

Ms. Pascua's claims, and that Ms. Pascua would have disclosed the childhood sexual abuse by her father had the Personal Representative sought to interview her. CP 91. As such, Ms. Pascua's claim is not conjectural or based upon speculation: It is based upon her personal knowledge of a litigable claim.

What the Personal Representative appears to argue is that a claim is conjectural if the Personal Representative, without any investigation, does not have personal knowledge of the claim. There is simply no basis for this in the case law. The Supreme Court specifically notes "conjectural" "claims" or "interests" and does not mention anything regarding the Personal Representative's knowledge of the claim. *Tulsa*, 485 U.S. at 490; *Mullane*, 339 U.S. at 317. The clear meaning is that the claim itself must be "conjectural" or speculative, and that is not effected by the Personal Representative's limited knowledge of the claim.

There is nothing in the Supreme Court's finding in *Tulsa Professional* that allows the Personal Representative to create a "conjectural claim" by failing to investigate that claim. 485 U.S. at 491 ("If appellant's identity was known or 'reasonably ascertainable,' then termination of appellant's claim without actual notice violated due process"). The only reason the Personal Representative would have to speculate regarding the basis of Ms. Pascua's claims is that he refused to take reasonable steps to

investigate her claims. Ms. Pascua's claim is concrete, she was sexually abused by her father as a minor, and the Personal Representative has admitted that it is a "litigable" claim. Ms. Pascua's claim is not conjectural and she is entitled to actual notice under RCW 11.40.051.

3. Like the Personal Representative in *Gaylor*, the Personal Representative Had Actual Knowledge of Potentially Tortious Acts and Elected Not to Conduct Any Further Investigation.

In *Gaylor*, the personal representative estate had actual knowledge of the accident that had caused death and access to the accident report. *American Home Assur. Co v. Gaylor*, 894 So.2d 656, 657 (Ala. 2004). In that case, the Court found the personal representative's failure to investigate the claim and provide actual notice violated the claimant's due process rights. *Id.* at 661. The *Gaylor* Court found a personal representative needed to "eliminated the possibility of a claim" against the estate. *Id.* at 660. The Court ruled the personal representative in *Gaylor* had failed to "foreclose the existence of a reasonable means by which she could have ascertained" the claim existed and failed to provide actual notice where required. *Id.*

Here, the Personal Representative admits that Ms. Pascua's disclosure amounted to notice of physical and emotional abuse by her father, but did not foreclose the possibility of a claim by interviewing Ms. Pascua. The Personal Representative has presented no evidence that Ms.

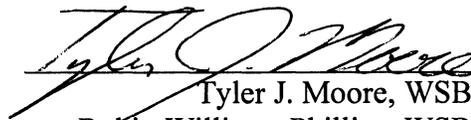
Pascua was uncooperative, or unhelpful in discussing her claim, and that it would be unreasonable to conduct an interview with her regarding a potential claim. In fact, the only evidence is that Ms. Pascua repeatedly brought up physical and emotional abuse by her father, and that the Personal Representative did not want to investigate any further. This is factually indistinguishable from *Gaylor* where the Personal Representative knew of potentially tortious acts, but did not foreclose all reasonable means of understanding the potential claim. Ms. Pascua was entitled to actual notice under the Court's opinion in *Gaylor*, and the trial court's dismissal of Ms. Pascua's claim must be reversed.

III. CONCLUSION

The Personal Representative has admitted that Ms. Pascua disclosed claims of physical and emotional abuse, but has not offered any reason why those claims were not investigated. In fact, there is no evidence in the record as to why the Personal Representative made the decision to hide from Ms. Pascua's potential claims, and not investigate to determine if Ms. Pascua had a claim against the estate. The only evidence is that the Personal Representative did the bare minimum to create a presumption of diligence under RCW 11.40.040(2), and took no other action. However, Ms. Pascua has presented clear, cogent and convincing evidence that the Personal Representative did not exercise reasonable diligence when he failed to

investigate potential claims, and that her claim for sexual abuse would have been discovered had the Personal Representative conducted the interview she offered. It is unreasonable that the Personal Representative did not discover Ms. Pascua's claim for childhood sexual abuse, which was ascertainable through a single interview, and it was unreasonable to deny Ms. Pascua actual notice. Ms. Pascua's claim was timely filed under RCW 11.40.051(1)(b)(ii). The trial court's dismissal of Ms. Pascua's complaint must be reversed and this action remanded for further proceedings.

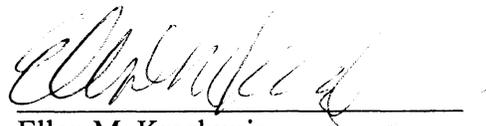
Respectfully submitted this 30th day of June, 2016.


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CERTIFICATE OF SERVICE

I certify that on June 30, 2016, I caused a copy of the foregoing document to be served via legal messenger to the following counsel of record:

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