IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

In re the Estate of: **CHARLES H. EVITT**, Deceased.	)	**1 CA-CV 17-0045** **Maricopa County No. PB2015-051215**
JUDITH EVITT-THORNE, Petitioner/Appellant, v. **LESLIE HIATT**, et al., Respondents/Appellees.	)	

APPELLANT'S REPLY BRIEF

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In re the Estate of: CHARLES H. EVITT, Deceased.	1 CA-CV 07-0093 Maricopa County No. PB2006-001880
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ARGUMENT

In their response to the opening brief filed by Appellant Judith Evitt Thorne ("Judith"), Co-Personal Representatives Leslie Hiatt, Sandra Evitt and Mary Jo Evitt (individually, "Leslie," "Sandra" and "Mary Jo," and collectively, the "Co-Personal Representatives") exhaustively lay out probate laws and procedures in Arizona and Wyoming, explaining for example that probate proceedings are "in rem" "creatures of statute," that nonclaim statutes differ from statutes of limitation and that a probate estate represents neither a person nor a legal entity and citing almost 90 supporting precedents. Most of their analysis has no bearing on the issues presented by Judith's appeal:

- The genuine issues of material fact, stemming from Leslie's recollections of her conversations with the decedent, Charles H. Evitt ("Charles"), regarding Judith's claim, that precluded' the trial court from finding that Judith was not a known or reasonably ascertainable creditor for purposes of written notice requirements under Wyoming law;
- Judith's presentation of her claim against Charles' estate within the deadline set by A.R.S. § 14-3803(C) for claims arising at the decedent's death; and
- The "peculiar circumstances" of this case that entitle Judith to equitable relief from Wyoming's nonclaim statute or, at minimum, "adversary proceedings" on the issue.

If Judith prevails on any one of these issues, this Court must reverse the trial court's decision as a matter of law.

I. The Trial Court Erred in not Considering Judith a Known or Reasonably Ascertainable Creditor for Purposes of Constitutionally Required Notice of Probate Proceedings.

Judith's claim arises from a settlement agreement, entered into as an incident of Charles and Judith's 1987 divorce (the "Settlement Agreement") [I.R. 43 ¶ 10][1] If Judith survived Charles, the Settlement Agreement required a $150,000.00 payment to Judith upon Charles' death:

> 10. Death Benefits to the Wife. If Wife shall survive Husband, Husband agrees to provide Wife, as additional adjustment of the property rights of Wife, the sum of $150,000.00 upon Husband's death. This provision shall be deemed satisfied if Husband provides insurance proceeds from any existing policy of life insurance or any new policy which Husband may from time to time obtain, including policies in which the Wife is now or in the future may be names as the owner and/or beneficiary.

[I.R. 43 ¶ 10]

As Judith explained in her opening brief, "[t]he Due Process Clause of the United States Constitution requires the personal representative of an estate to provide actual notice of probate proceedings to known or reasonably ascertainable

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[1] Judith will support the factual contentions in this Brief with citations to the Index of Record transmitted by the Clerk of the Maricopa County Superior Court and Transcripts of Proceedings from hearings on August 10, September 29 and November 12, 2015 and on March 30, 2016, In the Matter of Charles Evitt, Maricopa County Superior Court (Cause No. PB2015-051215). For convenience, this Brief will refer to the Index of Record as "I.R." and to the Transcript of Proceedings as "T.P."

creditors." Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 489-90 (1988); e.g., Estate of Novakovich, 101 P.3d 931, 938, ¶ 27 (Wyo. 2004). Judith received no written notice of the probate of Charles' estate in Wyoming until after she sought to enforce her claim under the Settlement Agreement by having her counsel send a demand letter to Jodi Evitt Sandra on May 15, 2015, [I.R. 36 Exhibit D], receiving a response from a lawyer representing Mary Jo on June 15, 2015 that addressed the merits of her claim but made no mention of any Wyoming probate proceeding, [I.R. 36 Exhibit E] and then initiating probate proceedings in Arizona, as threatened in her counsel's letter, [See I.R. 1 & 43 ¶ 14]. That notice informed her that the deadline for claims against Charles' estate had expired in early 2014. [I.R. 43 ¶ 14]

Leslie and Sandra supported their Motion for Summary Judgment with a Separate Statement of Facts and a Declaration recounting Leslie's "specific rec[ollection of Charles] telling her that he no longer owed [Judith] anything and that any obligation [Charles] had to [Judith] had long ago been paid in full." [I.R. 35 ¶ 12; I.R. 36 ¶ 14] Charles made these statements to Leslie "[o]n multiple occasions prior to his death." [I.R. 35 ¶ 12; I.R. 36 ¶ 14] Neither Mary Jo nor Sandra made any Declaration in support of the Summary Judgment Motion. But Leslie's Declaration betrays her knowledge of Judith's identity as a potential

creditor. As such, Judith had the right to more notice than publication. She should also have received written notice of the probate of Charles' estate.

In their Response, the Co-Personal Representatives claim that Judith presented no evidence to support her position and did nothing more than dispute the factual assertions supporting the Summary Judgment Motion.[2] The Co-Personal Representatives ignore that Judith presented them with a copy of the executed Settlement Agreement specifying the $150,000.00 payment required upon Charles' death. Judith did not dispute Leslie's assertions respecting her conversations with Charles about Judith's claim, moreover, but embraced them to the extent they illuminated Leslie's state of mind. Indeed, both sides agreed on the admissibility of those statements on this point.[3]

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[2] The Co-Personal Representatives do not explain where Judith could have found additional evidence after their response to her counsel's November 19, 2015 Document Request, which sought documents evidencing the Co-Personal Representatives efforts to identify the Decedent's debts and communications and agreements among themselves regarding Judith's claim and the ensuing letters exchanged between Judith's counsel and Mary Jo's counsel, [I.R. 44 ¶ 15 & Exhibit A], yielded just two responsive documents: an Affidavit of Publication relating to a notice published in the Buffalo, Wyoming Bulletin and a Stipulation for Distribution of Estate filed in the Wyoming Court on August 27, 2014, [id. ¶ 16 & Exhibit B].

[3] Compare I.R. 42 at 7 and 59 at 5 n.1 ("Judith relies on Leslie Hiatt's reported conversations with Charles as evidence of Leslie's awareness of Judith's identity as a creditor.") with I.R. 60 at 2-3 ("During his lifetime, decedent informed the personal representatives on numerous occasions that he no longer owed Claimant anything. While this evidence might not be admissible to establish the validity of

In reviewing the grant of a summary judgment, this Court must view the facts, the evidence and any reasonable inferences to be drawn from the facts and the evidence in the light most favorable to Judith as the party opposing the motion. E.g., Weitz Co. L.L.C. v. Heth, 235 Ariz. 405, 408, ¶ 2, 333 P.3d 23, 27 (2014); Andrews v. Blake, 205 Ariz. 236, 240, ¶ 13, 69 P.3d 7, 11 (2004). This Court also must construe all such inferences in Judith's favor. E.g., Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons, 201 Ariz. 474, 482, ¶ 13, 38 P.3d 12, 20 (2002). To defeat summary judgment, Judith need not demonstrate success on the merits, only that "reasonable people" could reach different conclusions. Salerno v. Atlantic Mutual Insurance Co., 198 Ariz. 54, 56 ¶ 2, 6 P.3d 758, 760 (App. 2000); Transamerica Insurance Co. v. Doe, 173 Ariz. 112, 114, 840 P.2d 288, 290 ([i]f, when drawing all reasonable inferences in favor of the party opposing the motion, "reasonable people could differ, summary judgment is not appropriate") (citing Orme School v. Reeves, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990)). The Co-Personal Representatives assertions, made for the first time in their Response (at 30-31), that the letter from Judith's counsel prompted Leslie's recollections of her conversations with Charles and that Charles' statements that he "had paid off his ex-wife back in 1993 . . . are not evidence relating to the

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the claim, it certainly is admissible to prove the personal representatives' state of mind and [their] diligent efforts to identify creditors 'based upon the information available to the personal representatives.")

investigation of creditors" only compound the factual dispute in this case. The trial court erred in reaching a contrary conclusion.

The precedents the Co-Personal Representatives cite do not dictate a different conclusion. In Estate of Novakovich, the Wyoming Supreme Court ruled in favor of the claimant, not the estate. 101 P.3d 931 (Wyo. 2004).[4] Specifically, the Court found that the trial court erred in requiring a claimant seeking to reopen an estate to make a serious showing, rather than a prima facie showing, of likely success on the merits before requiring the personal representative to submit to discovery as to whether the claimant was a reasonably ascertainable creditor. 101 P.3d at 937-39, ¶¶ 26-30. As the Co-Personal Representatives acknowledge (at 34), the Court declined to define "reasonably diligent efforts" by "any absolute standard," finding instead that they depend "on the relative facts of the special case. 101 P.3d at 938, ¶ 27. The Wyoming Supreme Court's approach does not lend itself to summary disposition.

In Mullane v. Central Hanover Bank, the Supreme Court ruled that known beneficiaries of a common trust fund administered under New York banking laws had a right to more notice than publication in the newspaper. 339 U.S. 306 (1950).

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[4] Many of the precedents cited by the Co-Personal Representatives construe the nonclaim statutes in favor of the creditors involved, [see infra p. *], suggesting an additional reason to reverse the trial court's ruling.

In reaching its conclusion, the Court elaborated on the shortcomings of notice by publication:

> It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed.

339 U.S. at 15. The Supreme Court later expanded the recipients constitutionally entitled to actual notice to include not just known but "reasonably ascertainable" creditors as well. Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 489-90 (1988).

In Soriano v. Estate of Manes, the trial court denied the creditor's claim after conducting a hearing on her petition, not by summary judgment. 177 So.3d 677, 679 (2015). The record included no evidence that the personal representative may have had knowledge of the creditor's claim. That evidence exists in the present case, in the form of Leslie's recollections of numerous conversations with Charles about Judith's claim.

Though the issue was disputed, the Arkansas Supreme Court's decision in Matter of Estate of Spears, also followed a hearing at which the parties could have presented evidence. 314 Ark. 54, 59, 858 S.W. 2d 93, 95-96 (1993). As with

Soriano, there was no evidence that the personal representative knew of the claim. Indeed, the personal representative could not have known of the claim because it stemmed from a mortgage not yet in default when the three-month notice period required by Arkansas law had lapsed. 314 Ark. at 61, 858 S.W. 2d at 97.

Viewing all facts, evidence and inferences in Judith's favor, as the standard of review requires, leads inescapably to the conclusion that a genuine issue of material fact relating to Judith's status as a known or "reasonably ascertainable" creditor precludes summary judgment on the point. This Court should reverse the trial court's award of summary judgment to Leslie and Sandra as a result.

II. Judith's Claim Arose at the Moment of Charles' Death.

The Co-Personal Representatives do not address Judith's statutory argument that the words "due or to become due" and "contingent" in A.R.S. § 14-3803(A) do not subject her claim to that statute, as a claim arising before the decedent's death, because the same words appear in A.R.S. § 14-3803(C), governing claims arising "at or after the death of the decedent." As her Opening Brief explains in more detail (at 16), A.R.S. § 14-3803(C), not (A), applies because Judith's claim "originated" at the moment of Charles' death, not before. The Settlement Agreement required no further action by Charles, and gave nothing for Judith to enforce, before his death. Instead, it provided for an automatic payment upon Charles' death – contingent on Judith surviving Charles. Judith first presented her

claim within the deadline prescribed by that statute. The trial court erred as a matter of law in finding otherwise.

Rather than grapple with the statutory question, the Co-Personal Representatives cite Division 2's decision in Ader v. Estate of Felger, 240 Ariz. 32, 375 P.3d 97 (2016), the same authorities from other jurisdictions they cited to the trial court, and additional authorities from other jurisdictions. None of these authorities suggest a different result.[5]

Ader dealt only tangentially with A.R.S. § 14-3803, although the decedent's real estate investment activities giving rise to the claim unquestionably occurred before his death. 240 Ariz. at 35, ¶ 2, 375 P.3d at 100. Instead, the Court found the creditor's claim barred because no personal representative had been appointed under A.R.S. § 14-3108 within two years after the decedent's death. 240 Ariz. at 37, ¶ 10, 375 P.3d at 10. Personal representatives appointed after two years have no power to address claims other than expenses of administration. 240 Ariz. at 40, ¶ 25, 375 P.3d at 105 (citing A.R.S. § 14-3108(4)). Ader bears no resemblance to this matter.

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[5] In her Opening Brief, Judith already addressed (at 17-18) the Arizona Supreme Court's decision in Hullett v. Cousin, 204 Ariz. 292, 63 P.3d 1029 (2003), the Colorado Court of Appeals decision in Poleson v. Wills, 998 P.2d 469 (Colo. App. 2000) and the Florida Supreme Court's decision in Spohr v. Berryman, 589 So.2d 225, 227-28 (Fla. 1991).

In Estate of Hadaway, the Minnesota Court of Appeals reversed a judgment for the estate and against the claimant based on a divorce decree "directing decedent to either maintain life insurance providing a lump-sum death benefit in the amount of $175,000 payable to appellant upon his death, or, alternatively, to provide in some other manner for the tax-free payment of that amount to appellant within 60 days following his death." 668 N.W.2d 920, 924 (Minn. App. 2003). The Court concluded that the trial court had erred by deeming the claim barred under the Minnesota equivalent of A.R.S. § 14-3803(C), which provided a shorter claim period than the Minnesota equivalent of A.R.S. § 14-3803(A). Id. at 922-24. The Court concluded that the obligation arose before the decedent died because "[t]he judgment obligated decedent to take action, while living, to ensure that appellant would receive $175,000 upon decedent's death. Id. at 923; accord id. ("[I]t is apparent that from the time of the settlement agreement and district court judgment, that decedent was obligated to make arrangements to provide $175,000 for appellant, either in his will, by life insurance, or by other means."). Because Judith survived Charles, by contrast, her right to payment arose automatically – at the moment Charles died.

Finally, in Estate of Hooey, the North Dakota Supreme Court ruled in favor of the creditor, a government agency administering disability and medical benefits, because no notice had been published and the creditor made its claim within three

years after the decedent's death, as required by North Dakota law. 521 N.W.2d 85 (N.D. 1994), while the Massachusetts Supreme Judicial Court decided Department of Public Welfare v. Anderson, 377 Mass. 23, 384 N.E.2d 628 (1979), years before the Supreme Court's decision in Tulsa Professional Collection Services, Inc. v. Pope, 485 U.S. 489-90 (1988). Both cases considered the impact of federal statutes allowing the state to impose a lien on real property, during the recipient's lifetime, while requiring it to defer recoupment of benefits paid until after the death of the recipient, the recipient's spouse, the majority of any children under age 21 and the death of any children suffering from blindness or other disabilities. E.g., Hooey, 521 N.W.2d at 86-87. Hooey and Anderson have tangential relevance at best.

Judith filed her claim before the statutory deadline for claims arising at or after the decedent's death. As a result, this Court should reverse the trial court's summary judgment as a matter of law.

III. The Arizona Probate Proceeding Obviated the Need to File a Claim in Wyoming.

Throughout their Response, the Co-Personal Representatives point out that Judith did not make a claim in the Wyoming probate. She might have done so, if the lawyer representing Mary Jo had disclosed the existence of the probate in responding to Judith's initial letter. Regardless, the Arizona probate provided a fitting vehicle to adjudicate her claim. Charles owned property here, and Judith filed her petition within two years after his death. See A.R.S. § 14-3108.

IV. "Peculiar Circumstances" Entitle Judith Equitable Relief from the Wyoming Non-Claim Statute.

As Judith's Opening Brief explains, Section 2-7-703(c)(i) of the Wyoming Statutes Annotated provides that the bar otherwise resulting from noncompliance with the claim's procedure does not apply to "[c]laimants entitled to equitable relief due to peculiar circumstances, if so found by the court in adversary proceedings." Wyo. Stat. Ann. § 2-7-703(c)(i). The Brief enumerates 10 circumstances peculiar to this case.

The Co-Personal Representatives do not deny the peculiar circumstances Judith asserts. Instead, they assert that Judith did not raise them until she filed her Motion to Reopen Judgment or in the Alternative for New Trial, [see I.R. 59], and did not challenge the trial court's denial of that motion on appeal.

The Co-Personal Representatives' arguments rest, in part, on this Court's decisions in Joel Erik Thompson, Ltd. v. Holder, 192 Ariz. 348, 965 P.2d 82 (1998) and AMERCO v. Shoen, 184 Ariz. 150, 907 P.2d 536 (1995). Neither case concerned a motion for new trial. See Joel Erik Thompson, Ltd. v. Holder passim; AMERCO v. Shoen passim. The Co-Personal representatives cite a footnote in the AMERCO decision holding that a "parenthetical reference" to an issue in a footnote in the appellant's brief does not preserve the issue for appeal. 184 Ariz. 150, 154 n.4, 907 P.2d 536, 540 n.4. Both cases are inapposite.

Judith raised the "peculiar circumstances" issue in the oral argument on the Motion for Summary Judgment. Contrary to the Co-Personal Representatives characterization of the argument (at 26 n.17) as a "casual reference," Judith presented the trial court with a copy of the Wyoming statute in question, [see T.P. (March 30, 2016) at 3:24 to 4:8], and enumerated the circumstances Judith considered peculiar, [see id. at 18:5 to 19:9] She also raised the issue in her statement of issues on appeal, citing the pertinent Wyoming statute and asking whether the trial court erred in "neglecting to conduct an adversary proceeding to explore the peculiar circumstances of this case."

The Co-Personal Representatives also claim (at 46) that the proceedings before the trial court provided the "adversary proceeding" required by Wyoming law while also asserting (at 26 n.17) that the trial court did not address the issue in ruling on the Motion for Summary Judgment. At best, the Co-Personal Representatives contradictory arguments are difficult to reconcile.

Finally, the case authorities the Co-Personal Representatives cite do not support their position. In Scott v. Scott, for example, the creditor failed to file a claim against the estate despite receiving notice of the probate. 918 P.2d 198, 201 (1996). That distinguishes the case from Judith's situation completely. The remaining authorities cited to not consider statutes analogous to Wyoming's provisions for "peculiar circumstances." See Matter of Estate of Spears, 14 Ark. 54, 858 S.W. 2d

93 (1993); Massey v. Fulks, 2011 Ark. 4, 376 S.W.3d 389 (2011); Matter of Estate of Ragsdale, 19 Kan. App. 2d 1084, 879 P.2d 1145 (1994).

Even given the trial court's interpretation of A.R.S. § 14-3803, it should conduct an "adversary proceeding" to determine whether the peculiar circumstances of this case entitled Judith to equitable relief from the bar Wyoming law otherwise might impose against her claim.

V. This Court Should Set Aside the Trial Court's Award of Attorney Fees to the Co-Personal Representatives and Award Judith her Reasonable Attorney Fees and Costs on Appeal.

The Co-Personal Representatives do not dispute that this Court should set aside the trial court's award of attorney fees and costs to the estate if it reverses the trial court's decision to grant Leslie and Sandra's Motion for Summary Judgment.

As to attorney fees on appeal, the Settlement Agreement entitles only a party who successfully enforces its provisions to recover attorney fees from the other party. [See I.R. 36, Exhibit D, at 11 "In the event either party is required to bring legal action against the other party to enforce any of his or her rights under this Agreement, the prevailing party shall be entitled to recover from the other all reasonable costs and expenses incurred in bringing such an action, including, but not limited to, reasonable attorneys' fees.") (emphasis added)] This appeal stems from Judith's effort to enforce the Settlement Agreement. As a result, it does not afford the Co-Personal Representatives a basis to recover their attorney fees and

costs. Instead, the Co-Personal Representatives must look to the discretionary provisions of A.R.S. § 12-341.01 and to A.R.S. § 12-341 for such relief.

CONCLUSION

For the reasons set forth in this Brief, this Court should reverse the trial court's award of summary judgment to Leslie and Sandra. It also should set aside the trial court's award of attorney fees and costs to the estate. Finally, this Court should award Judith her reasonable attorney fees and costs on appeal.

Dated August 25, 2017.

Respectfully submitted,

By /s/_____

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CERTIFICATE OF COMPLIANCE

This Certificate of Compliance concerns a Brief and is submitted in accordance with ARCAP 14(a)(5).

I certify that the attached Brief uses proportionately spaced type of 14 points or less, is double spaced using a roman font and contains 3,562 words.

The document accompanying this Certificate complies with ARCAP 14.

Date: August 25, 2017.

/s/_____

Charles Van Cott, Attorney for Appellant