

IN THE MISSOURI SUPREME COURT OF MISSOURI  
EN BANC

STATE OF MISSOURI EX REL.	)	
GINA MARIE HOUSKA, PERSONAL	)	
REPRESENTATIVE OF THE	)	
ESTATE OF JEFFREY A. HOUSKA,	)	No. SC90701
DECEDENT	)	
	)	
Relator,	)	Circuit Court of the County of
	)	Jefferson, Missouri
Vs.	)	Cause No. 07JE-PR00004
	)	
THE HONORABLE RAY DICKHANER,	)	
ASSOCIATE CIRCUIT JUDGE	)	Missouri Court of Appeals –
23 <sup>RD</sup> JUDICIAL CIRCUIT – JEFFERSON	)	Eastern District No. ED94117
COUNTY, MISSOURI,	)	
	)	
Respondent.	)	

PETITION FOR WRIT OF PROHIBITION, OR, IN THE ALTERNATIVE, FOR A  
WRIT OF MANDAMUS

**BRIEF OF RELATOR**

THOMAS J. RAY, JR., MOBar # 40222  
3520 Jeffco Boulevard, Suite 110  
Arnold, MO 63010  
636-464-8353  
RAY LAW OFFICES, P. C.

ATTORNEY FOR RELATOR

**TABLE OF CONTENTS**

JURISDICTIONAL STATEMENT ..... 1

STATEMENT OF FACTS ..... 2

POINTS RELIED UPON ..... 6

ARGUMENT ..... 7

CONCLUSION ..... 22

CERTIFICATE OF COMPLIANCE ..... 23

CERTIFICATE OF SERVICE ..... 24

## TABLE OF AUTHORITIES

### Table of Constitutional Provisions

Due Process Clause (U. S. Constitution, Amendment 14).....	11, 13, 14, 15, 18
Missouri Constitution Article V, Section 4.1.....	1

### Table of Statutes

ALM GL ch 190B § 3-803(a) .....	16
12 Del C. § 2102(a) .....	17 n.4
18-A M.R.S. § 3-108(A) .....	16
18 A M.R.S. § 3-308(A)(2) .....	17 n.4
Md. ESTATES & TRUSTS Code Ann, § 8-103(a)(1) .....	15, 17 n.4
Md. ESTATES & TRUSTS Code Ann. § 7-103(c)(1) .....	17 n.4
Minn. Stat. § 524.3-803(a)(3) .....	16
Mont. Code Ann. § 72-3-803(1)(a) .....	16
N. J. Stat. § 3B:22-4 .....	17 n.4
N. M. Ann. Stat. § 45-3-803(A)(1) .....	16
ORC Ann. § 2117.06(C) .....	16
RSMo. § 473.020 .....	19
RSMo. § 473.360 .....	2, 3, 8, 9, 10, 11, 12, 17
RSMo. § 473.444 .....	1, 3, 6, 7, 8, 9, 10, 11, 12, 12 n.3, 14, 17, 18
RSMo. § 473.840 .....	3, 20

S.C. Code Ann. § 62-3-803(a)(1) .....	16
T.C.A. 30-2-307(a)(2) .....	16
U.P.C. § 3-803(a)(1) .....	16, 19
Utah Code Ann. § 75-3-803(1)(a) .....	16
West’s A.I.C. 29-1-14-1(d) .....	15, 17 n. 4
West’s C.R.S.A. § 15-12-803(1)(III) .....	14-15, 16
Wis. Stat. § 859.48(2) .....	16

### Table of Cases

Burnett v. Villeneuve, 685 N.E.2d 1103 (Ind. App. 1997) .....	15, 17
Estate of Decker v. Farm Credit Services, 684 N.E.2d 1137 (Ind. 1997) .....	15
Estate of Kruzynski, 2000 Me. 17, 744 A.2d 1054 (Me. 2000) .....	16, 18
Fifth Third Bank v. Gottlieb, 1997 Ohio App. LEXIS 3815 (Ohio Ct. App. Wood County August 29, 1997) .....	16
Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978) .....	18
Green v. Washington University Medical Center, 761 S.W.2d 688 (Mo. App. E.D. 1988) .....	16
Hatfield v. McCluney, 893 S.W.2d 822 (Mo en banc 1995) .....	6, 10, 12-13 n.3, 19
In Re Estate of Ongaro, 998 P.2d 1097 (Colo. 2000) .....	14-15
In Re Estate of Wilkerson, 843 S.W.2d 377 (Mo. App. E. D. 1992) .....	12
In the Estate of Spray v. Swearingen, 77 S.W.3d 25 (Mo. App. E. D. 2002) .....	9
Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. en banc 1968) .....	16
Mennonite Board of Missions v. Adams, 463 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) .....	11, 13

Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) .....	11, 13
Ohio Casualty Insurance Co. v. Hallowell, 94 Md. App. 444, 617 A.2d 1134 (1993) .....	15, 18
Roddy v. Hamilton County Nursing Home (In Re Estate of Key), 1999 Tenn. App. LEXIS 201 (Tenn. Ct. App. March 24, 1999) .....	15
Schwartz v. Day, 780 S.W.2d 42 (Mo. en banc 1989) .....	21
Society Nat'l Bank v. Johnson, 1997 Ohio App. LEXIS 5682 (Ohio Ct. App. Cuyahoga County, December 18, 1997) .....	15-16
State ex rel. Blomquist v. Schneider, 244 S.W.3d 139 (Mo en banc 2008) .....	7
State ex rel. BP Products of North America Inc. v. Ross, 163 S.W.3d 922 (Mo. en banc 2005) .....	7
State ex rel. Dir. Of Revenue v. Mobley, 49 S.W.3d 178 (Mo. en banc 2001) .....	1
State ex rel. Fisher v. McKenzie, 754 S.W.2d 557, 562 (Mo. banc 1988) .....	7
State ex rel. Simmerock v. Brackmann, 714 S.W.2d 938, 939 (Mo. App. 1986) .....	7-8
Texaco v. Short, 454 U.S. 516, 102 S.Ct. 781, 70 L.Ed.2d 738 (1981) .....	13, 18
Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) .....	4, 6, 7, 8, 11, 12, 13, 14, 16, 17, 18

### **Other Authority**

M. Rector, "1989 Probate Code Amendments," Journal of the Missouri Bar Journal 199 (March 1990) .....	12, 12-13 n.3
J. Borron, 5B Missouri Practice: Probate Law and Practice (West 3d ed. 2000) .....	12, 12-13 n.3
U.P.C. § 3-803, <i>Comment</i> .....	19-20

## **JURISDICTIONAL STATEMENT**

This action seeks to prohibit the Respondent, sitting as the probate court, from reconsidering the claim of a purported creditor to the decedent estate herein when the creditor filed its claim outside the one-year statute of limitations mandated for estate claims by Section 473.444 of the Revised Statutes of Missouri. This Court has jurisdiction and authority to issue remedial writs under Article V, Section 4.1 of the Missouri Constitution. *State ex rel. Dir. of Revenue v. Mobley*, 49 S.W.3d 178, 179 (Mo. en banc 2001).

## STATEMENT OF FACTS

The parties admit the essential facts of this case:

1. The Relator is Gina Marie Houska, as personal representative of the Estate of Jeffrey A. Houska, Jefferson County Case No. 07JE-PR0004 J11.
2. The Respondent is the Honorable Ray Dickhaner, Associate Circuit Judge, Division 11, 23<sup>rd</sup> Judicial Circuit, Jefferson County, Missouri, sitting as the probate division.
3. The decedent died on November 2, 2006. (Exhibit No. 4 of Appendix at A9)
4. Gina Marie Houska, the decedent's daughter, filed her *Petition for Letters Of Administration* on January 4, 2007, seeking appointment as independent personal representative of the estate. (Exhibit No. 5 of Appendix at A10-A11)
5. The Probate Court granted *Letters of Administration* on May 3, 2007, and appointed Gina Marie Houska as independent personal representative of the estate. (Exhibit No. 6 of Appendix at A12)
6. The first date of publication for letters was May 11, 2007. (Exhibit No. 3 of Appendix – entry dated 5/3/07).
7. The period under which claims could be filed pursuant to RSMo § 473.360 tolled on November 11, 2007.
8. The self-executing statute of limitations for claims pursuant to RSMo § 473.444 tolled on November 2, 2007.

9. The personal representative filed her *Statement of Account and Schedule of Proposed Distribution*, pursuant to RSMo § 473.840, with the Respondent on April 23, 2009. (Exhibit No. 7 of Appendix at A13-A15)
10. JAMES T. PANAGOS LLC, a purported creditor of the estate (“Panagos”), filed its claim against the estate on May 5, 2009. (Exhibit No. 8 of Appendix at A16-A17)
11. The estate filed written objection to the claim on May 20, 2009. (Exhibit No. 3 of Appendix – Entry dated 5/26/2009)
12. On May 22, 2009, the Respondent sustained the estate’s objection to the claim, and ruled that the claim was “barred by both 473.360 and 473.444.” (Exhibit No. 9 of Appendix at A18)
13. On October 19, 2009,<sup>1</sup> Panagos filed its *Motion for Rehearing* on its claim. (Exhibit No. 10 of Appendix at A19-A20)
14. On December 2, 2009, the Respondent took up Panagos’ *Motion for Rehearing*, and hearing was had – the same consisting only of oral arguments by attorneys for

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<sup>1</sup> The Probate Court Docket in this case, as published in <http://www.courts.mo.gov/casenet.com>, shows the Motion for Rehearing was filed on November 19, 2009. In its response to Relator’s Petition in the Court of Appeals, the creditor has submitted a file stamped copy of the Motion revealing a filing date of October 19, 2009. It appears that Panagos filed its Motion on October 19, 2009, not on November 19, 2009, as shown on the docket sheet.

Panagos and the estate. The Respondent took the matter under advisement.

(Exhibit No. 3 of Appendix – Entry dated 12/2/09)

15. On December 21, 2009, the Respondent granted Panagos’ motion for rehearing and reinstated the claim on the basis of *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), and, further, ordered discovery by the parties and for the parties to set the claim for hearing after discovery in order to determine “whether the standards applied in *Pope* have been met.” (Exhibit No. 1 of Appendix at A1)
16. On December 24, 2009, Panagos filed an objection to the *Statement of Account and Schedule of Proposed Distribution*. (Exhibit No. 12 of Appendix at A24-A25)
17. On December 31, 2009, the Relator filed its *Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus* with the Missouri Court of Appeals-Eastern District, Case No. ED94117, seeking an order prohibiting the Respondent from proceeding with Panagos’ claim.
18. On January 4, 2010, Missouri Court of Appeals-Eastern District entered its Preliminary Order in Prohibition, and ordered the Respondent to “refrain from all action in the premises until further order.” (Exhibit No. 13 of Appendix at A26)
19. On February 9, 2010, the Missouri Court of Appeals quashed its preliminary order in prohibition and denied the writ. (Exhibit No. 14 of Appendix at A27)
20. On February 17, 2010, the Relator filed its *Petition for Writ of Prohibition, or in the alternative, a Writ of Mandamus* with this Court, seeking an order prohibiting the Respondent from proceeding with Panagos’ claim.

21. On March 23, 2010, this Court issued its Preliminary Writ of Prohibition.
22. On April 30, 2010, this Court granted Relator's Motion to amend its petition and specifically name the personal representative Gina Marie Houska as a party to the petition.

## **POINTS RELIED ON**

1. Relator is entitled to an order prohibiting Respondent from reconsidering the claim of purported creditor JAMES T. PANAGOS, L.L.C. (“Panagos”), because the claim is barred by the one-year limitation period for creditors’ claims as provided in RSMo. § 473.444, in that the decedent died on November 2, 2006, but Panagos did not file its claim until May 5, 2009, and Respondent therefore had no authority to reconsider Panagos’ claim; and, further, Respondent’s reliance on *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) as requiring him to inquire whether Panagos is a “reasonably ascertainable creditor” entitled to actual notice is misplaced because *Pope* has no application to RSMo. § 473.444, a self-executing statute of limitations.

Authority:

RSMo. § 473.444.1.

*Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108

S.Ct. 1340, 99 L.Ed.2d 565 (1988).

*Hatfield v. McCluney*, 893 S.W.2d 822 (Mo. en banc 1995).

## ARGUMENT

**Relator is entitled to an order prohibiting Respondent from reconsidering the claim of purported creditor JAMES T. PANAGOS, L.L.C. (“Panagos”), because the claim is barred by the one-year limitation period for creditors’ claims as provided in RSMo. § 473.444, in that the decedent died on November 2, 2006, but Panagos did not file its claim until May 5, 2009, and Respondent therefore had no authority to reconsider Panagos’ claim; and, further, Respondent’s reliance on *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988) as requiring him to inquire whether Panagos is a “reasonably ascertainable creditor” entitled to actual notice is misplaced because *Pope* has no application to RSMo. § 473.444, a self-executing statute of limitations.**

Standard of Review: This Court has held that prohibition is an appropriate remedy when the trial court has erroneously permitted a claim to proceed to trial that the law has barred by a statute of limitations. *State ex rel. Blomquist v. Schneider*, 244 S.W.3d 139, 141 (Mo. en banc 2008); *State ex rel. BP Products North America Inc. v. Ross*, 163 S.W.3d 922 (Mo. en banc 2005). This Court said in *State ex rel. Fisher v. McKenzie*, 754 S.W.2d 557, 562 (Mo. banc 1988) that a “writ of prohibition will issue to prevent a trial

court from acting in excess of its jurisdiction if such would produce ‘useless and unwarranted litigation,’” quoting *State ex rel. Simmerock v. Brackmann*, 714 S.W.2d 938, 939 (Mo. App. 1986). It is certainly “useless and unwarranted litigation” to permit the creditor herein to proceed on a claim that is clearly and unequivocally barred by statute.

Argument: The essential facts are undisputed: The decedent died on November 2, 2006, Notice to Creditors was first published on May 11, 2007, but Panagos failed to file its claim in this case until May 5, 2009. Likewise, the parties do not dispute that Panagos’ claim lies outside the time limits for presenting a claim as required in Section 473.360 (barring any claim not filed within six months after the first published notice of letters when a personal representative opens an estate in the probate court), and Section 473.444 (barring any claim filed more than one year after the decedent’s date of death, regardless of whether any person opened an estate in connection with the decedent’s death).

Panagos asserts as an excuse for sleeping on its claim for 2½ years that it failed to receive “actual notice” that the personal representative had opened an estate. Panagos has asserted in its *Memorandum to Support of the Motion of Creditor James T. Panagos LLC for Rehearing of Its Claim Against Estate* filed with the Respondent that failure to permit it to be heard on its claim denied Panagos due process of law under *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988), since Panagos is a “reasonably ascertainable creditor” entitled to actual notice under that decision. Panagos’ *Motion* refers only to RSMo. § 473.360 for support.

While Panagos assertion, if factually sound,<sup>2</sup> might carry the day under RSMo. § 473.360, we note that Respondent initially denied Panagos claims based on RSMo. § 473.360 and RSMo. § 473.444.1. Interestingly, nowhere in its *Motion for Rehearing* or *Memorandum* filed before the Respondent does Panagos raise Section 473.444.1 as support for its claim – *and with good reason*: Section 473.444.1 **absolutely bars** Panagos’ claim, regardless of whether Panagos received actual or constructive notice of the decedent’s death, or the opening of the estate by the personal representative. *In the Estate of Spray v. Swearingen*, 77 S.W.3d 25 (Mo. App. 2002). Section 473.444.1 provides:

Unless otherwise barred by law, **all claims** against the estate of a deceased person, other than costs and expenses of administration, exempt property,

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<sup>2</sup> Panagos has alleged, *but not proven*, that it is a “reasonably ascertainable creditor” whose identity should have been known if the personal representative had exercised due diligence. That said, Relator has never admitted that Panagos’ identity as a creditor was “reasonably ascertainable,” and even the Respondent noted in its order that “the only evidence before the Court is [Panagos’] affidavit. It recites that certain work performed in the fall of 2006 was invoiced to the decedent at an unspecified address. The invoice references work on Louie Drive. The affidavit contains assertions that Decedent was a contractor and was constructing a home. A separate memorandum, not the affidavit, recites that the Personal Representative, son of decedent and also a resident of Arnold, knew of the decedent’s construction project.” (Exhibit No 1 of the Appendix at A1).

family allowance, homestead allowance, claims of the United States and claims of any taxing authority within the United States, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or otherwise, which are not filed in the probate division, or are not paid by the personal representative, shall become unenforceable and shall be forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent one year following the date of the decedent's death, whether or not administration of the decedent's estate is had or commenced within such one-year period and whether or not during such period a claimant has been given any notice, actual or constructive, of the decedent's death or of the need to file a claim in any court. No contingent claim based on any warranty made in connection with the conveyance of real estate is barred under this section. (Emphasis added.)

As noted by Respondent in its original order denying the Panagos' claim, Section 473.444 is one of two statutes applicable here, the other being Section 473.360. Section 473.444.1, however, is dispositive of Panagos' claim. This court has specifically said that Section 473.444.1 operates independently of the RSMo. § 473.360. "Specifically," this Court held in *Hatfield v. McCluney*, 893 S.W.2d 822 (Mo. en banc 1995), "§§ 473.360 and 473.444 are separate statutes of limitations. The former (sic) statute of limitations begins running upon the death of the decedent. The nonclaims period of § 473.360 commences upon the publication of notice that letters of administration have

been granted.” 893 S.W.2d at 825-826 (emphasis added). Moreover, this Court has held that Section 473.444 “*operates independently* of any notice, judicial action or jurisdiction of the probate division to bar claims.” 893 S.W.2d 826 (emphasis added).

Why does Missouri have a nonclaims statute and self-executing statute of limitations on claims that operate separately from one another? Our Legislature enacted Section 473.444 in response to the U. S. Supreme Court’s decision in *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 99 L.Ed.2d 565 (1988). There, the U. S. Supreme Court considered an Oklahoma nonclaims statute similar in operation to Section 473.360. The Oklahoma statute required, when the personal representative opened an estate, that the personal representative give notice to creditors “that they must present their claims to the executor or executrix within two months of the date of first publication. As for the method of notice, the statute require[d] only publication . . .” 485 U.S. at 481. In deciding that the Oklahoma procedure violated the Due Process Clause, the Court noted: (1) the probate court’s “intimate involvement” through the probate proceeding – notably the court’s activation of the statute’s time bar by appointing the personal representative – constituted state action subject to the constraints of the Due Process Clause; and (2) because state action was involved, due process required that the state give actual notice to any creditor whose identity was known or “reasonably ascertainable” by the personal representative, citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950) and *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 103 S.Ct. 2706, 77 L.Ed.2d 180 (1983) as authority. The Missouri Court of Appeals – Eastern District has said the actual

notice requirements announced in *Pope* are applicable to RSMo. § 473.360. *In Re Estate of Wilkerson*, 843 S.W.2d 377 (Mo App. E.D. 1992).

But *Pope* has no application to RSMo. § 473.444. The legislative history of Section 473.444 indicates that the Legislature enacted that section in response to *Pope* in order to provide a final bar to most creditors' claims. See J. Borron, 5B *Missouri Practice: Probate Law and Practice* at 16-18 (West 3d ed. 2000). See also M. Rector, "1989 Probate Code Amendments," *Journal of the Missouri Bar* 119 at 121-122 (March 1990) (The Legislature adopted Section 473.444 as a "remedial measure" in response to "new due process problems produced by the decision in *Pope*," and designed the "new limitation period [to] comply with the 'self-executing' exception suggested in *Pope* . . ." *Id.* at 121.).

By its own terms, Section 473.444.1 makes it immaterial whether the personal representative gives actual or constructive notice to a creditor. If a creditor fails to file its claim with the Probate Court within one year of the decedent's date of death, and neither the claim nor the creditor is part of a very narrow class excluded from application of the statute, that claim is "forever barred against the estate, the personal representative, the heirs, devisees and legatees of the decedent." *Period*. No state action is required to bar the claim. Accordingly, the statute is a self-executing statute of limitations,<sup>3</sup> and the

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<sup>3</sup> Both Borron, *supra* at 17 and Rector, *supra* at 121 describe RSMo. § 473.444 as a "self-executing" statute. This Court, in *Hatfield*, without specifically using the term "self-executing," described the statute as "operat[ing] independently of any notice,

Supreme Court made its decision in *Pope* expressly inapplicable to such self-executing statutes: “We . . . have no occasion to consider the proper characterization of non-claim statutes that run from the date of death, and which generally provide for longer time periods, ranging from 1 to 5 years.” 485 U.S. at 488. Indeed, the Court specifically noted in *Pope* that a self-executing statute of limitations does not deny due process under *Mullane* or *Menonite*, even if the creditor receives no notice whatsoever:

[D]ue process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitations . . .

...

The State’s interest in a self-executing statute of limitations is in providing repose for potential defendants and in avoiding stale claims. The State has no role to play beyond enactment of the limitations period. While this enactment obviously is state action, the State’s limited involvement in the running of the time period generally falls short of constituting the type of state action required to implicate the protections of the Due Process Clause.

485 U.S. at 486, 486-487. In *Texaco, Inc. v. Short*, 454 U.S. 516 at 536, 102 S.Ct. 781 at 796, 70 L.Ed.2d 738 (1981), the Supreme Court considered a similar issue. There, the

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judicial action or jurisdiction of the probate division to bar claims.” 893 S.W.2d 826.

This is a very definition of a self-executing statute. See also the authorities cited herein on pages 14-17.

Court upheld against challenge under the Due Process Clause an Indiana statute providing that severed mineral interests not used for a period of 20 years would lapse and revert to the surface owner unless the mineral owner filed a statement in the applicable county office. The appellant-mineral owner claimed that absence of specific notice prior to this lapse rendered the statute violative of the Due Process Clause. In rejecting this argument, the Court noted, “That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statute of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary’s claim is barred without giving notice of that proceeding.” 454 U.S. at 536, 102 S.Ct. at 796 (emphasis added).

Although the question of whether *Pope* applies to Section 473.444 has never been considered by this Court, appellate courts in other states have considered whether *Pope* applies to self-executing statutes of limitation on creditor’s claims that begin running with the decedent’s death. Our research has shown that the states considering this issue are unanimous in holding that *Pope* does not apply, and that the statute is sufficient to bar the claim absolutely, even without actual notice to the creditor. In each instance, the court applied the reasoning that we assert above, concluding, as we have argued, that such a statute was a self-executing statute of limitations to which the actual notice requirement of the Due Process Clause has no application. *See*:

- *In Re Estate of Ongaro*, 998 P.2d 1097 (Colo. 2000) (“Unlike the Oklahoma nonclaim statute declared unconstitutional in *Tulsa*, [West’s C.R.S.A.] section 15-

12-803(1)(a)(III) is self-executing. The one-year period for presenting claims begins to run on the date of the decedent's death, not on the occurrence of an event requiring action by the state. *See* § 15-12-803(1)(a)(III). Accordingly, we find *Tulsa* inapposite to the case presently before us." 998 P.2d at 1105.);

- *Estate of Decker v. Farm Credit Services*, 684 N.E.2d 1137 (Ind. 1997) (“[B]ecause the one-year provision [in West’s I.C.A. § 29-1-14-1(d)] is self-executing, the federal Due Process Clause is not implicated . . . . Therefore, actual notice is not required prior to the termination of a claim . . .” 684 N.E.2d at 1139-1140.); and
- *Ohio Casualty Insurance Co. v. Hallowell*, 94 Md. App. 444, 617 A.2d 1134 (1993) (“ . . . [Md. Code Ann., Est. & Trusts, § 8-103(a)(1) (1991)] provides that the bar runs automatically from the time of death. The state court is not ‘intimately involved.’ In fact, no action by the state court is necessary to activate the time bar. It is not dependent on the opening of an estate, the appointment of a personal representative, the providing of notice, or the filing of notice. Death commences the running of the time period and the passing of that period, regardless of state action. Accordingly, we conclude that the statute at issue here is a self-executing limitation statute. Thus, due process concerns are not implicated, and the statute is not unconstitutional.” 617 A.2d at 1138.).

*Burnett v. Villeneuve*, 685 N.E.2d 1103 (Ind. App. 1997); *Roddy v. Hamilton County*

*Nursing Home (In Re Estate of Key)*, 1999 Tenn. App. LEXIS 201 (Tenn. Ct. App.

March 24, 1999); *Society Nat’l Bank v. Johnson*, 1997 Ohio App. LEXIS 5682 (Ohio Ct.

App. Cuyahoga County, December 18, 1997); *Fifth Third Bank v. Gottlieb*, 1997 Ohio App. LEXIS 3815 (Ohio Ct. App. Wood County August 29, 1997). *Accord Estate of Kruzynski*, 2000 Me 17, 744 A.2d 1054 (Me. 2000) (upholding 18-A M.R.S. § 3-108(A) requiring probate proceedings to be brought within 3 years of death).

*Pope* concerns aside, this Court has said that “[s]tatutes of limitation are favorites of the law and will not be held unconstitutional as denying due process unless the time allowed for commencement of the action and the date fixed when the statute commences to run are clearly and plainly unreasonable.” *Laughlin v. Forgrave*, 432 S.W.2d 308, 314 (Mo. en banc 1968). *See also Green v. Washington University Medical Center*, 761 S.W.2d 688 at 690 (Mo. App. E.D. 1988). Here the statute commences at date of death and runs one year. Not only has the Missouri Legislature determined that a one-year term running from date of death is reasonable, so has the Uniform Probate Code. U.P.C. § 3-803(a)(1) (2004). Six states have followed the Uniform Probate Code. *See* Massachusetts (ALM GL ch 190B § 3-803(a)); Minnesota (Minn. Stat. § 524.3-803(a)(3)), Montana (Mont. Code Ann. § 72-3-803(1)(a)), New Mexico (N. M. Ann. Stat. § 45-3-803(A)(1)), South Carolina (S.C. Code Ann. § 62-3-803(a)(1)), and Utah (Utah Code Ann. § 75-3-803(1)(a)). Likewise, the Legislatures in Colorado (West’s C.R.S.A. § 15-12-803), Tennessee (T.C.A. 30-2-307(a)(2)), and Wisconsin (Wis. Stat. § 859.48(2)) have enacted one year self-executing statutes of limitations running from the decedent’s

death.<sup>4</sup> The fact that the National Conference of Commissioners on Uniform State Laws and legislatures in at least fourteen states have enacted self-executing statutes of limitations on claims – each statute having terms of one year or less – is proof that the one-year limitation imposed by RSMo § 473.444 is not unreasonable. We also note that the Indiana Court of Appeals has specifically stated, “It is . . . reasonable that a party owed money by the decedent would discover that the debtor had passed away within a year of that death.” *Burnett v. Villeneuve*, 685 N.E.2d 1103 at 1112 (Ind. App. 1977).

In its *Return and Answer* filed in this Court, Panagos has admitted that Relator’s “characterization of Section 473.444 as a ‘self-executing statute of limitations’ is consistent with the majority opinion in *Pope*,” yet Panagos cites the minority opinion of a lone justice in asserting that the Supreme Court misuses the term “self-executing” in its opinion. *Return and Answer* at 4. This averment is indeed surprising because the minority justice – Chief Justice Rehnquist – would have affirmed the constitutionality of the Oklahoma statute. Thus, under the Chief Justice’s view, ***neither*** RSMo § 473.444 ***nor even § 473.360*** would require actual notice and Panagos’ claim would have failed

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<sup>4</sup> Some states have shorter periods for their self-executing statutes of limitations on claims. See Delaware – 8 months (12 Del C. § 2102(a)); Maine – 9 months (18 A M.R.S. § 3-308(A)(2)); Maryland – 6 months (Md. ESTATES & TRUSTS Code Ann, §§ 7-103(c)(1) and 8-103(a)(1)); New Jersey – 9 months (N. J. Stat. § 3B:22-4); and Ohio – 6 months (ORC Ann. § 2117.06(C)). Indiana has reduced its period from one year to 9 months. West’s A.I.C. 29-1-14-1(d). Maryland’s was formerly 9 months.

*under both!* It is hard to understand Panagos' invocation of the Chief Justice's rationale, as it seems to work expressly against its argument.

Panagos also asserts in its *Return and Answer* that "one can envision that an unscrupulous personal representative, who, most often, is also a beneficiary of the estate, might be tempted to both hush up the fact of the decedent's death and to delay the application for letters to allow the one-year bar of Section 473.444.1 to take effect before known creditors take action." *Return and Answer* at 6. This, Panagos argues, "surely constitutes state action and implicates due process notice requirements." *Id.* at 6. In response, we first note that this assertion is incorrect as a matter of federal constitutional law. As the U. S. Supreme Court noted in *Pope*, private use of state-sanctioned private remedies or procedures do not rise to the level of state action implicating the Due Process Clause. 485 U.S. at 485, citing *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978). Further, the Court in *Pope* stated emphatically that "due process does not require that potential plaintiffs be given notice of the impending expiration of a period of limitation." 485 U.S. at 486, citing *Texaco, Inc. v. Short, supra*. The Oklahoma statute was found unconstitutional in *Pope* because of the State's significant involvement through the probate process. But a court's action in dismissing a claim due to application of a self-executing statute of limitations does not rise to the level of state action because the court's sole involvement is to determine that the statute of limitations has run. *Estate of Kruzynski*, 744 A.2d at 1057. *Accord Ohio Casualty Insurance Company v. Hallowell*, 617 A.2d 1134 at 1137-1138.

Second, this Court has addressed and rejected a similar due process/public policy argument like that of Panagos in *Hatfield v. McCluney*, noting that a creditor who uses due diligence in ascertaining why a decedent has not paid its alleged debt, can, under Section 473.020, initiate proceedings itself as an interested person, and then file its own claim – thus protecting its claim from the reach of the state of limitations. 893 S.W.2d at 826. And regarding Panagos assertion that some beneficiaries might deliberately misuse the one-year self-executing statute of limitations, the National Conference of Commissioners on Uniform State Laws noted in discussing its own one-year state of limitations in U.P.C. § 3-803(a)(1) that:

“The Joint Editorial Board recognized that the new bar running one year after death may be used by some sets of successors to avoid payment of claims against their decedents of which they are aware. Successors who are willing to delay receipt and enjoyment of inheritances may consider waiting out the non-claim period running from death simply to avoid any public record of an administration that might alert known and unknown creditors to pursue their claims. The scenario was deemed unlikely, however, for unpaid creditors of a decedent are interested persons . . . who are qualified to force the opening of an estate for purposes of presenting and enforcing their claims. ***Further, successors who delay opening an administration will suffer from lack of proof of title to estate assets and attendant inability to enjoy their inheritances. Finally, the odds that holders of important claims against the decedent will need help in learning of the***

*death and proper place of administration is rather small. Any benefit to such claimants of additional procedures designed to compel administrations and to locate and warn claimants of an impending non-claim bar, is quite likely to be heavily outweighed by the costs such procedures would impose on all estates, the vast majority of which are routinely applied to quick payment of decedents' bills and distributed without any creditor controversy."*

U.P.C. § 3-803, *Comments* (emphasis added).

And, third, the hypothetical situation raised by Panagos does not even remotely conform to the facts here. In this case, the personal representative filed for Letters of Administration two months following the decedent's death. The record does not indicate that the personal representative attempted to delay the administration of the estate to hinder any creditors, or "hush up" the decedent's death from anyone. Panagos, on the other hand, took no immediate action on this alleged debt, and slept on its claim for **two and one-half years** before finally filing it. Then, after the claim was denied initially by the Respondent, Panagos waited another **five months** to file its Motion for Rehearing, barely avoiding automatic discharge of the personal representative under RSMo § 473.840.6. On this issue, Relator and Respondent agree: "[B]oth the Personal Representative and the Claimant have responsibility to protect their respective rights. Here, [Panagos] clearly had rights as Mechanic's Lien Claimant, as well as a collection matter, which he slept on for over 2 ½ years." *Respondent's Order dated December 24, 2009* (Exhibit No. 1 of Appendix at A1, note 1). As the Respondent implies, the equities

here cut both ways. *Schwartz v. Day*, 780 S.W.2d 42 (Mo en banc 1989) (in an analogous proceeding involving notice to property owners in a tax sale, this Court “recognized that the duties imposed by due process on the tax collector must be considered in balance with the duty of a landowner to preserve his property.” 780 S.W.2d at 44.)

By operation of law, Panagos’ claim expired one year following the decedent’s death on November 2, 2006, but Panagos slept on its claim until May 5, 2009 – 2½ years after the decedent’s death. The Respondent lacked statutory authority to do anything but dismiss the claim, which he initially did. And, he had no discretion to do anything but deny the Motion for Rehearing, and affirm his previous order of dismissal. This the Respondent failed to do. This Court must prohibit the Respondent from permitting Panagos to move forward with its claim.

## **CONCLUSION**

Based on the foregoing argument, the Relator prays this Court make the preliminary writ absolute and prohibit the Respondent from proceeding with Panagos' claim.

Respectfully Submitted,

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Thomas J. Ray, Jr., MOBar # 40222  
Attorney-at-Law

RAY LAW OFFICES, P. C.  
3520 Jeffco Boulevard, Ste 110  
Arnold, MO 63010  
(636) 464-8353

ATTORNEY FOR RELATOR

### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief contains the information required by Mo. Sup. St. R. 55.03, complies with Mo. Sup. Ct. R. 84.06(b) and contains 5,135 words, excluding parts of the brief exempted. The undersigned also hereby certifies that the brief has been prepared in proportionately spaced typeface using Microsoft Word in 13 pt. Times New Roman font, and includes a virus-free CD-RW disk in Microsoft Word format.

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Thomas J. Ray, Jr., MoBar # 40222

**CERTIFICATE OF SERVICE**

The undersigned certifies that, pursuant to Mo. Sup. Ct. 84.05(a), two (2) copies of the foregoing brief were mailed, by U. S. Mail, this \_\_\_\_ day of May, 2010 to the parties listed below:

**Respondent:**

The Honorable Ray Dickhaner  
Associate Circuit Judge, Div. 11  
Circuit Court for the 23<sup>rd</sup> Judicial Circuit  
Jefferson County Courthouse  
Hillsboro, MO 63050  
(636) 797-5365

**Attorney for JAMES T. PANAGOS, LLC:**

Canice Timothy Rice, Esq.  
1221 Locust Street, Ste 800  
St. Louis, MO 63103-2380  
(636) 241-8000  
Email: ctrice@ctrice.com

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Thomas J. Ray, Jr.