

No. SC 92388

IN THE SUPREME COURT OF MISSOURI

R.M.N. and R.D.N., minor children, by and through their father and next friend,
RANDY NOLAN, Appellants,

vs.

CATHY SNEAD, personal representative of the
ESTATE OF ALLEN AUSTIN, deceased, Respondent.

APPEAL FROM THE PROBATE DIVISION OF THE CIRCUIT COURT OF
GENTRY COUNTY, MISSOURI
THE HONORABLE GLEN DETRIECH

APPELLANTS' REPLY BRIEF

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ARGUMENT

I. APPELLANTS' REPLY TO RESPONDENT'S RESPONSE TO APPELLANTS' FIRST POINT RELIED ON

One of the duties personal representatives have is to use due diligence to provide actual notice to known or reasonably ascertainable creditors that an estate has been opened and that a claim must be filed in a particular time period. This is required by due process. The duty has arisen from necessity—personal representatives often have a financial interest in the estate and an incentive to keep creditors in the dark.

Here, Respondent stands to inherit from Mr. Austin's estate. She knew who the minor children were. She knew that allegations of sexual abuse had been made. She knew that the State of Missouri investigated those allegations and found that they were substantiated. So how can she say that the children were not known or reasonably ascertainable?

She says the state's letters were ambiguous and contradictory. The letters clearly state that there were two sets of allegations—one set from 2006 and another from 2008. They convey that the state investigated the 2006 allegations and found that they were substantiated. They also say that Mr. Austin never appealed that determination and that the allegations therefore remained substantiated. The letters say that the 2008 allegations were unsubstantiated.

If Respondent was in doubt, she could have asked the state for clarification. She never asked. She could have asked the children or their parents. She never asked.

Respondent urges the Court to find that the claims were conjectural just because they had not been reduced to a judgment or some other form of liquidated debt. There is nothing in Missouri law supporting the proposition that a claim has to be proven before it is filed in the probate court. Indeed, the Probate Code specifically recognizes the right of claimants to pursue contingent claims. *See* MO. REV. STAT. §§ 473.383, 473.390.

Respondent also emphasizes things like there being no lawsuit filed or claim pursued before Mr. Austin's death. That is completely immaterial. As minors, Appellants were free to wait until after they reached adulthood before pursuing a claim and no one, including Respondent, had the right to assume that a potential claim or liability had simply disappeared. *See* MO. REV. STAT. §§ 516.120(4), 516.170, 537.046.2.

Respondent's argument flies in the face of her duty as personal representative to use "reasonably diligent efforts" to identify claimants and their claim. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 491 (1988). Here, Respondent actually knew about Appellants and their claims of sexual abuse against Mr. Austin through the state's letters. Therefore, it is entirely unnecessary to reach the issue of whether they were reasonably ascertainable.

The trial court's application of section 473.360 to Appellants' claims therefore violates the due process clauses of the United States and Missouri Constitutions.

II. APPELLANTS' REPLY TO RESPONDENT'S RESPONSE TO APPELLANTS' SECOND POINT RELIED ON

Respondent argues that section 473.360 is not arbitrary or unreasonable and therefore does not violate article I, § 14 of the Missouri Constitution because the statute serves the valuable purpose of providing expedient closure to probate estates. While that is generally true, Respondent misses the point. Appellants are not challenging the statute's facial validity. They are challenging the constitutionality of section 473.360's application to them.

Under Missouri law, it is impossible for minor children to prosecute their own lawsuits. *Strahler v. St. Luke's Hospital*, 706 S.W.2d 7, 9 (Mo. 1986). Minors are, in other words, under a legal disability. *Id.* They are entirely dependent on the actions of others to assert their claims. *Id.* at 12.

In *Strahler*, the defendant argued, like Respondent here, that the short medical malpractice statute of limitations served a legitimate purpose—it addressed the so-called medical malpractice crisis—and as a result, it was not arbitrary.

This Court recognized that the statute may very well serve a legitimate purpose, but that its application to minors went too far. *Id.* at 12. It specifically said:

To the extent that it deprives minor medical malpractice claimants the right to assert their own claims individually, makes them dependent on the actions of others to assert their claims, and works a forfeiture of those claims if not asserted within two years, the provisions of § 516.105 are too severe an interference with a minors' state constitutionally enumerated right

of access to the courts to be justified by the state's interest in remedying a perceived medical malpractice crisis.

Id.

Accordingly, courts cannot apply statutes in a way that ignores the fact that minors are under a legal disability. The statute may be valid and well-intended in all other respects. But the statute cannot be applied to bar a minor's claim so long as they are under a legal disability. Otherwise, under *Strahler*, application of the statute is arbitrary and unreasonable and violates article I, § 14 of the Missouri Constitution. Because "[o]ur society takes great pride in the fact that the law remains forever at the ready to 'jealously guard' the rights of minors," statutes must provide them with an adequate substitute course of action to follow. *Id.*

Similarly, in *Schumer v. City of Perryville*, 667 S.W.2d 414 (Mo. 1984), this Court held that minors are excused from providing municipal governments notice of personal injury lawsuits, as required by statute, while they are under a legal disability. It emphasized the fact that it is literally impossible for minors to give cities notice when they lack the capacity to enforce their rights. *Id.* at 418. This Court did not examine the statute's intended purpose to determine whether it was sufficient to justify denying minors access to court. It simply noted that application of the statute to a minor's claim violates the open courts provision because it denies them the right to pursue their claim at a time when they are not allowed by law to do so.

In *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. 2000), this Court elaborated on it the standard for determining whether a statute violates article I, § 14 of the Missouri

Constitution. It said, “article I, section 14 ‘prohibits any law that arbitrarily *or* unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action for personal injury.’” *Id.* at 549. The Court went on to say that “right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes.” *Id.* When “a barrier is erected in seeking a remedy for a recognized injury, the question is whether it is arbitrary *or* unreasonable.” *Id.* at 550.

The *Kilmer* Court did not examine the statute’s intended purpose to determine whether it was legitimate and sufficient to justify closure of the courthouse doors. Instead, it found that the plaintiffs were unreasonably denied their remedy because their ability to impose dram shop liability was entirely dependent on the prosecutor’s decision to pursue and obtain a criminal conviction. *Id.* at 550.

In this case, it is undisputed that the minor appellants were under a legal disability during the time when the non-claim statute was running for the decedent’s estate. It would have been impossible for them to file a claim even if they knew they needed to. They were entirely dependent, like the plaintiffs in *Kilmer*, on the discretion of their parents or some other adult.

Accordingly, application of section 473.360 to Appellants’ claims is arbitrary and unreasonable and violates article I, § 14 of the Missouri Constitution. Like the medical malpractice statute in *Strahler*, the legislature has not provided minors, or anyone else under a disability, with an adequate substitute course of action. Section 473.360 closes

the courthouse doors to minors who, for whatever reason, do not have an adult ally who desires to file a claim and knows of the need to do so.

Respondent's arguments about the lofty purposes of section 473.360 ring hollow for a practical reason. Appellants' claims were only filed approximately one month after the six month period expired. The claims were filed well within one year after the decedent's death and the opening of his estate. As the docket sheet reveals, Respondent had not filed a final settlement, nor had she requested a distribution of the estate's assets. This is not a case where an estate was administered and closed for years before a claimant stepped forward. So Respondent is hardly in a position to argue the estate was denied the closure and peace of mind offered by section 473.360.

Respondent also relies on *Dane v. Cozean*, 584 S.W.2d 120 (Mo. Ct. App. 1979). First of all, the issue of whether section 473.360 violates article I, § 14 of the Missouri Constitution was not raised and decided in that case. For that reason alone, it is distinguishable.

Second, Respondent uses the case to suggest that Appellants could still obtain a judgment against the estate in circuit court. She acknowledges that if section 473.360 is applied, they could not collect from the estate assets. A judgment against the estate would therefore serve no purpose; it would be futile. The open courts provision guarantees a "certain remedy" and applying section 473.360 to bar their claim against the assets of the estate would unreasonably deny Appellants to that part of the courts that can provide them a remedy. It would provide a "hollow remedy."

Accordingly, the trial court's application of section 473.360 to Appellants' claims violates article I, § 14 of the Missouri Constitution.

CONCLUSION

For these reasons and those set forth in Appellants' initial brief, Appellants ask the Court to reverse the trial court's dismissal of their claims and allow them to proceed with their claims against Mr. Austin's estate.

Respectfully submitted,

**MURPHY, TAYLOR, SIEMENS &
ELLIOTT, P.C.**

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH RULE 84.06

I hereby certify that on the 7th day of November, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record. I also hereby certify that the foregoing brief complies with the limitations contained in Rule 84.06(b) and that it contains 1,917 words.

/s/ Benjamin S. Creedy