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 D. AUSTIN, deceased, Respondent.

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

RESPONDENT'S BRIEF

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JURISDICTIONAL STATEMENT

This action is one involving whether Section 473.360 RSMo. is unconstitutional under Article I, Section 10 and Article I, Section 14 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution when applied to bar the claims of minor children who lacked the capacity to file a lawsuit themselves and who never received, personally or by their custodial parent, actual notice of a probate estate or the need to file claims within a certain time period, and whether they were known or reasonable ascertainable creditors of the estate. Therefore, this appeal involves the constitutionality and validity of a state statute and is within the Court's jurisdiction as granted by Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Respondent helped Allen Austin with his business and personal affairs. TR 4:2-13. Mr. Austin died in August 2009 and Respondent was appointed personal representative of his estate. TR 4:21-23. The estate has two beneficiaries; Respondent is one. TR 19:9-10.

Mr. Austin rented a home in Albany, Missouri to Terri Nolan, the mother of R.M.N. and R.D.N.. TR 6:25-7:7, 7:22-25, 8:1-3. Respondent became aware of a Division of Family Services investigation regarding sexual abuse allegations by R.M.N. and R.D.N. in 2006. TR 5:15-20, 7, 8:1-3 when Mr. Austin showed her a letter. TR 9:14-17. Mr. Austin showed Respondent another letter in 2009 (TR 10:23-25) which Respondent interpreted to indicate that the allegations were unsubstantiated due to a lack of evidence. TR 11: 6-7. The 2009 letter (dated March 9, 2009) was admitted as Exhibit A at the hearing and read in pertinent part:

> I received a letter from your attorney, David Parman, requesting an administrative review of incident #20083260214. Your request is denied due to the new allegations alleged in this report being unsubstantiated. The current incident, 20083260214 included two different sets of allegations of abuse and neglect. The first allegations were the same as those investigated in 2006. The conclusions of those allegations remain as Preponderance of Evidence. The new allegations made in the current report are unsubstantiated. The time period to appeal the Preponderance of Evidence finding of the 2006 allegations has lapsed.

TR Ex. A; TR 11:21; Appellant's Appendix at A8.

Even though Respondent stated "Yes, sir" in response to Appellant's attorney's question "Ms. Snead, this Exhibit A that we're talking about, does that not say there were two complaints to DFS, one in 2006 and one in 2008?" (TR 14:13-15) a review of Exhibit A only mentions "two different sets of allegations of abuse and neglect". Exhibit A contains no mention of "2008" as stated in the question posed to Respondent. TR Ex. A; Appellant's Appendix at A8.

The 2006 allegations were investigated by DFS and as indicated in the March 9, 2009 letter from DFS, "the conclusions of those allegations remains as a preponderance of the evidence". Appellant's Ex. A; Ex. 1; TR 15:2-4. While Mr. Austin never appealed the 2006 finding (Ex. A; Ex. 1; TR 15:21-23) Respondent was told by the investigating deputy sheriff "that nothing would become of it. They felt that Terri was just trying to extort more money". TR 6:16-19. The initial DFS allegation became known to Respondent within a few weeks of the time Decedent told the minor children's mother Terri that she would have to vacate the property. TR 9:7-13.

Mr. Austin also showed Respondent another letter (dated January 6, 2009) admitted as Exhibit 1 at the hearing. TR 20:2-12. However, Respondent testified regarding what appeared to be a conflict between the DFS letters dated January 6, 2009 and March 9, 2009, she thought the later letter meant nothing had been substantiated. Tr 21:8-12.

Respondent testified that she took the March 9, 2009 letter from DFS to mean there weren't any other allegations that were substantiated. TR 12:5-7. Respondent

further testified that nobody from the Nolan family made any demand for money on behalf of the children (TR12:8-10) that she was not aware of any complaint filed with the prosecutor (TR 12:11-12) that she was not aware of any civil suit filed (TR 12:13-14) that she is a social worker (TR 13:8) and that in her training and experience, she was not aware of civil cases arising from children's allegations of abuse or neglect. TR 13:16-17, 22, 13:24-25 and 14:1. Respondent further testified, when asked by Appellant's attorney whether she ever tried to arrange an interview with the children, she felt there was no need because their aunt had told Respondent the allegations were false. TR 17:9-10.

Randy Nolan, the father of R.M.N. and R.D.N. (TR 22:8-9) testified that during the time the alleged abuse happened, he was incarcerated (TR 24:18-20) and obtained custody in July of 2009. TR 24:21-25. Mr. Nolan also testified that he was aware of the DFS allegations in 2006 (TR 25:1-4) and 2008 or 2009 (TR: 25:5-7); that when he got out of prison in 2008 and regained custody of his kids, that he did not make contact with Allen Austin about making a monetary claim (TR 26:9-13); that he did not call an attorney about suing Allen Austin (TR 26:14-15); and that he did not contact the sheriff's office or any law enforcement agency about pursuing criminal charges (TR 26:16-18). When Mr. Nolan was asked what he was waiting on, he testified that "….I didn't know it till he passed away" (TR 26:19, 24-25) and only then did he call an attorney to ask what could be done. TR 27:1-3.

Allen Austin died on August 7, 2009. LF 25. The estate was opened on August 13, 2009. LF 2. Mr. Nolan filed Appellants' claims in the estate on April 23, 2010. LF 3. An amended claim was filed in August 5, 2010. LF 4.

Respondent filed a motion to dismiss, which was granted on August 23, 2011 after a hearing. LF 77. The trial court reasoned that Appellants were not entitled to actual notice because those who may conceivably have a claim are not considered a creditor entitled to actual notice, and that it was reasonable to dispense with actual notice to those with mere "conjectural" claims, and described Appellant's claim as the epitome of a "mere conjectural claim". LF 76-77. Appellants filed a motion to amend the judgment on September 20, 2011. LF 79. The motion was never ruled on and this appeal was filed on December 23, 2011. LF 82.

POINTS RELIED ON

FIRST POINT RELIED ON

The trial court did not err in dismissing Appellants' claims against the estate, as the application of Section 473.360, RSMo. to bar their claims does not violate the due process clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, in that those with mere "conjectural" claims are not entitled to actual notice.

Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988).

Estate of Wilkinson, 843 S.W.2d 377 (Mo. App. 1992).

Estate of Bohannon, 943 S.W.2d 651 (Mo. banc 1997).

Simpson v. Estate of Simpson, 922 So. 2d 1027 (Fla. Dist. Ct. App. 2006).

SECOND POINT RELIED ON

The trial court did not err in dismissing Appellants' claims against the estate because application of section 473.360, RSMo. to bar their claims does not violate the open courts provision of the Missouri Constitution (Article I, Section 14) in that section 473.360 does not arbitrarily and unreasonably restrict their recognized causes of action due to their minority and lack of capacity and is a special statute of limitation, which must carry its own exceptions and the courts cannot engraft others upon it.

Doe v. Phillips, 194 S.W.3d 833, 841 (Mo. banc 2006).

Kilmer v. Mun, 17 S.W.3d 545 (Mo.,2000).

State ex rel. Whitaker v. Hall, 358 S.W.2d 845, 849 (Mo.1962)

Black v. City Nat. Bank & Trust Co. of Kansas City, 321 S.W.2d 477 (Mo.1959).

ARGUMENT

FIRST POINT RELIED ON

The trial court did not err in dismissing Appellants' claims against the estate, as the application of Section 473.360, RSMo. to bar their claims does not violate the due process clauses of Article I, Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, in that those with mere "conjectural" claims are not entitled to actual notice.

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A. Standard of Review

The constitutional validity of a statute is a question of law, the review of which is *de novo. Weinschenk v. State,* 203 S.W.3d 201, 210 (Mo. banc 2006). If a statute conflicts with a constitutional provision or provisions, this Court must hold that the statute is invalid. *State ex rel. Upchurch v. Blunt*, 810 S.W. 2d 515, 516 (Mo. 1991).

B. Argument

Section 473.360, RSMo. is the provision of the Missouri Probate Code that bars all claims against an estate that are not filed within six months of the first publication of letters. Mo. Rev. Stat. § 473.360.

Appellants argue that due process entitled them to actual notice from the Respondent because they were known or reasonably ascertainable creditors, and that their

claims are, therefore, not time-barred by Section 473.360. Their argument is based almost entirely on ambiguous and contradictory letters from the Missouri Department of Social Services regarding allegations that Mr. Austin sexually mistreated R.M.N. and R.D.N.. The argument fails because no reasonably ascertainable civil claim existed; therefore, the Appellants were not reasonably ascertainable estate creditors.

In *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988) the United States Supreme Court held that the publication notice of a nonclaim statute is insufficient to alert "known or reasonably ascertainable" estate creditors of probate proceedings; instead, due process requires actual notice. *Tulsa Prof. Collection Servs. v. Pope*, 485 U.S. 478 (1988). A claimant is a reasonably ascertainable estate creditor when both the claim and the claimant could be uncovered by "reasonably diligent efforts." However, not everyone who "may conceivably have a claim [is] properly considered a creditor entitled to actual notice;" rather, actual notice is not required for those with mere "conjectural" claims. *Id* at 490.

A claimant is not necessarily a reasonably ascertainable estate creditor even when the existence of a potential tort claim arising out of an automobile accident is clearly recognizable. *Estate of Wilkinson*, 843 S.W.2d 377 (Mo. App. 1992); *Estate of Bohannon*, 943 S.W.2d 651 (Mo. banc 1997). In *Bohannon*, the plaintiffs filed late claims against an estate, seeking recovery for their own personal injuries resulting from the same car accident that killed the decedent. The court held that the plaintiffs did not receive actual notice, but remanded the case for determination whether they were entitled to actual notice as "reasonably ascertainable parties." *Bohannon*, 943 S.W.2d at 655.

Even though the estate executor, who was the wife of the decedent, was well aware of the facts giving rise to the creditors' claims, the court refused to state as a matter of law that the plaintiffs were ascertainable as estate creditors. *Id* at 655.

Like in *Bohannon*, the plaintiff in *Wilkinson* filed a late claim for personal injury against the decedent's estate after being injured in the same car accident that killed the decedent. *Wilkinson*, 843 S.W.2d 377. The court held only that the trial court erred in ruling that the claimant received actual notice, not that the plaintiff was entitled to actual notice. The plaintiff in *Wilkinson* had previously attempted to file a pro se petition against the estate, which may or may not have reached the attention of the personal representative. 843 S.W.2d 377. The personal representative knew that the plaintiff had been involved in the accident. Still, the court remanded the issue of whether the plaintiff was a known or reasonably ascertainable estate creditor. *Id.* at 379, 382. Clearly the automobile accidents discussed in *Bohannon* and *Wilkinson* gave rise to claims that were reasonably ascertainable, warranting discussion only whether the claimants were reasonably ascertainable.

Further, actual notice is only required when a plaintiff's claim is reasonably ascertainable. In *Simpson*, the plaintiff brought a claim against his uncle's estate claiming that he was entitled to shares of the family business. *Simpson v. Estate of Simpson*, 922 So. 2d 1027 (Fla. Dist. Ct. App. 2006). He and his father discussed the claim with the administratrix, who even conceded that the plaintiff should get his stock in the company. *Id.* at 1029. The court held that the plaintiff qualified as a reasonably ascertainable estate creditor because the administratrix knew about the claim and stated,

"It is not just the claimant's identity but its 'claim' that must be reasonably ascertainable." *Id.* (quoting *Strulowitz v. Cadle Co.*, 839 So. 2d 876, 880 (Fla. Dist. Ct. App. 2003)).

Similarly, in *Estate of Pennington*, the plaintiff sued his uncle's estate for breach of contract. 829 P.2d 618 (Kan. Ct. App. 1992). The plaintiff's claim was filed late under the Kansas nonclaim statute, but the court held that actual notice was required because both the plaintiff and his claim were reasonably ascertainable. *Id*. at 622.

In *Gaylor*, the decedent rear-ended a tractor-trailer, causing the deaths of three people and approximately $14,000 worth of damage to the truck. *American Home Assurance Co. v. Gaylor*, 894 So. 2d 656 (Ala. 2004). The driver of the tractor-trailer received worker's compensation benefits from his insurer, who then filed a claim against the decedent's estate that was time-barred by the Alabama nonclaims statute. Even though the driver of the truck was actually uninjured, the court held that actual notice was due. The administrator had a duty to provide actual notice because he had knowledge about the catestrophic circumstances surrounding the accident and the plaintiff's contact information, which gave the administrator a "reasonable means of ascertaining the existence of a claim." *Id.* at 660.

Here, the Appellants were not reasonably ascertainable estate creditors because their tort claims against the Austin estate were neither known to Respondent, nor were they reasonably ascertainable. Like in *Simpson*, whether the identities of the Appellants were known or reasonably ascertainable is not in dispute. Unlike the plaintiff in that case, however, the Appellants did not alert Respondent that they had a claim against the

estate. Instead, they waited nearly four years after the first allegations were made to DFS in 2006 (Appellants' Ex. A) to file their claim in the probate court, which was done on April 23, 2009. (LF 3).

For the Appellants' claim to survive, the court must find that the ambiguous DFS letters were sufficient notice to the personal representative that the Appellants had or intended to pursue a tort action against the decedent.

Appellants allege that the ambiguous and contradictory DFS reports should have put Respondent on notice that their civil claims against Mr. Austin were forthcoming. However, Respondent testified that she took the March 9, 2009 letter from DFS to mean no allegations had been substantiated. TR 21:5-11. Respondent further testified that nobody from the Nolan family made any demand for money on behalf of the children (TR12:8-10) that she was not aware of any complaint filed with the prosecutor (TR 12:11-12) that she was not aware of any civil suit filed (TR 12:13-14) that she is a social worker (TR 13:8) and that in her training and experience, she was not aware of civil cases arising from children's allegations of abuse or neglect. TR 13:16-17, 22, 13:24-25 and 14:1. Respondent further testified, when asked by Appellant's attorney whether she ever tried to arrange an interview with the children, she felt there was no need because their aunt had told Respondent the allegations were false. TR 17:9-10.

The contradictory DFS documents did not make the Appellants' claims reasonably ascertainable; rather, the letter of March 9, 2009 caused Respondent to believe no allegations had been substantiated. TR 21:5-11.

The Appellants argue that Respondent had a duty to inquire into the existence of the Appellants' claim. However, the fact that she knew the identities of the Appellants does not mean that she had a "reasonable means of ascertaining the existence of a claim." Respondent did inquire into the circumstances surrounding the DFS report. She spoke to the Appellants' aunt, who advised the allegations made against Allen Austin by the children were false (TR 17:10). She also spoke to the Gentry County Sheriff, Tim Davis, who advised there was nothing to the claims and that nothing would become of it. (Tr. 10:20-21). Any civil claim based on the DFS report would have been "conjectural," at best.

Appellants further argue that federal precedent and the Missouri Constitution entitled them to actual notice because they were minors, such that Section 473.360 is invalid. These arguments fail, just as the argument that the Appellants were reasonably ascertainable estate creditors fails, because no reasonably ascertainable claim existed. Because the Appellants' claim is time-barred by Section 473.360, they have failed to plead sufficient facts that entitle them to relief. This Court should sustain the trial court's Order and Judgment Sustaining the Motion to Dismiss.

ARGUMENT

SECOND POINT RELIED ON

The trial court did not err in dismissing Appellants' claims against the estate because application of section 473.360, RSMo. to bar their claims does not violate the open courts provision of the Missouri Constitution (Article I, Section 14) in that section 473.360 does not arbitrarily and unreasonably restrict their recognized causes of action due to their minority and lack of capacity and is a special statute of limitation, which must carry its own exceptions and the courts cannot engraft others upon it.

Doe v. Phillips, 194 S.W.3d 833, 841 (Mo. banc 2006).

Kilmer v. Mun, 17 S.W.3d 545 (Mo.,2000).

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A. Standard of Review

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B. Argument

Appellants argue that because they are minors, the time limitation in Section 473.360 is arbitrary and unreasonable. A statute's validity is presumed, and it will not be declared unconstitutional unless it clearly contravenes a constitutional provision. *Doe v. Phillips,* 194 S.W.3d 833, 841 (Mo. banc 2006).

> As held by this Court in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo.,2000):
>
> Put most simply, 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." *Wheeler,* 941 S.W.2d at 515 (Holstein, C.J., dissenting) (emphasis added). The test of "arbitrary or unreasonable" is an important clarification of this Court's statement in *Harrell,* 781 S.W.2d at 62, that the "right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes."

Id. at 549. While Appellants' citations of *Schumer v. City of Perryville*, 667 S.W. 2d 414 (Mo. 1984) and *Strahler v. St. Luke's Hospital*, 706 S.W. 2d 7 (Mo. 1986) might seem persuasive, neither the city in *Schumer*, nor the hospital in *Strahler*, could articulate any basis for the limitations in question that was not arbitrary or unreasonable. However, in the instant case, the claims statute is "for the purpose of expediting the liquidation and distribution of estates of deceased persons". *State ex rel. Whitaker v. Hall*, 358 S.W.2d 845, 849 (Mo.1962). This purpose seems neither arbitrary, nor unreasonable. Rather, it is compelling. The *Whitaker* opinion further stated "[T]he statutes here involved deal with and define in precise terms the limitations placed upon the jurisdiction of probate courts *to allow claims not filed within the time and manner prescribed by law; they are mandatory and jurisdictional*". *Id.* at 849.

As held by this Court in *Black v. City Nat. Bank & Trust Co. of Kansas City*, 321 S.W.2d 477 (Mo.1959):

> A special statute of limitation must carry its own exceptions and the courts cannot engraft others upon it. *State ex rel. Bier v. Bigger*, 352 Mo. 502, 178 S.W.2d 347[4]; *Frazee v. Partney*, supra [5]; *State ex rel. State Life Ins. Co. v. Faucett*, Mo.Sup., 163 S.W.2d 592. As stated in Hoester v. Sammelmann, 101 Mo. 619, 14 S.W. 728, 730, 'courts cannot extend those exceptions so as to embrace cases not within the specific exceptions enumerated in the statute itself.'…. Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception,' *Shelby County v. Bragg*, 135 Mo. 291, 36 S.W. 600, 602; *Hunter v. Hunter*, Mo.Sup., 237 S.W.2d 100[8], and the exceptions provided for by the Legislature are not to be enlarged by the courts upon considerations of apparent hardship. *Woodruff v. Shores*, 354 Mo. 742, 190 S.W.2d 994[3], 166 A.L.R. 957.

Id. at 480.

In *Frazee v. Partney*, 314 S.W.2d 915 (Mo.1958), this court discussed the special statute of limitations in wrongful death cases. Here, the court recognized:

> This court has uniformly held that where a statute of limitations is a special one, not included in the general chapter on limitations, the running thereof cannot be tolled because of fraud, concealment or any other reason not provided in the statute itself.'….. "No other exceptions whatever are engrafted on that statute, and it is not the duty or the right of the courts to write new provisions into the statute. The infancy of plaintiff does not

> change the law…. 'The purpose of such statutes is expressed in one of the earliest of them, 21 James I, chap. 16, 'For the quieting of men's estates and the avoiding of suits.' In particular cases, this inflexible limitation may seem harsh. If so, the remedy is legislative, not judicial.'

Id. at 919. Neither *Whitaker, Black,* or *Frazee* contain any discussion of Article I, Section 14 of the Missouri Constitution, and all of them pre-date the later decisions in *Schumer* and *Strahler.* However, since Article I, Section 14, existed at the time this Court decided each *Whitaker, Black,* or *Frazee,* it can be presumed the court was aware of and considered this right, and that these cases are still viable. They stand strongly for the propositions that the nonclaims statute is not arbitrary or unreasonable, due to the desirability of expediting the liquidation and distribution of estates; that probate courts lack jurisdiction to allow claims not filed within the time and manner prescribed by law; that they are mandatory and jurisdictional; that statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception; that the exceptions provided for by the Legislature are not to be enlarged by the courts upon considerations of apparent hardship; and that if the limitation seems harsh, the remedy is legislative, not judicial

Dane v. Cozean, 584 S.W.2d 120 (Mo.App. E.D. 1979) involved a minor's claims for personal injuries against the administrator of a decedent's estate. The minor's suit was filed in the circuit court, with a notice of the suit filed in the probate court. Defendant moved to dismiss claiming that the Circuit court suit was barred by section 516.230 RSMo. 1969, and by section 473.360 RSMo 1969. The trial court sustained the

motion stating in its order that plaintiff's claim was barred by both statutes. The Eastern District reversed the trial court's dismissal of the suit .

As stated by the *Dane* court:

> Plaintiff argues that, in construing the six-month claim provision of s [sic] 473.360, we should consider such factors as the time limits allowed by the applicable statute of limitation, surprise or prejudice to the defendant, and actual notice of pending litigation to both the defendant and the probate court. Essentially, the gravamen of appellant's argument is that his contemporaneous notice filed with his first suit satisfies the notice requirement of ss [sic] 473.360 and 473.367 for his second suit. We need not decide that question in this case. It was settled in both *Vanderbeck v. Watkins*, 421 S.W.2d 274 (Mo. banc 1967) and *Nicholls v. Lowther,* 491 S.W.2d 3, 6 (Mo.App.1973) that "failure to comply with the non-claim statute does not bar plaintiff from instituting his litigation in Circuit Court nor from obtaining a judgment against the administrator, although it may preclude plaintiff from any recovery on the judgment obtained out of assets being administered upon." Thus, while plaintiff may not have complied with the requirements of s 473.360, his failure to do so does not provide the basis for dismissing his lawsuit.

Id. at 122. From this, it appears the *Dane* court overturned the lower court's ruling, and permitted the Circuit court case to proceed, while recognizing that because the plaintiff had not complied with the nonclaims statute, the plaintiff would not be able to recover

from estate assets. Therefore, in the case at bar, Appellants would be free to proceed with their suit in circuit court, but they would be precluded from recovering on any judgment from the estate assets.

CONCLUSION

In light of the foregoing, Respondent requests that this Honorable Court sustain the Judgment of the Probate Division of the Circuit Court of Gentry County, Missouri.

Respectfully submitted

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RULE 84.06© CERTIFICATE OF COMPLIANCE

I hereby certify that Respondent's Brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,857 words and 544 lines of text.

David B. Parman, LLC

By: /S/ David B. Parman_____

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CERTIFICATE OF SERVICE

I hereby certify that I did on October 11, 2012, serve a copy of this brief via the Supreme Court Electronic Filing System, to Benjamin S. Creedy, Counsel for Appellants.

By: /S/ David B. Parman_____