

IN THE SUPREME COURT OF OHIO

VITANTONIO, INC., et al.)
)
 Appellees)
)
 vs.)
)
 GARY BAXTER, Executor of the)
 Estate of William Vitantonio, Deceased)
)
 Appellant)

CASE NO. 06-952

APPEAL FROM LAKE COUNTY
COURT OF APPEALS, ELEVENTH
APPELLATE DISTRICT

MERIT BRIEF OF APPELLEES VITANTONIO, INC., GLORIA VITANTONIO, LOUIS J.
VITANTONIO AND WICKLIFFE FLORAL

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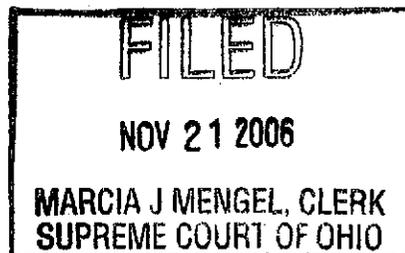


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STATEMENT OF THE CASE

Prologue

On October 12, 2001, Plaintiffs-Appellees timely filed a lawsuit against Defendant-Appellant pursuant to ORC § 2117.12; in Lake County Court of Common Pleas Case No. 01 CV 001602. On June 26, 2003, Plaintiffs-Appellees voluntarily dismissed their claims without prejudice. On June 17, 2004, Plaintiffs-Appellees refiled their claims against Defendant-Appellee; Case No. 04 CV 001203. Defendant-Appellant moved to dismiss. On January 10, 2005, the trial court granted Defendant-Appellant's motion to dismiss. Plaintiffs-Appellees thereafter timely appealed.

On or about March 21, 2006, the Court of Appeals for the Eleventh Appellate District, Lake County, Ohio, reversed the trial Court, and remanded this matter back to the Lake County Court of Common Pleas for further proceedings consistent with its opinion.

The Defendant-Appellant then filed the instant appeal.

STATEMENT OF FACTS

The trial court found certain facts to be true, as expressed in its Opinion and Judgment Entry dated December 13, 2004. William Vitantonio died on July 24, 2000. Prior to his death, William Vitantonio was a minority shareholder in and treasurer of Plaintiff-Appellee Vitantonio, Inc., and president of and the majority shareholder in Wickliffe Floral, Inc. On November 4, 2000, pursuant to a stock purchase agreement, Plaintiff-Appellee Vitantonio, Inc. tendered a payment to the Estate of William Vitantonio in return for the deceased's fifty shares. On November 7, 2000, the Estate of William Vitantonio rejected this tender.

On July 23, 2001, within the one year time period prescribed by ORC § 2117.06(B), Plaintiffs-Appellees filed a claim against the Estate of William Vitantonio. On August 17, 2001, Defendant-Appellant rejected the claim.

On October 12, 2001, within the two month time period prescribed by ORC § 2117.12, Plaintiffs-Appellees filed a lawsuit against Defendant-Appellant, Lake County Court of Common Pleas, Case No. 01 CV 001602, alleging numerous claims; including, nonfeasance, malfeasance, negligence, breach of fiduciary duty concerning the management of Wickliffe Floral, Inc., and a claim for William Vitantonio's failure to pay rent and utilities for his apartment that was owed to Plaintiff-Appellee Vitantonio, Inc. Defendant-Appellant filed an Answer and a Counterclaim.

On June 26, 2003, Plaintiffs-Appellees voluntarily dismissed Case No. 01 CV 001602. Defendant-Appellant voluntarily dismissed its Counterclaim on July 2, 2003. Thereafter, Defendant-Appellant took no efforts to finalize the administration of the Estate of William Vitantonio, or to close the Estate, which estate remained open when suit was subsequently timely refiled.

On June 17, 2004, pursuant to ORC § 2305.19, Plaintiffs-Appellees refiled the Complaint originally filed in Case No. 01 CV 001602, said refiled case being assigned Case No. 04 CV 001203. On July 14, 2004, Defendant-Appellant filed a motion to dismiss pursuant to Civ. R. 12(B)(6) arguing that ORC § 2305.19 is not applicable to claims filed pursuant to ORC § 2117.06(B), and therefore arguing that Plaintiffs'-Appellees' refiled Complaint is barred by ORC § 2117.12. On January 10, 2005, the trial court granted Defendant-Appellant's motion to dismiss.

It must be emphasized, as stated above, that subsequent to the dismissal of the original complaint in this matter the Estate of William Vitantonio remained open and was continually being administered up to and including June 14, 2004, when the new lawsuit was filed. Thus, there was not a delay in the administration of the estate as a result of this refiling as the estate was open and the executor remained in place to accept service of process.

As is demonstrated below, the Eleventh District Court of Appeals was correct in its determination that ORC § 2305.19 is applicable to causes of action brought pursuant to ORC § 2117.12, thus the Plaintiffs'-Appellees' Complaint is not barred by ORC § 2117.12, and it was error for the trial court to grant defendant-appellant's motion to dismiss.

ARGUMENT

Proposition of Law I:

ORC 2305.19, the savings statute, is applicable to actions brought pursuant to ORC 2117.06 for rejected claims against an estate.

The version of ORC § 2117.06(B) in effect on July 23, 2001 stated:

All claims shall be presented within one year after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that one-year period. Every claim presented shall set forth the claimant's address.

ORC § 2117.12 in effect on July 23, 2001 stated:

When a claim against an estate has been rejected in whole or in part but not referred to referees, or when a claim has been allowed in whole or in part and thereafter rejected, the claimant must commence an action on the claim, or that part thereof rejected, within two months after such rejection if the debt or that part thereof rejected is then due, or within two months after the same becomes due, or be forever barred from maintaining an action thereon. If the executor or administrator dies, resigns, or is removed within such two months' period and before action is commenced thereon, the action may be commenced within two months after the appointment of a successor.

For the purposes of this section, the action of a claimant is commenced when the petition and praecipe for service of summons on the executor or administrator have been filed.

ORC § 2305.19(A) provides in pertinent part that:

In an action that is commenced or attempted to be commenced, if in due time a judgment for the Plaintiff is reversed or if the Plaintiff fails otherwise than upon the merits, the Plaintiff or, if the Plaintiff dies and that cause of action survives, the Plaintiff's representative may commence a new action within one year after the date of the reversal of the judgment or the Plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

The trial court relied upon the Barnes v. Anderson (11th Dist. 1984), 17 Ohio App.3d 142, 478 N.E.2d 248, in support of the proposition that ORC § 2305.19 is not applicable to claims made against an estate pursuant to ORC § 2117.12. In Barnes, the appellate court concluded that ORC § 2305.19 was not applicable to a will contest. The only authority cited in Barnes is Alakiotis vs. Lancione (C.P. 1966), 19 Ohio Misc. 257, 232 N.E.2d 663. Alakiotis holds in paragraphs one through three of the syllabus:

1. An action to contest a will was unknown at common law and has been created by Section 2714.01 Revised Code.
2. The six-month established in Section 2741.09, Revised Code, for the commencement for a will contest action is a part of the right of action.
3. The savings clause of Section 2305.19, Revised Code, for commencing a new action when a suit has failed otherwise than on the merits, is not available in regard to a will contest.

The Ohio Supreme Court has recently addressed the application of ORC § 2305.19 to will contests, and the rationale underpinning of Alakiotis and its progeny, in Allen vs. McBride, 105 Ohio St.3d 21, 2004-Ohio-7112. In Allen, the Ohio Supreme Court held that ORC § 2305.19 does apply to will contests.

In rendering its opinion in Allen, the Ohio Supreme Court pointed to its decision in Osborne vs. AK Steel Ford/Armco Steel Company, 96 Ohio St.3d 368, 775 N.E.2d 483. In Osborne the Supreme Court was faced with Crandall vs. Irwin (1942), 139 Ohio St. 253, 39 N.E.2d 608, whose holding in paragraph three of its syllabus was very similar to the holding in Alakiotis, to wit:

Where the limitation of time is an inherent part of a right unknown to the common law and created by statute, time is of the essence, and there is no right unless the action or proceeding to enforce such right is commenced within the statutory limit.

In rejecting this rationale, the Ohio Supreme Court cited Lewis vs. Conner (1985), 21 Ohio St.3d 1, 487 N.E.2d 285, where the Court found ORC § 2305.19 applied to save a claim even though the claim was a creature of statute, and the statute contained its own limitations.

Most recently, in Allen vs. McBride, 105 Ohio St.3d 21, 2004-Ohio-7112, the Ohio Supreme Court stated:

We fully agree with the [10th District] court of appeals' observation that "Osborne eviscerated the rationale underpinning Alakiotis and the appellate decisions relying on it. Although R.C. Chapter 4112 created a statutory cause of action and contained its own statute of limitations, the Supreme Court determined R.C. 2305.19 applied to actions brought under that chapter of the Revised Code. See Ruble v. Ream, Washington App. No. 03CA14, 2003-Ohio-5969, ¶ 29 (stating that "[t]he underlying rationale of Osborne is that when a cause of action is a creature of statute and that statute contains a specific limitations period, the savings statute nevertheless applies)." The [10th District] court of appeals accurately determined that, since the rationale of Alakiotis is no longer valid, the reasoning underlying Osborne is relevant to whether the savings statute pertains to will-contest actions.

As stated by the Ohio Supreme Court in Allen, Osborne eviscerated the rationale underpinning Alakiotis v. Lancione (C.P. 1966), 12 Ohio Mic.257, 41O.O.2d 381, and the

appellate decisions relying upon it; specifically the cases cited in support of the trial court's decision, i.e. Barnes v. Anderson (11th Dist. 1984), 17 Ohio App.3d 142.

The trial court expressed concern that the application of ORC § 2305.19 "to presentment of claims against an estate would lead to unnecessary delays in the administration of estates, the very thing the two month limitations in R.C. 2117.12 was meant to prevent." However, in Allen, the Ohio Supreme Court found pertinent several observations made by the 10th District Court of Appeals in Allen vs. McBride, 2003-Ohio-7158 (Ohio App. Dist.10 12/30/2003) on that issue, and stated:

The court of appeals made several further observations to support its conclusion that we find apposite:

"Without question, the statute of limitations for will contests...is short. In the case of an expedited estate, however, the administration of the estate may be completed before the statute of limitations for a will contest has expired. A successful will contest, in such an instance, may require that, at least in part, the administration of the estate be undone, much as might occur if a refiled will contest complaint proved to be successful. Moreover, application of the savings statute to will contest actions does not slow the administration of the estate significantly more than does the right to appeal various rulings of the probate court during the administration of the estate. Indeed, because nothing requires that an estate be held open to determine if a dismissed will contest eventually will be refiled, the failure to refile before the administration of the estate is completed arguably may preclude further action and instead become part of the risk a will contestant takes in dismissing a will contest."

"Because the effect of the savings statute on the estate is not substantially greater than that posed by other applicable statutes and rules, the reasoning of the Supreme Court is appropriate. In both Reese and Lewis, the court noted that nothing in R.C. 2743.16 or 4123.519, respectively, prohibits refileing an action that was originally timely commenced. Moreover, as with the statute at issue in Lewis, the will contest statutes do not provide 'any guidance for the situation in which a timely filed complaint has been dismissed without prejudice after the time for commencement set forth in that statute has expired....R.C. 2305.19 "fills this void." ' Lewis, [21 Ohio

St.3d] at 4, [21 OBR 266, 487 N.E.2d 285,] quoting Reese, [6 Ohio St.3d] at 163 [, 6 OBR 221, 451 N.E.2d 1196].”

The Ohio Supreme Court went on to state in Allen vs. McBride, 105 Ohio St.3d 21, 2004-Ohio-7112, that ORC § 2305.19 is a broad statute of general application and there is nothing within that statute that bars its application to will-contest actions, and there is no indication within ORC § 2107.76 that ORC § 2305.19 does not apply to will-contest actions.

The Ohio Supreme Court went on to reason in Allen that after a will contest claim is validly filed, later developments are beyond the scope of ORC § 2107.76, and given the generality of ORC § 2305.19, and the inapplicability of ORC § 2107.76 once a will contest is properly commenced, normal principles of statutory construction require that ORC § 2305.19 apply to will-contest actions. This reasoning is equally applicable to the application of ORC § 2305.19 to claims made against an estate pursuant to ORC § 2117.12.

The Court of Appeals for the Eleventh Appellate District, in its findings, cited the case of Cero Realty Corp. v. Am. Manufacturer Mut. Ins. Co. (1960), 171 Ohio St. 82, at paragraph one that held that the savings statute is a remedial statute and is to be given a liberal construction to permit the decision of cases upon their merits rather than upon mere technicalities of procedure. It went on to follow the Supreme Court’s decision of Allen, supra, applying the savings statute to claims of will contests.

As previously stated, the Defendant-Appellant’s estate remained open subsequent to the voluntary dismissal of the original complaint and was, in fact, still open at the time of the second filing and service made upon the executor of the estate. Any argument that there might have been some delays in the administration of the estate as a result of this litigation are, thus, clearly shown not to exist in this matter since the Defendant-Appellant opted, for a variety of reasons

evidently, to keep the estate open and to allow service of process upon the executor almost a year after the original dismissal of the first lawsuit.

The Court of Appeals for the Eleventh District, adopting the same reasoning that subjects will contests to the savings statute, found that there was nothing in the savings statute that prescribes its application to claims against an estate, nor is there a provision in ORC 2117.06 that indicates the savings statute does not apply.

Accordingly, the Eleventh District Court found that since the Plaintiffs-Appellees met the threshold requirements of ORC 2305.19 by presenting their claims against the estate within the statutory time limit of ORC 2117.06 that the subsequent dismissal and refiling is pursuant to the savings statute.

The Appellate Court was also mindful of the amendment to the will contest statute, but conspicuously noted that no such modification of the presentation of claims statute has been made to also prohibit the refiling of a lawsuit predicated upon a claim which has been dismissed and subsequently timely refiled. It further indicated that any proposed legislation is not effective under the time parameters of this matter, and that the subsequent amendment to the will contest statute has no application to the savings statute relating to claims against an estate.

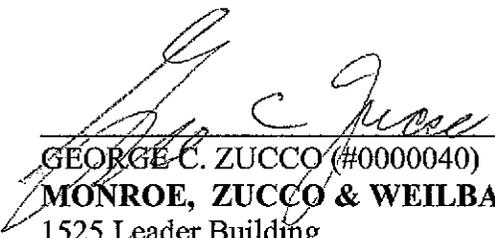
CONCLUSION

The trial court relied upon Barnes v. Anderson (11th Dist. 1984), 17 Ohio App.3d 142, 478 N.E.2d 248, in support of the proposition that ORC § 2305.19 is not applicable to claims made against an estate pursuant to ORC § 2117.12. The only authority cited in Barnes is Alakiotis vs. Lancione (C.P. 1966), 19 Ohio Misc. 257, 232 N.E.2d 663, whose rationale and holding has been eviscerated by the holding in Allen vs. McBride, 105 Ohio St.3d 21, 2004-

Ohio-7112, and the case cited therein. Thus, given the generality of ORC § 2305.19, and the inapplicability of ORC § 2117.12 once a claim against an estate is properly commenced, normal principles of statutory construction require that ORC § 2305.19 apply to claims made against an estate, and it was error for the trial court to dismiss the Plaintiffs-Appellees' complaint.

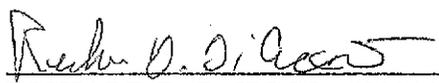
WHEREFORE, by all the foregoing and above, Plaintiffs-Appellees pray that this Court sustain the ruling of the Eleventh District Court of Appeals and remand the case to the trial court for a trial on the merits.

Respectfully submitted,



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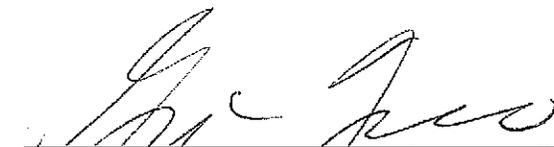


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PROOF OF SERVICE

A true copy of the foregoing Merit Brief of Appellees Vitantonio, Inc., Gloria Vitantonio, Louis J. Vitantonio, and Wickliffe Floral was sent by ordinary U.S. mail to Mark I. Wachter, Esq., and Jack Kurant, Esq., Attorneys for Appellant, Karberg, Kurant & Wachter Co., L.P.A., 20195 Chagrin Boulevard, Suite 300, Cleveland, Ohio 44124-5705, this 17th day of November, 2006.



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