

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

David R. May, as Administrator Ad Litem
of the Estate of Oscar T. Bradley, deceased,

Appellant/Plaintiff,

v.

Appeal No.: 98-2580

Illinois National Insurance Company,

Appellee/Defendant,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

DISTRICT COURT DOCKET NO. 3:97cv110/RV

ANSWER BRIEF OF APPELLEE

B. RICHARD YOUNG
Florida Bar No. 442682
MICHAEL T. BILL
Florida Bar No. 997722
Young and Associates, P.A.
P.O. Drawer 1070
Pensacola, Florida 32595-1070
(850) 432-2222
Attorney for Appellee/Defendant

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-1-26.1-3, the undersigned attorneys for appellee, Illinois National Insurance Company, certify that the following is a complete list of the trial judges, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the above case:

1. AIG, Inc. publicly traded corporate entity which may have interest in outcome of case.
2. Atlanta Casualty Company, third party defendant.

3. Beggs & Lane, attorneys for third party defendant.
4. Michael T. Bill, attorney for appellee.
5. Honorable Miles Davis, Magistrate Judge.
6. Illinois National Insurance Company, appellee.
7. Levin, Middlebrooks, Thomas, Mitchell, Green, Echsner, Proctor & Papantonio, P.A., attorneys for appellant.
8. Lefferts L. Mabie, III, attorney for appellant.
9. Lefferts L. Mabie, III, P.A., attorneys for appellant.
10. David Lee McGee, attorney for third-party defendant.
11. David R. May, appellant.
12. Robert J. Mayes, attorney for appellant.
13. Robert J. Mayes, P.A., attorneys for appellant.
14. Louis K. Rosenbloum, attorney for appellant.
15. Louis K. Rosenbloum, P.A., attorneys for appellant.
16. Honorable Roger Vinson, U.S. District Judge.
17. B. Richard Young, attorney for appellee.
18. Young & Associates, P.A., attorneys for appellee.

B. RICHARD YOUNG
Florida Bar No. 442682
MICHAEL T. BILL
Florida Bar No. 997722
Young and Associates, P.A.
P.O. Drawer 1070
Pensacola, Florida 32595-1070
(850) 432-2222
Attorney for Appellee/Defendant

PREFACE

Within this brief, Appellant shall be referred to as "May", Appellee shall be referred to as "INIC" and Atlanta Casualty Company shall be referred to as "ACC".

STATEMENT REGARDING ORAL ARGUMENT

INIC does not believe that oral argument is necessary for this Court to reach a decision regarding this appeal. The briefs and record on appeal are more than adequate to set forth the respective positions of the parties and oral argument would add nothing to the determination of the issues raised by this appeal.

CERTIFICATE OF TYPE SIZE AND STYLE

INIC's Answer Brief was prepared using proportionally spaced Times Roman 14 point type not exceeding 10 characters per inch in accordance with 11th Cir. R. 32-4(c).

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STATEMENT OF THE ISSUE

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STATEMENT OF JURISDICTION

Jurisdiction in this Court is based on 28 U.S.C. §1291. Jurisdiction in the District Court was based upon diversity of citizenship pursuant to 28 U.S.C. §1332.

STATEMENT OF THE CASE

On or about September 21, 1991, Donald J. Prockup, Sr. and Inez Prockup were involved in a motor vehicle accident with Oscar Bradley while Mr. Bradley was driving a vehicle owned by Velma Murphy. R1-1. (Complaint at ¶5). Inez Prockup died as a result of the aforementioned accident and Donald J. Prockup, Sr. sustained personal injuries in said accident. R1-1 (Complaint at ¶5). Oscar Bradley died at the scene of this accident. R2-85 (Exhibit "A"). Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, pursued claims against Velma Murphy and the Estate of Oscar Bradley. R1-1 (Complaint). INIC, the insurer for the Estate of Oscar Bradley, disputed coverage throughout Mr. Prockup's claim. R1-5; R1-12. Mr. Bradley's bodily injury policy limits with Illinois National were \$10,000 per person and \$20,000 per accident. R2-85 (Exhibit "B").

As of May 20, 1992, no estate had been opened on behalf of Oscar Bradley. On May 20, 1992, Lefferts L. Mabie, III, as attorney for Donald J. Prockup, Sr., personal representative of the Estate of Inez

Prockup, filed a petition for appointment of David May as Administrator Ad Litem of the Estate of Oscar Bradley in Escambia County Probate Court. R2-85 (Exhibit "C"). On May 26, 1992, Escambia County Circuit Judge John T. Parnham appointed David R. May Administrator Ad Litem of the Estate of Oscar T. Bradley in association with the accident of September 21, 1991. R2-85 (Exhibit "C").

On February 4, 1993, Emmer Bell Johnson, one of Oscar Bradley's nieces, filed a Petition for Administration of the Estate of Oscar Bradley. R2-85 (Exhibit "E"). On February 4, 1993, Emmer Bell Johnson gave written notice of her Petition for Administration to Donald John Prockup, Sr., and to David R. May. R2-85 (Exhibit "F"). On March 1, 1993, Donald John Prockup, Sr., as personal representative of the Estate of Inez Prockup, filed an answer, affirmative defenses and counter petition for administration in which Mr. Prockup requested that David R. May be appointed personal representative of Oscar Bradley's estate in response to Ms. Johnson's Notice of Petition for Administration. R2-85 (Exhibit "G"). As one of his affirmative defenses to Ms. Johnson's appointment

as personal representative, Mr. Prockup cited Mr. May's prior appointment as Administrator Ad Litem. R2-85 (Affirmative Defense 2).

On March 18, 1993, Fred T. Bradley, a nephew of Oscar T. Bradley, filed a petition to be appointed co-personal representative of the Estate of Oscar Bradley along with Emmer Bell Johnson, and Mr. Prockup received notice of said petition. R2-85 (Exhibit "I"). On July 23, 1993, a hearing was conducted on Ms. Johnson's petition and Mr. Prockup received notice of said hearing. R2-85 (Exhibit "I"). Upon completion of the aforementioned hearing, Judge Parnham appointed Emmer Bell Johnson and Fred Bradley as co-personal representatives of the Estate of Oscar Bradley, thereby rejecting Mr. Prockup's request for the appointment of David R. May as personal representative. R2-85 (Exhibit "J").

Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, filed a personal injury/wrongful death suit against Velma Murphy and David R. May, as personal representative of the Estate of Oscar Bradley, on May 15, 1992. R2-85 (Exhibit "K"). At no time after Judge Parnham's appointment of Ms. Johnson and Mr.

Bradley as co-personal representatives of the Estate of Oscar Bradley, did Mr. Prockup substitute Ms. Johnson and Mr. Bradley for Mr. May as defendants in his personal injury/wrongful death suit. In Mr. Prockup's counter petition for administration, he specifically stated that he intended to make such a substitution if David May was not appointed personal representative. R2-85 (Exhibit "G" at P.2, ¶3). Mr. Prockup also failed to file a notice of civil action in the probate proceeding as required by Fla.Prob.R. 5.065.

Mr. Prockup did, however, participate directly in the Estate of Oscar Bradley. After appointment of Ms. Johnson and Mr. Bradley as co-personal representatives of Oscar Bradley's estate, Mr. Prockup requested that he continue to receive notice of further probate proceedings and any further probate pleadings as long as he remained an interested party to the proceedings. R2-85 (Exhibit "L"). On August 23, 1993, letters of administration were issued to Ms. Johnson and Mr. Bradley by Judge Parnham and the notice of administration was published in The

Escambia Sun-Press in the issues of September 2, 1993 and September 9, 1993. R2-85 (Exhibits "M" and "N").

On December 27, 1993, Donald Prockup, Sr., as personal representative of the Estate of Inez Prockup, deceased, filed a statement of claim "for damages which arose out of an accident in Holmes County, Florida on September 21, 1991, in which Inez Prockup sustained fatal injuries." R2-85 (Exhibit "O"). At no time did Donald J. Prockup, Sr. file a statement of claim in the Estate of Oscar Bradley for his own personal injuries arising from the accident of September 21, 1991. At no time did Donald J. Prockup, Sr. request an extension of time to file a statement of claim based on fraud, estoppel or insufficient notice of the claims period.

Although the statement of claim of Donald J. Prockup, Sr., as personal representative of the Estate of Inez Prockup, was filed beyond the three month deadline provided for filing a statement of claim under Florida law and more than two years after Bradley's death, Ms. Johnson and Mr. Bradley filed a proof of claim indicating their intention to pay

said claim. R2-85 (Exhibit "P"). On April 21, 1994, after Mr. Prockup, as personal representative of the Estate of Inez Prockup, had filed his unliquidated statement of claim, final judgment was entered in favor of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, deceased, in the personal injury/wrongful death action in the total amount of \$1,106,522.70.¹ R2-85 (Exhibit "Q"). Of the aforementioned total, \$175,000 constituted damages to Donald Prockup, Sr. for his own personal injuries, \$850,000 constituted damages to Donald Prockup, Sr., for the death of Inez Prockup and \$81,522.73 constituted loss of net accumulations to the Estate of Inez Prockup.² R2-85 (Exhibit "Q"). At

¹ ACC, the insurer for Velma Murphy, provided a defense to the underlying personal injury/wrongful death action for both Murphy and the Estate of Oscar Bradley as ACC was primarily responsible for providing indemnity and a defense to Murphy and the Estate of Oscar Bradley under Florida law.

² After the entry of final judgment against Murphy and the Estate of

no time after entry of the aforementioned final judgment did Mr. Prockup file a petition to amend his late filed statement of claim as personal representative of the Estate of Inez Prockup to provide the liquidated damage amount nor did Mr. Prockup move for an extension of time to file his own individual statement of claim.

On September 23, 1994, Ms. Johnson and Mr. Bradley filed a Petition for Discharge as co-personal representatives of the Estate of Oscar Bradley. R2-85 (Exhibit "R"). Both Mr. Prockup and Mr. May

Oscar Bradley, Donald J. Prockup, Sr. executed a release in favor of ACC and Velma Murphy in exchange for ACC's payment of Murphy's policy limits of \$20,000. INIC and the Estate of Oscar Bradley were specifically excluded from said "release". R3-153 (P.2). At the time Donald J. Prockup, Sr. executed the "release", he also executed a "loan agreement" pursuant to which ACC "loaned" Donald J. Prockup, Sr. \$280,000. R3-153 (P.2). Repayment of the aforementioned loan was directly contingent on the success or failure of a "bad faith" case against INIC. R3-153 (P.2).

received notice of Ms. Johnson's and Mr. Bradley's petition for discharge. R2-85 (See Exhibit "C" to Exhibit "R"). As part of their plan for distribution, Ms. Johnson and Mr. Bradley proposed to pay Donald J. Prockup, as personal representative of the Estate of Inez Prockup, deceased, a total of \$2,648.44 in association with Mr. Prockup's statement of claim. R2-85 (See Exhibit "B" to Exhibit "R"). Neither Mr. Prockup nor Mr. May filed any objection to the petition for discharge or to the proposed distribution plan.

On January 20, 1995, an order requiring filing of an order of discharge was entered and a copy of said order was forwarded to Lefferts L. Mabie, III, Mr. Prockup's attorney, on January 29, 1995. R2-85 (Exhibit "T"). On June 23, 1995, almost six months after Mr. Prockup's attorney was notified of the order requiring filing of the order of discharge, an order discharging Ms. Johnson and Mr. Bradley as co-personal representatives of the Estate of Oscar Bradley was entered upon a finding that the estate had been properly distributed and that the claims of creditors had been paid or otherwise disposed of. R2-85 (Exhibit

"U"). At no time did Mr. Prockup or Mr. May voice any objection to the closing of the Bradley estate or to the discharge of the co-personal representatives. At no time did Mr.

Prockup or Mr. May request that the Bradley estate be re-opened.

After entry of judgment against Murphy and the Estate of Oscar Bradley in the personal injury/wrongful death action and after Donald J. Prockup, Sr.'s execution of the "release" and "loan agreement" involving Murphy and ACC, May filed an action for "bad faith" against INIC in Escambia County Circuit Court. R1-1. In filing his "bad faith" action against INIC, May was represented by Lefferts L. Mabie, III, the same attorney who represented Prockup in the underlying suit against May for personal injury/wrongful death. R1-1. Subsequently, INIC removed May's "bad faith" action to the United States District Court for the Northern District of Florida based on diversity of citizenship. R1-1. In his complaint against INIC, May alleged that INIC failed to act in the best interests of Bradley's estate in investigating and attempting to settle

Donald J. Prockup, Sr.'s claims against the Bradley estate. R1-1 (Complaint ¶¶9-13).

In its second amended answer, INIC raised several affirmative defenses, including an affirmative defense based upon the fact that May could not maintain his "bad faith" action against INIC because the Bradley estate had no personal exposure to the Prockup excess judgment in excess of Bradley's policy limits. R2-79 (Exhibit "B", ¶25). In its second amended answer to May's complaint, INIC also filed a third party complaint against ACC alleging that ACC failed to act in good faith towards Bradley's estate and towards INIC in its handling of Prockup's claims. R2-79 (Exhibit "B", ¶¶ 26-49). ACC filed a motion to dismiss INIC's third party complaint for failure to state a cause of action. R2-94.

After some initial discovery, INIC filed a motion for summary judgment alleging that it was entitled to judgment in its favor as a matter of law because the Bradley estate had no responsibility for the judgment entered in favor of Prockup in excess of Bradley's policy limits. R2-85. Specifically, INIC maintained that Prockup's failure to file a statement of

claim in the Bradley estate within the time limits provided by §§733.702 and 733.710, Florida Statutes, barred any claims for bad faith by May against INIC. R2-85.

In the event that INIC was successful in its motion for summary judgment, the Bradley estate would not be responsible for any part of Prockup's judgment in excess of Bradley's policy limits. Despite the foregoing, May, allegedly representing the interests of the Bradley estate, filed a memorandum in opposition to INIC's motion for summary judgment. R2-95. In his opposing memorandum, May contended that Mr. Prockup's counter-petition for administration of the Bradley estate satisfied the statement of claim requirements of the Florida Probate Code, that Prockup's alleged non-compliance with the statement of claim requirements of the Florida Probate Code had been waived either in the probate proceedings or in the personal injury/wrongful death action and that May was entitled to maintain his "bad faith" action against INIC even if the Bradley estate did not remain personally liable for the excess judgment. R2-95.

The United States District Court for the Northern District of Florida granted INIC's motion for summary judgment and entered final judgment in favor of INIC. R3-153, 154. In granting INIC's motion for summary judgment, the District Court determined that Prockup had failed to timely file a statement of claim in the Bradley estate under the Florida Probate Code and that Prockup's counter petition for administration of Bradley's estate did not constitute a valid statement of claim. R3-153-5, 9. The District Court also determined that §733.710, Florida Statutes, was a statute of repose under Florida law which could not be waived by a failure to raise the statutory bar as an affirmative defense in the underlying action. R3-153-11. Finally, the District Court determined that, even assuming the statutory bar of §733.710, Florida Statutes, was waived if not raised as an affirmative defense, May could still not maintain the "bad faith" action against INIC because the estate had been settled, final distribution had been made, the co-personal representatives had been discharged and, therefore, Bradley's estate was no longer liable on the excess judgment. R3-153-11. ACC's motion to dismiss was denied as

moot based on the granting of INIC's motion for summary judgment. R3-153-14.

SUMMARY OF ARGUMENT

The District Court did not commit reversible error in determining that May is not entitled to maintain a "bad faith" action against INIC because the estate has no personal exposure in excess of Mr. Bradley's contractual liability policy limits with INIC. Under Florida law and the facts of this case, Prockup's claims against the Estate of Oscar Bradley in excess of Mr. Bradley's liability limits are barred, as a matter of law, despite May's arguments to the contrary. Mr. Prockup failed to file a claim against the Estate of Oscar Bradley within two years of Mr. Bradley's death which absolutely bars any claim against the estate in excess of Mr. Bradley's liability policy limits. Mr. Prockup also failed to file a valid statement of claim within three months of the first publication of the notice of administration despite having actual notice of the administration of the Bradley estate and despite being intimately involved in said administration. May's contention that Prockup's petition for appointment of Administrator Ad Litem and Counter-Petition for Administration satisfy the statement of claim requirements is nothing

more than an attempt, after the fact, to provide an excuse for Mr. Prockup's failure to comply with the requirements of the Florida Probate Code. The most obvious evidence of the intentions of Mr. Prockup is the fact that he attempted to file a belated statement of claim in December of 1993.

May's contention that compliance with §§733.702 and 733.710, Florida Statutes, was waived by the co-personal representatives of the Bradley estate or by the fact that the statutory bars were not raised as affirmative defenses in the personal injury/wrongful death action are also without merit. Section 733.702, Florida Statutes, specifically provides that the personal representative cannot waive compliance with the statement of claim requirements by acknowledging the alleged claim by payment or otherwise. Additionally, §733.710, Florida Statutes, is clearly and unequivocally a statute of repose which is a jurisdictional bar that cannot be waived.

Finally, the decisions in Camp v. St. Paul Fire and Marine Ins. Co., 616 So.2d 12 (Fla. 1993) and Venn v. St. Paul Fire and Marine Ins. Co.,

99 F.3d 1058 (11th Cir. 1996), upon which May relies are completely inapplicable to the facts of the instant case. Unlike Camp, and Venn, there is no ongoing "estate" which remains responsible for the excess judgment. The estate has been distributed, the co-personal representatives have been discharged and the estate has been closed. Additionally, there is no policy language in the instant case which provides that INIC will remain liable under Bradley's policy even if the Bradley estate does not remain liable. Under the facts of this case and prevailing Florida law, the District Court's decision entering final summary judgment in favor of INIC should be affirmed.

ARGUMENT AND CITATIONS OF AUTHORITY

WHETHER THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY ENTERING SUMMARY JUDGMENT FOR INIC BASED ON THE DETERMINATION THAT MAY'S "BAD FAITH" ACTION TO RECOVER A JUDGMENT IN EXCESS OF THE INSURED'S POLICY LIMITS WAS BARRED BY THE JUDGMENT CREDITOR'S FAILURE TO FILE A LEGALLY SUFFICIENT CLAIM AGAINST THE INSURED'S ESTATE WITHIN THE TIME LIMITS SPECIFIED BY THE FLORIDA PROBATE CODE.

At common law, tort claims against a decedent died with the decedent and statutory provisions which go against this common law principal should be narrowly construed. Gates Learjet Corp. v. Moyer, 459 So.2d 1082, 1085 (Fla. 4th DCA 1984). The Florida Probate Code has abrogated the foregoing principal to some extent under very specific conditions. See §733, et seq., Florida Statutes. One of the most unassailable conditions for bringing claims against a decedent's estate

under the Florida Probate Code involves specific time limitations on the filing of statements of claim in the decedent's estate. See §§733.702(1) and 733.710(1), Florida Statutes. In 1960, the Florida Supreme Court discussed these so-called "statutes of non-claim" by stating:

Public policy requires that estates of decedents be speedily and finally determined. It is pursuant to this policy that statutes of non-claim have been enacted by the Legislature. It is not the purpose of the probate act to unreasonably restrict the rights of creditors, but the object of the act is to expedite and facilitate the settlement of estates in the interest of the public welfare and for the benefit of those interested in decedents' estates.

In re: Estate of Brown, 117 So.2d 478, 480 (Fla. 1960). Because non-claim statutes are intended to assist in the orderly and efficient administration of estates, courts may not create exemptions to their provisions where none exist in the plain language of the statute. Id. at 481 (citing In re: Woods Estate, 183 So. 10 (Fla. 1938)). Even in situations where the result of strict application of the non-claim statutes is harsh and where "equity and good conscience require that the [claimant] not lose his

claim", courts are not authorized to change the statute. Brown at 481. In the instant case, application of §§733.702 and 733.710, Florida Statutes, bars the claims of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, against the Estate of Oscar Bradley for any amount in excess of Mr. Bradley's bodily injury policy limits with INIC.

A. The District Court correctly determined that the judgment creditor, Prockup, failed to file a legally sufficient statement of claim against the insured, Bradley's estate within three months of first publication as required by §733.702, Florida Statutes, or within two years from Bradley's death as required by §733.710, Florida Statutes.

The failure of Donald J. Prockup, Sr. to file any statement of claim in the Estate of Oscar Bradley within two years of Mr. Bradley's death is an absolute bar to enforcement of any portion of Mr. Prockup's claim in excess of Mr. Bradley's liability insurance limits against the Estate of

Oscar Bradley. Section 733.710, Florida Statutes (1995)³ states, in pertinent part, that:

Limitations on claims against estates --

(1) Notwithstanding any other provision of the [probate] code, 2 years after the death of a person, neither the decedent's estate, the personal representative (if any), nor the beneficiaries shall be liable for any claim or cause of action against the decedent, whether or not letters of administration have been issued, except as provided in this section.

(2) This section shall not apply to a creditor who has filed a claim pursuant to s.733.702 within 2 years after the person's death, and whose claim has not been paid or otherwise disposed of pursuant to s.733.705.

Section 733.710 has been compared to a statute of repose that courts cannot avoid. Comerica Bank & Trust, F.S.B. v. SDI Operating Partners, L.P., 673 So.2d 163, 164 (Fla. 4th DCA 1996). Section 733.710 is a "self-executing absolute immunity" to claims not filed within two years of

³ The 1995 version of §733.710 is applicable to the case at bar as no amendments have been made to said statute since 1989. See History of §733.710, Florida Statute (1995).

the decedent's death. Comerica at 167. However, a tort claimant may recover up to the liability policy limits of a decedent even after the expiration of the time limit under §733.710(1), Florida Statutes. Pezzi v. Brown, 697 So.2d 883 (Fla. 4th DCA 1997). Under the facts of the instant case and the holding in Comerica, the Estate of Oscar Bradley is absolutely immune from the claims of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, in excess of Mr. Bradley's liability policy limits with INIC.

The claims of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, are also barred, as a matter of law, due to Mr. Prockup's failure to comply with the requirements of §733.702, Florida Statutes. Section 733.702, Florida Statutes (1995)⁴ states, in pertinent part, that:

⁴ The 1995 version of §733.702 is applicable to the case at bar as no amendments have been made to said statute since 1990. See

History of §733.702, Florida Statutes (1995).

(1) If not barred by s.733.710, no claim or demand against the decedent's estate that arose before the death of the decedent, including claims of the state and any of its subdivisions, whether due or not, direct or contingent, or liquidated or unliquidated; no claim for funeral or burial expenses; no claim for personal property in the possession of the personal representative; and **no claim for damages, including, but not limited to, an action founded on fraud or another wrongful act or omission of the decedent,** is binding on the estate, on the personal representative, or on any beneficiary **unless filed within the later of 3 months after the time of the first publication of the notice of administration** or, as to any creditor required to be served with a copy of the notice of administration, 30 days after the date of service of such copy of the notice on the creditor, **even though the personal representative has recognized the claim or demand by paying a part of it or interest on it or otherwise...**(emphasis added).

(2) **No cause of action heretofore or hereafter accruing, including, but not limited to, an action founded upon fraud or other wrongful act or omission, shall survive the death of the person against whom the claim may be made, whether an action is pending at the death of the person or not, unless the claim is filed within the time periods set forth in this part. (emphasis added).**

(3) Any claim not timely filed as provided in this section is barred **even though no objection to the claim is filed on the grounds of timeliness or**

otherwise unless the court extends the time in which the claim may be filed. Such an extension may be granted **only** upon grounds of fraud, estoppel, or insufficient notice of the claims period. No independent action or declaratory action may be brought upon a claim which was not timely filed unless such an extension has been granted...(emphasis added).

In the instant case, Mr. Prockup, individually and as personal representative of the Estate of Inez Prockup, failed to file a claim in Mr. Bradley's estate, despite having actual notice of the claim period and, therefore, his claims are barred by §733.702, Florida Statutes.

Mr. Prockup's failure to file any claim in Mr. Bradley's estate within the time period prescribed in §733.702(1), Florida Statutes, completely bars his claims, even though Mr. Prockup filed suit against May, as Administrator Ad Litem of Bradley's estate. Where a creditor has actual notice of administration of an estate and fails to file a statement of claim within the required time period under §733.702(1), Florida Statutes, his claim may not be maintained against the estate, its personal representative or its beneficiaries. Spohr v. Berryman, 589 So.2d 225 (Fla. 1991); In re: Estate of Danese, 641 So.2d 423, 425 (Fla. 1st DCA

1994); In re: Estate of Gleason, 631 So.2d 321 (Fla. 4th DCA 1994). In the instant case, Mr. Prockup initially had an Administrator Ad Litem appointed to represent Mr. Bradley's estate, was aware of and contested the appointment of co-personal representatives of Mr. Bradley's estate and requested and received the notice of administration of Mr. Bradley's estate. Even though notice of administration was first published on September 2, 1993, Mr. Prockup, as personal representative of the Estate of Inez Prockup, did not file a statement of claim in Mr. Bradley's estate until December 27, 1993 and never filed a statement of claim for his own personal injuries. Neither did Mr. Prockup move the probate court for an extension of time to file his claims under §733.702(3), Florida Statutes, and there is no record evidence to suggest fraud or the affirmative deception by the personal representative required to justify an extension of time based on estoppel. American & Foreign Ins. Co. v. Dimsom, 645 So.2d 45 (Fla. 4th DCA 1994). The fact that Mr. Prockup filed a civil action against Mr. Bradley's estate does not satisfy the requirement that his claims be filed in the probate court under §733.702(1), Florida

Statutes. Spohr v. Berryman, 589 So.2d 225, 229 (Fla. 1991); Jones v. Allen, 184 So. 651, 652 (Fla. 1938); Dimson supra at 47. In light of the foregoing, Mr. Prockup's claims against the Estate of Oscar Bradley in excess of Mr. Bradley's liability policy limits are absolutely barred.⁵

May's contention that Prockup's Petition for Appointment of Administrator Ad Litem and Counter-Petition for Administration constitute compliance with the requirements of §§733.702 and 733.710, Florida Statutes is completely without merit and should be disregarded. May contends that the following language from the Counter-Petition for Administration of the Estate of Oscar Bradley filed by Prockup constitutes a statement of claim under §§733.702 and 733.710, Florida Statutes:

Respondent is a creditor of the Estate of OSCAR THOMAS BRADLEY, by virtue of a wrongful death claim against the Estate of OSCAR THOMAS BRADLEY which arose out of an automobile

⁵ Section 733.702(4)(b) provides that "[n]othing in this section affects or prevents to the limits of casualty insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by the casualty insurance."

accident in Holmes County, Florida, on September 21, 1991, in which INEZ PROCKUP sustained fatal injuries.

Nowhere in the documents associated with the Estate of Oscar Bradley is the foregoing language designated as a statement of claim. There is absolutely no reference in the foregoing language to the amount of the alleged claim, whether the alleged claim was liquidated or not or whether the alleged claim was secured or not. See Florida Probate Rule 5.490. In dealing with the administration of an estate, all interested parties should be able to determine what claims have been filed against the estate in order to take steps to protect their interests. Spohr v. Berryman, 589 So.2d 225, 229 (Fla. 1991). The above quoted language, buried in a document including an answer, affirmative defenses, a counter-petition for administration and an objection to petition to determine homestead real property, completely fails to notify interested persons of the claim against the estate. As noted by the District Court, the language relied on by May from the counter petition "is not set out as a statement of claim, but rather as a reason favoring his counter petition

for administration". R-153-8. The foregoing reasoning is equally applicable to May's contention that Prockup's petition to appoint May as Administrator Ad Litem of Bradley's estate constitutes a statement of claim. The language from Prockup's Administrator Ad Litem petition which May relies on in his brief simply provided a "basis" for May's appointment as Administrator Ad Litem and did not satisfy the necessary requirements for a statement of claim under Florida law.

Section 733.703, Florida Statutes, clearly and unambiguously requires that a claimant file a written statement of claim. Florida Probate Rule 5.490 sets forth the contents to be included in a creditor's statement of claim. The filing of an actual statement of claim by Donald J. Prockup, Sr., as personal representative of the Estate of Inez Prockup, on December 27, 1993, after the expiration of the relevant time periods under §§733.702 and 733.710, Florida Statutes, clearly indicates that the language in the Counter-Petition for Administration and the Petition for Appointment of Administration Ad Litem which May relies on were not statements of claim and were not intended to be statements of claim. If

the language in Mr. Prockup's Counter-Petition for Administration and Petition for Appointment of Administrator Ad Litem constituted valid statements of claim, there would have been no reason for Mr. Prockup to file the untimely December 27, 1993 statement of claim. Clearly, Mr. Prockup recognized, although belatedly, that he had failed to file a valid statement of claim in the Bradley estate. At no time did Mr. Prockup request that the probate court extend the time for filing a statement of claim in Bradley's estate. May's argument that Mr. Prockup's Counter-Petition for Administration and Petition for Appointment of Administrator Ad Litem satisfy the requirements of §§733.702 and 733.710 is nothing more than a thinly veiled attempt to circumvent the dictates of the Florida Probate Code. Additionally, May's contention that all that §§733.702 and 733.710 are concerned with is ensuring that notice of the claim be provided in some manner is also completely without merit. Florida law is replete with cases where there was actual or record knowledge of a creditor's claim and the claim was still barred for the creditor's failure to comply with the statement of claim requirements. See Spohr supra at

227; In re: Estate of Bartkowiak, 645 So.2d 1082 (Fla. 3rd DCA 1994);
In re: Estate of Danese, 641 So.2d 423 (Fla. 1st DCA 1994); In re: Estate
of Gleason, 631 So.2d 321 (Fla. 4th DCA 1994).

Plaintiff's reliance on Notar v. State Farm Mutual Auto. Ins. Co.,
438 So.2d 531 (Fla. 2d DCA 1983) is also misplaced because Notar is
clearly distinguishable on its facts from the instant case. According to the
Court in Notar, the claimant was apparently unaware of the decedent's
death or that the estate of the decedent had been distributed without
formal administration. Notar at 532. In fact, it is clear that the Court's
holding in Notar was based entirely upon the lack of information
regarding the administration of the decedent's estate. The Court in Notar
stated that " . . . because no notice of administration of [the decedent's]
estate had been filed, Woodruff and Notar could have done no more to
preserve their rights against the estate." Id. at 533. By contrast, Donald
Prockup, Sr. clearly knew Oscar Bradley died in the same accident as
Inez Prockup. Donald Prockup, Sr. was also directly involved in every
aspect of the administration of Oscar Bradley's estate. Donald Prockup,

Sr., as personal representative of the Estate of Inez Prockup, filed a Counter-Petition for Administration of Oscar Bradley's estate, requested that he be copied with all documents associated with Oscar Bradley's estate, received Notice of Administration of Oscar Bradley's estate and even filed a belated statement of claim in Oscar Bradley's estate. Certainly, it cannot be said that Donald J. Prockup, Sr., as personal representative of the Estate of Inez Prockup, could have done no more to protect his rights against the estate than filing a counter-petition for administration. In fact, all Mr. Prockup had to do to protect his rights was to file a valid statement of claim in the Estate of Oscar Bradley within the time frames mandated by the Florida Probate Code which complied with the requirements of the Florida Probate Code. Based on Mr. Prockup's intimate knowledge of the administration of Oscar Bradley's Estate, the reasoning of the Court in Notar is completely inapplicable to the facts of the instant case.

B. The District Court correctly determined that the Bradley estate did not waive any objections to the sufficiency or timeliness of the Prockup's claims in either the probate proceeding or the wrongful death-personal injury action.

May's contention that Mr. Prockup's compliance with the requirements of §§733.702 and 733.710 was waived because no objection to the timeliness of the statement of claim was raised in the probate proceeding or in the wrongful death/personal injury action is wholly without merit and clearly reflects the confusing position that May has taken throughout this litigation. Section 733.702(3) specifically provides that an untimely claim against an estate is barred regardless of whether an objection on the grounds of timeliness or otherwise has been made unless "the court extends the time in which the claim can be filed." Interestingly, May's Initial Brief in this appeal relegates this statutory subsection, which directly refutes his waiver argument, to a mere footnote. (See May's Initial Brief at P.25). The court's discretion in extending the time for filing

a statement of claim can only be exercised on the grounds of fraud, estoppel or inadequate notice. §733.702(3). Mr. Prockup never requested that the probate court extend the time for filing a statement of claim and no such extension was ever ordered. Additionally, there is no record evidence to support a request for extension based on fraud, estoppel or inadequate notice of the claims period even if Mr. Prockup had requested an extension of time to file a statement of claim in the probate court. §733.702(1) also states that untimely claims are barred even if "the personal representative has recognized the claim or demand by paying a part of it or interest or otherwise." The clear and unambiguous language of §733.702 directly refutes May's contention that any action or inaction of the co-personal representatives of the Bradley estate acted as a waiver of the time requirements of §733.702.

May's contention that the failure to raise Mr. Prockup's non-compliance with the requirements of §§733.702 and 733.710 as affirmative defenses in the underlying personal injury/wrongful death action is also meritless. May was appointed as Administrator Ad Litem

of the Bradley estate on a petition by Mr. Prockup to create a defendant in the underlying personal injury/wrongful death action. May never took any steps to administer the Bradley estate and Mr. Prockup never took any steps to substitute Ms. Johnson and Mr. Bradley as defendants in the wrongful death/personal injury action. If the statutory bars set forth in §§733.702 and 733.710 were to be raised as affirmative defenses, May was the person to raise them. To accept May's argument on the waiver issue, this Court would have to determine that May is entitled to rely on his own failure to raise affirmative defenses in the underlying action as a basis for maintaining that said defenses have now been waived specifically because he failed to raise them. Not only would such a result be inequitable but it would promote collusion between wrongful death plaintiffs and persons they have appointed to represent an estate as a defendant in the wrongful death litigation. Not one of the cases cited by May in his Initial Brief holds that an insured can allege an affirmative defense waiver argument when it is the insured, himself, who failed to raise the affirmative defense. All of the cases cited by May involved a

third party contending that an affirmative defense had been waived by the opposing party. Additionally, the conduct of the litigation in the instant case was controlled by ACC as the primary insurer and not by INIC. Also, May is not an unsophisticated insured unfamiliar with the legal system. In fact, May was a licensed attorney in the State of Florida at the time the underlying litigation was pending. May's position in this matter is hard to comprehend considering the fact that if the Summary Judgment in favor of INIC is upheld, then the Estate of Oscar Bradley, which May allegedly represents, would be relieved of any and all responsibility for the claims of Donald J. Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup. In any event, May has provided this Court with no authority to support his position that he is permitted to rely on his own failure to raise an affirmative defense as an argument for waiver in a subsequent "bad faith" action and such a holding would create dangerous precedent for similar cases in the future.

May's contention that the requirements of §733.710(1), Florida Statutes, were waived by his own failure to raise it in the underlying

litigation is also refuted by the Fourth District Court of Appeals' holding in Comerica, supra. In Comerica, a suit for alleged environmental pollution of land was brought against several defendants in August, 1993. Comerica at 164. One of the defendants, a former land owner, had died on June 20, 1992. Id. First publication of the Notice of Administration of the estate was made on September 12, 1992. Id. On June 13, 1994, the plaintiff served an amended complaint on the personal representative of the deceased landowner. Id. A timely filed motion to dismiss was granted. Id. Thereafter, the personal representative advised the plaintiff that he should file a claim in the probate estate but that the probate estate would not be liable for any claims against the estate, the beneficiaries or the personal representative because the notice of claim had not been filed within two years of the decedent's death. Id. The plaintiff petitioned the court to enlarge the time for filing its claim, which the probate court granted. Id. On appeal, the Fourth District Court of Appeal reversed the order of the probate court and declared that the plaintiff's claim was time barred by §733.710, Florida Statutes, because it had not been filed within

two years after the death of the decedent. Id. at 168. In reaching this conclusion, the Fourth District stated:

[I]t seems inescapable that the legislative intent for Section 733.710 was to create a self-executing period of repose--without significant action by the state itself, it must be noted--for all claims after the lapse of the 2-year period. In its own terms, it takes precedence over all other provisions in the probate code. At the same time, the text is formulated to extinguish any liability that the estate, the beneficiaries or the PR might have had for any claim or cause of action against the decedent. Hence, rather than merely fixing a period of time in which to file claims, as Section 733.702 does, in reality it creates an immunity from liability arising from the lapse of the period stated. The only exception to section 733.710's immunity from liability is found within its own subsection (2), which exempts from the bar of subsection (1) claims that were actually filed within the 2-year period but as to which the PR has failed to make payment or filed an objection.⁶

Clearly, section 733.710 creates a self-executing, absolute immunity to claims filed for the first time, as

⁶ This exception does not apply because Prockup failed to file his claim in the probate court within two years from Bradley's date of death.

here, more than two years after the death of the person whose estate is undergoing probate. It does not depend on the PR timely objecting to a late claim, and the claimant cannot avoid it by showing, as he could for the nonclaim period under section 733.702, fraud or estoppel or insufficiency of notice. The absence of a provision authorizing enlargements of the repose period, together with the provision in section 733.702(5)⁷ negating any use of the enlargement provision to extend the repose period make it clear to us that the lapse of the 2-year period erects an absolute jurisdictional bar to late-filed claims that the probate judge lacks the power to ignore. It obviously represents a decision by the legislature that two years from the date of death is the outside limit to which a decedent's estate in Florida should be exposed by claims on the decedent's assets.

Id. at 165, 167.

In reaching the above stated conclusion after well reasoned analysis, the Fourth District found that the plain meaning of the statute required its interpretation as a statute of repose and not simply a statute of limitations.⁸ The Comerica Court quite correctly determined that the

⁷ Section 733.702(5), Florida Statutes, provides that "[n]othing in this section shall extend the limitations period set forth in §733.710".

⁸ The Fourth District, in Comerica, recognized conflict with the case

language used in §733.710, was clear and unambiguous and, therefore, the supposed legislative intent, relied on by the Third District Court of Appeal in Baptist Hospital of Miami v. Carter, 658 So.2d 560 (Fla. 3rd DCA 1995), is irrelevant to application of the plain meaning of the statute. Id. at 167-68. It makes no difference whether the personal representative objects to the late filing of the claims or whether a creditor can show fraud, estoppel or lack of adequate notice of the claims period. Comerica

of Baptist Hospital of Miami v. Carter, 658 So.2d 560 (Fla. 3rd DCA 1995). The Fourth District analyzed in depth the arguments set forth in Carter which led the Third District to reach a different conclusion. In analyzing the logic of the Third District, the Fourth District concluded that the underlying logic of the Carter case is flawed. Comerica at 167-68. Regardless of whether the logic of the Carter case is correct, the original plaintiff in this case, Prockup, failed to file his claim within the two year period set forth in section 733.710 and made no effort to request an enlargement of time for the purpose of filing that claim. Consequently, even the logic of the Carter case does not provide relief in this action.

at 167; See also In re: Estate of Bartkowiak, 645 So.2d 1082 (Fla. 3d DCA 1994) (holding judgment creditor's claim was barred by §733.710 even assuming that personal representative failed to ascertain that they were a creditor or to serve them with the notice of administration). Similarly, there is no requirement that §733.710 be raised as an affirmative defense. Comerica at 168. As Judge Farmer put it, "to repeat ourselves, there is no ambiguity in the words used in section 733.710. They say that, in spite of anything contained in any other statute, the estate is simply not liable on any claim filed more than two years after the decedent's death." Id. at 168.

The instant case and Comerica are essentially indistinguishable and, therefore, the claims of Donald J. Prockup, individually and as personal representative of the Estate of Inez Prockup, against the Estate of Oscar Bradley are barred by §733.710, Florida Statutes. In the instant case, it is undisputed that Oscar Bradley died as a result of injuries sustained in the accident of September 21, 1991. On the petition of Mr. Prockup, David May was appointed Administrator Ad Litem of the Estate

of Oscar Bradley on May 26, 1992. On May 15, 1992, Donald Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, filed a personal injury/wrongful death suit against the Estate of Oscar Bradley. Subsequently, on July 23, 1993, with Mr. Prockup's knowledge, two relatives of Mr. Bradley were appointed co-personal representatives and the first notice of administration was published on September 2, 1993. Despite his intimate knowledge of the administration of Mr. Bradley's estate, Donald Prockup, Sr., as personal representative of the Estate of Inez Prockup, did not file a statement of claim in Mr. Bradley's estate until December 27, 1993, more than two years after Mr. Bradley's death, and he never filed a statement of claim for his own individual injuries. Based upon Mr. Prockup's failure to comply with §733.710(1), Florida Statutes, the Estate of Oscar Bradley, its co-personal representatives and its beneficiaries are absolutely immune to the claim of Donald Prockup, Sr., individually and as personal representative of the Estate of Inez Prockup, in excess of Mr. Bradley's liability policy limits

of \$10,000 per person and \$20,000 per accident and no action or inaction by anyone can change this absolute jurisdictional bar.

C. The District Court correctly determined that no "bad faith" cause of action existed against INIC because the Bradley estate did not remain liable for any judgment in excess of Bradley's policy limits.

The Estate of Oscar Bradley does not have a bad faith cause of action against INIC in the instant case because the Estate of Oscar Bradley has no personal exposure to a judgment in excess of Mr. Bradley's policy limits. A settlement agreement which releases an insured from liability in excess of his liability policy limits extinguishes any claim for bad faith that an insured might have against his insurer because the agreement ensures that he will not be held personally liable for excess damages. Clement v. Prudential Property & Casualty Insurance Co., 790 F.2d 1545, 1548 (11th Cir. 1986); Fidelity and Casualty Company of New York v. Cope, 462 So.2d, 459, 460 (Fla. 1985); Kelly v. Williams, 411 So.2d 902, 904 (Fla. 5th DCA 1982). In the instant case, the Estate of

Oscar Bradley is not personally liable for any judgment in excess of his policy limits by operation of law rather than by a settlement agreement. Mr. Prockup's failure to comply with §§733.702(1) and 733.710 limit the liability of the Estate of Oscar Bradley to the limits of Mr. Bradley's liability policy with Illinois National, \$10,000 per person/\$20,000 per accident. See §733.702(4)(b); Pezzi v. Brown, 697 So.2d 883 (Fla. 4th DCA 1997). The extent of Mr. Bradley's liability insurance coverage cannot be construed to encompass any amount in excess of the contractual liability policy limits because to do so would be to ignore the fact that any excess judgment would be a judgment enforceable against the assets of the estate, which is not possible in the instant case under §§733.702 and 733.710, Florida Statutes.⁹

⁹ To interpret language limiting exposure to the limits of casualty insurance protection as referred to in §733.702(4)(b) and Pezzi to include damages in excess of the insured's policy limits would render the limiting language completely superfluous because the amount of exposure would be limited only by the amount of the judgment. In construing a statute the

May's reliance on Camp v. St. Paul Fire and Marine Ins. Co., 616 So.2d 12 (Fla. 1993) and Venn v. St. Paul Fire and Marine Ins. Co., 99 F.3d 1058 (11th Cir. 1996) is also misplaced. May contends that, even if the Estate of Oscar Bradley, its beneficiaries and its co-personal representatives are not personally liable for the excess judgment under the Florida Probate Code, May can still maintain the instant bad faith action against INIC. In his own Memorandum of Law in opposition to INIC's motion for summary judgment, May recognized that the Florida Supreme Court, in Camp, concluded that "[a]s the trustee of the bankruptcy estate, Mr. Venn acted properly in filing a bad faith action to recoup the excess judgment for which the estate remains liable." R2-95-13 (emphasis added). Obviously, the Court's holding in Camp was based upon the fact that the excess judgment remained a liability of the bankruptcy estate and would affect the assets available to the remaining creditors. By contrast, the Florida Probate Code provides that no one, not the estate, not the

court must assume the legislature used particular wording advisedly and for a purpose. Lee v. Gulf Oil Corp., 4 So.2d 868 (Fla. 1941).

beneficiaries and not the personal representative, will be liable for claims not filed within two years of the decedent's death. The decision of the Court in Camp also focused on the policy language indicating that coverage would be available if the insured filed bankruptcy. Camp at 15. May's attempt to twist the facts of this case to fit within the confines of the Camp decision by arguing that the Prockup judgment makes the estate "insolvent" is clearly an attempt to squeeze a square peg into a round hole. If you assume, as May does in his brief for this part of his argument, that the Bradley estate, the personal representatives and the beneficiaries are absolved from responsibility for the Prockup judgment because of Prockup's failure to file a timely statement of claim, it is impossible for the Bradley estate to be made insolvent by the Prockup judgment for which it is not liable. Additionally, there is no ongoing probate estate in this case. The estate has been closed, the assets have been distributed and the co-personal representatives have been discharged. There is no policy language in INIC's policy providing that it will be liable to an estate for a claim which is not filed within the time

frames provided by the Florida Probate Code or after the estate has been distributed and closed. Another important distinction between the instant case and Camp is the method by which the entities involved in said cases were relieved of liability. It is one thing to allow a bad faith action to be maintained when an insured voluntarily files bankruptcy to discharge his debts while it is quite another to allow a bad faith action to be maintained when a third party claimant, such as Mr. Prockup, has inexplicably failed to comply with the Florida Probate Code, thereby relieving everyone involved with the estate from any liability for the claims. In light of the foregoing, the Estate of Oscar Bradley may not, as a matter of law, maintain the instant bad faith action against INIC because no one associated with the estate remains responsible for the excess judgment involved in this case.

CONCLUSION

Based on the foregoing, the final summary judgment in favor of INIC should be affirmed and this case remanded for the imposition of taxable costs.

B. RICHARD YOUNG
Florida Bar No. 442682
MICHAEL T. BILL
Florida Bar No. 997722
Young and Associates, P.A.
P.O. Drawer 1070
Pensacola, Florida 32595-1070
(850) 432-2222
Attorney for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered to **Lefferts L. Mabie, III, Esquire**, Lefferts L. Mabie, P.A., 777 S. Harbour Island Boulevard, One Harbour Place, Suite 860, Tampa, Florida 33602; **Louis K. Rosenbloum, Esq.**, One Pensacola Plaza, Suite 212, 125 West Romana Street, Pensacola, Florida 32501, and to **David McGee, Esquire**, Beggs & Lane, Blount Building, Suite 700, Pensacola, Florida 32501, by U.S. mail this _____ day of _____, 1998.

B. RICHARD YOUNG
Florida Bar No. 442682
MICHAEL T. BILL
Florida Bar No. 997722
Young and Associates, P.A.
P.O. Drawer 1070
Pensacola, Florida 32595-1070
(850) 432-2222
Attorney for Defendant

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