

OA 7-31-88

IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,717

DISTRICT COURT OF APPEAL  
THIRD DISTRICT  
CASE NO. 86-1751  
CASE NO. 86-2492

JAMES MICHAEL WATSON, as  
Personal Representative of  
the Estate of Michael Corso,  
Deceased,

Petitioner,

vs.

FIRST FLORIDA LEASING, INC.,

Respondent.

FILED  
JUL 19 1988  
CLERK OF DISTRICT COURT  
By *m*

RESPONDENT'S BRIEF ON THE MERITS

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### SUMMARY OF ARGUMENT

The Third District Court of Appeal properly reversed the summary judgment entered by the general jurisdiction division of the Dade County Circuit Court and properly held that Florida Statute §733.705(3)(1985) was unconstitutional because it amounted to an unconstitutional incursion into the exclusive rule-making power of the supreme court.

Further, respondent properly raised and preserved the issue of the constitutionality of Florida Statute §733.705(3), by asserting same in its Motion for Rehearing filed in the probate court. In any event, petitioner waived the right to assert that the issue of the constitutionality of Florida Statute §733.705(3) (1985) was not preserved because the parties entered into a Stipulation requesting the Third District Court of Appeal to rule on the case on constitutional grounds so that the matter could be brought before this court.

This court should affirm the decision of the Third District Court of Appeal.

I

THE REQUIREMENT THAT A CREDITOR FILE A  
NOTICE OF INDEPENDENT ACTION PURSUANT TO  
§733.705(3) FLORIDA STATUTES IS  
UNCONSTITUTIONAL

The notice provision of Florida Statutes 733.705(3) is unconstitutional. In the probate case, respondent challenged the constitutionality of the requirement of filing the Notice of Independent Action (the "Notice"). It is a rule of practice and procedure, and this court so found in enacting Rule 5.065 of the Rules of Probate and Guardianship. The Florida Bar Re Amendments to Rules - Probate and Guardianship, 458 So.2d 1079, 1086 (Fla. 1984). This court has exclusive authority to promulgate rules of practice and procedure. Fla. Const., Art. V, §2(a) (1985); In re Clarification of Florida Rules of Practice and Procedure, 281 So.2d 204 (Fla. 1973). The requirement of filing the Notice is clearly procedural, and as a result, the statutory requirement is clearly unconstitutional.

The concurring opinion in Ricciardelli v. Faske, 505 So.2d 487 (Fla. 3rd DCA 1987), succinctly stated the rationale for finding the statute unconstitutional. Judge Pearson stated as follows:

I think the requirement that they file this notice (and the concomitant requirement to show good cause why they have not been able to, or cannot, file it within the allotted thirty days) is so manifestly procedural in nature that we should, without any hesitation, hold the requirement unconstitutional as being a legislative intrusion into powers vested

exclusively in the judiciary by Article V, Section 2(a) of the Florida Constitution. The notice does nothing more than (a) advise the court where the estate is being probated that suit has been filed against the estate, advice that is entirely redundant where, as here, the independent action has been filed in the same circuit court where the estate is being probated; and (b) advise other creditors that one of their number has instituted a suit which might impinge on their ultimate ability to collect from the estate. In either case, there is nothing substantive about this notice as, of course, the Supreme Court of Florida recognized when it promulgated Florida Rule of Probate and Guardianship Procedure 5.065 requiring the very same notice to be filed by the personal representative.

Id. at 488-89.

Z & O Realty Associates, Inc. v. Lakow, 519 So.2d 3 (Fla. 3rd DCA 1987) was correct in holding that §733.705(3), Florida Statutes (1985) is unconstitutional insofar as it conflicts with Florida Rule of Probate and Guardianship 5.065(a). In finding the statute unconstitutional, the court in Z & O Realty Associates, Inc., supra, stated as follows:

Accordingly, since the rules specifically address the notice requirement and mandate that the personal representative must provide notice of civil suit, the informational notice required by section 733.705, Florida Statutes (1985), as adopted by the supreme court, was superseded.

This is particularly true in a case where there is no plausible need for both the claimant and the personal representative to furnish the same informational notice to the creditors and beneficiaries of a decedent's or ward's estate. This

is even more evident when the claimant's alleged failure to provide the information causes it to forfeit its position as a creditor of the estate. We do not believe the supreme court intended such a redundant, much less, odious result.

Id. at 5.

The striking of the claim is an odious result. If the rationale of the petitioner is adopted, we would have the requirement that both the personal representative and the creditor file the notice but only the creditor can suffer a sanction for that failure.<sup>1</sup>

## II

### THE ISSUE OF THE CONSTITUTIONALITY OF FLORIDA STATUTE §733.705(3) (1985) WAS PROPERLY RAISED

This case was decided by the Third District Court of Appeals pursuant to a Stipulation, Appendix, A-1. It is clear from the Stipulation that the issue that parties sought to have determined was "the constitutionality of the statutory requirement that a creditor (to preserve its claim) must file with the probate court a copy of the notice of an independent action commenced by the creditor within the thirty days following the objection to the claim." Id. at A-2.<sup>2</sup>

<sup>1</sup>In re Estate of Victor Hammer, 511 So.2d 708, 711 (Fla. 4th DCA 1987), the Fourth District Court of Appeal found, by statutory construction, that Florida Statute §733.705(3)(1985) did not bar the claim of the creditor for failure to file the notice of independent action.

<sup>2</sup>Given the Stipulation, petitioner has waived his right to assert the arguments in pages 15 through 18 of his brief. Respondent will, however, briefly address those arguments.

In the case pending in the general jurisdiction division of the Circuit Court, Dade County, the viability of that action by respondent, First Florida Leasing, Inc. ("First Florida") was based on compliance with §733.705(3), Florida Statutes (1985). Prior to the granting of Final Summary Judgment for defendant (R.34), the probate division of the Circuit Court, Dade County, had entered on June 12, 1986, its Order Denying Motion for Extension of Time and Granting Motion to Strike Claim (R.6) and thereafter, its Order Denying Motion for Rehearing (R.7). In denying the Motion for Rehearing, the probate court rejected the claim of unconstitutionality of §733.705(3), Florida Statutes (1985) by appellant.<sup>3</sup> The issue of the constitutionality of the statute had been adjudicated and found adversely to respondent by the probate court. Thus, a judicial decision had been rendered by an appropriate court, the Circuit Court of Dade County, that the condition precedent for filing an independent action against the estate of the decedent was not complied with by First Florida when the Motion for Summary Judgment was ruled on by the trial court. First Florida was not required to raise the issue again with another judge of the Circuit Court of Dade County, as suggested by appellee.<sup>4</sup>

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<sup>3</sup>The claim by appellee that the Motion for Rehearing was improper is spurious. Rule 5.020 of the Florida Rules of Probate and Guardianship provides for a Motion for Rehearing, which was timely filed, and Rule 5.100 of the Florida Rules of Probate and Guardianship Procedure provides for the appeal from same.

<sup>4</sup>The propriety of the decision of the trial court is not at issue, and without citation of authority, petitioner seeks to create new standards for challenging the constitutionality of a statute. Indeed, if respondent had filed the Notice of Independent Action in accordance with the statute, there would be no necessity for

Petitioner also ignores his own non-compliance with Rule 5.065 of the Florida Rules of Probate and Guardianship Procedure. See Arky v. Harris, 504 So.2d 813, 814 (Fla. 3rd DCA (1987)). In such circumstances, it is inappropriate for respondent to have its claim stricken. Finally, this was not an action for declaratory relief under Chapter 86, Florida Statutes (1985). There is no requirement that the Attorney General be made a party to private litigation even where constitutionality of statute is questioned. §86.091, Florida Statutes (1985); Watson v. Claughton, 160 Fla. 217, 34 So.2d 243 (1948). The Attorney General has been given a full opportunity to be heard in this case and has not appeared. Appendix, A-3.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this court affirm the decision of the Third District Court of Appeal.<sup>5</sup>

Respectfully submitted,

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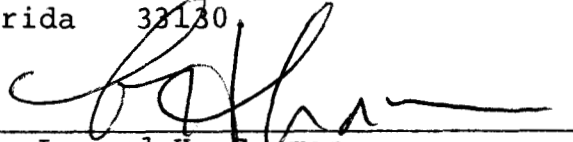
an appeal in the first instance.

<sup>5</sup>If the decision is not affirmed, the case should be remanded for further consideration to the Third District Court of Appeal on the issue of good cause. This issue was not reached by the Third

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 11th day of July, 1988, to Karen A. Gievers, Esquire, Gievers & Gonzalez, P.A., 44 West Flagler St., 750 Courthouse Tower, Miami, Florida 33130.

By



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District Court of Appeal in view of its holding that the statute was unconstitutional.