IN THE SUPREME COURT OF OHIO

JAMES A. WILSON, Appellee, v. WILLIAM LAWRENCE, Executor, Appellant.	)	**Case No. 2015-2081** **Case No. 2016-0180** On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 15-102585

CONSOLIDATED MERIT BRIEF OF APPELLANT WILLIAM LAWRENCE, EXECUTOR OF THE ESTATE OF JOSEPH T. GORMAN, IN JURISDICTIONAL APPEAL CASE NO. 2015-2081 AND CERTIFIED CONFLICT CASE NO. 2016-0180

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STATEMENT OF THE CASE AND FACTS

A. The Trial Court Proceedings.

On November 14, 2013, James Wilson ("Wilson" or "Appellee") filed a single-count complaint for breach of contract against William Lawrence in his capacity as the Executor of the Estate of Joseph T. Gorman (the "Estate" or "Appellant"). (R.1.)[1]

The Estate moved to dismiss the Complaint on the grounds that the Complaint failed to allege that Wilson had met the statutory prerequisites under Rev. Code § 2117.06(A)-(C) for filing a civil complaint against a decedent's estate– i.e., presentment of the plaintiff's claim in writing to the executor within six-months of Mr. Gorman's death. (R.6.) In response to the Estate's motion, Wilson's trial counsel explained, in a sworn affidavit, that he failed to send a written notice of his claim to Mr. Lawrence prior to the six month deadline because, he claimed, he could not determine who the executor of Mr. Gorman's estate was (R.8; Appellant's Supplement at Supp-1-Supp-2.) Viewing the Estate's defense as one better suited for summary judgment, the Trial Court denied the motion to dismiss. (R.14.) Thereafter, the Estate answered (R.15), and the parties engaged in discovery.

On September 8, 2014, the Estate moved for summary judgment on Wilson's Complaint on the grounds that the undisputed evidence demonstrated that Wilson failed to present his claim in writing to the executor of the Estate within the six-month deadline mandated

[1] The record entries are referred to herein as R.1, R.2, and so on to correspond with numbering set forth in the transcript of Docket and Journal Entries supplied to the Court of Appeals by the Court of Common Pleas on February 24, 2015. Those entries are reflected in the Court of Appeals' Index entry number 2, the "Original Papers" filed with the Court of Appeals. Entries in the Court of Appeals' Index are referred to herein as I.1, I.2, and so on.

by Rev. Code § 2117.06(A)-(C). (R.18.) Wilson opposed the motion, the Estate filed a reply, and on December 16, 2014, briefing closed. (R.24-26.)[2]

On January 27, 2015, the Trial Court granted summary judgment to the Estate, holding that Wilson failed to present his claim to the Estate in accordance with the procedure required by Ohio Rev. Code § 2117.06(A)-(C). (R.27.) In its decision, the Trial Court explained that Wilson's letter, "addressed and delivered to two individuals who were not in fact personal representatives of the decedent's estate was not legally sufficient as a matter of law under R.C. 2117.06." (R.27.) The Trial Court held that the "letter does not factually or legally amount to notice of a claim to the executor in writing." (*Id.*) Thereafter, Wilson appealed to the Eighth District Court of Appeals.

B. The Facts of the Case.

The relevant facts in this case are undisputed. Wilson seeks damages for the alleged breach of a contract that he entered into with the decedent, Joseph T. Gorman, for the sale of a 15% interest in Marine 1, LLC ("Marine") to Mr. Gorman. (R.1. ¶¶5-10; *id.* Ex. 1 at 3.)[3]

1. Wilson Enters into a Contract with Decedent Joseph T. Gorman for the Purchase of Stock in Marine, and Gorman Allegedly Fails to Pay as Required Under the Contract.

Wilson and Mr. Gorman executed the contract in September of 2011. (*See* Wilson Dep. 26:10-21; *see also id.* Ex. A at 1.) The contract called for payment in two phases: an initial payment of $100,000 at or near the time of the closing and quarterly payments of

[2] Wilson also sought summary judgment on his Complaint. (R.23.) The Trial Court denied his motion. (R.27.)

[3] Despite the fact that Marine has never "made money" and has made no "dividends" or "distributions . . . as a profit share" to any of its shareholders, Wilson convinced Mr. Gorman to purchase the interest in Marine for $300,000. (*See* Deposition of James Wilson ("Wilson Dep."), Ex. 1 to R.18, 24:7-25:1.) After selling those shares to Mr. Gorman, Wilson remains a 10% owner of Marine; as of the time of his deposition, Wilson had received no dividends or distributions from Marine based on that ownership interest. (*Id.*)

$50,000 for two years thereafter. (*Id.* 27:3-17.) The first $100,000 was paid in full. (*Id.* 27:18-20.) Mr. Gorman did not make quarterly payments, however, "as specified in th[e] contract," and, according to Wilson, "sent monthly installments instead," thereby "breach[ing] the contract." (*Id.* 28:2-7.) Thus, according to Wilson, Mr. Gorman allegedly breached the contract in the first quarter of 2012 and remained in breach through the rest of that year. (*Id.* 29:16-24.)[4]

2. Mr. Gorman Dies, and Wilson and his Trial Counsel Contact Mr. Gorman's Former Secretary to Inquire About How to Present His Claim Against Mr. Gorman's Estate.

Mr. Gorman died on January 20, 2013. (R.1 ¶2; Wilson Dep. 34:21-35:4, 35:16-18.) Wilson learned of Mr. Gorman's death when Scott Snow, a mutual friend and another shareholder of Marine, called him "right after [Mr. Gorman] died." (Wilson Dep. 34:24-35:1.) "[W]ithin 90 days of Mr. Gorman's death," Wilson hired his trial counsel to assist him in presenting his breach of contract claim against the Estate. (*Id.* at 38:16-39:2.)

Wilson rarely communicated directly with Mr. Gorman regarding the amounts outstanding under the contract while Mr. Gorman was alive; instead, he communicated primarily with Patricia Clark, Gorman's personal secretary, via email. (*Id.* 32:22-34:1.)[5] Wilson claimed below that, after Gorman died, he contacted Ms. Clark, an administrative assistant with no legal training, to ask "what should be [his] next move" in light of Gorman's death. (*Id.* 49:6-50:11.)[6]

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[4] In spite of that alleged breach, Wilson took no action in 2012 to enforce the terms of the contract. (Wilson Dep. 64-74; *id.* Ex. G.)

[5] He also claimed that he communicated with Mr. Gorman's accountant regarding "setting up the payment" of the installments that Mr. Gorman made on the contract. (Wilson Dep. 34:2-9.) Wilson never identified any other individuals connected to Mr. Gorman with whom he claims to have communicated regarding the allegedly outstanding debt under the contract.

[6] Although Wilson's alleged conversations with Ms. Clark do not excuse his failure to present his claim, Wilson produced no evidence that any of those alleged conversations with Ms. Clark ever occurred. (Wilson Dep. 64:10-68:24.) During Ms. Clark's deposition, she could not recall those conversations with specificity. (Deposition of Patricia Clark ("Clark Dep."), Ex. 2 to R.18, 35:16-35:24.)

Wilson and his trial counsel claimed below that they relied on those alleged, post-death conversations with Mr. Gorman's secretary in attempting to present the claim against the Estate. In fact, trial counsel asked Ms. Clark during her deposition if she recalled a "telephone conversation . . . concerning who [trial counsel] should contact about presenting a claim" against the Estate. (Clark Dep. 35:16-22.) It was Wilson's position at the Trial Court level that by contacting Ms. Clark and asking for her legal advice, he and his trial counsel sufficiently investigated how to present his claim.

3. Wilson and his Trial Counsel Attempt to Present his Claim Against the Estate.

After allegedly conferring with Ms. Clark about how to present the claim, Wilson and trial counsel made three attempts to present the claim to the Estate:

(1) A letter, dated July 11, 2013, addressed ***only*** to Randall S. Myeroff, the Trustee of Mr. Gorman's Revocable Trust, and Patricia Clark;[7]

(2) A letter, dated October 30, 2013, addressed to the Clerk of Courts, copying Mr. William Lawrence, the executor of the Estate; and

(3) The Complaint, dated November 14, 2013.

(*See* Wilson Dep. 45:19-23 (the October 30, 2013 letter); *id.* 47:2-6 (the July 11, 2013 letter); *id*. 54:17-22 (the Complaint)).[8]

The strict statutory deadline to present a claim against Mr. Gorman's estate expired on July 20, 2013. Only the July 11, 2013 letter, sent on trial counsel's letterhead, predates that deadline. (Supp. 3.) As Wilson admitted directly to the Trial Court, Mr. Lawrence

[7] The July 11, 2013 letter is included in Appellant's Supplement at Supp-3.
[8] *See* Plaintiff's Answers to Defendant's Interrogatories at 7, Ex. 3 to R.18 (Answer Number 9, listing those three documents); *see also id.* at 12 (sworn verification by James Wilson); Wilson Dep. 42:8-44:1 (confirming that Mr. Wilson is not aware of other attempts to present his claim).

was appointed as executor of the Estate on July 1, 2013.[9] Wilson further admitted that the July 11, 2013 letter was "not sent to Mr. Lawrence [at his] address." (*See* Plaintiff's Responses to Defendant's Requests for Admission at 4 (Request for Admission 3), Ex. 4 to R.18.) Moreover, as Wilson admitted at his deposition, "the name William Lawrence appear[s no]where on th[e] letter." (Wilson Dep. 48:11-13, *see also* Supp. 3.)

Throughout the course of this lawsuit, Wilson has acknowledged that he was required by law to send his claim to the executor of the Estate in writing.[10] He has sought to excuse his admitted failure to do so by claiming that he did not know the identity of the executor prior to sending the July 11, 2013 letter to Mr. Myeroff and Ms. Clark, neither of whom has ever been appointed executor. Mr. Myeroff, after receiving the July 11, 2013 letter, forwarded it to Mr. Lawrence. (Deposition of Randall S. Myeroff ("Myeroff Dep."), Ex. 5 to R.18, 10:14-11:8.)

Wilson and his trial counsel admitted that the reason the July 11, 2013 letter was not sent directly to Mr. Lawrence was that they "were unaware of the name or address of the Executor, or whether Mr. Gorman's Estate had been opened . . . ." (*See* R.8, Affidavit of Robert DeMarco at ¶3, Supp. 1.) Reasonable diligence, however, could have helped them figure it out. Indeed, at least five other claimants were able to identify the executor timely and present their claims against the Estate. (*See* Docket from Cuyahoga County Probate Case No. 2013-EST-190270 as of Sept. 8, 2014, Ex. 6 to R.18.)

C. <u>The Eighth District Court of Appeals's Erroneous Decision.</u>

On February 6, 2015, Wilson appealed to the Eighth District Court of Appeals, claiming that the Trial Court incorrectly granted summary judgment to the Estate. (I.1.) Wilson

[9] *See* Plaintiff's Opposition to the Estate's Motion to Dismiss, R.8 at 4.

[10] For example, in his Opposition to the Estate's Motion to Dismiss, Wilson claimed that he "chose § 2117.06 (A)(1)(a)" in trying to present his claim against the Estate and argued that the July 11, 2013 letter met the requirement that the claim be sent "to the executor or administrator" of the Estate "in a writing." *See* R.8 at 4.

argued on appeal that he properly presented his claim because he wrote a letter with the salutation "to the executor" on it that was, by happenstance, later received by the executor within six months of Mr. Gorman's death.[11] (*See* I.3 at ii.) The Estate argued, as it does here, that the Trial Court's decision should have been affirmed because Wilson failed to meet his burden of presentment under Ohio Rev. Code 2117.06 when he failed to ascertain who or where the executor was and failed to deliver his claim to the executor prior to the six month deadline in Rev. Code § 2117.06(B)-(C). (*See* I.6 at 5-15.) Instead, the Estate explained, Wilson sent his letter to two individuals who were not representatives of the Estate and relied on them to present his claim for him. (*Id.*)

On November 12, 2015, a panel majority of the Eighth District reversed the Trial Court's order granting summary judgment to the Estate. (I.8; Appendix at Appx-30.) The majority held that a plaintiff with a claim against a decedent's estate can meet his burden under Ohio Rev. Code § 2117.06(A)(1)(a) to "present" his claim "[t]o the executor" when he delivers his claim only to third parties, never appointed as executors, who then forward the claim to the court-appointed executor. (*See id.* at ¶23 (applying a "***softened*** standard to the presentment requirements" of Ohio Rev. Code § 2117.06) (emphasis added).) Judge Boyle dissented, explaining that the majority's holding "essentially shifts the standard from presentment to one of knowledge" and that such a "shift contravenes well-established precedent." (*Id.* at ¶32.)

[11] The salutation on the July 11, 2013 letter, addressed to and mailed only to Ms. Clark and Mr. Myeroff, listed the unnamed "executor" along with several other categories of persons, including the putative and apparently unknown "heirs, administrators, or executors of the Estate of; and the trustees or beneficiaries of the trust of; or any other creditors or interested persons in the proceeds of the Trust and/or Estate of Joseph T. Gorman, deceased." (*See* R.22, Ex.3, Supp. 3.) That letter was not a case of a mistaken address but a total failure to ascertain the identify of any of the parties involved.

On December 28, 2015, the Estate timely filed a Notice of Appeal and Memorandum in Support of Jurisdiction with this Court in accordance with S.Ct. Prac. R. 7.01(A)(6), which resulted in Case No. 2015-2081. (Appx-1.) On January 26, 2016, Wilson filed a memorandum opposing jurisdiction. On March 23, 2016, this Court accepted jurisdiction and ordered briefing on the proposition of law set forth in the Estate's memorandum.

D. The Certified Conflict.

On November 23, 2015, the Estate moved to certify a conflict between the Eighth District's decision and the Fourth District Court of Appeals case *Jackson v. Stevens*, 4th Dist. Case No. 1231, 1980 WL 350961. (I.9.) Wilson opposed the Estate's motion, and the Estate replied. (I.10-11.)

On January 28, 2016, the Eight District granted the Estate's motion to certify a conflict, certifying the following question for review to this Court:

> Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements for a claim against an estate. If so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time-frame under R.C. 2117.06.

(Appx-45.) On February 5, 2016, the Estate timely provided notice to this Court that the Eighth District had certified a conflict between its decision and the decision in *Jackson v. Stevens*, resulting in Case No. 2016-0180. (Appx-4.)

On March 23, 2016, this Court accepted the certified question for review and consolidated the certified question case with the Estate's jurisdictional appeal.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW AND ARGUMENT REGARDING CERTIFIED QUESTION OF LAW

Proposition Of Law No. 1: A plaintiff with a claim against a decedent's estate can meet his burden under Ohio Rev. Code § 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" only when he identifies the executor and delivers his claim to him; similarly, a claimant cannot meet his burden when he delivers his claim only to third parties, never appointed as executors, who then forward the claim to the court-appointed executor.

Certified Question of Law: Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements for a claim against an estate. If so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time-frame under R.C. 2117.06.

A. The Plain Text and Meaning of Ohio Rev. Code § 2117.06(A)(1)(a).

For decades, the Ohio Probate Code has spelled out exactly the means by which creditors may present their claims against decedents' estates.[12] Ohio Rev. Code § 2117.06(A) sets out specific "manners" by which creditors must present their claims against an estate:

> (A) ***All creditors having claims against an estate***, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, ***shall present their claims in one of the following manners***:
>
> (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:
>
> (a) To the executor or administrator in a writing;
>
> (b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

[12] The Proposition of Law in the jurisdictional appeal and the Certified Question of Law address the same issue – i.e., whether the statute is a substantial compliance statute or one that sets out specific means of presentment. Therefore, this merit brief presents a single argument section, rather than two repetitive and overlapping arguments.

> (c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.
>
> (2) If the final account or certificate of termination has been filed, in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim.

Ohio Rev. Code § 2117.06(A) (emphasis added).

1. The Word "Shall" Imposes a Mandatory Obligation.

The use of the word "shall" in Ohio Rev. Code § 2117.06(A), as in any statute, creates a ***mandatory obligation***. *See Dorrian v. Scioto Conservancy Dist*., 27 Ohio St.2d 102 (1971), syl. ¶1 ("In statutory construction, . . . the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal legislative intent that [it] receive a construction other than [its] ordinary usage."); *see also State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St. 3d 7, 2014–Ohio–2354, ¶27–28 (applying the mandatory meaning of "shall" to R.C. 2953.32 and 2953.52). Thus, Ohio Rev. Code 2117.06(A) ***mandates*** that creditors present their claims using one of the three "manners" listed in subsections (1)(a) through (1)(c).

The repeated use of "shall" in subsections (B) and (C) of Ohio Rev. Code § 2117.06 underscores that the legislature intended for Ohio Rev. Code § 2117.06(A) to impose a mandatory obligation on the claimant. Subsection (B) provides that "all claims ***shall be presented*** within six months after the death of the decedent . . . whether or not an executor is appointed during that six-month period." (emphasis added). Subsection (C) further mandates that any claim "not presented within six months after the death of the decedent ***shall be forever***

barred as to all parties." (emphasis added). The statute thus makes it "clear that the time within which claims are to be presented is ***mandatory***." *Soc'y Nat'l Bank v. Johnson*, 8th Dist. No. 72002, 1997 WL 781741, *2 (Ohio Ct. App. Dec. 18, 1997) (emphasis added). The word "shall," as used in subsection (A) to specify the "manners" for a creditor to present a claim, likewise imposes a mandatory obligation on creditors to present their putative claims in "one of the manners" prescribed by the statute.

2. Ohio Rev. Code § 2117.06(A)(1)(a) Establishes a Specific, Mandatory Means of Presentment, Not an Illustration of a Sufficient Means of Presentment.

Subsection (A)(1)(a) of Rev. Code 2117.06, the subsection at issue in this case, provides as follows:

> (A) All creditors having claims against an estate. . . ***shall present*** their claims ***in one of the following manners***:
>
> (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination . . .
>
> . . .
>
> (a) ***To the executor or administrator in a writing***.

Ohio Rev. Code 2117.06(A) (emphasis added). More succinctly, to comply with subsection (A)(1)(a), the provision mandates that a creditor "shall present" his claim "[t]o the executor." *Id.* The "creditors" – and not anyone else – "shall" present the claim, and they "shall" present it "to the executor" – and to no one else. Further, the statute requires that a creditor "shall present" his claim in "one of" the "manners" in subsections (1)(a)-(c) or, if applicable, the manner in

subsection (2), meaning that a would-be plaintiff must choose one of those manners and fulfill the express requirements of it.[13]

Moreover, the verb "present," as used in 2117.06(A)(1)(a), has a specific meaning, as a matter of plain English. "Present" means to "give something to someone" or, more apt here, to "formally deliver" something. NEW OXFORD AMERICAN DICTIONARY 1340 (2d ed. 2005); *see also* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1388 (4th ed. 2004) (defining the transitive verb "present" to mean "to introduce" or to "furnish" to someone). As used in 2117.06(A)(1)(a), the duty to "present" mandates that the claimant ***deliver*** the claim "***to the executor***," and not to someone else. That means that a would-be plaintiff can only meet his burden by finding the executor, addressing his claim to him, and delivering the claim to the executor in a writing. And it requires that the "creditors" present the claims themselves and does not permit creditors to shirk their duty of presentment onto third parties. That commonsense interpretation of the statute is consistent with decades of Ohio law. *See Beacon Mut. Indem. Co. v. Stalder*, 95 Ohio App. 441, 446 (1954) (the "statute places the burden upon the claimant to present" – i.e., deliver – his claim to "the probate officer"); *id.* ("presentation [of a claim] must be to the administrator [or executor] in his capacity as an officer of the Probate Court."); *see also Reid v. Premier Health Care Servs. Inc.*, 2nd Dist. Montgomery No. 17437, 1999 WL 148191, *2 (it is a would-be plaintiff's duty "to ascertain who and where the executor" is).

[13] Even Appellee Wilson appears to agree that a claimant must "choose" one of the three methods of presentment, given that he claimed in a brief to the Trial Court that he "chose §2117.06 (A)(1)(a)" in trying to present his claim against the Estate. *See* R.8 at 4.

3. Subsections Rev. Code § 2117.06(A)(1)(c) and Rev. Code § 2117.06(A)(2) Illustrate the Mandatory – and Specific – Nature of Rev. Code § 2117.06(A)(1)(a).

Reading Rev. Code § 2117.06(A)(1)(a) together with other subsections of Rev. Code § 2117.06(A) highlights the mandatory nature of Section 2117.06(A)(1)(a)'s presentment mechanism. As a matter of Ohio law on statutory construction, the three provisions must be read together, harmoniously and in a manner that gives effect to each provision:

> First, all statutes which relate to the same general subject matter must be read in pari materia. And, in reading such statutes in pari materia, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously.

Johnson's Markets, Inc. v. New Carlisle Dept. of Health, 58 Ohio St.3d 28, 35, 567 N.E.2d 101 (1991) (internal citations omitted.).

Comparing subsection 2117.06(A)(1)(a) with subsection 2117.06(A)(1)(c) illustrates the key distinction between the duty imposed on creditors in the statute – i.e., to "present" the claim – and the ultimate result envisioned by the statute – i.e., receipt. Section 2117.06(A)(1)(c) permits a claim to proceed against an estate where it is (1) "sent by ordinary mail," (2) "addressed ***to the decedent***" and (3) "***actually received*** by the executor or administrator . . . ." (emphasis added). Under that subsection, the claim must be sent to the decedent's address and "actually received" by the executor. Subsection (A)(1)(a), by contrast, contemplates actual receipt by the executor but specifically requires that the claim be presented "to the executor," not "to the decedent" or "to someone who forwards it on to the executor." Taking those two sections together, there are only two addressees to which a claimant may address his claim pursuant to subsection (A)(1) – either the decedent himself or the executor

himself. The statute does not permit the claim to be addressed to anyone just so long as it is "actually received" by the executor. Instead, only a claim addressed to the decedent or the executor will pass muster.

Subsection 2117.06(A)(2) further underscores the importance of the addressee in the probate code's presentment scheme. That subsection governs presentment "after the final account or certificate of termination has been filed" in a probate estate. Rev. Code § 2117.06(A)(2). At that point, when the executor is no longer in control of the estate, the probate code requires presentment "in a writing ***to those distributees of the decedent's estate*** who may share liability for the payment of the claim." Ohio Rev. Code § 2117.06(A)(2). Thus, the probate code identifies the ***exact addressees*** to whom a claimant may present his claim both before and after a final account has been rendered. If the statute merely required notice to someone who might forward it on to the relevant individuals, the legislature would not have distinguished between presentment "to the executor" while the estate is open and presentment "to the distributees" after the estate is closed.

Thus, the several subsections of Rev. Code § 2117.06(A) must be interpreted to provide specific mechanisms for presentment, not a list of potentially sufficient means of presentment. To interpret the statute otherwise would fail "to give the proper force and effect to each and all" of the statute's subdivisions, in direct contradiction to Ohio law on statutory construction. *See Johnson's Markets,* 58 Ohio St.3d at 35.

4. Ohio Civ. R. 4.1 is the Civil Rule Analogue to the Ohio Probate Code's Ohio Rev. Code 2117.06(A).

As demonstrated above, Ohio Rev. Code 2117.06(A)(1) provides a set of specific and mandatory methods by which a claimant must present his claim against a decedent's estate. While one of the purposes of those required methods is to ensure that an estate's executor does

actually receive a claim, the methods are nonetheless mandatory. Presentment under the statute can only be achieved if the claimant fulfills the statute's explicit requirements. That interpretation of the statute finds firm support in underlying purpose that Ohio Rev. Code 2117.06(A) serves in the structure of the Ohio probate code. The purpose of the statute is to provide the exact means that a claimant may use to achieve presentment and obtain an opportunity to recover on his claim.

A useful analogy is Ohio Civ. R. 4.1. That Rule outlines "[a]ll methods of service within [Ohio]." *See* Ohio Civ. R. 4.1(A)(-C) ("desrib[ing] all methods of service").[14] Likewise, Ohio Rev. Code 2117.06(A) outlines all methods of effective service of a creditor's claim against a decedent's estate. Further, just as actual receipt of the claim is the ultimate result envisioned by Ohio Rev. Code 2117.06(A)(1)(a), actual receipt of a complaint by a defendant is the outcome contemplated by Ohio Civ. R. 4.1. Nonetheless, actual receipt of a claim, standing alone, is not enough to satisfy the requirements of Ohio Civ. R. 4.1. It is equally insufficient to satisfy Ohio Rev. Code 2117.06(A).

Ohio Courts have held consistently that where a plaintiff fails to complete service of process in accordance with one of the methods provided in Ohio Civ. R. 4.1, it simply "does not matter that a party has actual knowledge of the lawsuit." *Bell v. Midwestern Educ. Serv., Inc.*, 89 Ohio App. 3d 193, 203 (1993); *Lazarevic v. John R. Jergensen Co*., 2nd Dist. No. 99-CA-7, 1999 WL 812382, at *1 (Ohio Ct. App. Sept. 24, 1999) ("actual knowledge of the lawsuit is immaterial"). Rather, in Ohio, "service must be made in accordance with the Ohio Rules of Civil Procedure. If there is not compliance with the[] rules, then service is improper." *Craig v.*

[14] Civ. R. 4.4 provides an additional means of service in Ohio, service by publication, which is available only when a plaintiff demonstrates that the methods outlined in Rule 4.1 cannot be achieved.

Reynolds, 10th Dist. Case No. 14AP–125, 2014-Ohio-3254, ¶17, *appeal not allowed*, 141 Ohio St. 3d 1474, *reconsideration denied*, 142 Ohio St. 3d 1425; *see also Miley v. STS Sys., Inc.*, 153 Ohio App.3d 752, 2003–Ohio–4409, ¶20 (10th Dist. Ct. App.) ("actual knowledge of" a "lawsuit is irrelevant" if a plaintiff fails "to comply with the civil rules governing service of process"). Where service is improper, even where the defendant has actual knowledge of the lawsuit, the plaintiff's case cannot proceed.[15]

Ohio Rev. Code § 2117.06(A) should be interpreted the same way.[16] Just as Rule 4.1 provides the means for a plaintiff to serve a complaint against a defendant and begin a lawsuit, Ohio Rev. Code § 2117.06(A) establishes the means for a creditor to present a claim against a decedent's estate and begin the process to recover on that claim. Indeed, the upshot of service of process under Rule 4.1 and the presentment of a claim under Ohio Rev. Code § 2117.06(A) is the same: to give notice, in accordance with the strict requirements of Ohio law, regarding the pendency of a claim. A plaintiff's failure of service of process following the Ohio

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[15] The federal courts interpreting analogous Fed. R. Civ. P. 4 are in accord with Ohio courts' interpretation of Ohio Rule 4.1. *See Leisure v. Ohio*, 12 F. App'x 320, 321 (6th Cir. 2001) (citing *Friedman v. Estate of Presser*, 929 F.2d 1151, 1155–56 (6th Cir.1991) (the "fact that a copy of the complaint was mailed to the defendants cannot substitute for proper service of process, as actual knowledge of a law suit will not cure defective service of process."); *see also Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 351 (1999) ("Unless a named defendant agrees to waive service, the summons continues to function as the sine qua non directing an individual or entity to participate in a civil action or forgo procedural or substantive rights.")

[16] In that regard, Ohio courts routinely hold that a fiduciary's "actual knowledge of the claim within six months of the decedent's death" cannot substitute the statutory presentment requirement and does not cure a creditor's failure to meet his duty to present his claim as prescribed by Rev. Code § 2117.06. *See, e.g., See In re Estate of Curry*, 10th Dist. No. 09AP-469, 2009 Ohio 6571, ¶¶12-14 (rejecting Plaintiff's contention that "because the eventual administrator had actual knowledge of the claim before the time for its presentation had expired, appellant's claim should be deemed valid"); *In re Estate of Greer*, 197 Ohio App.3d 542, 2011 Ohio 6721, ¶13 (1st Dist.) (executrix's actual knowledge of claims within that [six-month] period" did not "render[] claims timely."); *Reid v. Premier Health Care Servs., Inc.* 2nd Dist. No. 17437, 1999 WL 148191, *2 (Mar. 19, 1999) (claimant's "submission of the claim" was invalid despite the fact that the administrator had actual knowledge of claim before the time allowed for its presentation expired").

Civil Rules means that the putative complaint must be dismissed. The failure to comply with Ohio Rev. Code 2117.06(A)(1) means that a claim against a decedent's estate cannot proceed.

B. The Effect of the Eighth District's Decision on Ohio Rev. Code § 2117.06.

Ohio Rev. Code § 2117.06(A)(1)-(2) is a call to action to would-be claimants and delineates the specific means of presentment that creditors must utilize to effectively assert claims against a decedent's estate. Indeed, Ohio courts have held that the purpose of the presentment statute is "both to facilitate the ***prompt administration***" of decedents' "estates and ***to bar*** claimants who, through indifference, carelessness, or a dilatory attitude, fail to make an effort to file their claims on time" in accordance with the statute. *See Secrest v. Citizens Natl. Bank of Norwalk*, 154 Ohio App. 3d 245, 2003-Ohio-4731, ¶17 (6th Dist. Ct. App.) (emphasis added) (citing, *inter alia*, *Prudential Ins. Co. v. Joyce Bldg. Realty Co.*, 143 Ohio St. 564, syl. ¶2 (1944)). With that purpose in mind, Ohio courts also have long held that when a would-be claimant has "a claim against an estate, it is incumbent upon him" to ascertain who and where the court-appointed executor is and present his claim to that executor. *See Winkle v. Trabert*, 174 Ohio St. 233, syl. ¶2 (1963); *Reid v. Premier Health Care Servs. Inc.*, 2d Dist. Montgomery No. 17437, 1999 WL 148191, *2.[17]

[17] In addition, as explained in the final section of this argument, the duty to find the executor comes with the concomitant duty to *seek the appointment* of a special administrator where there is a delay in opening a decedent's estate with the probate court. *See* Ohio Rev. Code 2113.15 (when "there is delay in granting letters testamentary or of administration," a creditor may petition the probate court to "appoint a special administrator"). Appellee Wilson and his trial counsel claimed at various times that they did not know if Mr. Gorman's estate had been opened when they sent his claim to two people they never thought were the executor. *See* R.8, Supp. 3, Affidavit of Robert DeMarco at ¶3 (explaining that, when he sent the July 11, 2013 letter, he was "unaware . . . Mr. Gorman's Estate had been opened . . . ."). If that was the case, as this Court held many decades ago, it was incumbent upon him to seek the appointment of a special administrator. *See Winkle v. Trabert*, 174 Ohio St. 233, syl. ¶2 (1963). Moreover, there is no mystery about that statutory remedy for Wilson's purported dilemma in this case. His attorney had only to turn a few pages in his Ohio Revised Code to find the answer.

Contrary to those longstanding principles, the Eight District held that the specific procedural requirement in Rev. Code § 2117.06(A)(1)(a) that a claimant "present" his claim "***to the executor*** in writing" can be fulfilled even when—through "indifference, carelessness, or a dilatory attitude"—a claimant fails to identify the executor and fails to deliver his claim to the executor as long as, through some happenstance, the executor ultimately receives notice of the claim prior to the six-month deadline. *See Wilson v. Lawrence*, 8th Dist. Ct. App. No. 102585, 2015 Ohio 4677, ¶32 (November 12, 2015) (Boyle, J., dissenting) (explaining that the panel majority's holding "essentially shifts the standard from presentment to one of knowledge" and that such a "shift contravenes well-established precedent"). The Eighth District's decision cannot be squared with either the purpose of Rev. Code § 2117.06(A)-(C) – i.e., to facilitate the prompt and efficient administration of estates – or the longstanding principle that it is incumbent upon the claimant to find the executor and deliver his claim to him.

The Court of Appeals held that a plaintiff with a claim against a decedent's estate can meet his burden under Ohio Rev. Code § 2117.06(A)(1)(a) to "present" his claim "[t]o the executor" when he delivers his claim only to third parties, never appointed as executors or legally associated with the executor, who then forward the claim to the court-appointed fiduciary. *See id.* at ¶23. In making that decision, the Eighth District reasoned that because the executor received notice of the claim, the claim was "presented" to the executor, despite the fact that the statute specifically requires that the claimant himself to "present" (i.e., deliver) the claim to the court-appointed fiduciary. Only one other Ohio Court of Appeals has addressed the legal question in this case – i.e., whether a claimant's failure to present a claim to a decedent's estate can be cured when a third party happens to forward notice of the claim to the executor. In *Jackson v. Stevens*, the Fourth District Court of Appeals held exactly the opposite of what the

Eighth District held here. Specifically, *Jackson* explained that "notice" of a claim is not logically or legally the same as presentment to the executor under the statute, and reiterated that the claimant has a statutory duty to deliver the claim, in writing, to the court-appointed executor that he cannot pass off even to a willing third party. *See* 4th Dist. No. 1231, 1980 WL 350961, *2-3 (Jan. 24, 1980).

The Eight District's new "notice" standard guts the procedural requirements of Ohio Rev. Code § 2117.06(A)(1)(a), all but eliminating the obligation "to present" the claim to a court-appointed executor. The "softened" standard applied by the Eighth District also runs directly afoul of well-established precedent holding that an executor's actual knowledge of a pending claim does not render it timely "presented" in writing to the executor. *See*, *e.g.*, *In re Estate of Greer*, 197 Ohio App.3d 542, 2011-Ohio-6721, ¶ 13 (1st Dist.); *In re Estate of Curry*, 10th Dist. Franklin No. 09AP-469, 2009-Ohio-6571, ¶ 12-15; *Reid*, 1999 WL 148191, *2; *Ziegler v. Curtis*, 13 Ohio App. 484, 487 (1st Dist. 1921).

The Eighth District's decision calls into question the continuing validity of nearly century-old precedents, repeatedly cited and relied upon by other Ohio Courts of Appeals, supporting the commonsense proposition that the statute's presentment requirement does indeed obligate a would-be plaintiff to ascertain who and where the court-appointed executor is and to deliver his claim to him in writing. Moreover, the Eighth District's decision all but eliminates the specific, mandatory procedure set forth in Ohio Rev. Code § 2117.06(A)(1). Indeed, the Eighth District's holding renders pointless everything in Ohio Rev. Code § 2117.06(A)(1), save for the phrase "actually received by the executor." Had the legislature intended to create a presentment scheme that required nothing more than actual receipt, it could have saved a lot of ink by eliminating subsections (A)(1)(b) and (A)(1)(a), along with most of subsection (A)(1)(c).

That, however, is not what the legislature did when it drafted Ohio Rev. Code 2117.06(A)(1). This Court should reverse the Eighth District's decision and thereby give effect to all of the words in the statute, not just a few of them.

C. How the Eighth District Got it Wrong in this Case.

The specific facts of this case illustrate just how wrong the Eighth District's decision is. Appellee's July 11, 2013 letter failed to adhere to the strict requirement of Rev. Code § 2117.06(A)(1)(a) that he present his claim in writing "***to the executor***." As the Trial Court held, Appellee presented the letter – i.e., addressed and delivered it – to two individuals who have never been legal representatives of the Estate. Appellee never addressed or delivered the letter "to the executor" or any representative of the Estate because Appellee failed to ascertain the identity of the executor prior to the mandatory six-month deadline in Ohio Rev. Code § 2117.06(B). Appellee's letter, addressed to two individuals that he did not believe were the Court-appointed executor, was insufficient as a matter of law under Rev. Code § 2117.06 (A)(1)(a). Therefore, the Eighth District should have held that his claim was "forever barred." Rev. Code § 2117.06(C).

According to the Eighth District, however, the fact that the Estate's executor, received the claim prior to the six-month deadline should be deemed enough. That is, while Appellee failed to fulfill his statutory duty to identify and locate the executor, his failure was forgiven by the Eighth District because, through happenstance, his claim ended up on the executor's desk. In so holding, the Eighth District, rather than apply the plain letter of the Revised Code, ginned up a new "notice" standard that contravenes well-established precedent, erases most of the statute in question, and injects unnecessary uncertainty into the administration of estates.

The procedural requirements of the statute, which include obligating a plaintiff to deliver written notice of a claim to the executor, ensure that claims are stated with adequate specificity and that a putative plaintiff must, at least, overcome some initial hurdle in attempting to present her claim against an estate. The only logical result, when a claimant fails to determine who the executor is and fails to "present" his claim "in writing" to the executor, is to reject the claim. In *Jackson*, 1980 WL 350961, the Fourth District Court of Appeals did just that.

In that case, the court held that there was "no presented claim" where a plaintiff sent a written notice of his claim to a third party who then forwarded it to the executor within the six-month timeframe because Ohio law "specifically requires presentment ***to the executor***" and not to "a person other than the fiduciary." 1980 WL 350961 at *2 (emphasis added); *see also id.* at *3 (explaining that Ohio courts have "determined that the fact that the representative has knowledge of the claim is not sufficient to excuse failure to present"); *Ziegler*, 13 Ohio App. at 486 (holding that although an "executor may have knowledge of a claim, . . . if it is not presented for allowance or rejection, the estate may be closed without" accounting for the claim.).[18] On the legal issue here, *Jackson* is indistinguishable and undeniably the correct approach.

The "statute places the burden upon the claimant to present" – i.e., deliver – his claim to "the probate officer." *Beacon Mut. Indem. Co. v. Stalder*, 95 Ohio App. 441, 446

[18] Numerous decisions of the Ohio courts of appeals are in accord. *See In re Estate of Greer*, 2011 Ohio 6721 at ¶13 (executrix's actual knowledge of claims within that [six-month] period" did not "render[] claims timely."); *In re Estate of Curry*, 2009 Ohio 6571 at ¶¶12-14 (rejecting Plaintiff's contention that "because the eventual administrator had actual knowledge of the claim before the time for its presentation had expired, appellant's claim should be deemed valid"); *Reid*, 1999 WL 148191 at *2 (Mar. 19, 1999) (claimant's "submission of the claim" was invalid despite the fact that the administrator had actual knowledge of claim before the time allowed for its presentation expired"). Knowledge of the claim by the executor is not equivalent to valid presentment under the Ohio Probate Code.

(1954); *id.* at 446 ("presentation [of a claim] must be to the administrator [or executor] in his capacity as an officer of the Probate Court."). The statute does not allow a claimant to deliver his claim to anyone other than an executor or administrator, and it does not permit a claimant to shift his burden of presentment onto third parties. The Eighth District's interpretation of the statute, in direct contradiction of those principles, permits a plaintiff to send his claim to anyone in the hopes that the executor might later receive it.

Appellee Wilson and the Eighth District have made much of a few decisions in the Ohio Courts of Appeal and one from the Sixth Circuit Court of Appeals that held that, where a claimant presents his claim to a legal representative of the court-appointed fiduciary – e.g., the executor's attorney or his accountant – that amounts to a valid presentment under the statute. *See Wilson*, 2015 Ohio 4677, ¶17-22.[19] The key distinction between those cases and this one is that the would-be claimants in those cases fulfilled their duty to ascertain who and where the executor was prior to the deadline. In *Treon*, for example, the claimant addressed and delivered his claim to the attorney for the Estate; the claim was not merely "received" by the attorney or the executor, but specifically addressed and delivered to the attorney by the claimant himself. *See* 16 Ohio App.3d at 418. In *Fortelka*, the claimant filed a civil action against the estate, within the statutory deadline, and ***properly served*** it – i.e., delivered the claim – upon the estate's executor. *See* 176 Ohio St. at 479. In *Hart*, the plaintiff had communicated directly with an accountant "employ[ed] by . . . [the] administrator" of the estate. *See* 389 F.2d at 200. Thus, in *Hart*, *Fortelka*, and *Treon*, the claimants met their burden to ascertain the executor's identity and deliver their claims, in writing, to the executor or a legal representative that the executor

[19] The Court cited *Peoples Nat'l Bank v. Treon*, 16 Ohio App.3d 410 (2d Dist. 1984), *Fortelka v. Meifert*, 176 Ohio St.476 (1964), *Cannell v. Bulicek*, 8th Dist. Cuyahoga No. 41362, 1980 Ohio App LEXIS 12203, *2-3 (May 22, 1980), and *Hart v. Johnston*, 389 F.2d 239 (6th Cir. 1968).

appointed. By contrast, Wilson did not deliver his July 11, 2013 letter to any representative of the Estate. Instead, Wilson addressed and mailed his claim to two individuals who were not, in any way, representatives or agents of the Estate. Rather than find the executor and send his claim to an addressee that he believed was an agent for the executor, Wilson admittedly sent his letter to two individuals who he thought might be associated with the executor. That is a far cry from identifying the executor and delivering a claim to the attorney, or other legal representative, of the court-appointed executor.

Finally, the Eighth District's ruling simply does not jive with other sections of the Ohio Probate Code or the decisions of this Court interpreting those provisions. For example, the Eighth District's decision relies on the fact that Appellee allegedly could not find the executor prior to the six-month deadline, even though the Ohio Probate Code specifies the remedy for that purported dilemma. Under Rev. Code § 2113.15, when "there is delay in granting letters testamentary or of administration," a creditor may petition the probate court to "appoint a special administrator." Indeed, this Court, in *Winkle v. Trabert*, expressly held, in light of that provision, that "if no administrator has been appointed," the burden is on the claimant "to procure the appointment of an administrator against whom he can proceed." *See Winkle*, 174 Ohio St. 233, syl. ¶2. The statute does not allow a claimant to excuse his failure to comply with his statutory burden of presentment because he could not find an executor against whom he could proceed. To the contrary, the law makes it incumbent upon him to take action and secure the appointment of an administrator. Thus, the proper procedure, as expressly provided for under the Ohio Probate Code and reaffirmed in binding precedent of this Court, is for a plaintiff to petition the Probate Court to appoint an administrator. *See id.* The proper procedure is emphatically not to send a

claim to anyone previously associated with the decedent in the hopes that they might become the executor or forward the claim to the executor.

CONCLUSION

For all of the foregoing reasons, the decision of the Court of Appeals for the Eighth District should be reversed and the judgment of the Court of Common Pleas should be reinstated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Merit Brief of Appellant William Lawrence, Executor of the Estate of Joseph T. Gorman has been served by regular U.S. Mail, this 16th of May, 2016 upon the following:

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IN THE SUPREME COURT OF OHIO

JAMES A. WILSON, Appellee, v. WILLIAM LAWRENCE, Executor, Appellant.	)	**Case No. 2015-2081** **Case No. 2016-0180** On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 15-102585

APPENDIX

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IN THE SUPREME COURT OF OHIO

JAMES A. WILSON, Appellee, v. WILLIAM LAWRENCE, Executor, et al., Appellant.	)	**No. _____** On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 15-102585

NOTICE OF APPEAL
OF APPELLANT WILLIAM LAWRENCE, EXECUTOR
OF THE ESTATE OF JOSEPH T. GORMAN

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NOTICE OF APPEAL OF APPELLANT WILLIAM LAWRENCE, EXECUTOR OF THE ESTATE OF JOSEPH T. GORMAN

Appellant William Lawrence, Executor of the Estate of Joseph T. Gorman, hereby gives notice to the Supreme Court of Ohio of appeal from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 15-102585, entered in November 12, 2015.

On November 23, 2015, Appellant filed a motion to certify a conflict with the Court of Appeals. That motion remains pending.

This case is one of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail on this 28th day of December, 2015, to:

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One of the Attorneys for Appellant

IN THE SUPREME COURT OF OHIO

JAMES A. WILSON, Appellee, v. WILLIAM LAWRENCE, Executor, Appellant.	)	**No. _____** On Appeal from Cuyahoga County Court of Appeals, Eighth Appellate District Court of Appeals Case No. 15-102585

NOTICE OF CERTIFIED CONFLICT OF APPELLANT WILLIAM LAWRENCE, EXECUTOR OF THE ESTATE OF JOSEPH T. GORMAN

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NOTICE OF CERTIFIED CONFLICT

Defendant-appellant William Lawrence, Executor of the Estate of Joseph T. Gorman (the "Estate") hereby gives notice that the Eighth District Court of Appeals has certified pursuant to Article IV, Section 3(B)(4) of the Ohio Constitution that its decision in *Wilson v. Lawrence*, 8th Dist. Ct. App. No. 102585, 2015 Ohio 4677 (November 12, 2015) is in conflict with *Jackson v. Stevens*, 4th Dist. No. CA 1231, 1980 WL 350961, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980). A copy of the Eighth District's opinion below in *Wilson v. Lawrence* is attached hereto as Exhibit 2. A copy of the Fourth District's decision in *Jackson v. Stevens* is attached hereto as Exhibit 3.

The Court of Appeals certified the following question to this Court for review:

> Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements for a claim against an estate. If so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time-frame under R.C. 2117.06.

A copy of the Court of Appeals' January 28, 2016 Journal Entry, granting the Estate's motion to certify a conflict, is attached hereto as Exhibit 1.

Judge Mary J. Boyle concurred with the majority's decision to certify a conflict between *Wilson v. Lawrence* and *Jackson v. Stevens* but disagreed with the panel majority's "characterization of the stated conflict." Judge Boyle would have certified the following, modified question for review:

> Whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when he delivers his claim only to third parties, never appointed executors, who then forward the claim to the court-appointed executor.

(See Ex. 3 at 2). Thus, Judge Boyle fully agreed that a conflict exists and joined in the panel majority's decision to certify the conflict to this Court. She only disagreed with the way the majority framed the issue. The disagreement between majority and Judge Boyle regarding the question presented only underscores the need for this Court to review the conflicting rules of law at issue in this matter.

The Estate respectfully requests that this Court accept the certified question, either as presented by the panel majority or as presented by concurring Judge Boyle, for review. Under either the panel majority's or the dissent's formulation of the issue, the decisions in *Wilson v. Lawrence* and *Jackson v. Stevens* are irreconcilable. Therefore, this Court should accept, pursuant to S. Ct. Prac. R. 8.02(D), the question certified for review by the Court of Appeals.

Respectfully submitted,

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EXHIBIT 1

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Bryd, Clerk of Courts

JAMES A. WILSON

-vs-

Appellant

COA NO.	LOWER COURT NO.
102585	CV-13-817159

WILLIAM LAWRENCE, EXECUTOR, ET AL.

Appellee

COMMON PLEAS COURT

MOTION NO. 491184

Date 01/28/2016

Journal Entry

Motion by appellee, William Lawrence, Executor for the Estate of Joseph T. Gorman, to certify a conflict is granted. The court's decision in *Wilson v. Lawrence*, 8th Dist. Cuyahoga No. 102585, 2015-Ohio-4677 is in conflict with the following decision:

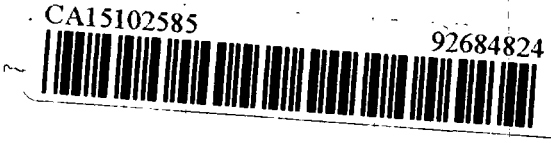
Jackson v. Stevens, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980).

The court hereby certifies the following issue to the Ohio Supreme Court pursuant to App.R. 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution:

> Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements of a claim against an estate. If so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time-frame under R.C. 2117.06.

Mary J. Boyle, J., concurring in part and dissenting in part:

I concur in the majority's decision to grant the motion to certify a conflict of appellee



William Lawrence, executor for the estate of Joseph T. Gorman, but I respectfully dissent from the majority's characterization of the stated conflict. Unlike the majority, I would certify the question as presented by appellee in his motion, which states the following:

> Whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when he delivers his claim only to third parties, never appointed as executors, who then forward the claim to the court-appointed executor.

ANITA LASTER MAYS, J., CONCURS.

MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART

KATHLEEN ANN KEOUGH
PRESIDING JUDGE

EXHIBIT 2

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102585

JAMES A. WILSON

PLAINTIFF-APPELLANT

vs.

WILLIAM LAWRENCE, EXECUTOR, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-817159

BEFORE: Keough, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: November 12, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, James A. Wilson ("Wilson"), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, William Lawrence, Executor for the Estate of Joseph T. Gorman. Wilson also appeals the trial court's decision denying his motion for summary judgment against the estate. For the reasons that follow, we reverse and remand.

{¶2} In September 2011, Wilson and Gorman entered into a contract where Gorman agreed to purchase a 15 percent interest in Marine 1, L.L.C. for $300,000. The contract provided for payment in two phases: an initial payment of $100,000 at or near the time of the closing and quarterly payments of $50,000 for two years thereafter. Thus, the full purchase price was due on September 2, 2012. The first $100,000 was paid in full. Gorman did not make quarterly payments as specified in the contract, but sent monthly installments instead, with the last payment made on December 27, 2012. A total of $113,000 was paid by Gorman under the contract prior to his death on January 20, 2013. A balance of $187,000 plus interest remained unpaid.

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the action pursuant to Civ.R. 12(B)(6), contending that the complaint was time-barred under R.C. 2117.06(B) and (C). The trial court denied the motion, concluding that statute of limitation challenges usually involve factual determinations; thus, outside the reach of Civ.R. 12(B)(6) review.

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{¶5} In January 2015, the trial court granted Lawrence's motion for summary judgment. In its written decision, the court stated,

> [Plaintiff] brings his action against the executor of an estate. The undisputed evidence is that [plaintiff] did not satisfy the requirements of R.C. 2117.06 for presenting claims against an estate within the applicable time period. Specifically, plaintiff's 7/11/13 letter giving notice of his claim against the decedent and his estate which letter was addressed and delivered to two individuals who were not in fact personal representatives of the decedent's estate was not legally sufficient as a matter of law under R.C. 2117.06. The letter does not factually or legally amount to notice of a claim to the executor in writing. Upon the undisputed material evidence, although that evidence is construed most strongly in favor of [plaintiff], a reasonable trier of fact could come to but one conclusion. Judgment is entered in favor of [defendant] Lawrence and against [plaintiff] as a matter of law upon all claims of [plaintiff's] complaint.

{¶6} Within this same ruling, the trial court denied Wilson's cross motion for summary judgment "since the undisputed evidence in the record shows [plaintiff] is not entitled to judgment in his favor."

{¶7} It is from these rulings that Wilson appeals, raising two assignments of error. In his first assignment of error, Wilson challenges the trial court's decision granting summary judgment in favor of Lawrence. In his second assignment of error, Wilson challenges the trial court's decision denying his motion for summary judgment.

{¶8} An appellate court reviews a decision granting summary judgment on a de novo basis. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is properly granted when (1) there is no genuine issue as to any material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made. Civ.R. 56(C); *State ex rel. Duganitz v. Ohio Adult Parole Auth.*, 77 Ohio St.3d 190, 191, 672 N.E.2d 654 (1996). Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), the nonmoving party must set forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449, 663 N.E.2d 639 (1996).

{¶9} Lawrence moved for summary judgment contending that Wilson did not comply with R.C. 2117.06; thus, his claim against the estate is forever barred.

{¶10} R.C. 2117.06 provides, in relevant part,

> A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:
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> (1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:
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{¶11} In this case, Gorman passed away on January 20, 2013. According to R.C. 2117.06, Wilson had six months to present his claim against Gorman's estate or by July 20, 2013. Lawrence was appointed as executor of Gorman's estate on July 1, 2013, which was prior to Wilson sending any formal writing making a claim against the estate. Therefore, Wilson needed to comply with R.C. 2117.06(A)(1) in presenting his claim.

{¶12} On July 11, 2013, Wilson sent a letter addressed to both Randall S. Myeroff, Trustee, and Pat Clark. Myeroff was an accountant with Cohen and Company that handled Gorman's account during the time Gorman and Wilson entered into the contract at issue. He was also the Successor Trustee for Gorman's Revocable Trust. Clark was Gorman's executive assistant who Wilson

communicated with about payment under the contract. While the letter was addressed to both Myeroff and Clark, the salutation of the letter was directed to "[t]o the heirs, administrators or executors of the Estate of; and the trustees or beneficiaries of the trust of; or any other creditors or interested persons in the proceeds of the Trust and/or Estate of Joseph T. Gorman, deceased * * *."

{¶13} Myeroff and Clark each testified at deposition that they received the letter. Myeroff testified that he received the letter on July 12, 2013, and forwarded the letter to Lawrence and the attorney for the estate, James A. Goldsmith "at or about the same time [he] received it * * * probably within a week." (Deposition Randall Myeroff, p. 10-11.) Clark testified that she forwarded the letter on to Attorney Goldsmith "on the day [she] received it." (Deposition Patricia Clark, p. 34.)

{¶14} In a letter dated September 24, 2013, to Wilson's attorney, Attorney Goldsmith rejected the claim Wilson made against the Gorman's Estate because "it was not presented to the Executor of the Estate in accordance with the Ohio Revised Code." The letter acknowledges that the attorney was aware that Wilson sent correspondence to Myeroff and Clark. "It has recently come to my attention that on behalf of your client, James Wilson, you mailed correspondence to the successor Trustee of the decedent's trust and the decedent's executive assistant regarding a claim Mr. Wilson allegedly has against the decedent's estate." The letter concludes that "[t]he mailing of this claim to the trustee of

the decedent's trust and to his executive assistant are insufficient to effectuate the filing of an appropriate claim."

{¶15} The issue before this court is whether Wilson "presented" his claim against Gorman's estate prior to the six-month deadline pursuant to R.C. 2117.06. Lawrence contends that Wilson did not "present" the letter to the executor as required under R.C. 2117.06 because Wilson did not send or address the letter directly to the executor. Rather, Lawrence characterizes Wilson's letter as a "shot in the dark" because the statutory deadline for presentment was rapidly approaching. Wilson contends the letter he sent was sufficient because it ultimately was presented the executor, or at the very least, the attorney for the estate prior to the six-month deadline.

{¶16} The presentation requirement of R.C. 2117.06 is mandatory. *Fortelka v. Meifert*, 176 Ohio St. 476, 480, 200 N.E.2d 318 (1964), citing *Beach v. Mizner*, 131 Ohio St. 481, 485, 3 N.E.2d 417 (1936); *In Prudential Ins. Co. of Am. v. Joyce Bldg. Realty Co.*, 143 Ohio St. 564, 56 N.E.2d 168 (1944). Under R.C. 2117.06, only a written presentment provided to the administrator during the statutory time period can constitute the presentment of a claim within the meaning of the statute. *Id.* Therefore, the presentment of a claim in writing to the administrator of an estate is a condition precedent to a creditor bringing suit on that claim. *Morgan v. City Natl. Bank & Trust Co.*, 4 Ohio App.2d 417, 418, 212 N.E.2d 822 (10th Dist.1964).

{¶17} However, in *Fortelka*, the Supreme Court considered whether the filing of an action without an allegation of prior presentment constitutes a valid presentment of the creditor's claim to the administrator and meets the requirements of R.C. 2117.06. *Id.* at the syllabus. The court recognized that the usual manner of presentment contemplated by the statute does not preclude any other efficient means of notifying the fiduciary of the existence of a claim against the estate. *Id.* at 480.

> "Since the law does not require a claimant or litigant to do a vain thing, the mandatory provisions of the statute requiring presentation in writing to the personal representative of claims against the estate he represents, are said to be quite uniformly softened and not enjoined when the application of such provisions would run contrary to reason and common sense."

Id., quoting 22 Ohio Jurisprudence (2d), 653, Section 293.

{¶18} Clearly, the presentment of the claim in *Fortelka* was not prior to filing suit, but the Ohio Supreme Court recognized that the manner of presentment is not to be strictly considered when considering the facts of the case.

{¶19} Recognizing this "softened" consideration, this court has determined that a claim is "presented" under R.C. 2117.06 when it is received by the executor of administrator or the attorney for the estate *Cannell v. Bulicek*, 8th Dist. Cuyahoga No. 41362, 1980 Ohio App. LEXIS 12203, *2-3 (May 22, 1980), citing *In re Estate of McCracken*, 9 Ohio Misc. 195, 224 N.E.2d 181 (P.C. 1967).

{¶20} The Second District reached the same conclusion in *Peoples Natl. Bank v. Treon*, 16 Ohio App.3d 410, 476 N.E.2d 372 (2d Dist.1984). The court held that a claim presented to the executor's attorney satisfies the statutory presentment requirements under R.C. 2117.06. *Id.* at syllabus; *see also In re Estate of Clark*, 11 Ohio Misc. 103, 229 N.E.2d 122 (C.P. 1967)(holding that receipt of written notice of claim by the attorney for the executor constitutes statutory presentment).

{¶21} Additionally, the Sixth Circuit considered whether the decedent's accountant could satisfy the presentment requirement under R.C. 2117.06 in *Hart v. Johnston*, 389 F.2d 239 (6th Cir.1968). In *Hart*, the court found that a question of fact existed regarding whether a claim was presented pursuant to R.C. 2117.06 when the accountant for decedent corresponded with the claimant and the accountant discussed claimant's debt with administrator.[2]

{¶22} Accordingly, Lawrence's strict interpretation of R.C. 2117.06 that the claim be directly presented to the administrator is rejected. As previously cited, courts, including this court, have upheld claims when the administrator was not the direct recipient of the claim. A claim may be deemed presented

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[2] *But see Jackson v. Stevens*, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980) (notice of claim sent to a third party, with copies of the claim letters sent and received by the executor prior to the statutory deadline was insufficient presentment under the statute). However, we find that *Jackson* is only persuasive authority and has not been relied on or cited as authority by any other reviewing court, including the Fourth District.

when other individuals connected with the estate receive the claim. Accordingly, the fact that Wilson's claim was forwarded to the estate attorney and the executor by a third party, who were connected with the decedent, is of no consequence; Wilson's "shot in the dark" possibly hit the target.

{¶23} Applying the softened standard to the presentment requirements to the facts of this case, and viewing those facts in the light most favorable to the nonmoving party, Wilson, we find that a genuine issue of material fact exists that would defeat Lawrence's motion for summary judgment.

{¶24} The record before us does not conclusively show when Wilson's letter and claim were received by Lawrence or the attorney. Rather a question of fact remains — whether Lawrence or Attorney Goldsmith received Wilson's claim prior to the July 20, 2013 deadline. Both Myeroff and Clark testified that upon receipt of the letter, they immediately forwarded the letter to Attorney Goldsmith. Myeroff further testified that he sent it to Lawrence as well. If either Lawrence or the attorney received the claim prior to the deadline, then, the claim was presented to the executor pursuant to R.C. 2117.06. *See Cannell*, 8th Dist. Cuyahoga No. 41362, 1980 Ohio App. LEXIS 12203 (question of fact existed as to when the executor actually received the claim because the evidence showed that the claimant mailed the claim prior to the expiration of the statutory time but the executor did not locate the mailed claim, which was found under a stack of books, until after the time expired).

{¶25} Accordingly, a genuine issue of material facts exists that would defeat Lawrence's motion for summary judgment. Wilson's first assignment of error is sustained. In so holding, we further find that the trial court did not err in denying Wilson's motion for summary judgment, albeit we find for a different reason — a genuine issue of material fact exists whether the claim was timely presented. Wilson's second assignment of error is overruled.

{¶26} Judgment reversed and remanded for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

ANITA LASTER MAYS, J., CONCURS;
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE OPINION)

MARY J. BOYLE, J., DISSENTING:

{¶27} I respectfully dissent and would affirm the trial court's decision in its entirety.

{¶28} I disagree with the majority's application of the presentation requirement under R.C. 2117.06(A)(1)(a). The plain language of the relevant provision makes clear that "[a]ll creditors having claims against an estate * * * shall present their claims * * *, [a]fter the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, [t]o the executor or administrator in writing." Therefore, in order for creditors to present their claims, they must ascertain the identity of the executor or administrator of the estate. *Children's Med. Ctr. v. Ward*, 87 Ohio App.3d 504, 507, 622 N.E.2d 692 (2d Dist.1993). Furthermore, "where one has a claim against an estate, it is incumbent upon him, if no administrator has been appointed, to procure the appointment of an administrator against whom he can proceed." *Wrinkle v. Trabert*, 174 Ohio St. 233, 188 N.E.2d 587 (1963), paragraph two of the syllabus.

{¶29} Recognizing the agency relationship between an attorney and his or her clients, Ohio courts have held that the presentation requirement may also be satisfied when creditors present their claims to an executor's attorney. *See Peoples Natl. Bank v. Treon*, 16 Ohio App.3d 410, 476 N.E.2d 372 (2d Dist.1984).

{¶30} In this case, Wilson admits that he did not know the identity of the executor. Further, Wilson never notified the executor or the executor's attorney. Instead, Wilson delivered a letter to two individuals who were neither the executors nor personal representatives of the decedent's estate, and these individuals forwarded Wilson's letter on to the executor. Under these facts, I find that Wilson failed to present his claim to the executor.

{¶31} I find the Fourth District decision in *Jackson v. Stevens*, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980), to be right on point and persuasive. In *Jackson*, the court held that there was no presented claim where a plaintiff sent a written notice of his claim to a third party who then forwarded it to the executor within the six-month deadline. In finding that the plaintiff failed to properly present his claim, the court emphasized that the statute requires presentment "to the executor or administrator," and therefore, presentment to a person other than the fiduciary fails to satisfy the statute.

{¶32} The majority's broad application of the statute defeats the intent of the law, "which is to assure expeditious and efficient administration of an estate by requiring prompt presentation of claims to the administrator." *Reid v. Premier Health Care Servs.*, 2d Dist. Montgomery No. 17437, 1999 Ohio App. LEXIS 999, * 14 (Mar. 19, 1999). By allowing a creditor to present a claim to anyone other than the fiduciary, the expeditious and efficient administration of an estate will be defeated by scenarios such as the instant case. Here, the

majority's holding essentially shifts the standard from presentment to one of knowledge. This shift contravenes well-established precedent. *See, e.g., In re Estate of Greer*, 197 Ohio App.3d 542, 2011-Ohio-6721, ¶ 13 (1st Dist.) (executrix's actual knowledge of claims within the six-month period did not render claims timely presented); *In re Estate of Curry*, 10th Dist. Franklin No. 09AP-469, 2009-Ohio-6571, ¶ 12-15 (rejecting plaintiff's contention that because the eventual administrator had actual knowledge of the claim before the time for its presentation had expired, appellant's claim should be deemed valid); *Reid* (recognizing that an administrator, who had knowledge of creditor's claim, properly denied the claim when the creditor presented the claim prior to the administrator's actual appointment; knowledge of the claim during the statutory period but prior to official appointment fails to satisfy "presentment" requirement); *Ziegler v. Curtis*, 13 Ohio App. 484, 487 (1st Dist.1921) (recognizing that an executor's knowledge of a claim alone does not bar closing the estate without accounting for the claim when the claim was not "presented" for allowance or rejection).

{¶33} Accordingly, I would affirm the trial court's decision and overrule Wilson's two assignments of error because he failed to timely present his claim to the executor.

EXHIBIT 3

1980 WL 350961
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES
FOR REPORTING OF OPINIONS AND
WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Fourth District, Scioto County.

EDNA JACKSON, Plaintiff-Appellant,
v.
RALPH A. STEVENS, EXECUTOR of the ESTATE OF R.C. CUNNINGHAM, Defendant-Appellee.

CASE NO. CA 1231. | January 2 , 1980.

Attorneys and Law Firms

Elliot D. Bucher, Portsmouth, Ohio, for Appellant.

Howard H. Harsha, Portsmouth, Ohio, for Appellee.

OPINION

ABELE, J.

***1** Plaintiff-Appellant takes her appeal from the dismissal of her action seeking a claim against the estate of R.C. Cunningham.

The Defendant-Appellee, Executor, was appointed on April 4, 1978; Plaintiff-Appellant mistakenly sent notice of her claim to a third party, copies sent to the Executor, an attorney receiving no verification of the claim, suit was initiated against the supposed third party executor, dismissal followed after Plaintiff-Appellant was apprized of her error. Suit was then brought against the appointed executor, Defendant-Appellee, below; but well after the statutory period of §2117.06 R.C.

The Trial Court had before it, in deciding favorably on Defendant-Appellee's Motion for Summary Judgment, evidence that the executor had received copies of the claims; had conversed with the attorney for Plaintiff-Appellant on the status of the claim; but, at no time had the executor attempted to inform the Plaintiff-Appellant as to her erroneous assumption of the third party's status. The Trial Court found that:

"It is undisputed that plaintiff did not make a timely filing of her claim with the defendant as executor.

R.C. Sec. 2117.06 provides in part: "All creditors having claims against an estate shall present their claims to the executor or administrator in writing . . . ."

This provision is mandatory, *Prudential Ins. Co. of America V. Joyce Building Realty Co.*, 143 Ohio St. 564, 56 N.E.2d 168; *Keifer V. Kissell*, 50 L.A. 375.

"A personal representative's knowledge of the existence of a claim does not dispense with the provisions of statutes requiring presentation." 31 *Am. Jr. 2d, Executors And Administrators*, Sec. 273; *Burkhardt V. Burkhardt*, 12 O.O. 359; *Devers V. Schreiber, Extr.*, 50 Ohio App. 442, 198 N.E. 601." Counsel for the administrator of the deceased's estate has no duty to advise such claimant of the name of the administrator, and is under no duty to advise the claimant of his error in wrongfully presenting his claim to the decedent's widow, under the mistaken belief that she was the administratrix of decedent's widow, under the mistaken belief that she was the administratrix of decedent's estate, instead of the court-appointed administrator." In re *Estate of Miller*, 98 Ohio App. 445, 129 N.E.2d 838.See also: *Beacon Mutual INdemnity Co. V. Stalder*, 95 Ohio App. 441, 120 N.E.2d 743.

Plaintiff's remedy was to file a petition pursuant to R.C. Sec. 2117.07 (B) in the Probate Division.

Presentment and rejection of a claim are pre-requisites to the filing of an action in this court under authority of R.C. Sec. 2117.12."

The Court found no duty in the true executor to educate the Plaintiff, and as well found no presented claim.

Plaintiff-Appellant alleges as error that:

***2** THE COMMON PLEAS COURT OF SCIOTO COUNTY, OHIO ERRED IN GRANTING THE MOTIONS OF THE DEFENDANT-APPELLEE, THEREBY DEPRIVING PLAINTIFF-APPELLANT A PLENARY HEARING WITH THE RIGHT OF FULL EXPLORATION BY CROSS-EXAMINATION ON THE QUESTION OF PRESENTATION OF THE CLAIM OF THE PLAINTIFF-APPELLANT AGAINST THE ESTATE OF R.C. CUNNINGHAM, DECEASED.

The Appellant, requests remand of this matter to hearing on the issue of the Executors knowledge of the claim.

Firstly we are of the opinion that sufficient evidence of the matters at issue; i.e. the claims as erroneous, filed, was before the court. Further it was apparent that copies of the claim letters were received by the executor prior to the run of the §2117.06 R.C. time limits. On the face of the record, we would perceive little additional value in further hearings.

As to the applicable law, the lower court was correct when noting the mandatory written claim, accepted or rejected by a notified and qualified executor.

A timely claim to the actual executor is not present in the record below. The Assignment of Error is not well taken and overruled. The Judgment appealed from is Affirmed.
JUDGMENT AFFIRMED.

Stephenson, P.J., Concurs.

Grey, J., Dissents.

Stephenson, P.J., Concurring.

Stephenson, P.J.

Because of the preference of the law to resolve lawsuits on their merits, I concur in the judgment and opinion without enthusiasm. While R.C. 2117.06 does not require any specific formality in presentation of claims, except that it be in writing, it specifically requires presentment to the executor or administrator. The presentment here was to a person other than the fiduciary. Notice to the fiduciary of such presentment is not logically or legally presentment to the fiduciary of the claim. Hence, my concurrence.

All Citations

Not Reported in N.E.2d, 1980 WL 350961

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102585

JAMES A. WILSON

PLAINTIFF-APPELLANT

vs.

WILLIAM LAWRENCE, EXECUTOR, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
REVERSED AND REMANDED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-817159

BEFORE: Keough, P.J., Boyle, J., and Laster Mays, J.

RELEASED AND JOURNALIZED: November 12, 2015

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KATHLEEN ANN KEOUGH, P.J.:

{¶1} Plaintiff-appellant, James A. Wilson ("Wilson"), appeals the trial court's decision granting summary judgment in favor of defendant-appellee, William Lawrence, Executor for the Estate of Joseph T. Gorman. Wilson also appeals the trial court's decision denying his motion for summary judgment against the estate. For the reasons that follow, we reverse and remand.

{¶2} In September 2011, Wilson and Gorman entered into a contract where Gorman agreed to purchase a 15 percent interest in Marine 1, L.L.C. for $300,000. The contract provided for payment in two phases: an initial payment of $100,000 at or near the time of the closing and quarterly payments of $50,000 for two years thereafter. Thus, the full purchase price was due on September 2, 2012. The first $100,000 was paid in full. Gorman did not make quarterly payments as specified in the contract, but sent monthly installments instead, with the last payment made on December 27, 2012. A total of $113,000 was paid by Gorman under the contract prior to his death on January 20, 2013. A balance of $187,000 plus interest remained unpaid.

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{¶6} Within this same ruling, the trial court denied Wilson's cross motion for summary judgment "since the undisputed evidence in the record shows [plaintiff] is not entitled to judgment in his favor."

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{¶14} In a letter dated September 24, 2013, to Wilson's attorney, Attorney Goldsmith rejected the claim Wilson made against the Gorman's Estate because "it was not presented to the Executor of the Estate in accordance with the Ohio Revised Code." The letter acknowledges that the attorney was aware that Wilson sent correspondence to Myeroff and Clark. "It has recently come to my attention that on behalf of your client, James Wilson, you mailed correspondence to the successor Trustee of the decedent's trust and the decedent's executive assistant regarding a claim Mr. Wilson allegedly has against the decedent's estate." The letter concludes that "[t]he mailing of this claim to the trustee of

the decedent's trust and to his executive assistant are insufficient to effectuate the filing of an appropriate claim."

{¶15} The issue before this court is whether Wilson "presented" his claim against Gorman's estate prior to the six-month deadline pursuant to R.C. 2117.06. Lawrence contends that Wilson did not "present" the letter to the executor as required under R.C. 2117.06 because Wilson did not send or address the letter directly to the executor. Rather, Lawrence characterizes Wilson's letter as a "shot in the dark" because the statutory deadline for presentment was rapidly approaching. Wilson contends the letter he sent was sufficient because it ultimately was presented the executor, or at the very least, the attorney for the estate prior to the six-month deadline.

{¶16} The presentation requirement of R.C. 2117.06 is mandatory. *Fortelka v. Meifert*, 176 Ohio St. 476, 480, 200 N.E.2d 318 (1964), citing *Beach v. Mizner*, 131 Ohio St. 481, 485, 3 N.E.2d 417 (1936); *In Prudential Ins. Co. of Am. v. Joyce Bldg. Realty Co.*, 143 Ohio St. 564, 56 N.E.2d 168 (1944). Under R.C. 2117.06, only a written presentment provided to the administrator during the statutory time period can constitute the presentment of a claim within the meaning of the statute. *Id.* Therefore, the presentment of a claim in writing to the administrator of an estate is a condition precedent to a creditor bringing suit on that claim. *Morgan v. City Natl. Bank & Trust Co.*, 4 Ohio App.2d 417, 418, 212 N.E.2d 822 (10th Dist.1964).

{¶17} However, in *Fortelka*, the Supreme Court considered whether the filing of an action without an allegation of prior presentment constitutes a valid presentment of the creditor's claim to the administrator and meets the requirements of R.C. 2117.06. *Id.* at the syllabus. The court recognized that the usual manner of presentment contemplated by the statute does not preclude any other efficient means of notifying the fiduciary of the existence of a claim against the estate. *Id.* at 480.

> "Since the law does not require a claimant or litigant to do a vain thing, the mandatory provisions of the statute requiring presentation in writing to the personal representative of claims against the estate he represents, are said to be quite uniformly softened and not enjoined when the application of such provisions would run contrary to reason and common sense."

Id., quoting 22 Ohio Jurisprudence (2d), 653, Section 293.

{¶18} Clearly, the presentment of the claim in *Fortelka* was not prior to filing suit, but the Ohio Supreme Court recognized that the manner of presentment is not to be strictly considered when considering the facts of the case.

{¶19} Recognizing this "softened" consideration, this court has determined that a claim is "presented" under R.C. 2117.06 when it is received by the executor of administrator or the attorney for the estate *Cannell v. Bulicek*, 8th Dist. Cuyahoga No. 41362, 1980 Ohio App. LEXIS 12203, *2-3 (May 22, 1980), citing *In re Estate of McCracken*, 9 Ohio Misc. 195, 224 N.E.2d 181 (P.C. 1967).

{¶20} The Second District reached the same conclusion in *Peoples Natl. Bank v. Treon*, 16 Ohio App.3d 410, 476 N.E.2d 372 (2d Dist.1984). The court held that a claim presented to the executor's attorney satisfies the statutory presentment requirements under R.C. 2117.06. *Id.* at syllabus; *see also In re Estate of Clark*, 11 Ohio Misc. 103, 229 N.E.2d 122 (C.P. 1967)(holding that receipt of written notice of claim by the attorney for the executor constitutes statutory presentment).

{¶21} Additionally, the Sixth Circuit considered whether the decedent's accountant could satisfy the presentment requirement under R.C. 2117.06 in *Hart v. Johnston*, 389 F.2d 239 (6th Cir.1968). In *Hart*, the court found that a question of fact existed regarding whether a claim was presented pursuant to R.C. 2117.06 when the accountant for decedent corresponded with the claimant and the accountant discussed claimant's debt with administrator.[2]

{¶22} Accordingly, Lawrence's strict interpretation of R.C. 2117.06 that the claim be directly presented to the administrator is rejected. As previously cited, courts, including this court, have upheld claims when the administrator was not the direct recipient of the claim. A claim may be deemed presented

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[2] *But see Jackson v. Stevens*, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980) (notice of claim sent to a third party, with copies of the claim letters sent and received by the executor prior to the statutory deadline was insufficient presentment under the statute). However, we find that *Jackson* is only persuasive authority and has not been relied on or cited as authority by any other reviewing court, including the Fourth District.

when other individuals connected with the estate receive the claim. Accordingly, the fact that Wilson's claim was forwarded to the estate attorney and the executor by a third party, who were connected with the decedent, is of no consequence; Wilson's "shot in the dark" possibly hit the target.

{¶23} Applying the softened standard to the presentment requirements to the facts of this case, and viewing those facts in the light most favorable to the nonmoving party, Wilson, we find that a genuine issue of material fact exists that would defeat Lawrence's motion for summary judgment.

{¶24} The record before us does not conclusively show when Wilson's letter and claim were received by Lawrence or the attorney. Rather a question of fact remains — whether Lawrence or Attorney Goldsmith received Wilson's claim prior to the July 20, 2013 deadline. Both Myeroff and Clark testified that upon receipt of the letter, they immediately forwarded the letter to Attorney Goldsmith. Myeroff further testified that he sent it to Lawrence as well. If either Lawrence or the attorney received the claim prior to the deadline, then, the claim was presented to the executor pursuant to R.C. 2117.06. *See Cannell*, 8th Dist. Cuyahoga No. 41362, 1980 Ohio App. LEXIS 12203 (question of fact existed as to when the executor actually received the claim because the evidence showed that the claimant mailed the claim prior to the expiration of the statutory time but the executor did not locate the mailed claim, which was found under a stack of books, until after the time expired).

{¶25} Accordingly, a genuine issue of material facts exists that would defeat Lawrence's motion for summary judgment. Wilson's first assignment of error is sustained. In so holding, we further find that the trial court did not err in denying Wilson's motion for summary judgment, albeit we find for a different reason — a genuine issue of material fact exists whether the claim was timely presented. Wilson's second assignment of error is overruled.

{¶26} Judgment reversed and remanded for further proceedings.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

ANITA LASTER MAYS, J., CONCURS;
MARY J. BOYLE, J., DISSENTS (SEE SEPARATE OPINION)

MARY J. BOYLE, J., DISSENTING:

{¶27} I respectfully dissent and would affirm the trial court's decision in its entirety.

{¶28} I disagree with the majority's application of the presentation requirement under R.C. 2117.06(A)(1)(a). The plain language of the relevant provision makes clear that "[a]ll creditors having claims against an estate * * * shall present their claims * * *, [a]fter the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, [t]o the executor or administrator in writing." Therefore, in order for creditors to present their claims, they must ascertain the identity of the executor or administrator of the estate. *Children's Med. Ctr. v. Ward*, 87 Ohio App.3d 504, 507, 622 N.E.2d 692 (2d Dist.1993). Furthermore, "where one has a claim against an estate, it is incumbent upon him, if no administrator has been appointed, to procure the appointment of an administrator against whom he can proceed." *Wrinkle v. Trabert*, 174 Ohio St. 233, 188 N.E.2d 587 (1963), paragraph two of the syllabus.

{¶29} Recognizing the agency relationship between an attorney and his or her clients, Ohio courts have held that the presentation requirement may also be satisfied when creditors present their claims to an executor's attorney. *See Peoples Natl. Bank v. Treon*, 16 Ohio App.3d 410, 476 N.E.2d 372 (2d Dist.1984).

{¶30} In this case, Wilson admits that he did not know the identity of the executor. Further, Wilson never notified the executor or the executor's attorney. Instead, Wilson delivered a letter to two individuals who were neither the executors nor personal representatives of the decedent's estate, and these individuals forwarded Wilson's letter on to the executor. Under these facts, I find that Wilson failed to present his claim to the executor.

{¶31} I find the Fourth District decision in *Jackson v. Stevens*, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980), to be right on point and persuasive. In *Jackson*, the court held that there was no presented claim where a plaintiff sent a written notice of his claim to a third party who then forwarded it to the executor within the six-month deadline. In finding that the plaintiff failed to properly present his claim, the court emphasized that the statute requires presentment "to the executor or administrator," and therefore, presentment to a person other than the fiduciary fails to satisfy the statute.

{¶32} The majority's broad application of the statute defeats the intent of the law, "which is to assure expeditious and efficient administration of an estate by requiring prompt presentation of claims to the administrator." *Reid v. Premier Health Care Servs.*, 2d Dist. Montgomery No. 17437, 1999 Ohio App. LEXIS 999, * 14 (Mar. 19, 1999). By allowing a creditor to present a claim to anyone other than the fiduciary, the expeditious and efficient administration of an estate will be defeated by scenarios such as the instant case. Here, the

majority's holding essentially shifts the standard from presentment to one of knowledge. This shift contravenes well-established precedent. *See, e.g., In re Estate of Greer*, 197 Ohio App.3d 542, 2011-Ohio-6721, ¶ 13 (1st Dist.) (executrix's actual knowledge of claims within the six-month period did not render claims timely presented); *In re Estate of Curry*, 10th Dist. Franklin No. 09AP-469, 2009-Ohio-6571, ¶ 12-15 (rejecting plaintiff's contention that because the eventual administrator had actual knowledge of the claim before the time for its presentation had expired, appellant's claim should be deemed valid); *Reid* (recognizing that an administrator, who had knowledge of creditor's claim, properly denied the claim when the creditor presented the claim prior to the administrator's actual appointment; knowledge of the claim during the statutory period but prior to official appointment fails to satisfy "presentment" requirement); *Ziegler v. Curtis*, 13 Ohio App. 484, 487 (1st Dist.1921) (recognizing that an executor's knowledge of a claim alone does not bar closing the estate without accounting for the claim when the claim was not "presented" for allowance or rejection).

{¶33} Accordingly, I would affirm the trial court's decision and overrule Wilson's two assignments of error because he failed to timely present his claim to the executor.

Court of Appeals of Ohio, Eighth District

County of Cuyahoga
Nailah K. Bryd, Clerk of Courts

JAMES A. WILSON

-vs-

Appellant

COA NO.	LOWER COURT NO.
102585	CV-13-817159

WILLIAM LAWRENCE, EXECUTOR, ET AL.

Appellee

COMMON PLEAS COURT

MOTION NO. 491184

Date 01/28/2016

Journal Entry

Motion by appellee, William Lawrence, Executor for the Estate of Joseph T. Gorman, to certify a conflict is granted. The court's decision in *Wilson v. Lawrence*, 8th Dist. Cuyahoga No. 102585, 2015-Ohio-4677 is in conflict with the following decision:

Jackson v. Stevens, 4th Dist. Scioto No. CA 1231, 1980 Ohio App. LEXIS 12905 (Jan. 24, 1980).

The court hereby certifies the following issue to the Ohio Supreme Court pursuant to App.R. 25(A) and Article IV, Section 3(B)(4) of the Ohio Constitution:

> Whether R.C. 2117.06 allows for substantial compliance in the presentment requirements of a claim against an estate. If so, whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when the claimant presents the claim to someone other than the fiduciary, who then submits the claim to the fiduciary within the statutory time-frame under R.C. 2117.06.

Mary J. Boyle, J., concurring in part and dissenting in part:

I concur in the majority's decision to grant the motion to certify a conflict of appellee

William Lawrence, executor for the estate of Joseph T. Gorman, but I respectfully dissent from the majority's characterization of the stated conflict. Unlike the majority, I would certify the question as presented by appellee in his motion, which states the following:

> Whether a plaintiff with a claim against a decedent's estate can meet his burden under R.C. 2117.06(A)(1)(a) to "present" his claim "[t]o the executor or administrator in writing" when he delivers his claim only to third parties, never appointed as executors, who then forward the claim to the court-appointed executor.

ANITA LASTER MAYS, J., CONCURS.

MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART

KATHLEEN ANN KEOUGH
PRESIDING JUDGE

87675770

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JAMES A. WILSON
Plaintiff

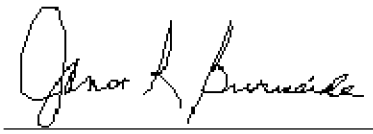
WILLIAM LAWRENCE, EXECUTOR, ET AL
Defendant

Case No: CV-13-817159

Judge: JANET R BURNSIDE

JOURNAL ENTRY

DEFENDANT WILLIAM LAWRENCE'S MOTION FOR SUMMARY JUDGMENT IS GRANTED. PLTF BRINGS HIS ACTION AGAINST THE EXECUTOR OF AN ESTATE. THE UNDISPUTED EVIDENCE IS THAT PLTF DID NOT SATISFY THE REQUIREMENTS OF RC 2117.06 FOR PRESENTING CLAIMS AGAINST AN ESTATE WITHIN THE APPLICABLE TIME PERIOD. SPECIFICALLY, PLTF'S 7/11/13 LETTER GIVING NOTICE OF HIS CLAIM AGAINST THE DECEDENT AND HIS ESTATE WHICH LETTER WAS ADDRESSED AND DELIVERED TO TWO INDIVIDUALS WHO WERE NOT IN FACT PERSONAL REPRESENTATIVES OF THE DECEDENT'S ESTATE WAS NOT LEGALLY SUFFICIENT AS A MATTER OF LAW UNDER RC 2117.06. THE LETTER DOES NOT FACTUALLY OR LEGALLY AMOUNT TO NOTICE OF A CLAIM TO THE EXECUTOR IN WRITING. UPON THE UNDISPUTED MATERIAL EVIDENCE, ALTHOUGH THAT EVIDENCE IS CONSTRUED MOST STRONGLY IN FAVOR OF PLTF, A REASONABLE TRIER OF FACT COULD COME TO BUT ONE CONCLUSION AND THAT IS THAT DEFT LAWRENCE IS ENTITLED TO JUDGMENT IN HIS FAVOR AS A MATTER OF LAW. JUDGMENT IS ENTERED IN FAVOR OF DEFT LAWRENCE AND AGAINST PLTF AS A MATTER OF LAW UPON ALL CLAIMS OF PLTF'S COMPLAINT. PLTF'S CROSS MOTION FOR SUMMARY JUDGMENT IS DENIED SINCE THE UNDISPUTED EVIDENCE IN THE RECORD SHOWS PLTF IS NOT ENTITLED TO JUDGMENT IN HIS FAVOR.. COSTS TO PLTF. THIS IS A FINAL JUDGMENT UNDER R 2505.02.
COURT COST ASSESSED TO THE PLAINTIFF(S).



Judge Signature 01/27/2015

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2117.06 Presentation and allowance of creditor's claims - pending action against decedent.

(A) All creditors having claims against an estate, including claims arising out of contract, out of tort, on cognovit notes, or on judgments, whether due or not due, secured or unsecured, liquidated or unliquidated, shall present their claims in one of the following manners:

(1) After the appointment of an executor or administrator and prior to the filing of a final account or a certificate of termination, in one of the following manners:

(a) To the executor or administrator in a writing;

(b) To the executor or administrator in a writing, and to the probate court by filing a copy of the writing with it;

(c) In a writing that is sent by ordinary mail addressed to the decedent and that is actually received by the executor or administrator within the appropriate time specified in division (B) of this section. For purposes of this division, if an executor or administrator is not a natural person, the writing shall be considered as being actually received by the executor or administrator only if the person charged with the primary responsibility of administering the estate of the decedent actually receives the writing within the appropriate time specified in division (B) of this section.

(2) If the final account or certificate of termination has been filed, in a writing to those distributees of the decedent's estate who may share liability for the payment of the claim.

(B) Except as provided in section 2117.061 of the Revised Code, all claims shall be presented within six months after the death of the decedent, whether or not the estate is released from administration or an executor or administrator is appointed during that six-month period. Every claim presented shall set forth the claimant's address.

(C) Except as provided in section 2117.061 of the Revised Code, a claim that is not presented within six months after the death of the decedent shall be forever barred as to all parties, including, but not limited to, devisees, legatees, and distributees. No payment shall be made on the claim and no action shall be maintained on the claim, except as otherwise provided in sections 2117.37 to 2117.42 of the Revised Code with reference to contingent claims.

(D) In the absence of any prior demand for allowance, the executor or administrator shall allow or reject all claims, except tax assessment claims, within thirty days after their presentation, provided that failure of the executor or administrator to allow or reject within that time shall not prevent the executor or administrator from doing so after that time and shall not prejudice the rights of any claimant. Upon the allowance of a claim, the executor or the administrator, on demand of the creditor, shall furnish the creditor with a written statement or memorandum of the fact and date of the allowance.

(E) If the executor or administrator has actual knowledge of a pending action commenced against the decedent prior to the decedent's death in a court of record in this state, the executor or administrator shall file a notice of the appointment of the executor or administrator in the pending action within ten days after acquiring that knowledge. If the administrator or executor is not a natural person, actual knowledge of a pending suit against the decedent shall be limited to the actual knowledge of the person charged with the primary responsibility of administering the estate of the decedent. Failure to file the notice within the ten-day period does not extend the claim period established by this section.

(F) This section applies to any person who is required to give written notice to the executor or administrator of a motion or application to revive an action pending against the decedent at the date of the death of the decedent.

(G) Nothing in this section or in section 2117.07 of the Revised Code shall be construed to reduce the periods of limitation or periods prior to repose in section 2125.02 or Chapter 2305. of the Revised Code, provided that no portion of any recovery on a claim brought pursuant to that section or any section in that chapter shall come from the assets of an estate unless the claim has been presented against the estate in accordance with Chapter 2117. of the Revised Code.

(H) Any person whose claim has been presented and has not been rejected after presentment is a creditor as that term is used in Chapters 2113. to 2125. of the Revised Code. Claims that are contingent need not be presented except as provided in sections 2117.37 to 2117.42 of the Revised Code, but, whether presented pursuant to those sections or this section, contingent claims may be presented in any of the manners described in division (A) of this section.

(I) If a creditor presents a claim against an estate in accordance with division (A)(1)(b) of this section, the probate court shall not close the administration of the estate until that claim is allowed or rejected.

(J) The probate court shall not require an executor or administrator to make and return into the court a schedule of claims against the estate.

(K) If the executor or administrator makes a distribution of the assets of the estate pursuant to section 2113.53 of the Revised Code and prior to the expiration of the time for the presentation of claims as set forth in this section, the executor or administrator shall provide notice on the account delivered to each distributee that the distributee may be liable to the estate if a claim is presented prior to the filing of the final account and may be liable to the claimant if the claim is presented after the filing of the final account up to the value of the distribution and may be required to return all or any part of the value of the distribution if a valid claim is subsequently made against the estate within the time permitted under this section.

Effective Date: 04-08-2004; 04-07-2005

2113.15 Special administrator.

When there is delay in granting letters testamentary or of administration, the probate court may appoint a special administrator to collect and preserve the effects of the deceased and grant the special administrator any other authority that the court considers appropriate.

The special administrator shall collect the assets and debts of the deceased and preserve them for the executor or administrator who thereafter is appointed. For that purpose the special administrator may begin , maintain, or defend suits as administrator and also sell any assets the court orders sold. The special administrator shall be allowed the compensation for the special administrator's services that the court thinks reasonable, if the special administrator faithfully fulfills the fiduciary duties.

Amended by 129th General AssemblyFile No.52, SB 124, §1, eff. 1/13/2012.

Effective Date: 10-01-1953