IN THE SUPREME COURT OF OHIO

IN RE ESTATE OF SARUNAS V. ABRAITIS, DECEASED

[Egidijus Marcikevicius, Successor Administrator of the Estate of Sarunas V. Abraitis, Deceased,

Appellee,

v.

Catherine Brady, Attorney,

Appellant.]

On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District

Court of Appeals
Case No. 109299

MEMORANDUM IN SUPPORT OF JURISDICTION APPELLANT CATHERINE BRADY

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

The social unrest that is prevalent today stems from a breakdown in the rule of law that has systematically denied many citizens of substantial constitutional rights. The independence, integrity, and impartiality of the judiciary is being called into question, and cases like this case erode promote public confidence in the judiciary and the rule of law. If citizens and their attorneys cannot expect to be treated fairly in a civil matter and have their constitutional rights protected, they have little hope of being treated fairly in more serious cases. It is the duty of the superior courts to reign in lower courts whose rulings erodes public confidence through the misapplication of stare decisis, judicial precedent, the rule of law, and statutory interpretation.

The disregard for due process under the Fourteenth Amendment to the U.S. Constitution and Article I § 16 of the Ohio Constitution is troubling, as well as the disregard for controlling statutory law. Even more troubling is the public perception that the swift administration of justice takes precedence over justice. A large part of the problem is that court appointed attorneys are more interested in their own stake and have lost sight of upholding the constitution or statutory law given that that the Ohio Supreme Court is unlikely to hear a discretionary appeal. This case has numerous court filings citing controlling statutory authority, with similar facts, that refute the arguments and actions of appellees that were not addressed by the appellate court.

This trend must be reversed and real-time measures need to be instituted if the legal profession is to be able to effectively self-regulate and uphold its constitutional duties as part of the social contract with its citizens. This can only be achieved by instituting safeguards that make it more difficult for courts to to ignore judicial precedent and evade addressing serious issues that damage public confidence.

STATEMENT OF THE CASE AND FACTS

Two successor administrators, one of the estate of a mother and the other of the estate of her son, made false statements of fact and law to the probate court that even included the filing of a sham adversarial case where the probate court had no subject-matter jurisdiction over a declaratory judgment addressing a rejected creditor's claim filed in the son's estate. R.C. 2117.12-Action on rejected claim barred. *Fried v. Marcinkevicius*, Case No. 2017 ADV 224527.

The declaratory judgment sought relief on the rejected claims for concealment of assets and an attorney fee sanction. The goal of Appellee Fried was to remove the Appellant Brady as Executrix of the *Estate of Sarunas Abraitis* based on her rejection his creditor's claims for concealment of assets and attorney fee sanction. Once removed, Appellee Marcinkevicius, successor administrator, deliberately deprived Appellant Brady of her ability to make a claim against the *Estate of Sarunas Abraitis* for attorney fees whose work product augmented the estate by $349,946.80 where the Final Account valued the estate at $410,750.96. The failure of the successor administrator to give Appellant Brady notice and opportunity to be heard stripped her of standing and deprived her of the constitutional right to due process.

Appellant Brady argued that R.C. 2117.12 barred the rejected creditor's claims where Appellee Fried did not pursue his rejected claims in a court of general jurisdiction. Appellee Marcinkevicius disbursed the lion's share of the IRS refunds in the amount of $251,347.75 to Appellee Fried and Reminger Co., LPA, based on a non cognizable action for declaratory judgment, Case No. 2017 ADV 224527. The appellate court was swayed by the court appointed fiduciaries who refused to respond to the fact that the IRS refunds originated from the work product of Appellant Brady whose request for time to apply for attorney fees was sua sponte denied by the probate court in the dismissal of her Exceptions to the Final Account.

Facts in support of Proposition No.I:

The final Social Security check. On January 11, 2017, Cardinal Credit Union improperly returned the final Social Security benefit check, direct deposited in the amount of $785.00, to the Social Security Administration. The Social Security Administration sent a notice that $785.00 was due to Sarunas Abraitis, decedent, who died on January 4, 2017. Appellant Brady filed a claim with the Social Security Administration, however, she was removed and the estate account was closed out by Appellee Marcinkevicius, Successor Administrator of the Estate, ("Appellee Marcinkevicius") before the check could be deposited.

Appellee Marcinkevicius failed to list the final Social Security check in the amount of $785.00 as an asset in the Estate even though Exceptor- Appellant Brady notified him on March 29, 2017 that it was returned. The Social Security benefits and military service of Sarunas Abraitis refute the finding by the probate court that Sarunas Abraitis never worked. This erroneous finding of fact was set forth in the Judgment Entry dated February 9, 2016 for concealment of assets against Sarunas Abraitis in the amount of $523,518.46 plus 10% penalty. Case No. 2015 ADV 203909. The Judgment Entry of concealment became the basis for an attorney fee sanction against Appellant Brady and Sarunas Abraitis, jointly and severally, in the amount of $104,485.00 plus expenses of $1,214.59 entered July 15, 2016 in the *Estate of Vlada Sofija Stancikaite Abraitis.*

The IRS refunds. Appellant Brady was the authorized representative for Sarunas Abraitis pursuant to IRS Form 2848, Power of Attorney and Declaration of Representative executed September 15, 2011. In 2012, the IRS refused to acknowledge that the information set forth in the IRS prepared substituted returns for tax years 2001 and 2002 did not match the IRS database, as this would cast doubt on the certificates of assessments that have a presumption of correctness. Comments by the probate court judge at the March 19, 2014 oral hearing in the

mother's estate led to meetings with the IRS Taxpayer Advocate Service (TAS) where it was suggested that individual income tax returns be filed with the IRS requesting claims for refund for tax years 2001 and 2002. Sarunas Abraitis executed the income tax returns that were prepared using the information from the IRS database. Appellant Brady filed the returns and actively tracked the progress that included contacting various IRS entities by fax, certified mail and by telephone, including IRS units at Fresno, CA, Ogden, UT, and Holtsville, NY.

On August 20, 2014, the IRS notified Appellant Brady that the claims for refund were disallowed as they were filed beyond the three-year due date of the returns. Three years later, without explanation, the IRS issued the following refund notices to Appellant Brady and Appellee Marcinkevicius, Successor Administrator: (1) September 18, 2017 for $37,836.09 for tax year 2002, (2) March 9, 2018 letter stating that all of the 2002 refund would be applied to tax year 2015, and(3) a September 24, 2018 for $187,241.40 for tax year 2001 with a portion to be applied to tax year 2015. Appellee Marcinkevicius did not file an amended inventory.

The IRS issued a refund check on April 16, 2019 for tax year 2001 for $194,259.17, deposited by Appellee Marcinkevicius on April 23, 2019. Again, an amended inventory was not filed and the asset was improperly reported as a newly discovered asset on November 17, 2019, over six months beyond the 30-day requirement of R.C. 2113.69. A second refund was issued on August 1, 2019 for tax year 2015 in the amount of $68,899.29 that also included all of the refund for 2002 and part of the refund for 2001. The refund check was deposited by Appellee Marcinkevicius on August 6, 2019 and improperly reported as a newly discovered asset on November 17, 2019, over two months beyond the 30-day requirement of R.C. 2113.69. Both checks were listed on the Final Account that was filed simultaneously with the foregoing Report of Newly Discovered Assets, without notice to Appellant Brady.

The U.S. Gas and Electric stock. Appellant Brady, after verifying that the stocks were still

valid and still in the decedent's name, turned over xerographic copies of U.S. Gas and Electric stocks plus information with points of contact for acquiring replacement originals and redemption to Appellee Marcinkevicius who received notice of the value of the U.S. Gas and Electric Stocks on July 5, 2017, $33,213.34 but did not file an amended inventory. Checks for the U.S. Gas and Electric stock were issued on October 11, 2018, cashed on October 18, 2018 in the amount of $33,213.34. Again, an amended inventory was not filed and the asset was improperly reported as a newly discovered asset on November 17, 2019, one year beyond the 30-day requirement of R.C. 2113.69.

No notice and opportunity to be heard. On November 17, 2019, Appellee Marcinkevicius simultaneously filed a non-conforming Report of Newly Discovered Assets and a Final Account. The probate judge immediately approved the Report of Newly Discovered Assets. No notice was given to Appellant Brady on the Report of Newly Discovered Assets, the Final Account, or the hearing on the Final Account. Appellant Brady filed Exceptions on November 12, 2019, the Final Account was approved on November 13, 2019, and the Exceptions were denied sua sponte on November 14, 2019. On December 4, 2019, the probate court denied the motion for findings of fact and conclusions of law which judgment entry was never docketed and bore the mother's estate caption, but was included in the appeal to the appellate court . The Exceptions were filed before the administration of the Estate was closed and accurately addressed the missing Social Security benefit check and the improper reporting of assets as newly discovered. Once again, the Report of Newly Discovered Assets was filed well beyond the thirty-day reporting requirements of R.C. 2113.69.

Facts in support of Proposition No. II:

On February 2, 2017, Appellee Fried, Administrator of the *Estate of Vlada Sofija Stancikaite Abraitis*, filed crditor's claims against the Estate simultaneously with a motion to

remove Appellant Brady as Executrix of the *Estate of Sarunas Abraitis*. The probate court acted on its own motion to remove Appellant Brady because Appellee Fried lacked standing.

On February 10, 2017, the creditor's claims filed by Appellee Fried were formally rejected based, in part, on an attempt to double collect on the judgment for concealment of assets. Appellee Fried did not file a case in the general division of the court of common pleas within two months to preserve the claims barring the claims pursuant to R.C. 2117.12.

Appellee Fried did file an adversarial case, 2017 ADV 224527, in the probate court citing R.C. 2117.12 and the statutory two-month requirement ending May 15, 2017. Appellee Fried did not cite any case law in support even though case law on his law firm's public website clearly states that the probate court lacked subject-matter jurisdiction. The complaint included the same fraud upon the court found in the creditors' claim in that he tried to double collect on the judgment for concealment of assets. Appellee Marcikevicius requested more time to answer then did not answer. Appellee Fried did not prosecute the case and the case went dormant until Appellee Marcinkevicius paid the "forever barred" claims as set forth in his Final Account. Additional fraud upon the court was identified in the Exceptions that included misidentification of the estate beneficiary, fraud where standard probate forms were not used, and the failure to give notice to the sole beneficiary, the Louis Stokes Cleveland Veteran's Affairs Medical Center, and the signing of a release by Appellee Fried for a non-beneficiary.

Based on the holdings of the probate court, the probate judge was apparently deceived as evidenced by the failure of the Clerk to file the Judgment Entry dated December 4, 2019 denying the motion for findings of fact and conclusions of law in support of the dismissed Exceptions.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

> Proposition of Law No. I: R.C. 2117.06 does not deprive a party of standing as a creditor with a direct pecuniary interest when only the administrator has notice of the subsequent accrual of the benefit to the estate from the party's work product, then fails to give timely notice to the party so a claim can be presented.

Chapter 2117 of the Ohio Revised Code does not require the impossible, as that would be an exercise in futility. *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) [The law does not require the doing of a futile act.]; *In re Estate of Norman*, 2010-Ohio-5920, P21 (5th Dist.) [This Court does not believe either equity or the statutory law of this state requires an exercise in futility.].

R.C. 2117.06 requires the submission of creditor's claims within six (6) months of the opening of an estate or prior to the filing of the final account, whichever comes first. R.C. 2117.06(A)(1), (B) – Presentation and allowance of creditor's claims – pending action against decedent. Claims filed after this time are forever barred. R.C. 2117.06(C). However, R.C.2117.06 does not address situations where a speculative claim accrues after the six-month period.

This proposition of law is supported, in part, by case law holding that R.C. 2117.06 does not bar a claim that accrues after a decedents' death and after the time prescribed by statute for the presentation of claims. *In re Estate of Runcie*, 33 Ohio Law Abs. 69, 1937 Ohio Misc. LEXIS 951 (PC 1937). The reasoning of the *Runcie* court was that a claim that accruing subsequent to the period prescribed in R.C. 2117.06, makes it impossible for a claimant to present the claim within the prescribed period: therefore, the claim is not governed and is not barred by said statute. Even without *Runcie*, this is common sense – except in some courts.

However, the *Runcie* court, like most courts, could never anticipate the circumstance where an administrator or probate court that would deliberately manipulate events to prevent the submission of a claim.

In this case, the Appellant Brady was pursuing three specific assets of the estate when she

was removed on March 15, 2017. Contrary to the findings of the probate court that was being misled by the administrator of a related estate, the estate inventory was not due until April 17, 2017. R.C. 2115.02 – Inventory – separate schedule. The information on these assets along with additional information necessary to complete recovery or track the progress of the recovery were provided to the successor administrator. Contrary to statutes, the successor administrator did not list these assets in the estate inventory that he filed, even though he had knowledge of them. R.C. 2115.02; R.C. 2115.09 – Inventory contents. Clearly, the probate court does not enforce these two Revised Code section, even though it makes easier to determine if accounts are accurate.

Based on the final account, Appellee Marcinkevicius did not pursue the final Social Security benefit check, possibly because the existence of this check refutes the probate court's holding in the complaint for concealment of assets filed by Appellee Fried in Case No. 2015 ADV 203909 that Sarunas Abraitis never worked.[1] However, Appellee Marcinkevicius did follow up on the two other assets: U.S. Gas and Electric stocks, and the IRS claims for refund for tax years 2001 and 2002 in the amount of $263,158.46.

In other words, the creditor's claim of the Appellant Brady for unpaid attorney fees that benefited the Estate would not accrue on these assets until receipt by the Estate, and both assets came into the possession of the administrator after the six month period for filing a creditor's claim. Again, instead of filing an amended inventory, Appellee Marcinkevicius filed a Report of Newly Discovered Assets even though he had notice of the missing U.S. Gas and Electric stock certificates on March 22, 2017. R.C. 2115.02; R.C. 2113.69 – Newly discovered assets. The report was filed beyond the statutory period, thirty days, and failed to give notice to Exceptor -Appellant Brady that the assets had been received. The Report of Newly Discovered Assets was withheld in order to simultaneously file it with the Final Account. In effect, Appellee

1 Appellee Marcinkevicius also dismissed the appeal of the judgment for concealment of assets that had been fully briefed and was awaiting oral argument. Case No. CA -16 -105071 (voluntarily dismissed April 25, 2017).

Marcinkevicius deliberately violated statutory laws in order to foreclose the filing of a creditor's claim under R.C. 2117.06 to block an application for attorney fees.

Lacking notice that the Final Account had been filed and set for hearing, Appellant Brady filed Exceptions fourteen days after the hearing on the Final Account. and requested additional time to file an application for attorney fees based on the IRS refunds.

Under *Runcie*, the claimant may present a claim to the administrator at any time before the administration is closed. The administration of the Estate was closed by the probate court on November 13, 2019, the day after the Exceptions were filed on November 12, 2019, and the Exceptions were denied sua sponte on November 14, 2019. On December 4, 2019, the probate court denied the motion for findings of fact and conclusions of law, an entry that was never docketed by the Clerk of the Probate Court.

The court in *Whitaker v. Estate of Whitaker* held as follows:

> Both U.S. Const. Amend. XIV and Ohio Consti. Art. I § 16, affirm that no person shall be deprived of life, liberty, or property without due process of law. The concept of "due process" has been deemed to encompass both substantive and procedural rights. The essence of procedural due process is the right to receive reasonable notice and a reasonable opportunity to be heard. (Citations omitted) We therefore examine the record to determine whether, as a matter of law, appellant received reasonable notice and a reasonable opportunity to be heard. (Citations omitted).

Whitaker v. Estate of Whitaker, 105 Ohio App.3d 46, 51, 663 N.E.2d 681, 684 (1995).

Clearly, Appellee Marcinkevicius and the probate court knowingly violated statutory law, without the benefit of due process, even though the work product of Exceptor -Appellant resulted in eighty-three percent (83%) of the assets identified in the Final Account. The appellate court erred by requiring the impossible under R.C. 2117.06 by filing a claim that accrued after the six-month period, without notice that the claim had accrued, before the Final Account had been filed.

The appellate court, like the probate court, ignored that Appellee Marcinkevicius knowingly filed an inventory that failed to list these assets, misidentified the assets as newly

discovered when they were received, and made an untimely filing of the Report of Newly Discovered Assets to coincide with the filing of the Final Account and depriving Appellant Brady of her ability to make a claim under R.C. 2117.06, which denied standing as a party with a direct pecuniary interest.

The actions of the administrator and the probate court were extremely prejudicial and undermine public confidence in the courts and the law. *In re Estate of Runcie* at 69.

> Proposition of Law No. II: Fraud upon the court must be addressed by the appellate court, even if raised for the first time on appeal.

Fraud upon the court is a species of fraud which either subverts or attempts to subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication. *Demjanjuk v. Petrovsky,* 10 F.3d 338, 352-53 (6th Cir. 1993). Clear and convincing evidence of fraud upon the court consists of: (1)[conduct] on the part of an officer of the court; that (2) is directed to the judicial machinery itself; is intentionally false, willfully blind to the truth, or (3) is in reckless disregard of the truth; is a positive averment or a concealment when one is under a duty to disclose; and (4) deceives the court. *Johnson v. Bell*, 605 F.3d 333, 339 (6th Cir. 2010); *Carter v. Anderson*, 585 F.3d 1007, 1011-1012 (6th Cir. 2009).

Courts have the ability to address fraud upon the court on their own motion. *Universal Oil Products Co. v. Root Refining Co*., 328 U.S. 575 580-581 (1946). After all, the courts must have the ability to defend the integrity of the court and the judicial system.

The previous proposition of law provides two of several examples of frauds upon court committed by the administrators of two estates. An even more egregious example involves the efforts by the successors of the two estates to knowingly circumvent statutory law resulting in the probate court taking subject-matter jurisdiction in a matter where it had no subject-matter-jurisdiction on creditor's claims that were rejected. R.C. 2117.12 – Action on rejected claim

barred, *In re Estate of Liggons,* 187 Ohio App.3d 750, 2010-Ohio-1624, 933 N.E.2d 1118, ¶32 (6th Dist.) [While R.C. 2117.12 does not specifically state in which court a creditor must commence the "action," cases have held that the matter must be brought before a court of general subject matter jurisdiction, not the probate court] *citing Mainline*; *In re Estate of Vitelli*, 110 Ohio App.3d 181, 183, 673 N.E.2d 948, HN1 (2nd Dist. 1996); *Kraus, Exr. v. Hanna*, 11th Dist. No. 2002-P-0093, 2004-Ohio-3928, ¶10, ¶33 (July 23, 2003)

Clearly, none of the frauds upon the court were acknowledged by the probate court, which means that the successor administrators successfully deceived the court. Similarly, the frauds upon the court were ignored by the appellate court. The two law firms involved have participated in over one thousand probate cases and have at least seventy-five years of combined probate experience. This suggests that at the core of this problem is the court's reliance on a select group of attorneys based merely on evidence of their or their firm's reputation that has resulted in the court's ignoring or excusing misdeeds or mitigating the consequences without regard for the enormity of the misdeeds. *State ex rel. Nebraska State Bar Assoc. v. Butterfield*, 169 Neb. 119, 127; 98 N.W.2d 714 (1959); citing *State ex rel. Nebraska State Bar Assn. v. Gudmundsen,* 145 Neb. 324, 16 N.W.2d 474 (1944).

In courts where the foregoing problem exists, there often exits a problem experienced by attorneys who are not favored and those who have been previously sanctioned: their arguments are dismissed out of hand by the courts even when supported by facts, evidence and well-accepted case law. These attorneys experience what amounts to a continuing silent sanction that often deprives these attorneys and their clients of due process.

This case has both extremes where favored attorneys run roughshod over their unfavored counterparts in the court, where even rumor and innuendo against the unfavored attorney are accepted as fact. Favored atorneys get paid while the unfavored attorney gets starved. Favored

attorneys can ignore statutory law with impunity while the unfavored attorney is sanctioned for following the law or, worse yet, admitting error and correcting that error. Favored attorneys win cases while the unfavored, even when facts and the law support them, continue to lose.

In this case, the receipt of the IRS income tax refunds for tax year 2001 and 2002 in the amount of $263,158.46 supports the assertion that the District Court holding in *Abraitis v. United States.* was in error. The IRS certificates of assesment were in error, the jeopardy levy was not warranted, IRS employees did not follow the law, and the assets titled to Sarunas Abraitis were his and not his mother's. Even the State of Ohio was a victim of the IRS error when assessments for tax years 2001 and 2002 suddently disappeared and the State of Ohio lost tax cases for these years against Sarunas Abraitis for lack of evidence.

The IRS tax refunds received by Appelle Marcinkevicius in 2019 in the amount of $263,158.46 reveals unacceptable truths regarding the validity of the probate court holdings for concealment of assets and the attorney fee sanction. If the holdings of the probate court were valid then the Appellees would have notified the IRS and the Ohio Department of Taxation of the holdings and state and federal income tax returns would have been filed in the *Estate of Vlada Sofija Stancikaite Abraitis*. Instead, the Appellees continued the ongoing fraud that ensured the disbursement of assets to their law firms as attorney fees, even though the probate court orders designated the Appellees as the payees in their fiduciary capacity.

Ignoring fraud upon the court causes irreparable damage to the integrity of the courts and the judicial process, erodes public confidence in the courts,and, in this case, deprived the Appellant in this case of her constitutional rights and ability to earn a living. Therefore, appellate courts should be alert to prima facie fraud upon the court involving statutory law and address the fraud whenever it is identified or raised, even if raised by an attorney that has been sanctioned by the probate court in a related estate. R.C. 2117.12. The balance of justice must be restored.

CONCLUSION

For the reasons discussed above, this case involves a matter of great public interest and includes substantial constitutional questions. The appellant request that this court accept jurisdiction in this case so that these important issues will be reviewed on their merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum in Support of Jurisdiction of Appellant Catherine Brady was sent by electronic mail to the following counsel for appellees on October 13, 2020.

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The undersigned also hereby certifies that a courtesy copy of the foregoing Memorandum in Support of Jurisdiction of Appellant Catherine Brady was sent via electronic mail on October 13, 2020 to the following:

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