



**ORIGINAL**

NOT FOR OFFICIAL PUBLICATION  
See Okla.Sup.Ct.R. 1.200 before citing.

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION IV

IN THE MATTER OF THE ESTATE )  
 OF LINZY LEE HILL, Deceased. )  
 )  
 BRIGHTWATER CAPITAL, LLC, )  
 )  
 Appellant, )  
 )  
 vs. )  
 )  
 LENZY LAMONT HILL, the Personal )  
 Representative of the Estate of Linzy )  
 Hill, Deceased, )  
 )  
 Appellee. )

**FILED**  
COURT OF CIVIL APPEALS  
STATE OF OKLAHOMA

DEC 27 2024

JOHN D. HADDEN  
CLERK

Case No. 121,662

APPEAL FROM THE DISTRICT COURT OF  
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE TOM RIESEN, TRIAL JUDGE

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**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS**

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For Appellant

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For Appellee

OPINION BY JAMES R. HUBER, PRESIDING JUDGE:

Ancillary plaintiff, Brightwater Capital, LLC, appeals the district court's Journal Entry of Judgment sustaining the Personal Representative's Motion to Dismiss with Prejudice Brightwater Capital, LLC's Amended Ancillary Petition and denying Brightwater Capital's Amended Ancillary Petition, which the district court treated as a motion to reconsider.

**BACKGROUND**

On October 15, 2012, Brightwater Capital obtained a judgment against Linzy Hill, now deceased, (Decedent) in Oklahoma County. Brightwater Capital filed the Journal Entry of Judgment with the Oklahoma County Court Clerk on October 15, 2012 and recorded the judgment with the Oklahoma County County Clerk.

On August 2, 2017, Brightwater Capital filed its Notice of Renewal of Judgment with the Court Clerk. The renewal was recorded with the Oklahoma County County Clerk on August 7, 2017. Brightwater Capital did not file a subsequent renewal of the judgment.

Decedent died on February 11, 2022, with his domicile at the time of death in Oklahoma County, Oklahoma. This probate was filed on May 24, 2022.

Decedent's son, Lenzy Lamont Hill (Personal Representative) was appointed as the

Personal Representative of the Estate of Linzy Hill, deceased, and provided Letters Testamentary on June 29, 2022.

On July 22, 2022, Personal Representative filed a Notice to Creditors stating that all claims of the Estate of Linzy Lee Hill, deceased, shall be presented no later than September 27, 2022. The Notice to Creditors was published in The Journal Record of Oklahoma City, Oklahoma, on July 27, 2022, and August 3, 2022. The Personal Representative did not mail a copy of the Notice to Creditors to Brightwater Capital or other creditors.

On November 7, 2022, Brightwater Capital submitted a Proof of Claim in the probate. Personal Representative rejected the claim and filed a Notice of Rejection of Claim on November 16, 2022. The district court entered an Order rejecting Brightwater Capital's claim, which was filed on November 30, 2022.

Brightwater Capital filed an Ancillary Petition in the probate on December 29, 2022, asking the court to approve its claim. Brightwater Capital alleged Personal Representative failed to give it notice of the probate proceedings contrary to 58 O.S.2021 § 331.2,<sup>1</sup> even though the judgment against Decedent was

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<sup>1</sup> Section 331.2 provides:

The notice to be given to creditors by mail as provided in Section 331 of Title 58 of the Oklahoma Statutes shall be given by mailing by regular first-class mail a file-stamped copy of said notice on or before the tenth day following the date said notice is filed with the district court clerk for the county in which the probate is pending. Said mailing shall be made to all known creditors of the decedent by the personal representative, or by the personal representative's attorney who may rely

filed in Oklahoma County District Court and recorded with the Oklahoma County County Clerk. Brightwater Capital claimed the deadline for filing claims was September 27, 2022, and that the only notice to file claims given by Personal Representative, if at all, was by publication.

Brightwater Capital also asserted that it was unaware of the probate until the Personal Representative's attorney called its attorney on September 28, 2022, one day after the probate claim deadline, and left a message requesting a release of the judgment. Brightwater Capital further alleged the "Personal Representative's attorney had knowledge of the Ancillary Plaintiff's judgment but intentionally and deceptively failed to give the Ancillary Plaintiff's [sic] proper notice as required by 58 O.S. § 331.2." Brightwater Capital asserted that it did not renew the judgment by the renewal deadline, which was after the September 27, 2022, deadline to file a claim in the probate. Brightwater Capital asked the court to approve its claim in the amount of \$27,214.06.

In response, on January 17, 2023, Personal Representative filed a motion to dismiss Brightwater Capital's Ancillary Petition. Personal Representative argued

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upon a list of known creditors submitted to said attorney by the personal representative. No notice by mail shall be required with respect to a creditor whose identity and address were not known to the personal representative on the date said notice was filed, even though the personal representative may thereafter learn the identity or address of such creditor. Personal delivery, by the personal representative or the personal representative's attorney, of a copy of the notice to creditors to any creditor shall be the equivalent of mailing such copy to such creditor.

Brightwater Capital failed to renew the judgment by the deadline of August 2, 2022, and the judgment expired and was unenforceable pursuant to 12 O.S.2021 § 735(B)(2).<sup>2</sup> Personal Representative alleged that Brightwater Capital was “not a ‘known’ creditor, [and] was not a creditor at all due to its expired Judgment.” Personal Representative claimed that by filing an untimely Proof of Claim in the probate, Brightwater Capital “was unsuccessfully trying to revive an expired and unenforceable Judgment.” According to Personal Representative, the Proof of Claim had no effect on the stale Judgment and, therefore, the Personal Representative and the district court properly denied its claim. Personal Representative asked the court to dismiss with prejudice Brightwater Capital’s Ancillary Petition.

Brightwater Capital objected to the Personal Representative’s motion to dismiss arguing that Personal Representative failed to give statutory notice to Brightwater Capital as a known creditor. Brightwater Capital alleged Personal Representative was statutorily required to conduct a reasonable search for creditors, which Personal Representative failed to do. Brightwater Capital claimed that “had notice been properly provided to Brightwater, its claim would have been

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<sup>2</sup> Section 735(B)(2) provides:

B. A judgment shall become unenforceable and of no effect if more than five (5) years have passed from the date of:

...

2. The last notice of renewal of judgment was filed with the court clerk; . . .

filed prior to the expiration of the judgment” and that it was entitled to file a claim against Personal Representative for failing to provide actual notice pursuant to 58 O.S. § 598.

After conducting a hearing on Personal Representative’s Motion to Dismiss Brightwater Capital, LLC’s Ancillary Petition on March 7, 2023, the district court entered a Court Minute sustaining Personal Representative’s dismissal motion.<sup>3</sup> A final appealable Journal Entry of Judgment pursuant to Okla.Sup.Ct.R. 1.20, 12 O.S.2021, Ch. 15, app. 1, memorializing the decision was filed approximately six months later, on September 12, 2023.

On May 15, 2023, Brightwater Capital filed an Amended Ancillary Petition without seeking leave of court or obtaining consent of Personal Representative’s attorney. The Amended Ancillary Petition essentially stated the same allegations and claims as the Ancillary Petition. However, the Amended Ancillary Petition sought relief from the personal representative’s bond rather than asking the court to approve its claim. The Amended Ancillary Petition alleged that, pursuant to 58 O.S. § 598, a creditor may recover the amount of the claim on the personal representative’s bond when the personal representative fails to give notice to

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<sup>3</sup> The Court Minute only noted the parties appeared with counsel and the “Court sustains PR’s Motion to Dismiss.” The Court Minute did not specify a time in which Brightwater Capital could amend the Ancillary Petition and did not contain a statement that no amendment of the Ancillary Petition could cure the defects in the Ancillary Petition.

creditors under 58 O.S. § 331. Brightwater Capital also asserted a person may recover on the bond of an executor or administrator of an estate pursuant to 58 O.S. § 491, “where the neglect or misconduct of the executor or administrator in relation to a sale causes damage to any person interested in the estate . . . .”

According to Brightwater Capital, the Estate was selling Estate real estate that would be available to pay the creditor’s claim. Therefore, Brightwater Capital requested a judgment in the amount of \$27,328.15 against the Personal Representative on the bond.

On June 5, 2023, Personal Representative filed a motion to dismiss the Amended Ancillary Petition. Personal Representative emphasized that Brightwater Capital did not seek leave from the district court, or consent from Personal Representative’s attorney, prior to filing its amended petition. In addition, Personal Representative alleged that Brightwater Capital did not assert any new arguments and allegations for the court’s consideration.

Personal Representative again argued that Brightwater Capital did not renew its judgment and the judgment expired and was unenforceable. In addition, Personal Representative alleged that the Proof of Claim was untimely and an attempt to revive the judgment Brightwater Capital failed to renew. Personal Representative, therefore, asked the court to dismiss with prejudice Brightwater Capital’s Amended Ancillary Petition and to make a finding that Brightwater

Capital's claim does not exist and that amending the petition would not cure any defects in the petition.

After considering Brightwater Capital's response to the motion to dismiss and hearing argument by the parties, the district court found that Brightwater Capital did not secure permission from the court, nor consent from the Personal Representative's attorney, to file its Amended Ancillary Petition. As a result, the court treated the Amended Ancillary Petition as a motion to reconsider. The district court dismissed with prejudice the Amended Ancillary Petition "as the Court finds that its judgment was dormant and thus no claim could be made." The court sustained Personal Representative's Motion to Dismiss With Prejudice Brightwater Capital LLC's Amended Ancillary Petition and denied the motion to reconsider.

Brightwater Capital appeals.

#### **STANDARD OF REVIEW**

Here, the district court did not reach the merits of the Amended Ancillary Petition but treated the matter as a motion to reconsider based on Brightwater Capital's failure to obtain leave to amend. Both a motion to amend and a motion to reconsider are reviewed for an abuse of discretion. *Prough v. Edinger, Inc.*, 1993 OK 130, ¶ 8, 862 P.2d 71, 75 (internal citations omitted); *Chase Home Finance LLC v. Gravitt*, 2015 OK CIV APP 46, ¶ 15 n.10, 350 P.3d 401 n.10.



However, “the trial court’s discretion is limited by the provisions of 12 O.S.1991, § 2015(A), requiring that leave to amend be given freely if justice requires.” *Prough*, ¶ 8, 862 P.2d at 75. While the “‘outright refusal to grant leave [to amend] without any justifying reason appearing for the denial’ is an abuse of discretion, . . . there is no abuse if the court relies on a reason such as ‘undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party . . . [or] futility of amendment.’” *Id.* ¶ 9, 862 P.2d at 76 (citation omitted).

### ANALYSIS

Brightwater Capital argues the district court erred in dismissing with prejudice its Amended Ancillary Petition. Brightwater Capital contends it was entitled to notice by Personal Representative as a “reasonably ascertainable creditor” pursuant to 58 O.S.2021 § 331.1(A). According to Brightwater Capital, it would have had sufficient time to renew the judgment if it had received notice by Personal Representative.

In dismissing Brightwater Capital’s Amended Ancillary Petition, the district court held Brightwater Capital failed to request permission from the court or obtain consent of Personal Representative’s attorney prior to filing the Amended Ancillary Petition. As a result, the court treated the amended petition as a motion to reconsider.

Leave to amend is freely given when justice requires. 12 O.S.2021 § 2015(A). Title 12 O.S.2021 § 2015(A) provides that “[a] party may amend his or her pleading once as a matter of course at any time before a responsive pleading is served . . . .” Once a responsive pleading is served, a party may amend a pleading only by leave of court or by written consent of the adverse party. *Hunter v. Echols*, 1991 OK 114, ¶ 6, 820 P.2d 450, 453. If this rule is not followed, the amended pleading is considered a nullity and not a part of the record. *Id.*

Here, Personal Representative filed a motion to dismiss but had not filed an answer to the Ancillary Petition. A motion to dismiss is not a responsive pleading within the meaning of the statute. *Ellis v. Ascension St. John Med. Ctr., Inc.*, 2023 OK CIV APP 16, ¶ 6, 531 P.3d 665, 668. Thus, Brightwater Capital was entitled to file an amended ancillary petition as a matter of right under § 2015(A) because Personal Representative had not filed a responsive pleading. The district court erred in holding Brightwater Capital was required to have permission from the court or consent of the adverse party to amend and in denying Brightwater Capital the right to amend its Ancillary Petition.

We also find the court abused its discretion in treating the Amended Ancillary Petition as a motion rather than as a pleading. Title 12 O.S.2021 § 2007 distinguishes between pleadings and motions. Section 2007(A) limits the “pleadings” category to petitions, answers, replies, cross-claims, third-party claims,

and counterclaims; whereas, Section 2007(B) discusses motions which are “application[s] to the court for an order.” 12 O.S.2021 § 2007(B)(1). In addition, Section 2012(B) “distinguishes between a ‘responsive pleading’ *i.e.* a claim, counterclaim, cross-claim or third-party claim; and a motion raising a defense like Defendant’s motion.” *Ellis*, 2023 OK CIV APP 16 ¶ 6 531 P.3d at 668.

Brightwater Capital’s Amended Ancillary Petition set forth its allegations and claims and why it was entitled to relief. It did not seek an order from the district court.

Brightwater Capital correctly argues the Amended Ancillary Petition differed from the Ancillary Petition because it sought relief from the Personal Representative’s bond rather than approval of its claim as requested in the Ancillary Petition. Brightwater Capital’s theory of liability set forth in its Amended Ancillary Petition is that had the Personal Representative provided it with actual notice of a claim deadline, Brightwater Capital would have had an opportunity to renew its judgment and that the Personal Representative’s failure to provide the statutorily required notice provides Brightwater Capital with a claim against the Personal Representative’s bond. Brightwater Capital’s new claim was alleged as a matter of right not in a motion but in a pleading and should be treated as such. We determine the district court erred in treating the Amended Ancillary Petition as a motion to reconsider.

We find the district court erred in holding that Brightwater Capital was required to seek leave of the court or written consent of the adverse party prior to filing a motion to amend. Here, a responsive pleading had not been filed and, under 12 O.S.2021 § 2015(A), Brightwater Capital was entitled to file an amended pleading as a matter of right. We conclude the district court erred in treating the Amended Ancillary Petition as a motion to reconsider and, therefore, in denying the motion to reconsider and in sustaining Personal Representative's Motion to Dismiss Brightwater Capital's Amended Ancillary Petition. This matter is reversed and remanded for further proceedings consistent with this Opinion.

**REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.**

HIXON, J., concurs, and BLACKWELL, J., dissents.

BLACKWELL, J., dissenting:

I respectfully dissent. Nothing in either § 2012 or § 2015 of the Oklahoma Pleading Code (or their confluence) permit a litigant to file an amended petition in the face of a dismissal order that does not grant leave to amend where it is clear from the record that no amendment was possible.<sup>1</sup> In this case, the record is

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<sup>1</sup> This is all assuming that the Oklahoma Pleading Code—being 12 O.S. § 2001 *et. seq.*—applies *at all* to this probate action. As a general matter, the Pleading Code does not apply in probate actions. *Matter of Estate of Wheeler*, 1996 OK CIV APP 65, ¶ 8, 919 P.2d 460, 462 (quoting *Matter of the Estate of Evelyn R. Daly, Deceased*, 1994 OK CIV APP 8, ¶ 12, 870 P.2d 795) (holding that the “Pleading code does not apply to cases involving probate code inasmuch as probate is a special area of law governed by its own statutory procedural code.”). However, for purposes of this appeal, I presume that it does under the provisions of the final sentence of 58

abundantly clear that the trial court’s first dismissal neither granted leave to amend nor left any possibility that the defect with the pleading—that Brightwater’s failure to preserve their judgment under 12 O.S. § 735 meant that *they had no judgment any time after August 2, 2022*—could be fixed with a more detailed pleading.

Without access to a time machine, Brightwater will never be able to repair this defect. Likely recognizing this, the trial court granted the personal representative’s motion to dismiss the first ancillary petition without offering any leave to amend.<sup>2</sup> Brightwater never sought leave to amend<sup>3</sup> *nor did they appeal the underlying judgment determining that they were not a creditor of the estate.*

Further, whether the additional allegations of the amended ancillary petition are considered as simply another bite at the creditor-claim apple or as a new claim, they do not save Brightwater here. First, as another attempt to make a creditor’s claim, the amended ancillary petition came too late. The probate code requires

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O.S. § 339, which notes that, “[i]f suit be brought as an ancillary proceeding ... pleadings and practice therein shall be the same as if an independent action had been brought to recover upon the claim.” No party argues to the contrary.

<sup>2</sup> Or, if the trial court did offer leave to amend, Brightwater does not show us where in the record the trial court did so. Although there was a hearing on the first motion to dismiss, either no transcript was made, or it was not designated for appeal. In either event, any failure to preserve the record on this point would land entirely at the feet of Brightwater, as the appellant.

<sup>3</sup> The majority recites the wrong standard of review in this regard. The Court reviews the trial court’s decision for an abuse of discretion, which would be the correct standard to apply if Brightwater had sought leave to amend its petition. However, no such motion was filed below. We are reviewing the trial court’s grant of the personal representative’s motion to dismiss the amended ancillary petition. The proper standard of review is *de novo*. *Rogers v. Quiktrip Corp.*, 2010 OK 3, ¶ 4, 230 P.3d 853, 855-56.

such claims to be made within forty-five days of the notice of rejection of the claim. 58 O.S. § 339. The amended petition was filed well after this deadline.

Second, to the extent those allegations are considered as a new claim made under 58 O.S. § 598,<sup>4</sup> that claim was also properly dismissed. Section 598 concerns the claims of actual creditors—parties that the court has already agreed are creditors of the estate—and those parties that *would have become* creditors but for the failure to give proper notice under § 331. However, the question of whether Brightwater was a creditor *at all* had already been decided. I cannot read § 598 as allowing Brightwater a second opportunity to litigate the question of whether it was or was not a creditor of the estate after it allowed its judgment to expire for want of renewal.<sup>5</sup> As mentioned, and as highly relevant here, Brightwater could have appealed the initial ruling denying their creditor’s claim but did not.<sup>6</sup>

The trial court has now twice correctly rejected Brightwater’s attempt to revive its defunct judgment. On August 3, 2022, the question of whether the

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<sup>4</sup> Counsel for Brightwater embraced this supposition at the hearing on the motion to dismiss the amended petition. Tr. (July 20, 2023), pg. 6 (“[A] few things I’d like to clarify at the outset just very quickly is, one, this is a different cause of action. This is a cause of action against the personal representative and his bond where the former petition was against the estate itself.”).

<sup>5</sup> Further, claims under § 598 are limited to the personal representative’s bond, and the record reveals there was no such bond in this case.

<sup>6</sup> Brightwater’s claim under 58 O.S. § 491 is also a red herring. Section 491 concerns “misconduct in the proceedings of the executor or administrator in the relation to any sale . . . .” The allegations of misdeeds against the personal representative in both ancillary petitions concerned whether notice by mail was wrongfully withheld. Neither petition relates to any misconduct as to the sale of property, but only seek the proceeds of the sale as an alleged creditor.

personal representative should have provided notice by mail to Brightwater became entirely moot. At no point since that date has Brightwater held any judgment against the decedent that it can enforce in a court of law. We need not—and should not—return this case to the trial court to make this ruling for a third time.

December 27, 2024