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**IN THE SUPREME COURT  
STATE OF ARIZONA**

PETITION TO AMEND RULE 10,  
ARIZONA RULES OF CIVIL  
PROCEDURE; RULE 110, JUSTICE  
COURT RULES OF CIVIL PROCEDURE

Supreme Court No. \_\_\_\_\_

**Petition to Amend Rule 10 of the  
Arizona Rules of Civil Procedure and  
Rule 110 of the Justice Court Rules of  
Civil Procedure**

Under Rule 28 of the Arizona Rules of the Supreme Court, the Law Office of James R. Vaughan, P.C. petitions the Court to amend Rule 10 of the Arizona Rules of Civil Procedure and Rule 110 of the Justice Court Rules of Civil Procedure. The proposed amendment would allow the Justice Courts and the Superior Courts to substitute a defendant's true name after rendering judgment when the defendant was designated by a fictitious name, but was reasonably identified in the pleadings or proceedings, and given pre-judgment notice and an opportunity to be heard in the proceedings.

**I. Background and Purpose of the Propose Rule Amendment**

Arizona is a community property state. Unlike other community property states, it requires a judgment against both spouses before a judgment creditor may satisfy the judgment

from any community property.<sup>1</sup> Community property includes all property acquired by either spouse during the marriage, with some narrow exceptions.<sup>2</sup> Often, the marital status or true name of a spouse cannot be determined at the time a lawsuit begins. In many cases, the marital status or true name of a spouse is discovered during the lawsuit's progress to judgment; the rules of procedure address this situation. Under the rules of civil procedure, if a defendant's name is "unknown to the plaintiff," that defendant may be identified by a placeholder.<sup>3</sup> When the "defendant's true name is discovered," the rules allow that name to be substituted for the placeholder.<sup>4</sup>

In some cases, however, the known defendant will not reveal another defendant's existence or true name until after judgment. Adding a provision to Rule 10 of the Arizona Rules of Civil Procedure and Rule 110 of the Justice Court Rules of Civil Procedure (the "Amendment") would make it clear that a court may justly replace the placeholder with the

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<sup>1</sup> See CAL. FAM. CODE § 910 (West) (making the "community estate" liable regardless of whether or not both spouses are parties to the "judgment for the debt."); *Twin Falls Bank & Trust Co. v. Holley*, 111 Idaho 349, 353, 723 P.2d 893, 897 (1986) (when a debt is incurred for the benefit of the community, the "community becomes liable" and the creditor "may seek satisfaction of his unpaid debt from [the community] property."); *Lawson v. Lawson*, 535 So. 2d 851, 852 (La. Ct. App. 1988) (with a judgment against one spouse, the creditor may acquire "all assets of the community, including the interest of the non-debtor spouse, as well as the separate property of the spouse who incurred the debt" to satisfy the obligation); *Randono v. Turk*, 86 Nev. 123, 132, 466 P.2d 218, 224 (1970) (the "wife need not be made a party when the husband is defending an action against the community property, since in legal effect she is a party to every action involving the community property."); *Huntington Nat. Bank v. Sproul*, 1993-NMSC-051, 116 N.M. 254, 265, 861 P.2d 935, 946 (only one spouse need be sued to reach that spouse's interest in the community property if the other spouse is given notice and an opportunity to be heard); TEX. FAM. CODE ANN. § 3.202(c) (West) ("The community property subject to a spouse's sole or joint management, control, and disposition is subject to the liabilities incurred by the spouse before or during marriage."); *but see* ARIZ. REV. STAT. ANN. § 25-215(D) (requiring spouses to be "sued jointly" before the community property can satisfy a community obligation).

<sup>2</sup> ARIZ. REV. STAT. ANN. § 25-211(A).

<sup>3</sup> ARIZ. R. CIV. P. 10(f); J.C.R.C.P. 110(b)(1).

<sup>4</sup> ARIZ. R. CIV. P. 10(f); J.C.R.C.P. 110(b)(1).

defendant's true name when the complaint reasonably identifies the defendant; the defendant received notice of the lawsuit; and the defendant had an opportunity to be heard in response to the lawsuit. The Amendment balances each defendant's due process rights, the plaintiff's right to compensation for harm from the responsible parties, and the trial court's duty to see justice done. It also recognizes the difficulty of obtaining information from uncooperative defendants when no central repository of marital information exists.

## **II. The Amendment**

The Amendment would replace Rule 10(f) of the Arizona Rules of Civil Procedure and most of Rule 110(b)(1) of the Justice Court Rules of Civil Procedure and is proposed as follows:

When the name of the defendant is unknown to the plaintiff, the defendant may be fictitiously designated in the pleadings or proceeding by any name. When the defendant's true name is discovered, the pleading or proceeding may be amended accordingly. If the defendant's true name is not discovered before judgment, the court may enter judgment against the fictitiously named defendant if the court finds: (1) the defendant received service in accordance with these Rules, and (2) the defendant was reasonably identified such that the defendant knew or should have known of the pleading or proceeding.

A redlined version of the Amendment is attached as **Exhibit A**; a clean version is attached as **Exhibit B**.

## **III. The Need for the Amendment**

### **A. The True Names of Fictitiously-Named Defendants are Sometimes Difficult to Uncover**

An example illustrates the need for the Amendment. Suppose Dave negligently injures Linda while both are driving to work in Maricopa County. Linda suffers personal injuries and damage to her automobile. She does not know that Dave married his spouse five years ago in Las Vegas, Nevada. She sues Dave to recover her damages. In a lawsuit where the primary

defendant is married and a community obligation arises, Arizona requires that the defendant's spouse be "sued jointly" before the community can be bound.<sup>5</sup>

Believing this obligation to belong to the community, if one exists, Linda's lawyer searches publically available court records in Arizona for a marriage license or divorce record, and reviews recordings in Maricopa County to see if a reliable document provides Dave's marital status. Linda's lawyer finds nothing indicating Dave's marital status. Under the present Rule 10(f) of the Arizona Rules of Civil Procedure, Linda's attorney designates Dave's possible spouse as "J. Doe" and describes him or her as Dave's spouse in the complaint. Dave is served with process at home, tells the process server that he is married, but refuses to tell the process server anything about his wife. The process server leaves two copies of the summons and complaint with Dave at the time of service—one for him and one for J. Doe. Linda's lawyer makes another attempt to locate Dave's wife's name, but is unsuccessful. Dave does not respond to the complaint or the entry of default.

Currently, Arizona courts do not issue judgments against someone who may not exist, and without any evidence concerning the identity of Dave's wife, the court enters a judgment against Dave as an individual. Five days later, Dave records a deed showing that he is a married man and providing his spouse's name. Dave's spouse knew—or should have known—about the lawsuit in time to appear and defend against it. However, Linda cannot enforce her judgment against Dave unless she can isolate some of his separate property. In this situation, Linda has been wronged and she has a judgment that should allow her to obtain relief for that wrong. Yet, her remedy is severely limited because she could not find information that Dave chose to conceal from her. This should not be permitted.

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<sup>5</sup> ARIZ. REV. STAT. ANN. § 25-215(D).

Identifying the name of a possible spouse became more difficult in 2015. Until recently, Arizona prohibited members of the same sex from marrying; the Supreme Court of the United States has invalidated this type of prohibition.<sup>6</sup> This change in the law of marriage compounds the difficulty of correctly naming a defendant's spouse, as many same-sex couples married in other states before 2015, and those scattered records are difficult to find. In the near future, same-sex couples may begin marrying each other in Arizona. Thus, after 2015, it will no longer be helpful to identify a spouse by his or her partner's gender. Furthermore, Arizona does not maintain a centralized repository for marriage and divorce records and, therefore, the true names of spouses cannot be readily identified. The difficulties of locating the true name of a responsible spouse multiplied in 2015. Adopting the Amendment will help mitigate these difficulties by giving investigators more time to locate the true name of the spouse when the complaint reasonably identifies that person's status and due process is followed to notify the possible spouse of the lawsuit.

#### **B. The Current Rule Does Not Foreclose Post-Judgment Amendments**

The current Rule 10(f) shows that courts want to correctly identify a defendant, but the rule leaves post-judgment corrections to implication. Rule 10(f) imposes no time limit for replacing a placeholder name with a true name. Instead, Rule 10(f) expressly allows amendment of the "the pleading or proceeding"<sup>7</sup> upon discovery of the defendant's true name, which implicitly includes post-judgment amendments.<sup>8</sup>

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<sup>6</sup> ARIZ. REV. STAT. ANN. § 25-101(C); *see also Standhardt v. Super. Court ex rel. County of Maricopa*, 206 Ariz. 276, 290, 77 P.3d 451, 465 (Ct. App. 2003) (rejecting constitutional challenge to the law); *but see Obergefell v. Hodges*, 135 S. Ct. 2584, 2604, 192 L. Ed. 2d 609 (2015) (finding that same-sex marriage is protected as a fundamental right).

<sup>7</sup> Black's Law Dictionary defines "proceeding" as "[a]ny procedural means for seeking redress from a tribunal or agency." Black's Law Dictionary 1324 (9th ed. 2010). The accompanying quotation from Edwin E. Bryant's The Law of Pleading Under the Codes of Civil Procedure

Courts must also be concerned with the due process owed to a defendant designated by a placeholder, so the lack of a time limit does not help those who do not find the defendant's true name before judgment. The Amendment directs the court to expressly consider a defendant's due process rights before allowing a post-judgment amendment. This protects defendants from being added to judgments because of mere proximity; allows plaintiffs to show that they conducted themselves reasonably in the context of the case; and keeps the court focused on the most important issues raised by the situation.

### **C. The Amended Rule Respects a Defendant's Due Process Rights While Conserving Judicial Resources**

The Amendment also fosters judicial economy in several ways. The Amendment obviates the need for several lawsuits or other methods to discover the true identity of a party. If a judgment is rendered against a single defendant when the plaintiff did not know the other defendant's identity, but the pleading used reasonable particularity to identify that defendant and that defendant received due process, the courts should not allow that defendant to hide from the judgment.<sup>9</sup> If defendant designated with a placeholder is revealed after judgment under the current rules, then the plaintiff would have to take extraordinary—and perhaps unappealing—measures to obtain a judgment against that party.

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notes that proceeding includes pre-judgment and post-judgment components. *Id.* Arizona courts have noted proceeding's linguistic flexibility. *See, e.g., City of Sedona v. Devol*, 196 Ariz. 178, 182, 993 P.2d 1142, 1146 (Ct. App. 1999) (construing a statute regarding the abandonment of condemnation proceedings). The courts have also used "proceeding" to describe post-judgment actions. *See, e.g., Osterkamp v. Browning*, 226 Ariz. 485, 489, 250 P.3d 551, 555 (Ct. App. 2011) (construing Rule 34 of the Arizona Rules of Criminal Procedure's requirements for post-conviction counsel in a "proceeding."). Thus, Rule 10(f) arguably allows for post-judgment substitution of names as currently written.

<sup>8</sup> ARIZ. R. CIV. P. 10(f).

<sup>9</sup> As the Louisiana Court of Appeals held, if the spouses live together, service of process "on one spouse alone does not offend the due process rights of the other with respect to the enforcement of an obligation against community property." *Shel-Boze, Inc. v. Melton*, 509 So. 2d 106, 109 (La. Ct. App. 1987) (emphasis added).

For example, a determined plaintiff may institute a new lawsuit requesting the court to include the heretofore unknown defendant as a judgment debtor.<sup>10</sup> This potential solution is littered with landmines, among them: (1) who must be parties to the new lawsuit; (2) has the first lawsuit tolled the statute of limitations for the second lawsuit; (3) what is the preclusive effect of the first judgment; (4) is the judgment in the new case a new judgment or an amendment to the original judgment; (5) what is the impact of a decision in the second case which is inconsistent with the first judgment; and so on. Alternatively, the plaintiff could engage in pre-judgment discovery to determine the true name of the defendant. When the known defendant contests the claim, pre-judgment discovery is one potentially cost-effective way the plaintiff can try to obtain an unknown defendant's true identity. These cases would rarely fall into the scope of the proposed Amendment.

For cases where the known defendant fails to answer the complaint, discovery tools and their effectiveness diminish. The defaulting defendant has shown that he or she is unwilling to participate in the lawsuit and, therefore, discovery requests are likely to be ignored. Assuming the defaulting defendant would respond to discovery, he or she may not reveal the identity of the codefendant out of a strong desire to protect that defendant. Although the court has the authority to sanction this obstructionist conduct, it will not consider the merits of the dispute without a "personal consultation" and good faith efforts to resolve the dispute.<sup>11</sup> Lawyers often have

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<sup>10</sup> In the unusual circumstances of a specific case where an arbitrator refused to allow a known spouse to be joined as a party to a lawsuit, the Court of Appeals held that an "independent action may be brought to establish the liability of the spouse who could not have been joined in the first action." *Heinig v. Hudman*, 177 Ariz. 66, 71, 865 P.2d 110, 115 (Ct. App. 1993). Only the barest contours of the second action were described by the court. *Id.* By contrast, Nevada allows its courts to summon joint debtors after judgment to show "cause why they should not be bound by the judgment." NEV. REV. STAT. ANN. § 17.030 (West).

<sup>11</sup> ARIZ. R. CIV. P. 37(a)(2)(C) and J.C.R.C.P. 127(b) (limiting the personal consultation requirement to motions filed by attorneys).

difficulty obtaining a response to a request for a personal consultation from a recalcitrant defendant. Even if the full force of discovery sanctions were imposed on the known defendant, the sanction would ordinarily be limited to that defendant or his attorney and, hence, may not be enforceable against the fictitiously-named defendant. ARIZ. R. CIV. P. 37(a)(4)(A). If the plaintiff must account for the difficulties of obtaining necessary information, they may ask their lawyers to request default hearings on the issue of attorneys' fees and costs that should be assessed to defaulting defendants instead of seeking a judgment without a hearing. This is not efficient or just.

#### **D. The Existing Rules of Civil Procedure Fail to Address this Situation Adequately**

The existing rules of civil procedure do not resolve this issue. Rule 15(c) is aimed at a different, though related, problem: naming the wrong party.<sup>12</sup> In cases within the ambit of Rule 10(f), however, there is no mistaken party and no change in the identity of the party; only an unknown party who has since become known.<sup>13</sup> Rule 19(a) also addresses a different issue: bringing a non-party before the court under certain circumstances.<sup>14</sup> However, the defendant designated by a placeholder is a party to the lawsuit whose true name has not been uncovered. Like Rule 19(a), the Amendment requires a court to respect due process when amending pleadings or proceedings.

Rule 21 states, in relevant part, that “[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just.”<sup>15</sup> This broad rule is aimed very closely at the problem addressed by the

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<sup>12</sup> ARIZ. R. CIV. P. 15(c); J.C.R.C.P. 119(c).

<sup>13</sup> See *Lane v. Elco Indus., Inc.*, 134 Ariz. 361, 365, 656 P.2d 650, 654 (Ct. App. 1982) (discussing the different sources and aims of Rules 10(f) and 15(c)).

<sup>14</sup> ARIZ. R. CIV. P. 19(a); J.C.R.C.P. 104(d).

<sup>15</sup> ARIZ. R. CIV. P. 21.

Amendment, but it is insufficient. Rule 21 assumes that the identity of the party to be added is known to the plaintiff and the question is whether the person should be a party. In the situations covered by the Amendment, the defendant is a party with an unknown name; it has already been determined that these defendants should be parties and they are parties. That said, they are not identified by their true names. Like Rule 15(c), Rule 21 requires due process protections.<sup>16</sup> The Amendment requires a finding that the defendant designated by a placeholder received due process.

#### **IV. Conclusion**

The Amendment promotes justice, efficiency, and respect for each defendant's due process rights. It covers a situation that pre-trial discovery may only reach with difficulty and it aligns with the spirit of rules that cover related situations. It should be adopted as the balance for a defendant's cloak of mystery. Arizona courts should prevent defendants from concealing others who may be responsible for a plaintiff's harm. The Amendment does just that.

RESPECTFULLY SUBMITTED on January 8, 2016.

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<sup>16</sup> See *Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 37, 676 P.2d 669, 671 (Ct. App. 1984).