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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. R-16-0019

**Reply to Comments on 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., through Brian K. Partridge, replies to the comments filed in response to the Petition to amend Rule 10 of the Arizona Rules of Civil Procedure and Rule 110 of the Justice Court Rules of Civil Procedure (the “Petition”). At their root, the two comments opposing the Petition argue that post-judgment substitution of names violates a defendant’s due process rights. State Bar Comment; Response from Maricopa County Justice Court Bench. However, the Petition is not intended to impair anyone’s due process rights. When viewed in its entirety, the Petition’s proposed amendments preserve the fictitiously-named defendant’s right to notice of proceedings and an opportunity to be heard.

I. Due Process is Not Violated by Substitution of Names After Judgment

The State Bar of Arizona (“State Bar”) analogizes the impact of revising Rule 10(f) of the Arizona Rules of Civil Procedure to a process repudiated by the Supreme Court of the United

States in *Nelson v. Adams USA, Inc.*, 529 U.S. 460 (2000).¹ In *Nelson*, a company sued Adams USA, Inc. for patent infringement. *Id.* at 462. After prevailing in the patent case and been awarded costs and attorneys' fees against the plaintiff-company, Adams sought to amend its pleading to add the plaintiff-company's sole shareholder, Nelson, to the case and enter judgment against him. *Id.*, at 462-463. The district court granted this motion, "simultaneously making Nelson a party and subjecting him to judgment." *Id.* Nelson challenged whether he could immediately be made liable to a judgment when he was not a party to the lawsuit before judgment. *Id.*, at 465. The Supreme Court agreed that adding a non-party to the lawsuit after judgment without providing an opportunity to present a defense violated due process. *Id.*, at 467.

The *Nelson* case is inapposite to the situation addressed by the Petition. Unlike Nelson, a fictitiously-named defendant is a party to the lawsuit from its inception. The Petition does not permit proceeding without identifying the fictitious defendant in a reasonable manner. To use the amendment to Rule 10(f), the plaintiff names the defendant as a party; the plaintiff simply does not know the true name of that party. By contrast, Adams, the defendant in the *Nelson* case, "knew of Nelson's *role and existence* and, until it moved to amend its pleading, chose to assert its claim for costs and fees only against" Nelson's company. *Id.*, at fn. 1 (emphasis added). The plaintiffs who need to utilize Rule 10(f)'s provisions lack the knowledge that Adams had and, therefore, could not make the choice that Adams made pursuant to the law.

The Supreme Court distinguished the due process concern in *Nelson* from another case. In that case, the potential defendants owned a corporation, acted as the corporation's directors,

¹ The United States Court of Appeals for the Ninth Circuit observed years ago that "[t]here is no provision in the Federal Statutes or Federal Rules of Civil Procedure for use of fictitious parties." *Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d 1187, 1191 (9th Cir. 1970) (citations omitted); *see also*, FED. R. CIV. P. 10(a) (lacking any reference to fictitious names for defendants). Understandably, the federal courts are less charitable to "Doe" defendants than Arizona courts. In fact, *Nelson* does not involve a "Doe" defendant, but a potential plaintiff.

appeared at the trial, and misrepresented the company's solvency to resist a pre-trial amendment of the complaint. *Fromson v. Citiplate, Inc.*, 886 F.2d 1300, 1304 (Fed. Cir. 1989).² The Supreme Court noted that the defendants in *Fromson* could hardly "assert that another's mistake or choice of whom to sue had compromised their ability to defend" under the circumstances. *Nelson*, at 468 (distinguishing *Fromson v. Citiplate, Inc.* from *Nelson*). Instead, the Supreme Court noted that those defendants had made their bed and would be made to lie in it. *Id.* Due process is flexible and responsive to the particular circumstances of a case. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *In re MH-2008-000867*, 225 Ariz. 178, 182, 236 P.3d 405, 409 (2010) (applying *Mathews*); see also, *Hannah v. Larche*, 363 U.S. 420, 442 (1960) (remarking that "'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts.").

Looking at *Nelson* in context, it does not stand for the proposition that responsible individuals can hide behind a cloak of due process by withholding important information from the court. Those defendants who frustrate a plaintiff's right to redress for suffered harms by withholding information vital to establishing the fictitiously-named defendant's true name, or deceiving the plaintiff, should not avoid the consequences of their actions. In those situations, due process is not offended even by a post-judgment amendment without a trial. *Fromson*, 886 at 1304 (Fed. Cir. 1989); *Nelson*, at 486. If the defendants are participating in the litigation, the tools of discovery, the current rules of civil procedure, and the trial courts provide an adequate

² Although *Fromson* and *Nelson* both arose in the context of corporate patent infringement battles, their discussions of due process when more than one party is responsible for a person's harm are not limited to their facts. Indeed, the law often holds individuals responsible for the acts of their associates. See, e.g., *Cnty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 631, 898 P.2d 1005, 1009 (Ct. App. 1995) (holding former spouses jointly liable for community obligations); *Kitchell Corp. v. Hermansen*, 8 Ariz. App. 424, 426, 446 P.2d 934, 936 (1968) (noting that "the general partner may become individually liable for all of the debts of the partnership.").

deterrent for this misbehavior and gamesmanship. When the defendants fail to participate in the litigation, however, it is unlikely that the plaintiff will have much success, either using formal or informal discovery methods, to correctly identify the fictitiously-named defendant's true name. Due process does not protect deceivers from being held responsible for the harms they cause.

II. The Petition Imposes Restrictions on the Court's Power to Alter the Judgment

The Petition contemplates post-judgment substitutions of a true name only where the trial court is satisfied that: (1) the defendant's true name was not discovered before judgment; (2) the defendant received "service in accordance with these Rules"; and (3) was "reasonably identified such that the defendant knew or should have known of the pleading. . . ." served upon the defendant. Yet, the Maricopa County Justice Court Bench ("MCJCB") asserts that the Petition, if adopted, would "subject people to being added to judgments without notice." Response from the MCJCB at pp. 2-3.

When an individual is served with process, as the Petition requires, they are provided adequate notice of the case and an opportunity to be heard. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). When a defendant is served with a complaint that "reasonably identif[ies]" that particular defendant so that he should reasonably conclude that he is the fictitiously-named individual in the complaint, that defendant should take appropriate action.³ Of course, the fictitiously-named defendant must have sufficient notice to conclude that

³ If the fictitiously-named defendant appears and defends against the complaint's allegations, then the current version of Rule 10(f) would immediately substitute that defendant's true name. *Brennan v. W. Sav. & Loan Ass'n*, 22 Ariz. App. 293, 297, 526 P.2d 1248, 1252 (1974) (relying on Rule 10(f) to substitute a true name without resort to Rule 15). The Petition does not alter this portion of Rule 10(f). Since the fictitiously-named defendant must receive service of process and be reasonably identified in the complaint, the defendant cannot rely on lack of notice. *Cf. Meyer v. Kelsey-Hayes Corp.*, 126 Ariz. 165, 166, 613 P.2d 628, 629 (Ct. App. 1980) (upholding dismissal in a case where Rule 15 was used to amend the complaint and it was "undisputed" that service did not occur on the defendant before the statute of limitation ran); *see also, Powers v.*

he is a defendant in the case. *Lane v. Elco Indus., Inc.*, 134 Ariz. 361, 364, 656 P.2d 650, 653 (Ct. App. 1982) (citation omitted). This notice could be given by an alias summons naming the defendant. *Id.* It could also occur if the circumstances sufficiently identify the defendants in a way that should put them on notice that they are defendants. *Safeway Stores, Inc. v. Ramirez*, 99 Ariz. 372, 379, 409 P.2d 292, 297 (1965) (reviewing the information in the summons, the complaint, the process server's remarks, and the remarks of the person accepting service to determine if circumstances gave clear notice to the fictitiously-named defendant).

If the fictitiously-named defendant is properly identified in the complaint and served with process but does not respond to the summons, complaint, entry of default, or request for default judgment, that defendant has had ample opportunity to be heard in the case. Failing to participate will not prevent the entry of judgment against that defendant. *See, e.g., Cmty. Guardian Bank v. Hamlin*, 182 Ariz. 627, 631, 898 P.2d 1005, 1009 (Ct. App. 1995) (noting that a default judgment is an admission of well-pleaded facts). If the trial court fails to be persuaded of the conditions imposed by the Petition, then the plaintiff will not receive a judgment against the fictitiously-named defendant.

III. Other Community Property States Have Determined that Service Upon One Spouse is Sufficient Due Process

Many community property states have approved service of process on either spouse as adequate notice to the community estate. *See, e.g., 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

W.B. Mobile Servs., Inc., 182 Wash. 2d 159, 165, ¶ 12, 339 P.3d 173, 176 (2014) (holding that the statute of limitations was tolled as to an unserved and unidentified defendant when that defendant was identified with reasonable particularity and the defendant had, or should have had, “such notice of the action that it will not be prejudiced” by joinder in the case).

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 when the judgment is executed). Arizona has determined that both spouses must be “sued jointly,” which means they must both be named as parties in the case and served with process. *Eng v. Stein*, 123 Ariz. 343, 346, 599 P.2d 796, 799 (1979). The Petition allows a plaintiff who does not know if a defendant is married to sue them jointly, serve them properly, and substitute a true name for the spouse when it is uncovered. The Petition gives married defendants more process than that required in other community property states.

IV. The Petition Is More Protective Than Similar Procedures in Other States

The Petition draws upon the wisdom of courts in other jurisdictions to solve a vexing problem: what to do with defendants whose true name is not known until after judgment. In Nevada, courts have the power to summon joint debtors who are not a party to a judgment to find out why they should, or should not be included in, the judgment. *Meritage Homes of Nevada, Inc. v. F.D.I.C.*, 753 F.3d 819, 826 (9th Cir. 2014) (construing NEV. REV. STAT. § 17.030). While this process may protect the joint debtor’s due process rights, it only gives the potential judgment

debtor a single hearing to explain away his liability. The Petition requires that the defendant be identified, served with process, defaulted, and notified of the post-judgment motion before the judgment can be altered. The Petition provides more safeguards and guidance than Nevada's law on the same subject.

In Louisiana, the Court of Appeals has determined that if “the spouses reside together at the time [of service], service of prior notice 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” because each spouse has the power to act for the community. *Shel-Boze, Inc. v. Melton*, 509 So. 2d 106, 109 (La. Ct. App. 1987). With a few exceptions, either spouse may act to bind the community in Arizona. ARIZ. REV. STAT. ANN. § 25-214. In Louisiana, the rules of civil procedure allow the court to *sua sponte* join a spouse as a party when “injustice” may result “to that spouse.” LA. CODE CIV. PROC. ANN. art. 735. The Petition respects the statute requiring that creditors sue both spouses jointly. ARIZ. REV. STAT. ANN. § 25-215(D). It also ensures that the court does not act on its own initiative without adequate information. Finally, the Petition gives the trial court specific guidance of what it should consider before acting.

In Washington, Rule 10's equivalent has been interpreted to allow the tolling of the statute of limitations as to an unidentified and unserved defendant when that defendant was identified with reasonable particularity and the defendant had, or should have had, “such notice of the action that it will not be prejudiced” by joinder in the case. *Powers v. W.B. Mobile Servs., Inc.*, 182 Wash. 2d 159, 165, ¶ 12, 339 P.3d 173, 176 (2014). The Petition incorporates the requirement of identifying the defendant with reasonable particularity in the complaint, but adds the requirement of service of process. Service of process is more specific and more strenuous

than a general requirement for notice of the action. The Petition draws upon the approaches of several other states while providing additional protections those states have not adopted.

V. A Proposed Revision to the Petition

The Petition presupposes that the trial court will make the required findings after the plaintiff requests a change in the name of the parties. After considering the comments, especially the concern as to rendering a person liable without adequate notice, the undersigned crafted a simple revision to the Petition to express the service requirements for the underlying lawsuit and the method of seeking relief. The proposed revisions are 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, upon motion which is served in accordance with Rule 5(c)(4), the court may enter judgment against the defendant in the defendant's true name if the court finds: (1) the defendant was served with process in accordance with the Rules of Civil Procedure and (2) the defendant knew or should have known of the pleading or proceeding.
Ariz. R. Civ. P. 10(f).

The proper name of every plaintiff and of every defendant. If a defendant's name is unknown, a complaint may identify the defendant by a fictitious name, and the complaint may be amended when the defendant's true name becomes known. If the defendant's true name is not discovered before judgment, upon motion which is served in accordance with in accordance with Rule 120(e), the court may enter judgment against the defendant in the defendant's true name if the court finds: (1) the defendant was served with process in accordance with the Rules of Civil Procedure and (2) the defendant knew or should have known of the pleading or proceeding. This paragraph also applies to defendants in a third-party complaint.
J.C.R.C.P. 110(b)(1).

The post-judgment motion under Rule 10(f) or Rule 110(b)(1) must be served upon the defendants and they must be given another opportunity to respond to that motion and explain why they should not be held liable under the judgment. As a requirement, this motion must identify the defendant by his or her true name and should motivate that defendant to act even if

prior notices failed to do so. Thus, the court will have as many facts and arguments as the parties can muster when considering the motion.

For example, if the fictitiously-identified defendant has evidence that he or she was not properly served with process, that issue can be briefed and resolved. If the defendant believes his or her joinder in the lawsuit was improper from the beginning, that issue can be briefed and resolved. The proposed revision to the Petition builds upon the comments elicited in response to the original Petition in a meaningful and helpful way. Petitioner urges the Supreme Court to adopt the revised rules set forth above.

VI. Conclusion

The petitioner appreciates the thought, time, and energy evident in the comments on the Petition. Although the State Bar and the MCJCB expressed concerns as to how the Petition would impact any fictitiously-named defendant's due process rights, the Petition safeguards those rights in a common-sense manner. The Petition respects Arizona's substantive law while facing the reality that identifying every responsible party by their true name, especially before a default judgment's entry is, to use an understatement, "difficult." Response of MCJCB at pg. 4. The Petition provides guidance to the trial courts in tackling this difficult problem. Finally, the Petition rectifies the injustice imposed on plaintiffs who are misled by defendants. For all of the reasons stated here and in the Petition, the Supreme Court of Arizona should adopt the amended rules set proposed by the Petitioner.

Respectfully submitted on June 30, 2016

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