No. 2D17-755

IN THE SECOND DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

THOMAS SAMMONS and MADELINE SAMMONS, his wife,

Appellants,

v.

ADAM GREENFIELD, D.O., ASG DOCTORS, INC., and FAMILY MEDICAL CENTER OF PORT RICHEY, INC. d/b/a FAMILY MEDICAL CENTERS,

Appellees.

On Appeal from the Circuit Court of the Sixth Judicial Circuit
in and for Pasco County, Florida
L.T. No. 15-CA-651, Hon. Declan P. Mansfield

REPLY BRIEF OF APPELLANTS

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ARGUMENT

I. ISSUE 1: APPELLEES MISTAKENLY INVITE THIS COURT TO APPLY AN INCORRECT STANDARD OF REVIEW AND SUGGEST THIS COURT SHOULD REJECT THE FIFTH DISTRICT'S DECISION IN *TAYLOR* V. *ORLANDO CLINIC*

In addressing Rule 1.260(a)(1), Appellees invite the Court to apply an incorrect standard of review (*see* Answer Br. 7) and suggest this Court should reject the Fifth District's opinion in *Taylor* v. *Orlando Clinic*, 555 So. 2d 876 (Fla. 5th DCA 1989) (*see* Answer Br. 7-10). Both arguments are mistaken.

A. The Court Should Review The Trial Court's Misinterpretation Of Rule 1.260(a)(1) De Novo

Distinguishing between "interpretation" and "application" of a procedural rule (Answer Br. 7), Appellees contend the Court should review the Rule 1.260(a)(1) issue for abuse of discretion. There are two problems with that argument. First, it misreads the case upon which it relies. And second, even if it were correct, it would amount to a Pyrrhic victory because, no matter what the standard of review is, the issue would still involve resolution of a question of law (to which no deference is owed even under an abuse-of-discretion standard).

As support for their position, Appellees rely on *Farish* v. *Lum's, Inc.*, 267 So. 2d 325, 327-28 (Fla. 1972). That case involved a defendant whose responses to requests for admission were signed by his attorney rather than sworn by the litigant himself. *Id.* at 326. Upon receipt of the defendant's unsigned, unsworn response, the plaintiff moved for summary judgment. *Id.* Before the summary judgment hear-

ing, the defendant sought leave to file a properly sworn amended response. *Id.* The trial court denied leave, granted summary judgment, and denied post-judgment relief. *Id.* at 326-27. On appeal, the district court reversed and remanded. *Id.* at 327. The Florida Supreme Court, however, reversed the district court because its decision "eliminated" trial court discretion: "The exercise of discretion by a trial judge who sees the parties first-hand and is more fully informed of the situation, is essential to the just and proper application of procedural rules." *Id.*

Farish is inapposite because the question here is not whether the trial court properly exercised discretion to dismiss Mrs. Sammons's cause of action under Rule 1.260(a)(1), but rather whether Rule 1.260(a)(1) gave it any authority to do so in the first place. That is, to use Appellees' words, a legal question of "interpretation," not "application." As such, the correct standard of review is de novo. *See Saia Motor Freight Line, Inc.* v. *Reid*, 930 So. 2d 598, 599 (Fla. 2006) (interpretation of procedural rules "is a question of law subject to de novo review").

And even if Appellees were somehow correct that the standard of review was abuse of discretion, for practical purposes it would remain de novo either way. *Cf. United States* v. *Barner*, 441 F.3d 1310, 1315 n.5 (11th Cir. 2006) ("The disagreement is perhaps more apparent than real, for even under an abuse of discretion standard, errors of law receive no deference.").

B. The Court Should Follow *Taylor* v. *Orlando Clinic*

Taking issue with the Fifth District's decision in *Taylor* v. *Orlando Clinic*, 555 So. 2d 876, 878 (Fla. 5th DCA 1989), Appellees urge this Court to follow the Third District's decision in *ACandS, Inc.* v. *Redd*, 703 So. 2d 492, 494-95 (Fla. 3d DCA 1997), instead. *See* Answer Br. 7-10. The invitation is misguided.

As an initial matter, *Redd* involved a different issue: *i.e.*, whether a loss-of-consortium claim survives after a spouse's death or abates to the deceased spouse's estate as part of its wrongful death claim. 703 So. 2d at 493. The issue here, in contrast, which *Taylor* addressed, concerns the scope of authority granted to trial courts under Rule 1.260(a)(1) to dismiss a living widow's action for failure to substitute an estate for the widower within 90 days of a suggestion of death. Some explanation is in order.

Redd involved a doctor's personal injury lawsuit for asbestos exposure that led to mesothelioma. *Id.* at 493. His wife sued for loss of consortium. *Id.* Midway through the jury trial, the doctor died of mesothelioma. *Id.* The question was whether the wife's loss-of-consortium claim survived the doctor's death or instead abated to his estate as part of a wrongful death claim. *Id.* In answer to that question, *Redd* declined to follow its interpretation of *Taylor* because it believed the wrongful death statute allowed recovery of loss-of-consortium damages, so the wife's cause of action abated. *Id.* Nevertheless, consistent with *Taylor*, *Redd* rec-

ognized that "a spouse can maintain a consortium claim in situations where there has not been joinder of the injured spouse, or where the injured spouse has executed a consent judgment or a release as to his or her claim." *Id.* at 494 (citations omitted). *Redd*, for that reason, *abated* the wife's claims; it did not *dismiss* them.

Taylor, on the other hand, is virtually on all fours with the situation here. There, a husband brought a medical malpractice claim, and his wife sued for loss of consortium. 555 So. 2d at 877. During trial court proceedings, the husband died as a result of his personal injury. *Id.* He failed to substitute his estate within 90 days, as required by Rule 1.260(a)(1). *Id.* After that 90-day deadline expired, the personal representative of the husband's estate (*i.e.*, his wife) sought leave to amend the complaint to substitute the medical malpractice claim for a wrongful death claim. *Id.* Separately, the personal representative filed a wrongful death lawsuit on behalf of the husband's estate in a new action. *Id.* at 878. In the original action, the trial court denied leave to amend and dismissed the action as to both the deceased husband and his wife for failure to comply with Rule 1.260(a)(1)'s 90-day deadline. *Id.* Additionally, in the second action, the trial court dismissed the wrongful death action as impermissible claim splitting. *Id.*

On appeal, the Fifth District affirmed the dismissal of the husband's medical malpractice claim because it "was extinguished by the patient's death when it was not reduced to judgment before the patient died." *Id.* But it reversed the dismissal

of the estate's wrongful death claim in the second action and the wife's loss-of-consortium claim. *Id.*

With respect to the wife's loss-of-consortium claim, *Taylor* explained it was "entirely independent and different in many significant ways." *Id.* In that regard, *Taylor* noted the old common law rule (*actio personalis moritor cum persona*) by which actions based on contracts or property torts survived a decedent's death, "but actions for personal wrongs and personal injuries were considered 'personal' causes of action and died with the person." *Id.* at 878 & n.2. Nevertheless, *Taylor* explained the Florida Legislature had abrogated that common law rule: "No cause of action dies with the person. All causes of action survive and may be commenced, prosecuted, and defended in the name of the person prescribed by law." § 46.021, *Fla. Stat.* The exception to that abrogation is the wrongful death statute, which provides in relevant part: "When a personal injury to the decedent *results in his death*, no action *for the personal injury* shall survive, and any such action pending at the time of death shall abate [to the decedent's estate]." § 768.20, *Fla. Stat.* (emphases added).

Here, it was not legally possible for Mrs. Sammons's loss-of-consortium claim to abate to her husband's estate, because Mr. Sammons did not die *as a result of* the amputation; instead, he died of other causes. *Compare* R. 9 (below-the-knee amputation occurred in March 2013), *with* R. 105 (death occurred in three

years later in March 2016). For that reason, his estate could not bring a wrongful death action through which it might seek damages for Mrs. Sammons loss-of-consortium claim. *Compare* § 768.16, *Fla. Stat.* (providing wrongful death cause of action "[w]hen the death of a person *is caused by* the … negligence … of any person" (emphasis added)), *with* § 768.21(2), *Fla. Stat.* (allowing spouse to recover loss-of-consortium damages as part of estate's wrongful death cause of action but not its personal injury action).

That analysis is well within the legal framework established by the Florida Supreme Court in *Busby* v. *Winn & Lovett Miami, Inc.*, 80 So. 2d 675 (Fla. 1955). There, a trial court had dismissed a husband's loss-of-consortium claim "solely because the wife had not participated in the action." *Id.* at 676. On appeal, the Florida Supreme Court reversed. *Id.* In doing so, *Busby* noted there were "two causes of action—one for her own personal injuries and the other for the husband's loss of her society and services and for medical expenses incurred by him on her behalf." *Id.* As such, the two causes of action are "separate and distinct and the husband's action may be maintained without joinder of the wife." *Id.*

The crux of Appellees' position here is that because they obtained a judgment against Mr. Sammons, they necessarily are entitled to one against his wife as well. *See* Answer Br. 7-10. It is of course true that a loss-of-consortium claim is derivative from the spouse's claim in one respect: "Where the husband's cause of

action has been terminated by adverse judgment *on the merits*, this should bar the wife's cause of action for consortium." *Gates* v. *Foley*, 247 So. 2d 40, 45 (Fla. 1971) (emphasis added). But the problem for Appellees is that they did not obtain a judgment against Mr. Sammons *on the merits* such that it would have *res judicata* effect; instead, they obtained a dismissal due to a procedural defect (*i.e.*, failure to comply with Rule 1.260(a)(1)), which would have been without prejudice to refiling the case in a new action except that the statute of limitations had already run.[1] *Cf. Hughes* v. *Lott*, 350 F.3d 1157, 1161 (11th Cir. 2003) ("A dismissal without prejudice is not an adjudication on the merits and thus does not have a *res judicata* effect." (citing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 396 (1990)).

Because the dismissal against Mr. Sammons was for a procedural defect rather than on the merits, Appellees are not entitled to a judgment against Mrs. Sammons. And it almost goes without saying—and certainly without dispute from Appellees—that the plain language of Rule 1.260(a)(1) does not otherwise authorize a trial court to dismiss a living party's action merely because a deceased party failed to substitute his estate within 90 days. *See* Fla. R. Civ. P. 1.260(a)(1) ("the action shall be dismissed *as to the deceased party*" (emphasis added)).

[1] Indeed, even Appellees conceded at the hearing that the dismissal would have been without prejudice but for the fact that the statute of limitations had run: "The only question is whether [dismissal] should be with or without prejudice, and our position is it should be with prejudice because … the two-year statute of limitations has run." R. 133-134; *see also* R. 108 (making same concession in motion to dismiss).

II. ISSUE 2: APPELLEES MISREAD THE SCOPE OF APPELLANTS' ARGUMENT, AND NOTWITHSTANDING ANY PROCEDURAL ERROR, THE AFFIDAVIT ALONE ESTABLISHED EXCUSABLE NEGLECT

In addressing excusable neglect, Appellees misread the scope of Appellants' argument (*see* Answer Br. 5-6, 11) and contend the affidavit lacked sufficient averments. They are incorrect.

A. Appellants Argued The Trial Court Committed Both Procedural Error And Substantive Error, And Appellees' Contrary Misreading Is Incorrect

Appellees contend the only Appellants issue raised concerned procedural error, not substantive error. *See* Answer Br. 6 ("the issue on appeal is whether the Trial Court followed the appropriate procedure in granting the motion"), 11 (same). They have misread the initial brief. Specifically, in addition to addressing procedural error, Appellants addressed the trial court's substantive error as follows:

> And that procedural error [in denying an evidentiary hearing] exacerbated the trial court's mistake, because Ms. Bannasch's hypothyroidism-induced memory problems easily qualified as excusable neglect under *Somero*, *Paul*, *Mims ex rel. Mims*, and other cases. As Ms. Bannasch explained, she did not need to establish that she was "totally incapacitated." Rather, it was sufficient to show that her hypothyroid-induced memory "lapses" prevented her from timely filing the motion to substitute parties.

Initial Br. 13-14 (citations omitted).

In that regard, moreover, appellate courts "liberally read briefs to ascertain the issues raised on appeal," which also includes "amplification of [a] position in the reply brief." *United States* v. *Starke*, 62 F.3d 1374, 1379 (11th Cir. 1995). Lest

there remain any confusion, it is—and always has been—Appellants' position that the trial court committed procedural and substantive error when it (1) failed to convene an evidentiary hearing and (2) concluded their trial counsel had not established excusable neglect.

B. Notwithstanding The Trial Court's Procedural Error In Failing To Convene An Evidentiary Hearing, The Affidavit Alone Established Excusable Neglect

The parties dispute whether the affidavit, taken as true, established excusable neglect. *Compare* Initial Br. 13-14, *with* Answer Br. 14. Appellees rely (Answer Br. 14) on cases like *Martin* v. *Hacsi*, 909 So. 2d 935, 937 (Fla. 5th DCA 2005) (inactivity), *Bowers* v. *Allez*, 165 So. 3d 710, 712 (Fla. 4th DCA 2015) (medical issues), and *Geer* v. *Jacobsen*, 880 So. 2d 717, 721 (Fla. 2d DCA 2004) (attorney errors, inadvertence, or ignorance of rules). In contrast, Appellants rely (Initial Br. 13-14) on cases like *Somero* v. *Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985) (clerical or secretarial error), *Paul* v. *Wells Fargo Bank, N.A.*, 68 So. 3d 979, 985 (Fla. 2d DCA 2011) (illness or psychological condition), and *Mims ex rel. Mims* v. *Am. Sr. Living of Dade City, FL, LLC*, 36 So. 3d 935, 936 (Fla. 2d DCA 2010) (clerical error). Notably, *Paul* is the only Second District case that concerns whether an attorney's illness or psychological condition can establish excusable neglect. And as it happens, *Paul* is consistent with numerous cas-

es from this Court that allow excusable neglect to be established based on such health concerns.[2]

The problem is that the trial court required Ms. Bannasch to demonstrate she was "totally incapacitated." R. 142. Instead, her demonstration that her hypothyroid-induced memory lapses prevented her from timely filing the motion to substitute was sufficient.[3] It remains for the Court to determine which side has correctly applied the case law to the sufficiency of the affidavit's averments.

CONCLUSION

The Court should vacate the judgment and remand for further proceedings.

Respectfully submitted,

/s/ Thomas Burns

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[2] *E.g.*, *Am. Network Transp. Mgmt., Inc.* v. *A Super-Limo Co.*, 857 So. 2d 313, 314-15 (Fla. 2d DCA 2003) (kidney stones); *Leinberger* v. *Leinberger*, 455 So. 2d 1140, 1141 (Fla. 2d DCA 1984) (bipolar psychosis); *Jasson D. Radding, Inc.* v. *Coulter*, 138 So. 2d 380, 383 (Fla. 2d DCA 1962) (illness).

[3] In doing so, the trial court necessarily rejected the veracity of the affidavit's averments, which illustrates why an evidentiary hearing was so necessary.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 16, 2018, I electronically served the following via eDCA and email: Desiree Bannasch (debannasch@me.com), Desiree E. Bannasch, P.A., 5401 South Kirkman Road, Suite 310, Orlando, FL 32819; and Bryan Snyder (bryan.snyder@rissman.com), Rissman, Barrett, Hurt, Donahue & McLain, P.A., One North Dale Mabry Highway, 11th Floor, Tampa, FL 33609.

January 16, 2018 /s/ Thomas Burns
Thomas A. Burns

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

January 16, 2018 /s/ Thomas Burns
Thomas A. Burns