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

INITIAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE AND FACTS

Statement Of The Case

Appellants, Thomas Sammons and Madeline Sammons, sued Appellees, Adam Greenfield, D.O., ASG Doctors, Inc., and Family Medical Center of Port Richey, Inc. d/b/a Family Medical Centers, for medical malpractice. R. 7-14. Appellants alleged Appellees failed to "timely diagnose and treat" some "redness and irritation" in Mr. Sammons left toe, which ultimately led to an otherwise avoidable "below the knee amputation." R. 8-9. Appellees answered and asserted affirmative defenses. R. 81-88.

On April 20, 2016, Appellants filed a suggestion of death for Mr. Sammons. R. 105. (Mr. Sammons had passed away on or about March 20, 2016. R. 105.) On July 25, 2016, Appellees moved to dismiss the action with prejudice because Appellants had failed to substitute parties within 90 days of filing the suggestion of death as required by Florida Rule of Civil Procedure 1.260. R. 106-109.

Appellants did not file a written response. Instead, on September 7, 2016, Appellants filed a notice of unavailability (which is not part of the record); it indicated their trial counsel, Desiree E. Bannasch, would be unavailable from September 7, 2016 through October 5, 2016. *See* R. 139-140. On September 15, 2016, Appellants moved to substitute parties. R. 110-111.

At a transcribed hearing on the motion to dismiss (R. 127-148), Appellants submitted Ms. Bannasch's affidavit, which described her medical treatment for memory problems and attached her doctor's note (R. 118-121, 135). Based on that affidavit, Appellants argued the motion to dismiss should be denied because the failure to comply with the 90-day deadline was excusable neglect. R. 134. The trial court disagreed and orally granted the motion to dismiss. R. 145-147.

After the hearing, the trial court reduced its ruling to a written order (R. 122-123) and entered final judgment (R. 124-125). This timely appeal followed. R. 156.

This appeal raises two issues. First, did the trial court misinterpret Rule 1.260(a)(1) when it dismissed the action as to Mrs. Sammons, who is not deceased? Second, did the trial court abuse its discretion or commit an error of law to which no deference is owed when it rejected Ms. Bannasch's affidavit and granted the motion to dismiss without convening an evidentiary hearing?

Statement Of The Facts

A. The Motion To Dismiss

Appellees moved to dismiss the action with prejudice because Appellants had failed to file a timely motion to substitute parties within 90 days of filing the suggestion of death as required by Florida Rule of Civil Procedure 1.260. R. 106-109. Citing public probate records, *see* § 90.202(6), *Fla. Stat.*, the motion pointed out that Mrs. Sammons was appointed personal representative of her husband's es-

tate on June 2, 2016. R. 107-108 (citing *In re Estate of Thomas Sammons*, No. 51-2016-CP-557 (Fla. 6th Cir. Ct.)). Additionally, the motion requested dismissal with prejudice because the applicable statute of limitations had expired. R. 108.

B. The Affidavit And Doctor's Note

Ms. Bannasch is a personal injury attorney with over 25 years' experience and no 10-year disciplinary history. *See* The Florida Bar, *Desiree Ellison Bannasch*, https://www.floridabar.org/mybarprofile/938874 (last visited August 23, 2017). Her affidavit averred she "became aware" in "late July or early August" of 2016 that "something was wrong" with her memory. R. 119. Specifically, Ms. Bannasch noticed she was having difficulty with her memory and recalling the names of ordinary objects, such as "whipped cream." R. 119. Her other symptoms included "rapid weight gain, tiredness, and recurrent thrush infections around [her] mouth and lips."[1] R. 119.

Ms. Bannasch sought medical treatment during the first week of August. R. 143. At the end of August (R. 145), her doctor diagnosed her with hypothyroidism, which "account[ed] for the symptoms [she] was experiencing, including the brain fog and memory lapses" (R. 119). The doctor told Ms. Bannasch she had been experiencing hypothyroidism "for about 9 months" beginning in December 2015. R.

[1] Thrush is an oral fungal infection. WebMD, *What is Thrush?*, http://www.webmd.com/oral-health/guide/what-is-thrush#1 (last visited August 23, 2017).

119. The doctor prescribed Synthroid,[2] which Ms. Bannasch began taking in September 2016, and ruled out stroke and brain tumor by doing an MRI (magnetic resonance imaging) of her brain. R. 119.

While afflicted with hypothyroidism, Ms. Bannasch "had trouble remembering to do tasks." R. 119. For instance, Ms. Bannasch did not "remember" or even "think" to file a motion to substitute parties "even though the estate had not been completely set up." R. 119. Ms. Bannasch also described some miscommunications with the clerk of the probate court that delayed proceedings. R. 119. In summary, Ms. Bannasch averred, "I have never had this problem before and did not recognize it as it was happening. Doing the [motion to substitute parties] was something that I knew I was supposed to do, but in my fog, I did not remember." R. 119-120.

The affidavit also attached a November 22, 2016 note from Ms. Bannasch's doctor. R. 121. The note stated Ms. Bannasch had been "unaware of" her hypothyroidism, which had caused "cognitive changes." R. 121. Nevertheless, the note indicated Ms. Bannasch was "compliant" with her treatment and would continue to be under the doctor's care and potentially that of other specialists. R. 121.

[2] "Synthroid (levothyroxine) is a thyroid medicine that replaces a hormone normally produced by [the] thyroid gland to regulate the body's energy and metabolism." Drugs.com, *What is Synthroid?*, https://www.drugs.com/synthroid.html (last visited August 23, 2017).

C. The Hearing

At the hearing, Appellees explained that Rule 1.260's 90-day deadline for filing a motion to substitute parties expired on July 19, 2016. R. 130. But Appellants did not file their motion (R. 110-111) until September 15, 2016—almost two months later. R. 130. Accordingly, Appellees argued dismissal was required under existing case law. R. 131-133. Additionally, Appellees argued the dismissal should be with prejudice because the statute of limitations had run. R. 133-134.

In response, Appellants did not dispute that the 90-day deadline had expired; instead, they argued their failure to file a timely motion to substitute was excusable neglect. R. 134. Ms. Bannasch described her symptoms, submitted her affidavit, and explained she had "noticed improvement" since she started taking medication in September 2016. R. 134-137.

The trial court asked Ms. Bannasch to address whether the notice of unavailability she had filed on September 7, 2016 "tend[ed] to contradict" her affidavit. R. 139-140. Ms. Bannasch explained that earlier in August 2016, she had "turned this file with others over to [other attorneys] to handle for me" because she "wasn't doing too well." R. 140-141. Additionally, Ms. Bannasch explained she also "had a trip planned for the whole month of September" to "attend the Gerry Spence Trial Lawyers College" in Wyoming. R. 141; *see also* Gerry Spence, *Trial Lawyers Col-*

lege, http://gerryspence.com/trial-lawyers-college/ (last visited August 23, 2017) (describing Gerry Spence Trial Lawyers College scheduled September 7-30, 2016).

When Ms. Bannasch mentioned the trial lawyers college, the trial court stated that "indicates to me that you're capable and competent as to what you're doing in a court." R. 142. Ms. Bannasch responded:

> MS. BANNASCH: Well, in some instances yes and some, no. I wasn't totally debilitated. I would have lapses of memory and be in a fog that I wasn't really aware was happening. And it wasn't until the incident—I mean, I wasn't totally incapacitated. I still did things. I would just have lapses sometimes.
>
> And that is what happens with this condition. I've read up on it a lot since then and, in fact, I started taking the medication at the beginning of September. My doctor put me on a particularly high dose to try to get my cognitive abilities up enough to be able to comprehend and do well at the seminar.

R. 142.

At that point, Appellees described correspondence between their counsel, the trial court, and Ms. Bannasch. R. 142-143. Specifically, Appellees apparently had written a letter on August 9, 2016 (which was never made part of the record), which asked the trial court, pursuant to a local administrative order, to rule on the motion to dismiss without a hearing. R. 143. The same day, Ms. Bannasch apparently responded to Appellees' counsel by email (which also was never made part of the record) that she objected to having the motion decided without a hearing. R. 143. But her email apparently did not mention "anything health related." R. 143.

Instead, her email apparently indicated she was "out of town at the present time but intend[ed] to file a response to [the] motion." R. 145.

Based on this correspondence, the trial court stated, "All I know is you're telling counsel you're not available at that point, and at that point you have not made a motion to substitute, at that point you have not made a motion to extend time, you haven't done anything in the case yet you're corresponding with no indication that there's … any problem whatsoever." R. 145. Ms. Bannasch explained her email did not mention health problems because "it was the end of August before I was diagnosed." R. 145.

At any rate, relying on Ms. Bannasch's August 9, 2016 email (which is not part of the record), her September 7, 2016 notice of unavailability (which also is not part of the record), and some case law, the trial court concluded there was no excusable neglect and orally granted the motion to dismiss. R. 145-147. A written order (R. 122-123) and this timely appeal (R. 156) followed.

SUMMARY OF ARGUMENT

1. The trial court committed an elementary procedural error when it dismissed the entire action, including Mrs. Sammons's independent cause of action for loss of consortium, because Mrs. Sammons is not deceased.

2. The trial court procedurally erred when it rejected the affidavit and granted the motion to dismiss without convening an evidentiary hearing.

ARGUMENT

I. ISSUE 1: DID THE TRIAL COURT MISINTERPRET RULE 1.260(A)(1) WHEN IT DISMISSED THE ACTION AS TO MRS. SAMMONS, WHO IS NOT DECEASED?

The trial court committed an elementary procedural error when it dismissed the entire action, including Mrs. Sammons's independent cause of action for loss of consortium, because Mrs. Sammons is not deceased.

Standard Of Review

"'This court reviews an order granting a motion to dismiss de novo.'" *Reyes* v. *Roush*, 99 So. 3d 586, 589 (Fla. 2d DCA 2012) (citation omitted). In doing so, this Court "give[s] no deference to the trial court's findings." *Id.* The interpretation of procedural rules "is a question of law subject to de novo review." *Saia Motor Freight Line, Inc.* v. *Reid*, 930 So. 2d 598, 599 (Fla. 2006).

Merits

Rule 1.260(a)(1) provides, "Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed *as to the deceased party*." Fla. R. Civ. P. 1.260(a)(1) (emphasis added). The Rule does not, however, provide for dismissal of the action as to a *living* party.

The complaint in this case was filed on behalf of two individuals: Mr. Sammons and Mrs. Sammons. Mr. Sammons, who is now deceased, asserted three medical malpractice causes of action. R. 8-14. In contrast, Mrs. Sammons, who is not deceased, asserted a cause of action for loss of consortium. R. 14.

Although Mrs. Sammons's cause of action for loss of consortium derived from the injury to Mr. Sammons, it was an independent cause of action. *See Taylor* v. *Orlando Clinic*, 555 So. 2d 876, 878 (Fla. 5th DCA 1989) ("The wife's cause of action for loss of consortium, while derived from the personal injury to the husband, survives the death of her husband-patient, whose own personal injury action did not survive his death."). Accordingly, even if Rule 1.260(a)(1) gave the trial court authority to dismiss the action as to Mr. Sammons, it provided the trial court no authority whatsoever to dismiss the action as to Mrs. Sammons. *See id.* (even where "[n]o motion for substitution was made within 90 days after the [husband's] recorded suggestion of death," it still "was error to dismiss the wife's cause of action for loss of consortium").

The trial court's dismissal of the entire action—including Mrs. Sammons's independent cause of action for loss of consortium—was therefore an elementary misinterpretation of Rule 1.260(a)(1) that requires immediate reversal.

II. ISSUE 2: DID THE TRIAL COURT ABUSE ITS DISCRETION OR COMMIT AN ERROR OF LAW TO WHICH NO DEFERENCE IS OWED WHEN IT REJECTED MS. BANNASCH'S AFFIDAVIT AND GRANTED THE MOTION TO DISMISS WITHOUT CONVENING AN EVIDENTIARY HEARING?

The trial court abused its discretion or committed an error of law to which no deference is owed when it rejected Ms. Bannasch's affidavit and granted the motion to dismiss without convening an evidentiary hearing.

Standard Of Review

A dismissal is reviewed de novo, *Reyes*, 99 So. 3d at 589, and a procedurally appropriate finding on excusable neglect is reviewed for abuse of discretion, *see Richards* v. *Crowder*, 191 So. 3d 524, 524 (Fla. 4th DCA 2016), but the failure to convene an evidentiary hearing about excusable neglect is an error of law to which no deference is owed, *see, e.g.*, *Halpern* v. *Houser*, 949 So. 2d 1155, 1158 (Fla. 4th DCA 2007); *Steinhardt* v. *Intercondominium Group, Inc.*, 771 So. 2d 614, 615 (Fla. 4th DCA 2000).

Merits

Rule 1.260(a)(1) provides, "Unless the motion for substitution is made within 90 days after the death is suggested upon the record by service of a statement of the fact of the death in the manner provided for the service of the motion, the action shall be dismissed as to the deceased party." Fla. R. Civ. P. 1.260(a)(1). Notwithstanding its mandatory language, however, Rule 1.260(a)(1) "has been interpreted liberally, pursuant to Rules 1.540(b)(1) and 1.090(b), "to allow substitution

of a party after 90 days of the suggestion of death upon a showing of excusable neglect." *Provident Life & Accident Ins. Co.* v. *Lebo*, 355 So. 2d 195, 196 (Fla. 3d DCA 1978) (citing *King* v. *Tyree's of Tampa, Inc.*, 315 So. 2d 538 (Fla. 2d DCA 1975), and *New Hampshire Ins. Co.* v. *Kimbrell*, 343 So. 2d 107 (Fla. 1st DCA 1977)); *accord Mims ex rel. Mims* v. *Am. Sr. Living of Dade City, FL, LLC*, 36 So. 3d 935, 936 (Fla. 2d DCA 2010) ("Rule 1.260(a)(1) has been liberally interpreted to permit a substitution of parties beyond the ninety-day period set forth in the rule."). Indeed, if excusable neglect exists, it is reversible error to deny even an untimely motion for extension of time. *E.g.*, *Vera* v. *Adeland*, 881 So. 2d 707, 710 (Fla. 3d DCA 2004) ("In view of the confusion on this issue, we conclude that excusable neglect was shown by the plaintiff and an extension of time for substitution should have been granted."). This liberal construction of Rule 1.260(a)(1) is consistent with the State of Florida's "long-standing policy to determine civil disputes on the merits." *Id.*; *accord Mims ex rel. Mims*, 36 So. 3d at 936.

"[T]here is no precise definition of 'excusable neglect' in the Florida rules or the case law." *Boudot* v. *Boudot*, 925 So. 2d 409, 415 (Fla. 5th DCA 2006). Instead, "excusable neglect remains a general concept to be applied on a case-by-case basis." *Id.* For example, "where inaction results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or *any other of the foibles to which human nature is heir*, then upon timely application accompanied by a rea-

sonable and credible explanation the matter should be permitted to be heard on the merits." *Somero* v. *Hendry Gen. Hosp.*, 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985) (emphasis added). Accordingly, this Court has held "illness or psychological can be a valid ground for finding excusable neglect." *Paul* v. *Wells Fargo Bank, N.A.*, 68 So. 3d 979, 985 (Fla. 2d DCA 2011). In such circumstances, it "is a gross abuse of discretion for the trial court to" reject a finding of excusable neglect. *Somero*, 467 So. 2d at 1106.

Given that fact-intensive, case-by-case framework, whenever a litigant opposes a motion to dismiss by asserting a failure to comply with Rule 1.260(a)(1)'s deadline resulted from excusable neglect, black letter law requires a trial court to convene an evidentiary hearing. *E.g.*, *Halpern* v. *Houser*, 949 So. 2d 1155, 1158 (Fla. 4th DCA 2007) (remanding "for the trial court to conduct an evidentiary hearing on the issue of excusable neglect"); *Steinhardt* v. *Intercondominium Group, Inc.*, 771 So. 2d 614, 615 (Fla. 4th DCA 2000) ("we quash the order denying the motion to dismiss and direct the trial court on remand to conduct an evidentiary hearing to determine whether the counterclaimants' delay in moving to substitute was the result of excusable neglect"); *see also King*, 315 So. 2d at 540 ("we affirm the trial court, without prejudice to the plaintiff's right to file a motion under RCP 1.540 should appropriate grounds therefor exist"). This is not surprising, because in a related circumstance, when resolution of a motion to dismiss under Florida

Rule of Civil Procedure 1.140(b)(2) for lack of personal jurisdiction depends on competing facts that "cannot be reconciled," the trial court "will have to hold a limited evidentiary hearing." *Venetian Salami Co.* v. *Parthenais*, 554 So. 2d 499, 503 (Fla. 1989).

Here, the trial court did not convene an evidentiary hearing when Ms. Bannasch asserted excusable neglect. Instead, it reviewed Ms. Bannasch's affidavit and doctor's note and asked questions about her August 9, 2016 email correspondence, September 7, 2016 notice of unavailability, and travel plans. It did not allow the parties to take discovery; it did not consider medical literature about Ms. Bannasch's condition; and it did not take testimony from Mrs. Sammons, her doctor, or the attorneys who were helping her with her matters while she was suffering from memory problems. Instead, the trial court rejected Ms. Bannasch's affidavit out of hand based on its perceived inconsistency with her correspondence and notice of unavailability. This was not the proper procedure to follow, so the judgment must be vacated for that reason alone. *See Halpern*, 949 So. 2d at 1158; *Steinhardt*, 771 So. 2d at 615.

And that procedural error exacerbated the trial court's mistake, because Ms. Bannasch's hypothyroidism-induced memory problems easily qualified as excusable neglect under *Somero*, 467 So. 2d at 1106, *Paul*, 68 So. 3d at 985, *Mims ex rel. Mims*, 36 So. 3d at 936, and other cases. *See* R. 119. As Ms. Bannasch explained,

she did not need to establish that she was "totally incapacitated." R. 142. Rather, it was sufficient to show that her hypothyroid-induced memory "lapses" prevented her from timely filing the motion to substitute parties. R. 142.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 23, 2017, 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.

August 23, 2017 /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.

August 23, 2017 /s/ Thomas Burns
Thomas A. Burns