IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD ZOLLO, AN INDIVIDUAL,
Appellant,
vs.
TERRIBLE HERBST, INC., A NEVADA CORPORATION; AND HENDERSON CAR WASH INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondents.

No. 60313

FILED

FEB 28 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER VACATING JUDGMENT AND REMANDING

This is an appeal from a district court order dismissing a negligence action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Appellant Richard Zollo was injured at a gas station owned by respondents Terrible Herbst, Inc., and Henderson Car Wash Investments, LLC (collectively, Terrible Herbst). As a result of his injuries, Zollo filed a personal injury lawsuit against Terrible Herbst. Before the jury trial was scheduled to begin, Zollo died. After Zollo's death, Terrible Herbst filed a suggestion of death upon the record pursuant to NRCP 25(a). Terrible Herbst served the suggestion of death on May 12, 2011, by mailing it to one of Zollo's two attorneys at the Richard Harris Law Firm. The suggestion of death was not served on Richard Harris Law Firm's co-counsel, Nikolas Mastrangelo, or on Zollo's son Thomas, the special administrator of Zollo's estate. At issue is (1) whether Terrible Herbst's failure to serve the suggestion of death on Mr. Mastrangelo renders service defective under NRCP 5, or (2) whether Terrible Herbst's failure to

serve the suggestion of death on Zollo's heirs or successor in interest renders service defective under NRCP 4.

After Terrible Herbst served the suggestion of death on Zollo's attorney at the Richard Harris Law Firm, Terrible Herbst then agreed to continue the trial date to allow Zollo's estate to file a motion to substitute. On July 22, 2011, the Richard Harris Law Firm filed special letters of administration with the probate court, appointing Zollo's son, Thomas, as the special administrator of Zollo's estate. The Richard Harris Law Firm then filed notice of entry of special letters of administration in this negligence case on August 8, 2011. However, Zollo's attorneys failed to file a motion for substitution of a proper party within 90 days of service of the suggestion of death in accordance with NRCP 25(a)(1).

As a result, Terrible Herbst filed a motion to dismiss the case for failure to substitute a proper party. Zollo, through his attorneys, opposed the motion to dismiss, arguing that any failure to substitute a proper party was excusable neglect, and countermoved to amend the complaint to substitute in his estate. After oral argument, the district court denied the countermotion to amend and granted Terrible Herbst's motion to dismiss.

Zollo subsequently filed a motion to alter or amend the judgment pursuant to NRCP 59(e) and a renewed motion to amend the complaint to substitute the proper party. This motion was based on Terrible Herbst's failure to serve the suggestion of death on attorney Mastrangelo. At the hearing on Zollo's motion, the district court noted that it considered Zollo's motion to be a motion for reconsideration and chose to entertain the new arguments regarding the sufficiency of service to Zollo's attorneys. The district court denied Zollo's motion. Zollo now

appeals, arguing, among other things, that the 90-day deadline was never triggered because (1) service on only one of Zollo's attorneys rendered service defective; (2) Terrible Herbst's failure to serve Zollo's son, Thomas, the special administrator of Zollo's estate rendered service defective; and (3) excusable neglect was shown.

Zollo's arguments regarding insufficiency of service are properly before this court

Preliminarily, Terrible Herbst argues that we may not even consider Zollo's argument because it was not made below until after the district court rendered its dismissal order, in a post-judgment motion for reconsideration. When a "reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment." *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007). Here, the district court viewed Zollo's motion to alter or amend as a motion for reconsideration and chose to entertain Zollo's arguments regarding sufficiency of service. The district court denied Zollo's motion on February 1, 2012. Zollo filed a timely notice of appeal on February 21, 2012. *See* NRAP 4(a)(1). Therefore, given that (1) the reconsideration order and motion are properly part of the record on appeal, and (2) the district court elected to entertain Zollo's motion on its merits, we may consider the sufficiency of service arguments asserted in Zollo's motion.

Standard of review

Resolution of the issues raised in this appeal requires our interpretation of the Nevada Rules of Civil Procedure, which are interpreted using the same rubric as that used for the interpretation of

statutes. *Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). We review such questions of law de novo. *State, DMV v. Taylor-Caldwell*, 126 Nev. ___, ___, 229 P.3d 471, 472 (2010); *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008). We will not look beyond a rule's plain language when it is clear on its face. *Cf. Wheble v. Eighth Judicial Dist. Court*, 128 Nev. ___, ___, 272 P.3d 134, 136 (2012). "[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority when this court examines its rules." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005).

Service on only one of a party's several attorneys and law firms of record is generally sufficient under NRCP 5

Zollo argues that the 90-day period was not triggered because the suggestion of death was not properly served on both attorneys of record in accordance with NRCP 5 and that, even if it was, excusable neglect was shown.

NRCP 25(a)(2) provides that an action does not terminate upon the death of the plaintiff. Rather, if a party to a lawsuit dies, the death shall be "suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion [to substitute a proper party]," and the action proceeds in favor of or against the surviving parties. NRCP 25(a)(1)-(2). Once the suggestion of death is served, a motion to substitute a proper party may be made by any party and "shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 . . ." NRCP 25(a)(1). However, if a motion to substitute a proper party is not filed within 90 days after "the death is suggested upon the record by service . . . the action shall be dismissed as to the deceased party." *Id.* The 90-day period may

be extended under NRCP 6, however, if excusable neglect is shown. *Moseley*, 124 Nev. at 662, 188 P.3d at 1142.

NRCP 5 provides that when service is made "upon a party represented by an attorney, the service shall be made upon the attorney" by "[d]elivering a copy to the attorney." In looking at the plain language of NRCP 5, we conclude that the language "the attorney" is ambiguous because it does not address situations in which a party is represented by multiple attorneys and law firms. Under the plain language, it is reasonable to conclude that either the document must be delivered to all attorneys or law firms of record representing a party, or just one attorney.

A number of courts that have addressed this issue have found that the analogous federal rule, FRCP 5, only requires service on one of a party's several attorneys. *See Daniel Int'l Corp. v. Fischbach & Moore, Inc.*, 916 F.2d 1061, 1063 (5th Cir. 1990) (concluding that service on local counsel, but not lead counsel, was effective service of a pleading); *Buchanan v. Sherrill*, 51 F.3d 227, 228 (10th Cir. 1995) (concluding that service of a motion on one of two attorneys was sufficient, noting that FRCP 5 "requires service on all parties, not on all attorneys."); *Allen v. Pac. Bell*, 212 F. Supp. 2d 1180, 1190 n.2 (C.D. Cal. 2002) (citing *Daniel Int'l* for the proposition that FRCP 5(b) does not require service to be made on every attorney appearing on behalf of a party); *but see Hornburg v. Esparza*, 737 N.E.2d 658, 662 (Ill. App. Ct. 2000) (finding that while the Illinois rule states that service upon one of several attorneys is sufficient,

when two attorneys represent a party in different capacities, then service on one of them did not constitute valid service for all purposes).[1]

Thus, it appears that many jurisdictions faced with this question have found that service under FRCP 5 (or analogous state rules) only requires service on one of a party's several attorneys. We are persuaded that absent a situation in which two attorneys represent a party in separate capacities, service upon one of a party's several attorneys and law firms is sufficient under NRCP 5. Therefore, Terrible Herbst's service on only one of Zollo's attorneys did not render service defective. However, this analysis only confronts the issue of service upon the parties to the ongoing litigation. While service on Zollo's attorneys under NRCP 5, governing service on parties, was proper, Zollo argues that NRCP 25(a)(1) also required service on Zollo's estate, a nonparty, to be made under NRCP 4.

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[1]In *Hornburg*, attorney Douglas Ziech filed a complaint on behalf of Richard and Susan Hornburg. *Id.* at 659-60. The defendant then filed a counterclaim against Richard, and Richard hired a separate attorney, Scott Ellefsen, to represent him on the counterclaim. *Id.* After arbitration ended in favor of the Hornburgs as plaintiffs and in favor of Richard on the counterclaim, the defendant filed a notice of rejection of the arbitration award, which he apparently served on Ziech, attorney for both of the Hornburgs as plaintiffs, but not on Ellefsen, the attorney for Richard on the counterclaim. *Id.* On motion, the trial court struck the rejection of the arbitration award in its entirety, in part on the ground that the notice was not served on Ellefsen. *Id.* Emphasizing that Ziech and Ellefsen each represented Richard in a separate capacity, the *Hornburg* court concluded that service on one of them could not constitute service on the Hornburgs for all purposes. *Id.* at 662.

Under Nevada law, when a plaintiff dies, a defendant who serves a suggestion of death is not required to locate the deceased plaintiff's successor in order to trigger the 90-day limitation

Zollo argues that Terrible Herbst was required to serve Zollo's son, Thomas, the special administrator of Zollo's estate. *See Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994) (requiring service on a deceased party's estate or representative to be made pursuant to FRCP 4). In *Barlow*, the plaintiff Barlow died during litigation against the City of San Diego, and no substitution was made within 90 days after the filing and service of the suggestion of death on Barlow's attorney. 39 F.3d at 232. Barlow's estate argued that because it was not properly served with the suggestion of death, the 90-day period under FRCP 25(a)(1) was never triggered. *Id.* The Ninth Circuit concluded that parties must be served with the suggestion of death in accordance with FRCP 5, and Barlow's non-party successors should have been served with the suggestion of death in accordance with FRCP 4. *Id.* at 233-34. However, it is notable that in *Barlow*, the City of San Diego had a copy of Barlow's will, giving it actual knowledge of Barlow's heirs. *Id.* at 234. The Ninth Circuit expressly declined to address a scenario where the deceased party's successors could not be ascertained at the time the suggestion of death was served because in *Barlow*, the City of San Diego knew the identity of Barlow's executor. *Id.* Thus, we conclude that *Barlow* is inapplicable to this case.

This court has previously addressed the substitution of parties under NRCP 25 in *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 188 P.3d 1136 (2008). In *Moseley*, we clarified that "a suggestion of a plaintiff's death filed by a defendant is generally sufficient to trigger the 90-day limitation period within which . . . the deceased party's successor or personal representative are required to move for substitution." 124 Nev.

at 657, 188 P.3d at 1139 ("Because petitioner is the defendant and it is a plaintiff who died, petitioner was not required to locate or wait for the designation of a successor for the deceased plaintiff to successfully trigger the 90-day limitation period."). In *Moseley*, we recognized the difference between a situation in which a suggestion of death emanating from the deceased party fails to identify a successor as opposed to a situation in which a plaintiff dies and a defendant files a suggestion of death. 124 Nev. at 660-61, 188 P.3d at 1141. In the second situation, we noted that "requiring a defendant to speculatively identify a successor or personal representative for a deceased plaintiff incorrectly shifts the burden of locating a successor or personal representative to the defending party."[2] *Id.* at 661, 188 P.3d at 1141. Therefore, we conclude that Terrible Herbst was not required to locate or wait for the designation of Zollo's successor, thus the failure to serve the suggestion of death on Zollo's successor did not render service defective.

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[2]We note that *Moseley* involved a situation in which the party serving the suggestion of death failed to *name* a successor or representative to the deceased party in the suggestion of death, rather than a situation in which such a party is not served with the suggestion of death. 124 Nev. at 660-61, 188 P.3d at 1141-42. However, the same concerns remain that requiring a defendant to speculatively identify—and thus, serve—a successor or personal representative for a deceased plaintiff would incorrectly shift the burden of locating a successor or personal representative to the defending party. This is especially true in a case such as this. Here, the notice of entry of special letters of administration giving notice that Thomas Zollo was named the administrator of Zollo's estate was not filed until 88 days after Terrible Herbst initially filed and served the suggestion of death on Zollo's attorney.

The district court failed to make adequate findings regarding excusable neglect

As noted above, the 90-day time period to file a motion to substitute a proper party under NRCP 25 may be extended under NRCP 6 if excusable neglect is shown.[3] *Moseley*, 124 Nev. at 665, 188 P.3d at 1144. In *Moseley*, this court concluded that "it is not clear from the district court record what findings of fact the district court made when it denied [the defendant's] motion to dismiss." 124 Nev. at 668, 188 P.3d at 1146. Accordingly, this court remanded the case to the district court to reconsider whether the plaintiffs established excusable neglect for failing to file a motion for substitution within the 90-day limitation period under NRCP 25. *Id.*

Here, the district court heard oral arguments regarding the *Moseley* factors before summarily concluding: "I don't think that not filing the motion was excusable. Based upon that, Defendant's motion to dismiss is granted." The subsequent district court order granting Terrible Herbst's motion to dismiss stated that based on review of the motion and pleadings, Terrible Herbst's motion to dismiss was granted, with prejudice, and Zollo's countermotion to amend the complaint was denied. Given the record before us, it appears that the district court did not articulate what findings of fact it made when it found that excusable

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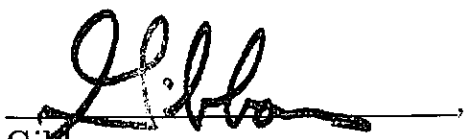
[3]In *Moseley*, this court concluded that a party seeking relief from NRCP 25(a)(1) under NRCP 6(b)(2), is required to demonstrate four elements: "that (1) it acted in good faith, (2) it exercised due diligence, (3) . . . a reasonable basis [exists] for not complying within the specified time, and (4) the nonmoving party will not suffer prejudice." 124 Nev. at 667-68, 188 P.3d at 1146.

neglect was not established. Therefore, we remand this matter for the district court to reconsider this issue and outline its findings under the *Moseley* excusable neglect factors.[4] Accordingly, we

VACATE the judgment of the district court and REMAND this matter to the district court for further proceedings consistent with this order.



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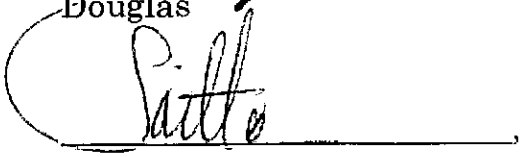

_____, J.
Saitta

cc: Hon. Douglas Smith, District Judge
Israel Kunin, Settlement Judge
Richard Harris Law Firm
Marquis Aurbach Coffing
Nikolas L. Mastrangelo
Moran Law Firm, LLC
Eighth District Court Clerk

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[4]We have considered the parties' remaining arguments and conclude that they are without merit.