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Med Mal Suit Revived After Atty's 'Excusable Neglect'

By **Nathan Hale**

Law360 (May 10, 2019, 9:15 PM EDT) -- A Florida appeals court has revived a couple's medical malpractice suit based on the majority's finding that counsel showed "excusable neglect" for missing a filing deadline by asserting a medical condition, although a dissent said the lower court's finding of credibility issues should bar full reversal.

The 2-1 decision Wednesday from the Second District Court of Appeal fully restored claims of negligence and loss of consortium that Thomas and Madeline Sammons brought against doctor of osteopathy Adam Greenfield, ASG Doctors Inc. and Family Medical Center of Port Richey Inc. over their alleged failure to diagnose and treat redness and irritation in one of Thomas Sammons' toes, according to the opinion.

The trial court had granted the defendants' motion to dismiss the case when the Sammonses failed to move to substitute Madeline Sammons as the plaintiff for the negligence count within the required 90 days after they gave notice that Thomas Sammons had died of causes unrelated to the case.

At the motion to dismiss hearing, the Sammonses' trial attorney, Desiree E. Bannasch, presented the court with an affidavit and note from her doctor explaining that she had recently been experiencing intermittent cognitive problems as a result of undiagnosed hypothyroidism. The trial court reviewed her affidavit and asked her several questions, but it concluded that she had not demonstrated excusable neglect and dismissed the case with prejudice.

In the majority opinion, however, Judges Patricia J. Kelly and Robert Morris pointed out that Florida state courts have a long-standing tradition of favoring resolution of cases on their merits and that the rule establishing the 90-day deadline the Sammonses missed has been liberally interpreted to allow late filings.

"While our procedural rules provide for an orderly and expeditious administration of justice, we must take care to administer them in a manner conducive to the ends of justice," they said, quoting from the Florida Supreme Court in [Rogers v. First National Bank at Winter Park](#) .

They also cited the Fifth District's 1987 decision in *City of Ocala v. Heath* to support their finding that Bannasch had made a sufficient showing of excusable neglect. In that case, the court found that an attorney's illness combined with effects of medication made his neglect excusable.

The majority's findings were countered, however, by Judge Morris Silberman in a lengthy dissent.

He recounted that the trial court expressed skepticism of Bannasch's claim that her medical condition prevented her from filing the motion to substitute on time. He noted that during the 90-day window leading up to the missed deadline, she filed a notice of unavailability when she was attending a legal seminar and emailed opposing counsel about their motion to dismiss, and neither time did she mention any health issues.

Bannasch told the trial court that she did not remember sending that email, but the court rejected her assertions, finding that based on the information before it, Bannasch was fully aware of the status of the case and that her health was not the reason she failed to file the motion on time, according to the opinion.

"In determining that counsel failed to meet her burden of establishing excusable neglect, it is evident that the [trial] court did not find counsel to be credible. Because the record supports this determination, we must affirm," Judge Silberman said.

Judge Silberman said he would have reversed the lower court's dismissal of Madeline Sammons' claim for loss of consortium, however, finding that a spouse's loss of consortium claim survives the dismissal of the spouse's personal injury claims. He said his finding was in line with the Fifth District's position in two decisions over a conflicting position in the Third District.

"While a loss of consortium claim is a derivative right, it does not require a simultaneous personal injury action and may be sustained unless the underlying personal injury action has been ruled upon on the merits," Judge Silberman said.

Madeline Sammons' appellate counsel Thomas A. Burns applauded the court's decision.

"We are grateful to have prevailed in our appeal, and we look forward to presenting our case in the trial court on remand," he said Friday.

Counsel for the defendants did not immediately respond to a request for comment late Friday.

Judges Patricia J. Kelly, Robert Morris and Morris Silberman sat for the Second District.

The Sammons are represented by Thomas A. Burns of Burns PA and Desiree E. Bannasch of Desiree E. Bannasch PA.

The defendants are represented by Isaac R. Ruiz-Carus of Rissman Barrett Hurt Donahue McLain & Mangan PA.

The case is Sammons et al. v. Greenfield et al. case number 2D17-755, in the Second District Court of Appeal of Florida.

--Editing by Haylee Pearl.