NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

YVONNE BLUE and DEBORAH COOPER, as Co-personal Representatives of the Estate of Ramona Leonard, deceased,

Appellants,

v.

R.J. REYNOLDS TOBACCO COMPANY and PHILIP MORRIS USA INC.,

Appellees.

Case No. 2D16-3007

Opinion filed January 19, 2018.

Appeal from the Circuit Court for Lee County; John E. Duryea, Jr., Judge.

Lorenzo Williams and Natasha N. Harrison of Gary, Williams, Parenti, Watson & Gary, P.L., Stuart, for Appellants.

Troy A. Fuhrman and Marie A. Borland of Hill, Ward & Henderson, P.A.; and Jason T. Burnette of Jones Day, Atlanta, Georgia, for Appellee R.J. Reynolds Tobacco Company.

Geoffrey J. Michael of Arnold & Porter LLP, Washington, D.C., for Appellee Philip Morris USA Inc.

MORRIS, Judge.

Yvonne Blue and Deborah Cooper, as co-personal representatives of the estate of Ramona Leonard, appeal a final order dismissing their Engle[1] progeny complaint against R.J. Reynolds Tobacco Company and Phillip Morris U.S.A., Inc. (the tobacco companies). We hold that the trial court erred by dismissing the complaint based on its conclusion that Blue and Cooper failed to timely move to substitute proper parties, and we therefore reverse.

BACKGROUND

Ms. Leonard, the deceased, initially brought a personal injury action against R.J. Reynolds, Philip Morris, Liggett Group LLC, Vector Group Ltd., and several other defendants in 2008. Ms. Leonard died in 2013 while the suit was still pending. Thereafter, Blue and Cooper, Ms. Leonard's daughters, were appointed by a probate court to serve as the co-personal representatives of the estate.

In March 2014, Blue and Cooper, along with Liggett Group LLC (Liggett) and Vector Group Ltd. (Vector), filed a joint notice and stipulation with the trial court explaining that Liggett and Vector were being dropped as party defendants. The stipulation included the following: "COMES NOW, the Plaintiffs, Yvonne Blue and Deborah Cooper, as Proposed PR[s] for the Estate of Ramona Leonard, deceased . . . ." The tobacco companies remained in the case as party defendants, and the case proceeded. Initially, Blue and Cooper did not move to substitute themselves as proper parties, and no formal suggestion of Ms. Leonard's death was ever filed. Instead, Blue and Cooper and the tobacco companies continued to litigate the case for almost two years.

[1]Engle v. Liggett Grp., Inc., 945 So. 2d 1246 (Fla. 2006).

In September 2015, Blue and Cooper filed a motion to substitute themselves as the proper parties. The tobacco companies then filed their motion to dismiss, arguing in relevant part that because Ms. Leonard's death had been suggested on the record, within the joint notice and stipulation of dropping defendants, Blue and Cooper were required to move to substitute themselves as proper parties within ninety days of filing that document. The tobacco companies further argued that because Blue and Cooper failed to do so, Florida Rule of Civil Procedure 1.260(a)(1) required that the complaint be dismissed. At the hearing on the motion to dismiss, Blue and Cooper asserted that the ninety-day period did not begin to run until a specific pleading entitled "Suggestion of Death" was filed. However, the trial court rejected Blue and Cooper's assertion. The trial court determined that for purposes of starting the ninety-day period, the rule did not require a formal document reciting a party's death but instead required only that the party's death be somehow suggested on the record. The trial court entered its order of dismissal and subsequently denied Blue and Cooper's motion for rehearing.

ANALYSIS

We conduct a de novo review of the order of dismissal. See Ruiz v. Brink's Home Sec., Inc., 777 So. 2d 1062, 1064 (Fla. 2d DCA 2001).

Rule 1.260(a)(1) provides in relevant part that

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. . . . . 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.

While the rule only requires a statement "of the fact of the death" of a party and does not otherwise require specific information such as the location or date of the death or the name of a person to be substituted, see King v. Tyree's of Tampa, Inc., 315 So. 2d 538, 540 (Fla. 2d DCA 1975); Martin v. Hacsi, 909 So. 2d 935, 936 (Fla. 5th DCA 2005); Vera v. Adeland, 881 So. 2d 707, 709-10 (Fla. 3d DCA 2004), we are not persuaded that the joint notice and stipulation of dropping defendants was sufficient to constitute a suggestion of death that triggered the ninety-day period. A review of the docket would not reveal any document having been filed that, on its face, reflects that the original plaintiff died. Instead, that fact would only become apparent after reading the contents of each and every document filed.

We do not construe the passing reference to Ms. Leonard's death—which was made within a document that related to a settlement with other defendants—as a suggestion of death as contemplated in rule 1.260(a)(1). Rather, we construe rule 1.260 to require the filing of a document that is intended to notify all of the litigants of a party's death. Cf. Wilson v. Clark, 414 So. 2d 526, 530 (Fla. 1st DCA 1982) (interpreting the words "upon the record" in rule 1.260 to mean that the time period set forth in the rule is triggered "by the recording or the filing of the suggestion of death" rather than by the service of the pleading).

We find support for our interpretation of the rule's requirements in Toney v. Freeman, 600 So. 2d 1099, 1101 n.4 (Fla. 1992), receded from on different grounds by Wilson v. Salamon, 923 So. 2d 363 (Fla. 2005). There, the Florida Supreme Court explained that the parties did not argue that a statement noting the plaintiff's death within a response to the trial court's case status order was sufficient to constitute a

suggestion of death. However, the court then went on to opine that it did "not construe [the] response as a formal suggestion of death as contemplated by . . . rule [1.260]." 600 So. 2d at 1101 n.4. While not the holding of the case, such language strongly implies that a passing reference to a party's death in a document that was not filed for the purpose of notifying the litigants of the death is not sufficient to start the ninety-day time period set forth in rule 1.260(a)(1). Federal courts hold similarly.[2] See, e.g., Grandbouche v. Lovell, 913 F.2d 835, 836-37 (10th Cir. 1990) (holding that the ninety-day time period under the federal rule "is not triggered unless a formal suggestion of death is made on the record, regardless of whether the parties have knowledge of a party's death" and that "[m]ere reference to a party's death in court proceedings or pleadings is not sufficient to trigger the limitations period for filing a motion for substitution"); United States v. Miller Bros. Constr. Co., 505 F.2d 1031, 1034-35 (10th Cir. 1974) (rejecting argument that formal suggestion of death was unnecessary in order to start the ninety-day time period for filing a motion to substitute); cf. Dolgow v. Anderson, 45 F.R.D. 470, 471 (E.D.N.Y. 1968) (concluding that statement made in passing during a deposition regarding a defendant's death is not a suggestion of death and explaining that "[w]hen the consequences to the client of a slightly delayed reaction may be severe and the burden of providing formal notice is slight, insistence on the observance of procedural ritual is justified").

The case relied on by the trial court, Kash N' Karry Food Stores, Inc. v. Smart, 814 So. 2d 530 (Fla. 2d DCA 2002), in addition to all of the cases relied on by

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[2]Rule 25(d) of the Federal Rules of Civil Procedure and rule 1.260 are similar as rule 1.260 was modeled after the federal rule. Wilson, 414 So. 2d at 530 n.3. "Consequently, federal decisions relating to the construction and history of Rule 25 . . . are instructive." Id.

the tobacco companies in support of their argument for affirmance, are distinguishable because they all involved situations where motions for substitution were not made within ninety days after suggestions of death were filed. Cf. King, 315 So. 2d at 539; Martin, 909 So. 2d at 936; Vera, 881 So. 2d at 710; Scutieri v. Miller, 584 So. 2d 15, 16 (Fla. 3d DCA 1991); N.H. Ins. Co. v. Kimbrell, 343 So. 2d 107, 108 (Fla. 1st DCA 1977).[3] That is not what happened here. There was no document entitled "Suggestion of Death" nor was there any other document filed that indicated its purpose was to alert the litigants that the original plaintiff had died.

Although the rule does not explicitly provide that a document be labeled a "Suggestion of Death," we construe the rule to, at the very least, require that the document be filed for the purpose of alerting the litigants to a party's death. Burying the fact of a party's death in a document that is filed for another purpose cannot possibly comport with the intent of the rule since the opposing party could merely bury the statement in any document within the record and then wait out the ninety-day period to execute their "gotcha" move. The purpose of the rule is to "allow more flexibility in substitution" and "[t]he [ninety-]day period was not intended to act as a bar to otherwise meritorious actions." Kimbrell, 343 So. 2d at 109 (quoting Rende v. Kay, 415 F.2d 983,

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[3]Indeed, dismissals are routinely granted in such circumstances. See generally Tucker v. Firestone Tire & Rubber Co., 552 So. 2d 1178, 1179 (Fla. 2d DCA 1989) (acknowledging that no motion for substitution was made within ninety days of the suggestion of death, but reversing dismissal based on excusable neglect); Scott v. Morris, 989 So. 2d 36, 37 (Fla. 4th DCA 2008) (reversing dismissal where motion for substitution was sufficient even though it did not state in the body of the motion that substitution was being requested); Stroh v. Dudley, 476 So. 2d 230, 231 (Fla. 4th DCA 1985) (reversing dismissal where trial court erroneously believed dismissal was mandatory rather than discretionary and where dismissal with prejudice was not warranted because appellant did file a motion for substitution, though it was untimely); Canter v. Hyman, 363 So. 2d 29, 30 (Fla. 3d DCA 1978).

986 (D.C. Cir. 1969), and agreeing that the same liberal construction applied in Rende should be applied to rule 1.260).

We are cognizant of the fact that in this case, Blue and Cooper were obviously aware of Ms. Leonard's death as they, along with Liggett and Vector, jointly filed the joint notice and stipulation of dropping defendants. But we reject the tobacco companies' argument that personal knowledge of a party's death is sufficient to trigger the ninety-day period. Instead, it is the filing of a document (i.e., a suggestion upon the record) for the purpose of alerting the litigants of the party's death that triggers the time period set forth in rule 1.260(a)(1). If the tobacco companies wanted the ninety-day period to begin running, they had the ability to file a document for that purpose. But the tobacco companies are not entitled to a dismissal based on a passing reference to a party's death in a document that was filed for a completely different purpose. Consequently, because the trial court erred by dismissing the complaint for failure to comply with rule 1.260(a)(1), we reverse and remand for proceedings in conformance with this opinion.

Reversed and remanded.

NORTHCUTT and LUCAS, JJ., Concur.