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LLAMIRA NIEVES, as personal representative of the Estate of Ivette Rivera, Appellant,
v.
SENIOR HEALTH TNF, LLC d/b/a Whispering Oaks, Appellee.

No. 2D22-423

Florida Court of Appeals, Second District

August 18, 2023

Appeal from the Circuit Court for Hillsborough County; Anne-Leigh Gaylord Moe, Judge.

Matthew T. Christ and Lindsey E. Gale of Domnick Cunningham &Whalen, Palm Beach Gardens, for Appellant.

Amy L. Christiansen of Spector Gadon Rosen Vinci LLP, St. Petersburg, for Appellee. La

ROSE, Judge.

Llamira Nieves, as personal representative of Ivette Rivera's estate, appeals the trial court's final order dismissing, without prejudice, her lawsuit against Senior Health TNF, LLC d/b/a Whispering Oaks, the nursing home where Ms. Rivera contracted and died from COVID-19. We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A). We affirm because Ms. Nieves was not the personal representative when the trial court dismissed the lawsuit and denied her rehearing motion.

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I. BACKGROUND

Ms. Rivera died in September 2020. In March 2021, her daughter, Ms. Nieves, served Whispering Oaks with a notice of intent to sue. *See* § 400.0233(2), Fla. Stat. (2020) (requiring presuit notice). Ms. Nieves, purportedly as personal representative of her mother's estate, sued Whispering Oaks for negligence on March 24, 2021, under chapter 400. Ms. Nieves served process on Whispering Oaks in July 2021.

Whispering Oaks moved to dismiss the lawsuit. It argued that Ms. Nieves failed to comply with the heightened pleading requirements of the COVID-19 Protection Act, sections 768.38 and 768.381, Florida Statutes, that became effective on March 29, 2021. *See* ch. 2021-1, §§ 1-5 Laws of Fla. Whispering Oaks further contended that Ms. Nieves failed to comply with chapter 400's presuit notice period by filing the lawsuit before the seventy-five-day presuit period expired on or about June 1, 2021. *See* § 400.0233(3)(a).

Ms. Nieves countered that the COVID-19 Protection Act did not apply to a lawsuit commenced before the statute's March 29, 2021, effective date. *See* ch. 2021-1, § 4 Laws of Fla. She also asserted that, although she filed the lawsuit on March 24, 2021, any problem with a premature filing was cured because she waited until July 21, 2021, to serve Whispering Oaks. *See generally Thomas v. Suwannee County*, 734 So.2d 492, 498 (Fla. 1st DCA 1999) (reversing the dismissal because the premature filing of the complaint "does not justify dismissal with prejudice long after the [presuit] period has expired" and "by the time the motions to dismiss were made, the period of statutory prematurity had ended").

At a November 10, 2021, hearing on the motion, Whispering Oaks alerted the trial court that Ms. Nieves lacked standing to sue because she

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was not yet the personal representative of Ms. Rivera's estate. Ms. Nieves conceded this point. She asserted, however, that Florida law allowed her to proceed because "her acts as an individual with sufficient interest in the case will relate back to when she is appointed personal representative of the estate."

The trial court paused the hearing to research the standing issue. It asked Ms. Nieves for any case support. Ms. Nieves relied on *Friedel v. Edwards*, 327 So.3d 1242 (Fla. 2d DCA 2021). The trial court found *Friedel* distinguishable and continued researching. Whispering Oaks pointed the trial court to *Progressive Express Insurance Co. v. McGrath Community Chiropractic*, 913 So.2d 1281 (Fla. 2d DCA 2005). The trial court found *Progressive* on point and orally granted the motion to dismiss. Because lack of standing was not raised in the motion to dismiss, Ms. Nieves requested "an opportunity to do some more research on this issue."

Ms. Nieves later submitted a letter with a proposed order to the trial court. She claimed a deprivation of adequate notice and an opportunity to fully address the standing issue. She also presented two cases for the trial court's consideration: *Griffin v. Workman*, 73 So.2d 844 (Fla. 1954), and *Lindor v. Florida East Coast Railway, LLC*, 255 So.3d 490 (Fla. 3d DCA 2018). Ms. Nieves asked that any dismissal of the lawsuit be "with leave to amend after an Estate is opened."

Thereafter, on December 6, 2021, the trial court entered its written order dismissing the lawsuit, without prejudice, "[b]ased on representations made by [Ms. Nieves'] counsel at the hearing" that Ms. Nieves was not the duly appointed personal representative and where "Letters of Administration were not attached to the Complaint." The trial court noted that it had considered the case law cited in Ms. Nieves' letter.

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Ms. Nieves moved for rehearing. She urged the trial court "to rehear arguments because it erred in dismissing [her] Complaint without prejudice and without leave to amend due to lack of standing." She maintained that case law allowed her to sue as a prospective personal representative. Ms. Nieves reported that she "filed the necessary paperwork with the Probate Court in Hillsborough County, Florida to be appointed Personal Representative of the Estate of Ivette Rivera [on December 14, 2021]. It is unknown how long it will take for the Probate Court to enter Letters of Administration, but [Ms. Nieves] is working with all due haste to complete the process."

The trial court denied Ms. Nieves' motion. As to any due process complaints, the trial court stated as follows:

> [Ms. Nieves] had actual notice of the issues and an opportunity to be heard. [Ms. Nieves] came to the hearing aware of the factual issue underlying Defendant's standing argument, and was aware that the defense sought dismissal of the complaint. The relief granted--dismissal--did not exceed that which was requested in the motion that was noticed for hearing. There is no concern here that as a practical matter, [Ms. Nieves] was ambushed and not given the opportunity to correct factual misrepresentations made by [Whispering Oaks]. Even now, there is no argument that [Whispering Oaks] is wrong or merely confused about the fact that [Ms. Nieves] filed this case as though she were the personal representative when in fact no estate had been opened. On the legal issues relating to standing, [Ms. Nieves] presented argument at the hearing and both lawyers and the court conducted research during the hearing on various issues. Counsel were given an opportunity to argue the cases identified in that research. Moreover, though the court ruled at the conclusion of the hearing, when [Ms. Nieves] supplied new cases after the hearing the court considered them as noted in the signed order. Although it did not ultimately alter its ruling then (just as it does not do so now) because it found them distinguishable, the

> arguments and cases brought up by [Ms. Nieves] at every point have been considered.

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Regarding standing, the trial court found the cases relied upon by Ms. Nieves distinguishable:

> Here, [Whispering Oaks] has shown how it would be prejudiced if the Complaint were to relate back. It bears acknowledgment that [Ms. Nieves'] explanation for when she filed the complaint ties directly to the argument [Whispering Oaks] raises about prejudice: she filed early so that [Whispering Oaks] would be deprived of statutory protections that would otherwise apply if she waited until she had complied with all of the statutory requirements. This presents a fairly stark contrast to the cases applying the relation-back doctrine in other contexts, where the issue is generally the sense that the plaintiff would suffer injustice through the loss of substantive rights if the complaint is not permitted to relate back.

Ms. Nieves petitioned the probate court to appoint her personal representative shortly after the trial court rendered the final order now before us.

II. DISCUSSION

A. Standing and the Relation-Back Doctrine

Essentially, Ms. Nieves argues that she should have been permitted to amend her complaint because "a prospective [p]ersonal [r]epresentative has standing to file a negligence claim." In her view, any actions she took as prospective personal representative would relate back to the original complaint once she is appointed the personal representative. Whispering Oaks counters that Ms. Nieves could not acquire standing retroactively, especially where she sought appointment only after the trial court dismissed the lawsuit.[1] Whispering Oaks also contends that the trial court correctly rejected the relation-back doctrine

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because doing otherwise would have deprived Whispering Oaks of its rights under the COVID-19 Protection Act.

We review the trial court's order granting a motion to dismiss de novo. *Bivins v. Douglas*, 335 So.3d 1214, 1217 (Fla. 3d DCA 2021) (quoting *Edwards v. Landsman*, 51 So.3d 1208, 1213 (Fla. 4th DCA 2011)); *see also Palm Beach Cnty. Sch. Bd. v. Doe*, 210 So.3d 41, 43 (Fla. 2017) ("The determination of whether an amended complaint relates back to the filing of the original complaint is a question of law, also reviewed de novo.").

> A chapter 400
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> > "action may be brought by the resident or his or her guardian, by a person or organization acting on behalf of a resident with the consent of the resident or his or her guardian, or by the personal representative of the estate of a deceased resident regardless of the cause of death."

§ 400.023(1)(a). "The powers of a personal representative relate back in time to give acts by the person *appointed*, occurring before *appointment* and beneficial to the estate, the same effect as those occurring after *appointment*." § 733.601, Fla. Stat. (2021) (emphasis added); *see*, *e.g.*, *Est. of McKenzie v. Hi Rise Crane, Inc.*, 326 So.3d 1161, 1164 (Fla. 1st DCA 2021) (concluding that section 733.601 and case law required "that McIntosch's appointment in July 2020 related back to January 2020 when the [petition for benefits] was filed"). The

relation-back doctrine applies to an *appointed* personal representative.

Undisputedly, Ms. Nieves was *not* the personal representative when the trial court dismissed the lawsuit or when it denied her rehearing motion. Accordingly, the trial court correctly dismissed the lawsuit. *See Graca v. Rosebank Mar., Inc.*, No. 04-14302, 2005 WL 6458603, at *2 (11th Cir. Mar. 8, 2005) ("There is no dispute that Graca was not appointed the personal representative of Fortes's estate until after the

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district court dismissed this case. Although Graca argues that, under Florida and federal law, his appointment relates back to the time the complaint was filed, Graca's later appointment as representative cannot operate to reinstate his complaint. Neither does Graca's argument address the fundamental problem that, when the district court acted, Graca was not the personal representative of the estate. Because Graca lacked the capacity to sue when the district court entered its order, the order was not erroneous.").

Next, Ms. Nieves asserts that the trial court should have granted her "leave to amend after an Estate is opened."[2] "Whether a proposed amended complaint should be permitted . . . is reviewed for an abuse of discretion." *Friedel*, 327 So.3d at 1244. A trial court abuses its discretion in disallowing an amendment "unless it clearly appears the

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amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile." *Armiger v. Associated Outdoor Clubs, Inc.*, 48 So.3d 864, 868 (Fla. 2d DCA 2010) (quoting *Colandrea v. King*, 661 So.2d 1250, 1251 (Fla. 2d DCA 1995)).

Seemingly, the trial court denied leave to amend because the relation-back doctrine would prejudice Whispering Oaks by depriving it of its statutory protections under section 768.381. *See generally* § 768.38(1) ("The threat of unknown and potentially unbounded liability to such businesses, entities, and institutions, in the wake of a pandemic that has already left many of these businesses, entities, and institutions vulnerable, has created an overpowering public necessity to provide an immediate and remedial legislative solution. Therefore, the Legislature intends for certain business entities, educational institutions, governmental entities, and religious institutions to enjoy heightened legal protections against liability as a result of the COVID-19 pandemic."). We see a less complex way to address this point. *See generally Bueno v. Workman*, 20 So.3d 993, 998 (Fla. 4th DCA 2009) ("Under the tipsy coachman rule, 'if a trial court reaches the right result, but for the wrong reasons, it will be upheld if there is any basis which would support judgment in the record.' "(quoting *Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So.2d 638, 644 (Fla. 1999))).

The relation-back doctrine did not apply because Ms. Nieves was never the personal representative in the trial court proceedings. *See* § 733.601. She did not timely cure the standing problem in the trial court. *Cf. All Risk Corp. of Fla. v. State, Dep't of Lab. &Emp. Sec., Div. of Workers' Comp.*, 413 So.2d 1200, 1202 (Fla. 1st DCA 1982) (finding "that the denial of leave to amend was an abuse of discretion" where

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"[t]he record here shows that all prior challenges to the service companies' standing had been rebuffed").

The cases upon which Ms. Nieves relies are distinguishable; indeed, they support our conclusion. The parties in those cases obtained standing before the final order or before moving for rehearing. *See Griffin*, 73 So.2d at 844-46 (holding the trial court erred in dismissing the case where the daughter later qualified as administrator at the time of the dismissal and the father qualified as administrator when he petitioned for rehearing); *Friedel*, 327 So.3d at

1246-47 (applying the relation-back doctrine where the plaintiff filed a complaint against a deceased person and the trial court substituted the deceased's appointed personal representative as the defendant); *Lindor*, 255 So.3d at 491-93 (remanding for reinstatement of the case where the plaintiff sought to substitute for the appointed personal representative before the trial court dismissed the case); *Talan v. Murphy*, 443 So.2d 207, 208 (Fla. 3d DCA 1983) (applying the relation-back doctrine where the plaintiff was appointed executor while the action was pending). Consequently, the trial court did not abuse its discretion when it dismissed the lawsuit without prejudice and without leave to amend.

B. Procedural Error

Ms. Nieves argues that Whispering Oaks' motion to dismiss for lack of standing was akin to an "*ore tenus* motion for [summary] judgment." She faults the trial court for ruling without an evidentiary hearing.

Generally, "a trial court may not consider matters outside the four corners of the complaint in deciding a motion to dismiss." *Metro. Cas. Ins. Co. v. Tepper*, 969 So.2d 403, 405 (Fla. 5th DCA 2007) (citing *Winter v. Miami Beach Healthcare Grp., Ltd.*, 917 So.2d 973 (Fla. 3d DCA 2005)). But Ms. Nieves never advanced this issue in the trial court. Ms.

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Nieves waived this issue for appeal. *See id.* (finding that Metropolitan waived the argument that the trial court erred in looking outside the four corners of the complaint where it never presented the issue below). Her only objection to Whispering Oaks' raising the standing issue was a lack of notice and an opportunity to be heard.

Moreover, Ms. Nieves never disputed the facts relevant to her standing. *See id.* (explaining that "Metropolitan does not dispute the facts that were relevant to the resolution of Lucas' motion to dismiss," and "[a] trial court is not bound by the four corners of the complaint where the facts are undisputed and the motion to dismiss raises only a pure question of law" (citing *Ground Improvement Techs., Inc. v. Merchs. Bonding Co.*, 707 So.2d 1138 (Fla. 5th DCA 1998))). Thus, this purported procedural error does not warrant appellate relief.

III. CONCLUSION

The trial court did not err in dismissing the lawsuit where Ms. Nieves lacked standing. Nor did the trial court abuse its discretion in denying Ms. Nieves leave to amend her complaint. Ms. Nieves waived the purported procedural error.

Affirmed.

ROTHSTEIN-YOUAKIM and ATKINSON, JJ, Concur

Opinion subject to revision prior to official publication.

Notes:

[1] Whispering Oaks presents two additional arguments for affirming the trial court's order. In light of our decision, we need not address those grounds.

[2] To be clear, the issue on appeal is not whether the trial court should have abated or stayed the lawsuit during the pendency of a petition to become personal representative. *See generally Kennedy v. Carnival Corp.*, 385 F.Supp.3d 1302, 1312-13 (S.D. Fla. 2019) (explaining that courts could stay proceedings for another court to appoint a personal representative or dismiss the case "where appointment as personal representative is speculative or unsuccessful"), *report and recommendation adopted*, No. 18-20829-CIV, 2019 WL 2254962 (S.D. Fla. Mar. 21, 2019); *compare Glickstein v. Sun Bank/Miami N.A.*, 922 F.2d 666, 670-72 (11th Cir. 1991) (holding that the trial court erred in dismissing the case with prejudice, rather than staying the proceedings, where the plaintiff already had a case pending wherein he sought to be appointed

the estate's personal representative and the plaintiff assured the district court that he would be appointed the personal representative), *with Graca*, 2005 WL 6458603, at *2 (distinguishing *Glickstein* and explaining that dismissal was appropriate where Graca "provided the district court with no assurance that he would be appointed personal representative," "admitted that he had not filed an action in the probate court," and did not provide any "evidence that the state court would appoint him representative"). Ms. Nieves never requested a stay or abatement.
