



DIVISION ONE
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 RUTH A. WILLINGHAM,
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**IN THE COURT OF APPEALS
 STATE OF ARIZONA
 DIVISION ONE**

RAYMOND and VALENCIA BENNETT,) 1 CA-SA 12-0062
 husband and wife,)
) DEPARTMENT E
 Petitioners,)
) Maricopa County
 v.) Superior Court
) No. CV2007-052900
 THE HONORABLE LINDA MILES, Judge)
 of the SUPERIOR COURT OF THE) **DECISION ORDER**
 STATE OF ARIZONA, in and for the)
 County of MARICOPA,)
)
 Respondent Judge,)
)
 INSURANCE COMPANY OF THE STATE)
 OF PENNSYLVANIA, a foreign)
 corporation; AIG DOMESTIC CLAIMS,)
 INC., a foreign corporation;)
 ZORAN MARIC, M.D. and DEBRA)
 MARIC, husband and wife; ARIZONA)
 SPINE CENTER, LLC, a domestic)
 limited liability company,)
)
 Real Parties in Interest.)
 _____)

Petitioners, Raymond and Valencia Bennett, petition this court for review of the superior court's denial of their Notice of Change of Judge. Presiding Judge Patricia A. Orozco and Judges John C. Gemmill and Maurice Portley have considered this petition for special action, the responses, and the reply. For the reasons stated below, we exercise our special action jurisdiction, grant relief and remand the matter for further

proceedings consistent with this order.

In 2007, Petitioners filed a complaint against Insurance Company of the State of Pennsylvania (ICSOP), AIG, Dr. Maric, and Arizona Spine Center. Petitioners alleged ICSOP engaged in bad faith by hiring Dr. Maric and relying on his opinion that Mr. Bennett did not need treatment for his workplace injury. Petitioners also alleged Dr. Maric committed medical malpractice.

In September 2010, the superior court granted partial summary judgment in favor of ICSOP and AIG (the Insurance Defendants). The court also declined to rule on the Motion for Separate Trials (motion to sever) filed by Dr. Maric and Arizona Spine Center (the Medical Defendants) because the issue was moot. A final judgment was entered pursuant to Arizona Rule of Civil Procedure 54(b). Petitioners appealed that judgment, while the case against the Medical Defendants proceeded in superior court.

On February 9, 2012, this Court issued a memorandum decision reversing the partial summary judgment granted in favor of the Insurance Defendants. *Bennett v. Ins. Co. of State of Pa.*, 1-CA-CV 10-0815, 2012 WL 424913 (Ariz. App. Feb. 9, 2012) (mem. decision). Subsequently, on March 2, 2012, Petitioners

moved to stay the proceedings in superior court so the Insurance Defendants could rejoin the action. The court denied the motion.

On March 13, 2012, this court issued its mandate. On that same day, Petitioners filed a Notice of Change of Judge pursuant to Arizona Rule of Civil Procedure 42(f)(1)(E). The Medical Defendants requested an emergency status conference, which was held on March 15, 2012. The Insurance Defendants and the Medical Defendants both opposed Petitioners' Notice of Change of Judge. The superior court denied Petitioners' request for change of judge as to the Medical Defendants but took the matter under advisement as to the Insurance Defendants.¹

Petitioners filed this special action and requested that we grant their Notice of Change of Judge and stay the trial which was scheduled to begin on March 26, 2012. We granted Petitioner's request to stay the trial.

JURISDICTION

Special action jurisdiction is highly discretionary and is appropriate when there is no adequate remedy on appeal. *State ex rel. Thomas v. Duncan*, 216 Ariz. 260, 262, ¶ 4, 165 P.3d 238, 240 (App. 2007). Accepting jurisdiction is appropriate in this

¹ The superior court granted a change of judge as to the claims against the Insurance Defendants on April 4, 2012.

case because the denial of a preemptory request for change of judge is reviewable only by special action. *Taliaferro v. Taliaferro*, 186 Ariz. 221, 223, 921 P.2d 21, 23 (1996). Because Petitioners have no remedy by appeal, we accept jurisdiction.

DISCUSSION

We review a request for change of judge pursuant to Rule 42(f) for an abuse of discretion, but we review the interpretation of procedural rules de novo. *Anderson v. Contes*, 212 Ariz. 122, 124, ¶ 5, 128 P.3d 239, 241 (App. 2006).

The Insurance Defendants argue that Petitioner's Notice was untimely because it was filed within sixty days of the set trial date. Rule 42(f)(1)(C) provides that a notice of change of judge "is timely if filed sixty (60) or more days before the date set for trial." However, the Rule also provides that when the case is assigned to a new judge within sixty days of the trial date, "a notice shall be timely filed as to the newly assigned judge if filed within ten (10) days after such new assignment." Ariz. R. Civ. P. 42(f)(1)(C). Thus, the Rule permits flexibility under special circumstances.

Although the Notice in this case was filed only thirteen days before trial was set to begin, a notice as of right following remand cannot be considered untimely when it is filed

the same day the mandate is issued -- to hold otherwise would defy common sense, as Petitioners could not have filed their Notice any sooner. See *In re Reymundo F.*, 217 Ariz. 588, 590, ¶ 5, 177 P.3d 330, 332 (App. 2008) (noting that we employ a common sense approach in interpreting procedural rules). Declaring Petitioners' Notice untimely under these circumstances would eliminate their right to change of judge, which this court has recognized as "a valuable substantive right." *Brush Wellman, Inc. v. Lee*, 196 Ariz. 344, 348, ¶ 13, 996 P.2d 1248, 1252 (App. 2000); *Del Castillo v. Wells*, 22 Ariz. App. 41, 43, 523 P.2d 92, 94 (1974). Based on a common sense application of Rule 42(f) to the particular circumstances of this case, we determine that Petitioners' Notice was timely.

The superior court denied Petitioners' Notice of Change of Judge as it pertained to the Medical Defendants "[f]or reasons stated by the [Medical Defendants] in their Objection [to Plaintiffs' Notice of Change of Judge]." However, the Objection was premised on the erroneous assumption that this case had already been severed. In their "Objection to Plaintiffs' Notice of Change of Judge," the Medical Defendants assert the superior court effectively severed the cases when it denied Petitioners' motion to stay the proceedings on March 2, 2012. The superior

court, however, could not have severed the cases at that time, because only the Medical Defendants were before the court. Until the mandate issued on March 13, 2012, the appellate decision reversing summary judgment did not have legal effect and the claims against the Insurance Defendants had not yet been remanded to the superior court. See *Joel Erik Thompson, Ltd. v. Holder*, 192 Ariz. 348, 350, ¶ 15, 965 P.2d 82, 84 (App. 1998) (“[T]he appellate process is not formally completed, terminated, concluded, or final until the mandate issues. . . .”). Thus, there were no claims to sever on March 2.

When the appeal against the Insurance Defendants was remanded from this court, jurisdiction over the Insurance Defendants was transferred from this court to Maricopa County Superior Court Cause No. CV2007-052900. At that time, only one action existed in superior court and the parties included Petitioners, the Insurance Defendants and the Medical Defendants. No portion of the case had been severed at that point in time, and when Petitioners filed their Notice of Change of Judge, the Notice was applicable to the entire case. Since that time, no party has filed a motion to sever the case and the superior court has not ordered separate trials.

In denying the Notice of Change of Judge, the superior

court essentially found that the motion to sever had been previously granted. However, because the motion to sever had been determined to be moot, which is not a denial on the merits; the superior court abused its discretion in denying the Notice of Change of Judge as to all defendants. See *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, 350, ¶ 17, 141 P.3d 824, 830 (App. 2006) (a court abuses its discretion when the reasons given in support of its decision are legally incorrect).

Petitioners were entitled to a change of judge as a matter of right. Rule 42(f)(1)(E) states, "When an action is remanded by an appellate court and the opinion or order requires a new trial on one or more issues, then all rights to change of judge are renewed and no event connected with the first trial shall constitute a waiver." Where, as here, the superior court's grant of summary judgment disposed of all substantive claims, reversal of summary judgment is equivalent to remand for a new trial for purposes of Rule 42(f)(1)(E). See *Valenzuela v. Brown*, 186 Ariz. 105, 107-08, 919 P.2d 1376, 1378-79 (App. 1996).

CONCLUSION

We find Petitioners were entitled to a change of judge upon

remand pursuant to Rule 42(f)(1)(E) after this court reversed summary judgment against the Insurance Defendants and issued the mandate. Furthermore, Petitioners were entitled to a change of judge as to the entire case, and we direct the superior court to implement that change of judge. The newly-assigned judge can determine whether the cases should be tried separately, in the event another motion to sever is filed.

For the above-mentioned reasons, we accept jurisdiction, lift the stay and grant relief by vacating the April 4, 2012 order granting a change of judge only as to the Insurance Defendants and by ordering a change of judge for the entire case.

/S/

PATRICIA A. OROZCO, Presiding Judge