FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D22-43

CLAUDIA PISANO and
CHRISTOPHER PISANO, Spouse
and Son, Attorneys-in-Fact, and
HEALTH CARE PROXIES FOR
DANIEL PISANO,

Appellants,

v.

MAYO CLINIC FLORIDA, a Non-
Profit Corporation,

Appellee.

On appeal from the Circuit Court for Duval County.
Marianne L. Aho, Judge.

January 27, 2022

PER CURIAM.

On the evening of December 29, 2021, Appellants Claudia and Christopher Pisano sought emergency injunctive relief to compel Mayo Clinic Florida (hereinafter Mayo Clinic), located in Jacksonville, to administer particular pharmaceutical treatments to Daniel Pisano (hereinafter Mr. Pisano), a patient at its facility being treated for COVID-19 related illness. At the time, Mr. Pisano was in a medically induced coma, attached to a ventilator at the Mayo Clinic. His wife, Claudia, and son, Christopher, attorneys-

in-fact and his health care proxies (hereinafter referred to as Appellants), sought medical treatment the Mayo Clinic refused to provide. They petitioned the trial court for an order compelling Mayo Clinic and its relevant staff, over the objection of its physicians and contrary to its approved course of treatment for COVID-19 related conditions, to administer the pharmaceutical recipe prescribed by an outside physician. The trial court denied the petition for emergency injunctive relief to compel the treatment, finding Appellants failed to satisfy the required elements for entitlement. Appellants appealed that denial. On January 14, 2022, we affirmed that denial by expedited order. We issue this opinion to explain our reasoning.

We greatly empathize with the desire and conviction of Appellants to explore every option to assist in the survival of their family member. But the rule of law cannot give way to benevolent inclination, regardless of the unpleasantness of the judicial duty. Our role here is to apply the law as written, absent personal sentiment or bias, and to consider only those arguments properly raised. We cannot consider legal argument not properly raised or preserved by a litigant. *Archer v. State,* 613 So. 2d 446, 448 (Fla. 1993) (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)) (strictly construing the preservation requirement to require that the "specific legal argument or ground to be argued on appeal must be part of that presentation [below] if it is to be considered preserved"). Because Appellants failed to demonstrate a legal entitlement to injunctive relief, we affirm the denial of the petition.

I. FACTS

A. Emergency Verified Petition for Injunctive Relief

The medical protocol that the Appellants sought to compel Mayo Clinic to administer was recommended by an outside physician, Dr. Ed Balbona. The petition described Mr. Pisano's condition as deteriorating since his admission to Mayo Clinic on December 11, 2021. A week after his arrival, he was placed in a medically induced coma and on a ventilator in the intensive care unit. Mayo Clinic had exhausted its course of treatment and estimated Mr. Pisano's chance of survival to be between 0–5%. Mr. Pisano's family had been advised by Mayo Clinic of the risks and

benefits of Dr. Balbona's recommended treatment and had offered to sign a document releasing Mayo Clinic from all liability in administering the requested protocol. Without injunctive relief, the petition alleged irreparable harm—the death of Mr. Pisano. The petition was filed "pursuant to Rule 5.900 of the Florida Rules of Probate Procedure" and tracked the provisions of the rule. No constitutional basis, statutory provision, or case law was cited in support of the requested relief.

Attached to the petition was the protocol advocated by Dr. Balbona, a page entitled "Covid Associated Pulmonary Inflammatory Syndrome Protocol." The protocol called for specific doses of Lovenox, aspirin, Famotidine, Dexamethasone, Fluvoxamine, Doxycycline, Vitamin C, Vitamin D3, Zinc, Melatonin, and ivermectin.

Appellant, Claudia Pisano, provided an affidavit asserting that Mayo Clinic would not honor her right of medical decision-making. Also included was an affidavit from Appellant, Christopher Pisano, who attached numerous articles about alternative treatments for COVID-19.

B. Mayo Clinic's Response to Petition

Prior to the hearing on the emergency petition, Mayo Clinic filed its response arguing that Appellants failed to cite any legal basis for the requested relief. Though expressing confusion as to Appellants' claim, Mayo Clinic acknowledged the right to privacy and self-determination included the right to choose or reject medical treatment but argued it did not include the right to demand a particular treatment. Similarly, the Florida Patient's Bill of Rights did not grant such a right but instead contemplated patients having access to treatments offered in the judgment of his or her healthcare provider.

Regarding the petition's reliance on rule 5.900, Mayo Clinic argued such an action could not be brought under the rule. Mayo Clinic also attempted to challenge the petition by way of addressing the requirements for a temporary injunction.

Mayo Clinic detailed that Dr. Balbona was not permitted to treat Mr. Pisano at its facility because Mayo Clinic has a closed staff, and Dr. Balbona failed to meet Mayo Clinic's requirement that physicians who managed patients in the intensive care unit be employees and board-certified in both critical-care medicine and the physician's primary field. Further, Mayo Clinic offered for Dr. Balbona to participate in patient care conferences regarding Mr. Pisano, but he had not done so.

None of Mayo Clinic's staff were willing to provide the complete protocol advocated by Dr. Balbona. Though the staff agreed to give some of the requested drugs, administration was in lower doses and some declined altogether due to risk of side-effects and interaction with other drugs Mr. Pisano was taking. In particular, no one on Mayo Clinic's staff was willing to prescribe or administer ivermectin. According to Mayo Clinic, there had been no showing that ivermectin is effective in treating late-stage COVID-19 patients like Mr. Pisano, it was not FDA approved to treat COVID-19, and no national or international organization recommends its use for COVID-19. Mayo Clinic prohibits staff from prescribing or administering medications for off-label use that are not supported by medical literature and approved through Mayo Clinic's approval procedures.

Mayo Clinic attached the affidavit of Dr. Pablo Moreno Franco, Chair of the Department of Critical Care at Mayo Clinic. He detailed that pursuant to Mayo Clinic's bylaws, it was a closed hospital, meaning all physicians were required to be employed by Mayo Clinic or have a contractual relationship with Mayo Clinic. Additionally, Mayo Clinic created a multidisciplinary COVID-19 treatment review panel that reviewed significant amounts of information to formulate recommendations and guidelines for managing COVID-19 patients. The panel did not recommend or approve ivermectin for treatment of COVID-19, and the Mayo Clinic staff could not prescribe or administer medications for off-label use that are not supported by the medical literature and approved through the procedures described above. After reviewing the research, Dr. Franco concluded that there is no reliable medical evidence to support the use of ivermectin for late-stage COVID-19 patients like Mr. Pisano, who no longer had an active COVID-19 infection.

Dr. Franco attested that Dr. Balbona had not been involved with or participated in Mr. Pisano's treatment. Mayo Clinic had invited Dr. Balbona to participate in patient-care conferences, but he had not attended any. Dr. Franco addressed each medication that Dr. Balbona prescribed for Mr. Pisano, explaining which ones the doctors at the Mayo Clinic agreed to administer, which medications or doses it did not agree to administer, and the reasons behind those decisions. He further stated that the dosage and frequency with which Dr. Balbona wanted Mr. Pisano to take ivermectin was higher than the standard dose for the medication's approved uses and it was difficult to know what the side effects would be if administered at that level. Dr. Franco also expressed concern that the other drugs recommended by Dr. Balbona could cause bleeding or interact with other drugs Mr. Pisano was taking.

C. The Hearing

A hearing on the emergency petition was conducted on December 30, 2021, the day after the petition was filed. At the hearing, Appellants' counsel argued that their reliance on rule 5.900 was appropriate, referencing *Downey v. Indian River Memorial Hospital, Inc.*, No. 2021-CA-000490 (Fla. 19th Cir. Ct. July 20, 2021), a Florida circuit court case involving ivermectin that also proceeded under the rule. Appellants emphasized medical research that they believed supported a finding that ivermectin in particular would help Mr. Pisano, and emphasized Dr. Balbona's history of treating COVID-19 patients.

In turn, Mayo Clinic reiterated that no appellate court in Florida had applied rule 5.900 or any right of self-determination to compel a doctor to provide a particular treatment against their medical judgment. It argued further that Appellants' request was unprecedented, and no legal authority had been cited to support their alleged "right" to compel Mayo Clinic and relevant staff, contrary to their medical judgment and perceived ethical obligations, to administer certain medical treatments prescribed by an unaffiliated physician and which were contrary to Mayo Clinic's protocol. Lastly, Mayo Clinic argued Appellants failed to meet the required elements for injunctive relief.

The only witness at the hearing was Dr. Balbona. He testified that he is licensed to practice medicine in the State of Florida but holds no board certifications. He did not review Mr. Pisano's medical records in their entirety, but he reviewed his recent lab work. Dr. Balbona explained that he had set protocols that he prescribed to successfully treat approximately 50–100 COVID-19 patients. Dr. Balbona confirmed that he had not spoken with anyone at Mayo Clinic about his protocols. His protocol included ivermectin, which he believed the overwhelming amount of medical evidence proved was helpful at any stage of COVID-19. Despite Dr. Balbona's cited evidence, he acknowledged it was most helpful in early stages of COVID-19 infection. He explained the other components of the recommended protocol and why he believed they would be helpful to COVID-19 patients. He believed that none of the potential side effects of his protocol would have a 95% mortality rate like Mr. Pisano was facing, and that Mr. Pisano's odds of survival would dramatically increase with his protocol.

On cross-examination, Dr. Balbona confirmed that he had never been permitted to administer ivermectin in a hospital setting except in one court-ordered circumstance. That patient died, not from COVID-19, but instead from bleeding. Furthermore, none of the other COVID-19 patients he had treated with his protocol were on ventilators like Mr. Pisano. Some of his COVID-19 patients had been hospitalized and were treated by doctors who wanted to place them in intensive care or on ventilators, but they discharged themselves so Dr. Balbona could treat them. Dr. Balbona stated there were no hospitals in Jacksonville that allowed ivermectin to be administered, though there were hospitals in South Florida. He agreed ivermectin was not approved by the FDA for use in COVID-19 patients, but he stated that the FDA did not have a license to practice medicine and most medicines used are not for the specific use approved by the FDA. He acknowledged that several major health organizations were either neutral on the use of ivermectin to treat COVID-19 or were opposed to it. The FDA was opposed to it. He agreed that no major health organizations were in favor of it.

D. Trial Court's Ruling

At the conclusion of the hearing, the trial judge announced its ruling. Due to the emergency nature of the proceedings, the trial court declined to address the propriety of the action proceeding under rule 5.900. However, it denied the petition on the merits, finding Appellants failed to meet three of the four requirements for temporary injunctive relief.

A written order followed. Again, for purposes of providing an expeditious ruling, the trial court accepted that proceeding under rule 5.900 was the proper procedural mechanism and again denied the petition on the merits. The court addressed the four factors necessary to issue a preliminary injunction as set forth in *Florida Department of Health v. Florigrown, LLC*, 317 So. 3d 1101, 1110 (Fla. 2021).

Among its other findings, the court found that Appellants did not demonstrate a likelihood of success on the merits. Specifically, Appellants did not establish that the rights of privacy, self-determination, or any other right entitled them to the injunctive relief requested. The court referenced the circuit court order in *Drock*, which concluded:

> [a]n individual's right to privacy is one of self-determination, the right to accept or refuse. It is not a right to demand a particular treatment. It is not a right to substitute one's judgment as to which treatments must be made available by others. There is no right, constitutional or otherwise, of a patient to substitute one's judgment for a medical professional.

Drock v. Palm Beach Gardens Medical Center, No. 50-2021-CA-011209-XXXXMB (Fla. 15th Cir. Ct. Oct. 16, 2021). The trial court further found that Mayo Clinic was a closed hospital, and it would not be required to allow an outside physician not credentialed at Mayo Clinic to treat a patient there.

Notably, following entry of the written order, Appellants filed a motion for rehearing. The motion asserted that the language of

the Florida Patients' Bill of Rights and Responsibilities[1] supported their requested relief. Mayo Clinic filed a response the same day. However, Appellants withdrew their motion for rehearing and filed an Emergency Notice of Appeal with this Court.

II. ANALYSIS

A. Preservation

Mayo Clinic correctly argues that Appellants attempt to raise on appeal arguments not presented below. The petition relies solely on rule 5.900 as authority for its requested injunctive relief. At the hearing on the petition, Appellants again asserted their right to compel the requested treatment arose from rule 5.900, and counsel referenced only a circuit court order in which rule 5.900 was addressed. For the first time in the motion for rehearing, Appellants asserted that their right to compel medical treatment may derive from a different origin, specifically from the Florida Patient's Bill of Rights and Responsibilities and related statutes. Then, Appellants withdrew their motion for rehearing.

The preservation requirement has been strictly construed to require that the "specific legal argument or ground to be argued on appeal must be part of that presentation [below] if it is to be considered preserved." *Archer,* 613 So. 2d at 448 (quoting *Tillman*, 471 So. 2d at 35). A motion for rehearing may be required to preserve errors that appear for the first time in a written order, such as a failure to make statutorily required written findings. *See Eaton v. Eaton*, 293 So. 3d 567, 567 (Fla. 1st DCA 2020). Further, Appellants may have preserved their arguments through a motion for rehearing because a trial judge has discretion to consider new arguments raised on rehearing. *See Fitchner v. Lifesouth Cmty. Blood Ctrs., Inc.*, 88 So. 3d 269, 278 (Fla. 1st DCA 2012). However, because Appellants withdrew their motion for rehearing, the issues raised therein are not before us.

On appeal, because we may only address those issues properly raised below and preserved, the issues before us are 1) whether the

[1] §§ 381.026, 456.41, Florida Statutes (2021).

right of self-determination or rule 5.900 provides a legal right supporting the requested relief and 2) whether the record and law support the trial judge's conclusion that Appellants failed to satisfy the requirements for injunctive relief.

B. Right of Self-Determination & Rule 5.900

The emergency petition, by its specific language, declared its filing pursuant to rule 5.900. Appellants argue, for the first time on appeal, that rule 5.900 incorporates the legal grounds that spawned its creation. The genesis of rule 5.900 is the Florida Supreme Court's decision in *In re Guardianship of Browning*, 568 So. 2d 4 (Fla. 1990). In *Browning*, the court held that a medical surrogate or proxy may exercise the constitutional right of privacy to end life-saving treatment for an incompetent person if that person expressed such wishes while still competent. *Id.* at 17. The "fundamental right of self-determination, commonly expressed as the right of privacy," applies to medical decision-making, *Id.* at 9, and "everyone has a fundamental right to the sole control of his or her person." *Id.* at 10. Self-determination includes the right to "make choices pertaining to one's health, including the right to refuse unwanted medical treatment," particularly in the case of a terminally ill patient "in their choice of whether to discontinue necessary medical treatment." *Id.* This right "encompasses all medical choices. A competent individual has the constitutional right to refuse medical treatment . . . ." *Id.*

The court in *Browning* tasked the Probate and Guardianship Committee to submit a proposed rule establishing procedures for "expedited judicial intervention as required herein." *Id.* at 16, n.17. The court expressed concern that the "experience of numerous patients who died during the course of burdensome litigation underscores the importance of rules that provide such patients with certain access to the courts and the ability to swiftly resolve their claims when nonlegal means prove unsuccessful." *Id.*

In response to *Browning,* rule 5.900 of the Florida Probate Rules was promulgated. The rule sets procedural guidelines for "[a]ny proceeding for expedited judicial intervention concerning medical treatment procedures." Fla. Prob. R. 5.900(a). Appellants reason this rule creates a patient's right to compel treatment

because it provides that after an initial hearing, the trial court can "rule on the requested relief immediately" or hold an evidentiary hearing. Fla. Prob. R. 5.900(d). Going further, Appellants interpret this to establish a broad substantive right that empowers a trial court to fashion any relief.

Appellants mischaracterize the scope and purpose of rule 5.900. It does not, as they contend, "require" courts to intervene in medical treatment, but rather creates an expeditious procedural mechanism for limited medical disputes. The rule requires only that the trial court render a decision. It is silent regarding the scope of relief to which a petitioner is or may be entitled under substantive law. Furthermore, Appellants misconstrue the import of the court's statements in *Browning* as it relates to the need for the rule.

Appellants frame the issue as whether Mr. Pisano has "the right to choose life," but that framing misses the legal dispute at issue. No one disputes Mr. Pisano's "right to choose life." The question before this Court is not whether ivermectin or any other particular treatment is effective or reasonable. The answer to that question is quite obviously of critical importance to Mr. Pisano and his family. But the petition before us presents a legal question that is, while not unrelated, entirely different. The question here is not about whether Mr. Pisano (or his proxies) may "choose life"; it is whether Mr. Pisano has identified a legal right to compel Mayo Clinic and its physicians to administer a treatment they do not wish to provide.[2] The answer is no.

Rule 5.900 does not, and cannot, create a substantive right upon which a patient may base such a petition. Rules promulgated

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[2] The only relief Appellants requested in their petition was to compel Mayo Clinic to abide by and administer Dr. Balbona's treatment orders. Appellants did not seek an injunction requiring Mayo Clinic to allow Dr. Balbona to personally step in and administer the requested treatment at the Mayo Clinic. Having never sought injunctive relief to permit Dr. Balbona to directly provide treatment at Mayo Clinic hospital, Appellants cannot now request such relief for the first time on appeal.

by courts cannot create substantive law. And the rule does not build in *Browning* or any other substantive law. But even if it did, *Browning* provides no legal basis to usurp the medical judgments of treating physicians and compel them to administer medical treatment against their will.

C. Injunctive Relief

The trial court analyzed the merits of the petition using the temporary injunction rubric. It understandably engaged in this analysis because the petition lacked a cause of action or any other discernable legal criteria under which to adjudicate the claim. But Appellants did not seek a *temporary* injunction and the trial court did not deny one. The court issued a final order denying a petition for injunctive relief. The bottom line is that Appellants filed a petition for injunctive relief without providing any legal basis. The trial court denied the petition on the ground that it was not substantially likely to succeed on the merits. That is certainly true. An injunction cannot be granted without some basis in law; thus, this petition was incapable of succeeding on the merits. Though the temporary injunction analysis may not have been the perfect tool, it nevertheless reached the correct result. Appellants failed to demonstrate any legal right to injunctive relief and therefore the petition must be denied.

III. CONCLUSION

Rule 5.900 does not provide a substantive legal basis to compel a hospital, physicians, or medical staff to administer treatment against their medical judgment or perceived ethics. We agree with the trial court that Appellants failed to satisfy the requirement for injunctive relief. Accordingly, the trial court's denial of the emergency petition is AFFIRMED.

WINOKUR, M.K. THOMAS, and LONG, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Seldon J Childers and Sarah K. Walker, Childers Law, LLC, Gainesville; and Gregory A. Anderson and Nick Whitney, AndersonGlenn LLP, Jacksonville, for Appellants.

Sally Anne Brown, In-House Counsel for Mayo Clinic, Jacksonville; Edward McCarthy, III, Christine M. Russell, and Brian G. Kelley, Rogers Towers, P.A., Jacksonville; and Earl E. Googe, Jr., Smith Hulsey & Busey, Jacksonville, for Appellee.

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