

STATE OF MINNESOTA

IN SUPREME COURT

A17-0472

Certified Question  
United States Court of Appeals  
for the Eighth Circuit

Hudson, J.

Thomas J. Litterer and Mary L. Litterer,

Appellants,

vs.

Rushmore Loan Management Services,  
LLC as Servicing Agent for U.S. Bank  
National Association as Legal Title Trust  
for Truman 2012 SC Title Trust and U.S.  
Bank National Association as Legal Title  
Trust for Truman 2012 SC Title Trust,

Filed: January 10, 2018  
Office of Appellate Courts

Respondents.

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John R. Neve, Evan H. Weiner, Neve Webb, PLLC, Edina, Minnesota, for appellants.

Kalli L. Ostlie, Shapiro & Zielke, LLP, Burnsville, Minnesota, for respondents.

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S Y L L A B U S

Applying the excusable neglect standard of Minnesota Rule of Civil Procedure 6.02 to the *lis pendens* deadline contained in Minn. Stat. § 582.043, subd. 7(b) (2016), would alter the substantive rights provided by the statute. Therefore, Rule 6.02 may not be applied to extend the deadline.

Certified question answered in the negative.

## OPINION

HUDSON, Justice.

In this mortgage foreclosure dispute, the United States Court of Appeals for the Eighth Circuit asks us to decide whether the *lis pendens* deadline in Minn. Stat. § 582.043, subd. 7(b) (2016), may be extended upon a showing of excusable neglect under Minn. R. Civ. P. 6.02. Appellants, Thomas J. Litterer and Mary L. Litterer, argue that the *lis pendens* recording requirement is procedural in nature, and thus the excusable neglect provision of Rule 6.02 may be used to extend the time limit for recording a *lis pendens*. Respondents, Rushmore Loan Management Services, LLC and U.S. Bank National Association, take the opposite position, contending that the *lis pendens* requirement is substantive in nature, and therefore Rule 6.02 may not be used to extend the deadline for recording a *lis pendens*. We hold that applying Rule 6.02 to extend the *lis pendens* deadline is prohibited because to do so would impermissibly modify the substantive rights provided by the statute. We therefore answer the certified question in the negative.

## FACTS

This case requires us to determine the legal relationship between the recording deadline for a *lis pendens* in Minn. Stat. § 582.043, subd. 7(b), and the excusable neglect provision in Minn. R. Civ. P. 6.02.

Enacted by the Legislature in 2013, Minn. Stat. § 582.043 (2016) requires mortgage servicers to notify mortgagors of loss mitigation options before referring the mortgage for foreclosure. Minn. Stat. § 582.043, subds. 3, 5. The statute prohibits “dual tracking,” in

which a servicer refers a mortgage to an attorney for foreclosure while simultaneously processing a loss mitigation application. Minn. Stat. § 582.043, subd. 6. The statute also creates a cause of action for mortgagors to enjoin or set aside a foreclosure sale based on a violation of section 582.043. Minn. Stat. § 582.043, subd. 7(a). For an action under subdivision 7(a), “[a] *lis pendens* must be recorded prior to the expiration of the mortgagor’s applicable redemption period,” Minn. Stat. § 582.043, subd. 7(b).<sup>1</sup> Failure to record a *lis pendens* prior to this deadline “creates a conclusive presumption that the servicer has complied with this section.” *Id.*

The relevant facts of this case are undisputed. Appellants, Thomas J. Litterer and Mary L. Litterer (“Litterers”), financed the purchase of their home in 2004 with a loan from Wells Fargo secured by a mortgage. The Litterers began to have trouble making the payments on their loan in late 2011, when Thomas Litterer lost his job. For more than two years, the Litterers sought to either modify their mortgage or enter into a repayment plan with their mortgage servicer. During this time, their mortgage was transferred from Wells Fargo to U.S. Bank. U.S. Bank eventually transferred the servicing of the loan to Rushmore Loan Management Services, LLC (“Rushmore”). The Litterers repeatedly completed the required applications and submitted the documentation Rushmore told them was needed

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<sup>1</sup> A *lis pendens* is “[a] notice, recorded in the chain of title to real property, required or permitted in some jurisdictions to warn all persons that certain property is the subject matter of litigation, and that any interests acquired during the pendency of the suit are subject to its outcome.” *Lis Pendens, Black’s Law Dictionary* (10th ed. 2014). In Minnesota, any party to an action affecting the title to real property may file a notice of *lis pendens* with the appropriate county recorder to be recorded in the same manner as mortgages, to provide notice of the pendency of the action. Minn. Stat. § 557.02 (2016).

for a loan modification. Throughout the application process, Rushmore gave the Litterers conflicting information regarding the status of the mortgage modification application and the appropriate person to contact at Rushmore, and was frequently nonresponsive to the Litterers. After receiving erroneous and conflicting information from different Rushmore agents, the Litterers were told that their modification was denied, and that they could not appeal the denial, even if the denial was due to errors by Rushmore.

Eventually, the Litterers were served with foreclosure documents, and a sheriff's sale was conducted six months later. The home was sold back to U.S. Bank at the sale. After various extensions, the redemption period for the Litterers' mortgage expired on March 1, 2015. On February 27, 2015, just before the redemption period ended, the Litterers filed a lawsuit against Rushmore and U.S. Bank in Dakota County District Court.

On March 2, 2015, defendants (respondents here) were served, marking the commencement of the lawsuit. *See* Minn. R. Civ. P. 3.01(a). The Litterers' complaint, as amended, alleged that respondents had failed to comply with the requirements of Minn. Stat. § 582.043 by, among other things, failing to fully evaluate the Litterers' loan modification application and referring their mortgage for foreclosure while their loss mitigation/loan modification application was still pending.

The Litterers, who initially represented themselves, did not file a *lis pendens* when they first filed suit. After they retained an attorney in late April 2015, a *lis pendens* was recorded against the property on May 6, 2015. There is no dispute that, although the Litterers filed their suit before the expiration of their redemption period, the *lis pendens*

was not recorded before the end of their redemption period as required by Minn. Stat. § 582.043, subd. 7(b).

Rushmore and U.S. Bank removed the suit to the United States District Court for the District of Minnesota. The federal district court granted summary judgment to Rushmore and U.S. Bank. Analogizing to our prior case law on mechanic's liens, the district court stated that the statutory requirement for recording a *lis pendens* "must be strictly construed." The district court therefore ruled that even if the Litterers could establish excusable neglect, it would not excuse their failure to comply with the statutory *lis pendens* deadline.

The Litterers appealed to the United States Court of Appeals for the Eighth Circuit. In their brief, the Litterers argued that the district court erred in concluding that the *lis pendens* deadline could not be extended upon a showing of excusable neglect. The case was briefed before the Eighth Circuit and oral argument was scheduled. A few days before oral argument, the Litterers filed a Motion for Certification of Question to Minnesota Supreme Court. After the argument, the Eighth Circuit certified the following question to our court:

May the *lis pendens* deadline contained in Minn. Stat. § 582.043, subd. 7(b) be extended upon a showing of excusable neglect pursuant to Minn. R. Civ. P. 6.02?

We accepted the certified question by order on March 24, 2017.

### **ANALYSIS**

We review certified questions de novo. *Lyon Fin. Servs., Inc. v. Ill. Paper & Copier Co.*, 848 N.W.2d 539, 541 (Minn. 2014). We construe and interpret Minnesota's rules of

procedure de novo. *State v. Barrett*, 694 N.W.2d 783, 785 (Minn. 2005). Whether a legal requirement is a matter of substantive or procedural law is a question of law we consider de novo. *State v. Johnson*, 514 N.W.2d 551, 553 (Minn. 1994).

At issue is whether extending the *lis pendens* deadline using the excusable neglect provision of Rule 6.02<sup>2</sup> would “abridge, enlarge, or modify the substantive rights of any litigant.” Minn. Stat. § 480.051 (2016). The constitutional separation of powers and our state statutes prohibit the Rules of Civil Procedure from intruding upon the Legislature’s power to define substantive law. *Id.*; *see also State v. Lindsey*, 632 N.W.2d 652, 658 (Minn. 2001).

We are first and foremost constrained by the constitutional separation of powers. The Minnesota Constitution establishes “three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.” Minn. Const. art. III, § 1. As we stated in *Johnson*, “[d]etermination of procedural matters is a judicial function. The [L]egislature, for its part, determines matters of substantive law.” 514 N.W.2d at 554. Therefore, although the judiciary has the power to regulate procedure within the courts, we have no authority to intrude upon legislative declarations of substantive law. *See Anderson v. Twin*

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<sup>2</sup> Rule 6.02 reads in relevant part, “[w]hen by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect[.]” Minn. R. Civ. P. 6.02.

*City Rapid Transit Co.*, 84 N.W.2d 593, 604 (Minn. 1957).

The statutes governing the Rules of Civil Procedure reflect the constitutional separation of powers. Minnesota Statutes § 480.051 states that our court has “the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, including the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant.” Thus, a promulgated rule may not be applied in a way that would alter the substantive rights of any litigant.

Our case law echoes this limitation. As we stated in *Anderson*, the Rules of Civil Procedure “neither have nor could legally attempt to change” substantive law. 84 N.W.2d at 604. “Substantive law is that part of law which creates, defines, and regulates rights, as opposed to ‘adjective or remedial law,’ which prescribes method[s] of enforcing the rights or obtaining redress for their invasion.” *Id.* at 604 n.7; *see also Meagher v. Kavli*, 88 N.W.2d 871, 879–80 (Minn. 1958) (describing the same definition of substantive law). The Rules of Civil Procedure are “limited to governing the procedure in the district courts of this state and not in any respect to legislate where substantive law is involved.” *Anderson*, 84 N.W.2d at 604.

Thus, the question we must answer is whether the *lis pendens* deadline of Minn. Stat. § 582.043, subd. 7(b), creates, defines, or regulates rights. If it does not, then the excusable neglect standard in Rule 6.02 may be used to extend the *lis pendens* deadline. If it is substantive law, then a procedural rule may not be used to extend the deadline.

“Distinguishing between substantive rights and procedural rights is not an easy

task.” *State v. Wingo*, 266 N.W.2d 508, 513 n.11 (Minn. 1978). “Many statutes and rules have both procedural and substantive aspects. Statutes of limitation, for example, are procedural in that they regulate when a party may file a lawsuit and are substantive in that they are outcome determinative.” *Johnson*, 514 N.W.2d at 555.

However, the application of a rule is not substantive simply because it may be outcome determinative in certain cases. In *State v. Lemmer*, we concluded that the application of collateral estoppel did not affect substantive rights, despite it being outcome determinative in that particular case. 736 N.W.2d 650, 658 (Minn. 2007). In doing so, we discussed the difference between substantive and procedural law by contrasting statutes of limitations and collateral estoppel:

We believe that a key consideration in determining that the statute of limitations is substantive is that the statute of limitations will always bar claims if the statute has tolled. In contrast, the application of collateral estoppel will not consistently preclude litigation of the claim because collateral estoppel only prevents the relitigation of issues, leaving open the possibility that a claim could still proceed even absent the ability to address the estopped issue.

*Id.* Because “collateral estoppel is not *always* outcome determinative,” and its bar to the state’s prosecution in that case was “only an incidental and indirect effect of its application,” we described collateral estoppel as procedural despite its outcome-determinative effect in that case. *Id.*

Because our power to create rules of civil procedure is constitutionally limited to areas of procedural law, we must always consider whether the application of a rule would be substantive or procedural. We emphasize that we may never use rules of civil procedure to create substantive law—we lack the constitutional authority to do so. Thus, when our

previous cases have discussed whether a statute and a rule are “inconsistent” or “in conflict” with one another, this analysis was necessarily limited to instances involving procedural law. *See, e.g., Stern v. Dill*, 442 N.W.2d 322, 324 (Minn. 1989); *Guillaume & Assocs., Inc., v. Don-John Co.*, 336 N.W.2d 262, 264 (Minn. 1983). In other words, in cases of substantive law, we do not reach the question of whether the statute and rule conflict, because our procedural rules may not be used to alter substantive rights.

Although both the Litterers and Rushmore make a number of arguments regarding the appropriate interpretation of Minn. Stat. § 582.043, our central inquiry must be whether the *lis pendens* deadline is substantive law. The parties make no assertion that the statutory language itself allows an extension for excusable neglect. Contrary to the parties’ arguments, in the absence of ambiguity in statutory language, we do not analyze whether a statute should be strictly or broadly construed. *See Moulton v. Simon*, 883 N.W.2d 819, 824 (Minn. 2016). We focus instead on whether using Rule 6.02’s excusable neglect provision to extend the *lis pendens* deadline would alter underlying substantive rights.

The Litterers argue that the *lis pendens* deadline is a procedural deadline akin to the expert affidavit deadlines in *Stern*, 442 N.W.2d at 324. In *Stern*, the applicable statute mandated dismissal with prejudice for failure to comply with the statute’s requirements for serving expert affidavits in malpractice cases. *Id.* at 323. We held that this requirement was procedural because it “[did] not change [the plaintiff’s] basic right to sue for negligence,” but simply “impose[d] additional requirements on plaintiff before she [could] enforce her claim.” *Id.* at 324.

Here, by contrast, failure to comply with the *lis pendens* deadline creates a

“conclusive presumption” that the mortgage servicer complied with the statute’s requirements. Minn. Stat. § 582.043, subd. 7(b). If the servicer complied with the statute’s requirements, plaintiffs have no basic right to sue apart from the statute. The statute requires that a *lis pendens* be recorded before the expiration of the redemption period to avoid the “conclusive presumption” defense provided to servicers. To extend the *lis pendens* deadline using Rule 6.02 would deny the mortgage servicer the defense created by the conclusive presumption, thereby affecting the servicer’s substantive rights.

Additionally, unlike the expert affidavit requirements in *Stern*, the recording of a *lis pendens* falls outside the domain of general court procedure. A *lis pendens* is not filed with the court; it is filed with and recorded by the appropriate title registrar. Minn. Stat. § 557.02 (2016). Unlike expert affidavits, which provide information to opposing parties and the court regarding the evidence and witnesses in a case, a *lis pendens* provides information to not just the litigants in a particular case and the court, but also to third parties who might be interested in purchasing the property or taking it as security. For these reasons, the *lis pendens* deadline is materially different from the expert affidavit deadline from *Stern*.

Minnesota Statutes § 582.043 creates a right to sue mortgage servicers for failure to comply with the statute’s requirements. Subdivision 7(b) places limits upon that right, requiring a *lis pendens* to be recorded before the end of the redemption period to avoid the “conclusive presumption” defense created for servicers. To extend this deadline using Rule 6.02 would “abridge, enlarge, or modify the substantive rights” of the litigants by altering the defenses available to servicers under the statute. Such an alteration would be an impermissible intrusion into matters of substantive law.

Because extending the deadline in Minn. Stat. § 582.043, subd. 7(b), would alter the substantive rights of the litigants, we hold that Rule 6.02 may not be used to extend this deadline. We recognize that our decision will likely lead to a harsh result in this particular case. By no means do we condone dual-tracking or any of the other harmful practices that the Legislature sought to combat with this statute. Nonetheless, our decision is necessarily constrained by the constitutional separation of powers and the limits it imposes.

### **CONCLUSION**

For the foregoing reasons, we answer the certified question in the negative.