SUMMARY
May 23, 2024

2024COA57

No. 23CA0449, *Riggs Oil & Gas Corp. v. Jonah Energy LLC* — Appeals — Colorado Rules of Appellate Procedure — Appeals in Civil Cases — Extension of Time to File a Notice of Appeal — Excusable Neglect

A division of the court of appeals considers whether, and if so, under what circumstances, the Colorado appellate courts consider prejudice to the parties in deciding whether to accept an untimely notice of appeal in a civil case on grounds of excusable neglect under C.A.R. 4(a)(4). The division holds that the courts do not consider prejudice to the parties when determining whether the late filing of a notice of appeal under C.A.R. 4(a) was attributable to excusable neglect. Rather, one of these courts only considers prejudice if the court first determines that the neglect was excusable and then proceeds to analyze whether it should exercise its discretion to accept the untimely notice of appeal.

Under this standard, the division concludes that the appellant's untimely notice of appeal was not a result of excusable neglect when the attorney failed to timely read the district court's submission receipt showing that his nonlawyer assistant had filed the notice of appeal in the wrong court. Thus, the division does not consider whether the one-day delay would prejudice the appellees, and it dismisses the appeal for lack of jurisdiction.

COLORADO COURT OF APPEALS **2024COA57**

Court of Appeals No. 23CA0449
City and County of Denver District Court No. 18CV30838
Honorable Marie Avery Moses, Judge

Riggs Oil & Gas Corporation; Gasconade Oil Co.; Helm Energy, LLC; McLish Resources, L.P., LLLP; and W. Clifton Arbuckle Trust Dated 1/1/1996,

Plaintiffs-Appellees,

and

Los Feliz Oil Company, LLC; Samis Oil Company, Inc.; MKB Energy, L.L.C.; Westar Oil & Gas, Inc.; JJB Energy Ventures, LC; Callaway Oil, L.L.C.; Anadarko Partners II, L.P.; Cartel Petroleum, Inc.; Castlebay Energy LLC; Coyote Energy LLC; S.N.S. Oil & Gas Properties, Inc.; Winchester Energy, LLC; El Dorado Corporation; and Ridgeview Exploration, Inc.,

Plaintiffs-Intervenors-Appellees,

v.

Jonah Energy LLC,

Defendant-Appellant.

APPEAL DISMISSED

Division VII
Opinion by JUDGE LIPINSKY
Tow and Grove, JJ., concur

Announced May 23, 2024

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¶ 1 Appellate courts lack jurisdiction over untimely appeals. Under C.A.R. 4(a)(1), a party to a civil case seeking to appeal a judgment or order to this court must file a notice of appeal no later than forty-nine days from the date of the judgment or order.

¶ 2 C.A.R. 4(a)(4) contains an exception to this requirement. We will accept an untimely notice of appeal upon a showing that the party seeking to commence the appeal missed the filing deadline due to excusable neglect.

¶ 3 "Excusable neglect" is "a somewhat 'elastic concept,'" *Goodman Assocs., LLC v. WP Mountain Props., LLC*, 222 P.3d 310, 319 (Colo. 2010) (quoting *People v. Wiedemer*, 852 P.2d 424, 442 n.20 (Colo. 1993)), that does not encompass the same acts or omissions in every context. A court may excuse a lawyer's neglect for purposes of certain court rules but not for other rules.

¶ 4 In this case, we consider whether the excusable neglect language in C.A.R. 4(a)(4) allows us to accept an untimely appeal resulting from a lawyer's failure to read the submission receipt showing that, on the filing deadline, his nonlawyer assistant filed the notice of appeal in the district court, rather than in this court. In analyzing excusable neglect in this context, we decide the novel

issue of whether, and, if so, under what circumstances, the appellate courts consider prejudice to the parties in deciding whether to accept an untimely appeal on grounds of excusable neglect under C.A.R. 4(a)(4).

¶ 5 We conclude that the lawyer's failure in this case constitutes mere "garden-variety attorney inattention," *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000), which does not rise to the level of excusable neglect. Because we conclude that the untimely filing of the notice of appeal was not the result of excusable neglect, we do not consider whether any party was actually prejudiced. Accordingly, we hold that we lack jurisdiction over this appeal and dismiss it.

I. Background and Procedural History

¶ 6 Defendant, Jonah Energy LLC, appeals the district court's judgment in favor of plaintiffs — Riggs Oil & Gas Corporation; Gasconade Oil Co.; Helm Energy, LLC; McLish Resources, L.P., LLLP; and W. Clifton Arbuckle Trust Dated 1/1/1996 — and plaintiffs-intervenors — Los Feliz Oil Company, LLC; Samis Oil Company, Inc.; MKB Energy, L.L.C.; Westar Oil & Gas, Inc.; JJB Energy Ventures, LC; Callaway Oil, L.L.C.; Anadarko Partners II,

L.P.; Cartel Petroleum, Inc.; Castlebay Energy LLC; Coyote Energy LLC; S.N.S. Oil & Gas Properties, Inc.; Winchester Energy, LLC; El Dorado Corporation; and Ridgeview Exploration, Inc.

¶ 7 This is Jonah Energy's second appeal in this case. In the first appeal, a different division of this court affirmed the district court's grant of summary judgment in favor of the plaintiffs and plaintiffs-intervenors (collectively, the non-operators). *See Riggs Oil & Gas Corp. v. Jonah Energy LLC*, (Colo. App. No. 19CA1464, Dec. 10, 2020) (not published pursuant to C.A.R. 35(e)).

¶ 8 After Jonah Energy filed a petition for rehearing and a petition for a writ of certiorari, and the parties engaged in an unsuccessful mediation, the non-operators filed a "Motion to Release Escrow and Approve Forms of Assignment." The district court granted the motion on January 23, 2023. This appeal followed.

¶ 9 Pursuant to C.A.R. 4(a)(1), Jonah Energy's notice of appeal was due in this court no later than March 13, 2023, forty-nine days from January 23, 2023.

¶ 10 The day after the filing deadline, counsel for Jonah Energy filed a notice of appeal in this court, together with a motion for leave

to file the notice of appeal out of time that said counsel's late filing was attributable to excusable neglect.

¶ 11 In the motion, counsel said that, because his law firm's offices were being remodeled, he and his staff had worked remotely on the day of the filing deadline. He said that he instructed his assistant by email to "file after 4 PM with the Colorado Court of Appeals the attached Notice of Appeal." In a separate email, counsel directed his assistant to file an advisory copy of the notice of appeal in the district court. Counsel asserted that, because he and his legal assistant were working remotely that day, he was unable to supervise his assistant in person when she filed the notice of appeal.

¶ 12 According to counsel, his assistant selected an option in the Colorado courts' electronic filing system (the e-filing system) to commence a new case filing in the district court, rather than in this court. Because of this error, the assistant filed the notice of appeal in the district court.

¶ 13 At 4:36 p.m. on March 13, the e-filing system sent a submission receipt for "Notice of Appeal" to counsel for Jonah Energy, whose account the assistant had used for the filing. The

receipt indicated that the notice of appeal had been filed in "Denver County – District." Additionally, the receipt provided a "CV" rather than a "CA" case number, which further indicated that the notice of appeal had been filed in the district court.

¶ 14 One minute later, the assistant informed counsel by email that she had filed the "new appeal case." At 4:51 p.m., she advised counsel by email that she had submitted "part 2 of this filing" (the advisory copy to the district court).

¶ 15 The next day, the district court sent counsel a rejection notice stating, "Document is captioned for the appeals court." Later that day, counsel filed in this court Jonah Energy's notice of appeal and the motion for leave.

¶ 16 The non-operators opposed the motion for leave, arguing that Jonah Energy's untimely filing was not attributable to excusable neglect and that this court should dismiss the appeal for lack of jurisdiction.

¶ 17 A motions division of this court voted two to one to accept the untimely appeal. *See Riggs Oil & Gas Corp. v. Jonah Energy LLC*, (Colo. App. No. 23CA0449, Mar. 24, 2023) (unpublished order).

¶ 18 The parties subsequently filed their merits briefs. In their answer brief, the non-operators renewed their argument that we should dismiss the appeal for lack of jurisdiction because Jonah Energy failed to establish that its counsel missed the filing deadline due to excusable neglect.

¶ 19 We ordered the parties to file supplemental briefs addressing the untimely filing of the notice of appeal. *See Riggs Oil & Gas Corp. v. Jonah Energy LLC*, (Colo. App. No. 23CA0449, Feb. 29, 2024) (unpublished order).

¶ 20 Having reviewed the parties' supplemental briefing and the authorities cited in those briefs, we agree with the non-operators that Jonah Energy has not shown that its counsel missed the filing deadline for the notice of appeal due to excusable neglect. Accordingly, we dismiss this appeal for lack of jurisdiction.

II. Relevant Law

A. The Law Governing Untimely Appeals in Civil Cases

¶ 21 "Failure to file a notice of appeal within the prescribed time deprives the appellate court of jurisdiction and precludes a review of the merits." *Widener v. Dist. Ct.*, 200 Colo. 398, 400, 615 P.2d 33, 34 (1980). "Strict compliance" with this jurisdictional rule is

"required." *Collins v. Boulder Urb. Renewal Auth.*, 684 P.2d 952, 954 (Colo. App. 1984). Unlike other deadlines in Colorado court rules, an appellate court may not grant a would-be appellant leave to file an untimely notice of appeal in a civil case for "good cause shown." *See, e.g.*, C.A.R. 26(c) (providing that this court can extend the time for certain filings — but not for notices of appeal in civil cases — "[f]or good cause shown"). Rather, C.A.R. 4(a)(4) prescribes that an appellate court may accept an untimely notice of appeal only upon a showing of "excusable neglect."

B. The Meaning of Excusable Neglect

¶ 22 Jonah Energy urges us to consider prejudice to the parties as part of our excusable neglect analysis. Specifically, Jonah Energy asserts that the non-operators were not prejudiced by the untimely filing because they received the notice of appeal upon the filing of the notice in the district court on the forty-ninth day following entry of the January 23, 2023, order. Jonah Energy said that, in contrast, it would be significantly prejudiced if not permitted to proceed with its appeal.

¶ 23 The non-operators argue that the Colorado courts do not consider equitable factors, such as prejudice, when considering

whether to accept an untimely notice of appeal for excusable neglect under C.A.R. 4(a)(4). They contend that, in this context, we must focus on whether the attorney's action or inaction that caused the client to miss the filing deadline was excusable. The non-operators further assert that the analysis of excusable neglect in contexts where prejudice is a consideration does not apply to the analysis of excusable neglect under C.A.R. 4(a)(4).

¶ 24 Thus, our determination of whether Jonah Energy established that its untimely filing was attributable to excusable neglect largely rests on whether we must consider prejudice as part of the C.A.R. 4(a)(4) analysis.

¶ 25 We first examine the general definition of "excusable neglect" and how courts have applied it in the context of C.A.R. 4(a)(4). Because so few Colorado cases have addressed this specific issue, we also consider cases involving other Colorado court rules containing an excusable neglect standard and cases from other jurisdictions involving untimely notices of appeal.

1. The General Definition of "Excusable Neglect" and Its Application in Civil Appeals

¶ 26 Colorado courts have provided a general definition of "excusable neglect" untethered from any specific context. "Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty." *Farmers Ins. Grp. v. Dist. Ct.*, 181 Colo. 85, 89, 507 P.2d 865, 867 (1973). "Failure to act due to carelessness and negligence is not excusable neglect. On the other hand, 'excusable neglect' occurs when there has been a failure to take proper steps at the proper time, *not* in consequence of carelessness, but as the result of some *unavoidable hindrance or accident*." *Id.* (emphasis added) (first citing *Doyle v. Rice Ranch Oil Co.*, 81 P.2d 980 (Cal. Dist. Ct. App. 1938); and then citing *Gov't Emps. Ins. Co. v. Herring*, 477 P.2d 903, 906 (Or. 1970)). Occurrences involving "unavoidable hindrance" or "accident" include "personal tragedy, illness, family death, destruction of files, and other similar situations." *Id.*; *cf.* Black's Law Dictionary 1244 (11th ed. 2019) (defining excusable neglect as "[a] failure — which the law will excuse — to take some proper step at the proper time

. . . not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident" or "because of reliance on the care and vigilance of the party's counsel or on a promise made by the adverse party").

¶ 27 Colorado courts have used this general definition in different contexts. As relevant here, the supreme court applied this formulation of excusable neglect in deciding whether to extend an appellant's time to file a notice of appeal in a dependency or neglect case, to which C.A.R. 4(a)(4) applies. *See P.H. v. People in Interest of S.H.*, 814 P.2d 909, 912-13 (Colo. 1991). The supreme court also looked to this characterization of excusable neglect when considering whether to extend the deadline for filing a notice of appeal in a criminal case under C.A.R. 4(b), *see Estep v. People*, 753 P.2d 1241, 1247 (Colo. 1988); whether to accept, pursuant to C.R.C.P. 6(b)(2), a motion to substitute parties filed after the filing deadline had expired, *see Farmers Ins. Grp.*, 181 Colo. at 88-89, 507 P.2d at 866-67; and whether to set aside a default judgment under C.R.C.P. 60(b), *see Goodman Assocs.*, 222 P.3d at 319;

McMichael v. Encompass PAHS Rehab. Hosp., LLC, 2023 CO 2, ¶ 14, 522 P.3d 713, 719.

¶ 28 We agree with the non-operators that, under this general definition, "the critical question is the *reason* for the late filing." *Bosworth Data Servs., Inc. v. Gloss*, 41 Colo. App. 530, 531, 587 P.2d 1201, 1203 (1978). Indeed, Colorado's appellate courts have applied this definition, which does not include consideration of whether denying the requested extension of time would cause prejudice to any party, in the context of C.A.R. 4(a)(4).

¶ 29 For example, in *Bosworth Data Services*, a division of this court held that "miscounting the days within which to file a notice of appeal does not constitute excusable neglect under C.A.R. 4(a)," and it dismissed the appeal even though the appellant had filed its notice of appeal only one day late. *Id.* at 532, 587 P.2d at 1203. Similarly, in *Ford v. Henderson*, the division dismissed the untimely appeal — without considering prejudice to the parties — because the appellant's "reliance on the postal service for timely delivery of his notice of appeal did not constitute excusable neglect." 691 P.2d 754, 756 (Colo. App. 1984).

¶ 30 Jonah Energy contends that *Widener* stands for the proposition that a court abuses its discretion by rejecting a belated appeal of which the appellees received timely notice, as did the non-operators here. *See* 200 Colo. at 401, 615 P.2d at 35. But in *Widener*, the supreme court did not consider whether the appellant should be permitted to file a notice of appeal after the C.A.R. 4(a)(1) deadline had run. Rather, the court held that the appellant had, in effect, commenced a timely appeal in the correct court by submitting a motion to stay the underlying judgment and for approval of a supersedeas bond in that court. *Id.* at 399, 615 P.2d at 33. Although the filings were not technically a notice of appeal, the supreme court determined that they "contain[ed] everything necessary to comply with the requirements of C.A.R. 3(c) with respect to the content of the notice of appeal." *Id.* at 400, 615 P.2d at 34. It thus held that "[l]ack of designation in the caption that the document is a notice of appeal will not defeat substantial compliance" with C.A.R. 3(c) and 4(a). *Id.* at 401, 615 P.2d at 34. To the extent the *Widener* court determined that the late filing of the actual notice of appeal was a harmless "technical defect," *id.*, it did not address whether, or under what circumstances, a timely filing

of a notice of appeal in the wrong court, with notice to the appellees, can satisfy the excusable neglect standard under C.A.R. 4(a)(4).

¶ 31 Jonah Energy cites no Colorado case considering prejudice to the parties in analyzing excusable neglect in the C.A.R. 4(a)(4) context, and we are not aware of any. However, we also have not found any cases indicating that a court *cannot* consider prejudice in this analysis. For this reason, we next turn to cases applying the concept of excusable neglect in other contexts.

2. Criminal Appeals

¶ 32 In *Estep*, the supreme court considered the standards that apply in determining whether a court may accept an untimely criminal appeal. 753 P.2d at 1245. Like C.A.R. 4(a)(4), C.A.R. 4(b)(3) allows an appellate court to "extend the time for filing a notice of appeal" in a criminal case "[u]pon a showing of excusable neglect."

¶ 33 The *Estep* court held that, even if defense counsel's neglect in missing the deadline for the notice of appeal is inexcusable, and therefore would not justify an extension of time under C.A.R. 4(b), courts "should consider further whether other factors weigh heavily

in favor of permitting the late filing" under the "good cause" standard of C.A.R. 26(b). *Estep*, 753 P.2d at 1248. "Those factors include the potential prejudice the appellee may suffer from a late filing, the interests of judicial economy, and the propriety of requiring the defendant to pursue other remedies to redress his counsel's neglect." *Id.*

¶ 34 *Estep* highlights an important point — C.A.R. 26(c), which, as noted above, contains a "good cause" standard, applies in criminal appeals. But C.A.R. 26(c) by its terms does not apply in civil appeals. *See* C.A.R. 26(c)(1). For this reason, *Estep* indicates that courts may consider prejudice when deciding whether to extend the deadline for filing a notice of appeal in a criminal case, but not when deciding the same issue in a civil appeal. *See* 753 P.2d at 1248-49; *see also People v. Baker*, 104 P.3d 893, 896-98 (Colo. 2005) (holding that the defendant failed to establish that his counsel's failure to file a notice of appeal in the correct court constituted excusable neglect, but nonetheless reinstating the appeal based on the "good cause" standard in C.A.R. 26(c)).

3. Interlocutory Appeals Pursuant to C.A.R. 4.2(d)

¶ 35 In *Farm Deals, LLLP v. State*, a division of this court analogized the deadline in C.A.R. 4.2(d) for filing an interlocutory appeal to the deadline for filing a notice of appeal in C.A.R. 4. 2012 COA 6, ¶ 18, 300 P.3d 921, 924. In that case, the division concluded there was no excusable neglect where the petitioners' counsel "entrusted the filing of the petition to his secretary, who initially filed the petition in the trial court rather than the court of appeals," and the attorney professed a lack of familiarity with the e-filing system. *Id.* at ¶ 21, 300 P.3d at 925. The division did not consider prejudice to the parties, but rather based its holding on its determination that the attorney had missed the filing deadline through "mere carelessness" and not excusable neglect. *Id.* Accordingly, the division declined to accept the untimely petition and dismissed the interlocutory appeal. *Id.* at ¶ 22, 300 P.3d at 925.

¶ 36 *Farm Deals* indicates that prejudice is not a consideration in the analysis of whether a party's failure to file a timely notice of appeal in a civil case was attributable to excusable neglect.

4. Motions to Set Aside a Default Judgment

¶ 37 When considering whether to grant a motion for relief from a default judgment on the basis of excusable neglect, pursuant to C.R.C.P. 60(b), courts conduct what they characterize as a *Buckmiller* analysis: "(1) whether the neglect that resulted in entry of judgment by default was excusable; (2) whether the moving party has alleged a meritorious claim or defense; and (3) whether relief from the challenged order would be consistent with considerations of equity." *Goodman Assocs.*, 222 P.3d at 319 (quoting *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo. 1986)).

¶ 38 The "first factor looks to the *cause* of the neglect." *Id.* (emphasis added). "A party's conduct constitutes excusable neglect" for purposes of setting aside a default judgment "when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty." *Id.* (quoting *In re Weisbard*, 25 P.3d 24, 26 (Colo. 2001)).

¶ 39 The second factor of the *Buckmiller* analysis focuses on the merits of the underlying claim or defense. *See id.* The third factor "addresses the circumstances surrounding the neglect and the motion to set aside." *Id.* It includes consideration of "any prejudice

to the opposing party if the motion were to be granted," *id.* (quoting *Buckmiller*, 727 P.2d at 1116), and "[p]rejudice to the moving party by a denial of the motion," among other equitable considerations. *Id.*

¶ 40 But there is a material distinction between a decision to set aside a default judgment and a decision to accept an untimely appeal. "Whether to set aside a default judgment is at its core an equitable decision." *Id.* Although the three *Buckmiller* factors constitute a "balancing test" in which "each must be considered in resolving the motion," in certain cases, "the failure to satisfy just one of these factors is so significant that it requires denial of the motion to set aside." *Id.* at 321.

¶ 41 Thus, *Goodman Associates* shows that, although courts consider prejudice in applying the concept of excusable neglect in deciding whether to set aside a default judgment, the review of potential prejudice in this context is independent from the review of whether the underlying error was the result of excusable neglect.

¶ 42 In *McMichael*, the supreme court considered whether the trial court abused its discretion by granting a C.R.C.P. 60(b) motion to set aside a default judgment for excusable neglect. *McMichael*, ¶ 1,

522 P.3d at 717. Like in *Goodman Associates*, the court considered the three *Buckmiller* criteria, starting with the cause of the neglect. *Id.* at ¶¶ 13-23, 522 P.3d at 719-20. It recited the general definition of excusable neglect: "A party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty." *Id.* at ¶ 14, 522 P.3d at 719 (quoting *Weisbard*, 25 P.3d at 26). The trial court had found that the defaulting party established excusable neglect where "the reason for [the party's] delayed response was a docketing oversight in its lawyer's office," and that the default resulted from "honest mistakes rather than willful misconduct, carelessness or negligence." *Id.* at ¶ 15, 522 P.3d at 719.

¶ 43 Although the supreme court concluded that "the trial court did not abuse its discretion in finding excusable neglect," the opinion noted that the court "may have reached a similar conclusion if the trial court had come out the other way" and that the court could not "say on this record that the trial court's decision was manifestly arbitrary, unreasonable, or unfair." *Id.*

¶ 44 The *McMichael* court devoted most of its analysis to the third *Buckmiller* factor — the "equitable considerations" including

prejudice — noting that such considerations "are analyzed in light of our preference for resolving cases on the merits." *Id.* at ¶ 17, 522 P.3d at 720. The court determined that the "equitable considerations lean heavily toward vacating the default judgment" because the delayed responsive pleading was "filed just thirteen days past its deadline," *id.* at ¶ 18, 522 P.3d at 720, and there would be "no material prejudice" to the nonmoving party "from such a short delay," *id.* at ¶ 23, 522 P.3d at 720. The supreme court concluded that "the trial court did not abuse its discretion in vacating the default judgment." *Id.*

¶ 45 Like *Goodman Associates*, *McMichael* shows that prejudice to the parties — linked to the length of the delay in the filing — is an equitable consideration separate and apart from a finding of excusable neglect. Additionally, although *McMichael* indicates that it is not necessarily manifestly arbitrary, unreasonable, or unfair for a court to find excusable neglect based on a "docketing oversight" caused by "honest mistakes," it also highlights that courts can disagree on that outcome, and that deference must be accorded to the fact finder. *Id.* at ¶ 15, 522 P.3d at 719. Moreover, to the extent that "docketing oversight[s]" resulting from "honest mistakes"

can constitute excusable neglect, *McMichael* is consistent with the general principle that such oversights would *not* constitute excusable neglect if they resulted from "carelessness or negligence." *Id.* at ¶¶ 14-15, 522 P.3d at 719 ("Common carelessness and negligence do not amount to excusable neglect." (quoting *Weisbard*, 25 P.3d at 26)).

5. Motions for an Extension of Time Under the Rules of Civil Procedure

¶ 46 Jonah Energy directs us to *Town of Silverthorne v. Lutz*, 2016 COA 17, ¶¶ 10-12, 370 P.3d 368, 371-72, for the proposition that courts consider prejudice as part of the excusable neglect analysis under C.R.C.P. 6(b)(2). That rule allows district courts to accept filings past the deadline "where the failure to act was the result of excusable neglect." C.R.C.P. 6(b)(2).

¶ 47 In *Lutz*, the plaintiff argued that the defendants waived their challenge to condemnation proceedings by failing to file a timely answer to the plaintiff's petition within the twenty-one days prescribed in C.R.C.P. 12. *Lutz*, ¶ 8, 370 P.3d at 371. After the parties had briefed the defendants' untimely motion to dismiss, the

district court ordered the defendants to file their answer within fourteen days. *Id.* at ¶ 9, 370 P.3d at 371.

¶ 48 The division concluded that, even if the defendants' answer was untimely, they had not waived their right to contest the condemnation proceedings. *Id.* at ¶¶ 10, 13, 370 P.3d at 371-72. The division said it perceived the order directing the defendants to file an answer "as an exercise of [the district court's] discretion under C.R.C.P. 6(b)(2)," and noted that the plaintiff "neither assert[ed] that the court abused its discretion in ordering [the defendants] to file an answer nor explain[ed] how the relatively short delay caused it any prejudice." *Id.* at ¶¶ 11-12, 370 P.3d at 371-72. The division explained that the defendants' "jury demand, filed within the twenty-one day period, as well as the parties' long history of conflict concerning the [property], placed the [plaintiff] on notice that the [defendants] intended to contest the condemnation" and the defendants' "motion to dismiss advised the [plaintiff] of their defenses." *Id.* at ¶ 12, 370 P.3d at 372.

¶ 49 Although the *Lutz* division briefly mentioned excusable neglect, it did not decide whether the defendants had established excusable neglect for purposes of C.R.C.P. 6(b)(2). Rather, the

division considered prejudice as part of its waiver analysis. Accordingly, *Lutz* does not shed light on whether courts consider prejudice in determining whether a party established that its untimely appeal was attributable to excusable neglect.

6. The *Pioneer* Standard of Excusable Neglect

¶ 50 The United States Supreme Court considered the meaning of "excusable neglect" in *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380, 395 (1993), a bankruptcy case. In *Pioneer*, the Court identified factors courts should use in determining "what sorts of neglect will be considered 'excusable'" in bankruptcy proceedings, including "[1] the danger of prejudice to the [nonmovant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 395.

¶ 51 Courts have applied the *Pioneer* factors outside the bankruptcy context. *See Pincay v. Andrews*, 389 F.3d 853, 855 (9th Cir. 2004) (characterizing *Pioneer* as the "leading authority on the modern concept of excusable neglect" and applying it in

deciding whether the district court abused its discretion by excusing the appellant's untimely notice of appeal in a civil case); *see also In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig.*, 401 F.3d 143, 153-54 (3d Cir. 2005) (collecting cases where a federal appellate court applied the *Pioneer* excusable neglect standard in cases involving Fed. R. App. P. 4(a)(5), the federal analogue of C.A.R. 4(a)(4)). Some state courts also adopted the *Pioneer* standard in the context of deciding whether to accept an untimely notice of appeal under the excusable neglect standard. *See, e.g.*, *Eckard Brandes, Inc. v. Dep't of Lab. & Indus. Rels.*, 463 P.3d 1011, 1017 (Haw. 2020).

¶ 52 When applying *Pioneer* in cases involving untimely notices of appeal in civil cases, the federal courts have, with few exceptions, adopted a "hard line" approach that emphasizes the third factor — the reason for the delay. *In re Enron Corp.*, 419 F.3d 115, 123 (2d Cir. 2005) (collecting cases). "In the typical case, the first two *Pioneer* factors will favor the moving party" and "rarely . . . is the absence of good faith [the fourth factor] at issue." *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 (2d Cir. 2003). "But despite the flexibility of 'excusable neglect' and the existence of the

four-factor test in which three of the factors usually weigh in favor of the party seeking the extension," the Second Circuit, consistent with the holdings of other federal courts, concluded that "the equities will rarely if ever favor a party who 'fail[s] to follow the clear dictates of a court rule' and held that where 'the rule is entirely clear, we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test.'" *Id.* at 366-67 (quoting *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 250-51 (2d Cir. 1997)).

¶ 53 In other words, the *Pioneer* factors "do not carry equal weight; the excuse given for the late filing must have the greatest import. While prejudice, length of delay, and good faith might have more relevance in a close[] case, the reason-for-delay factor will always be critical to the inquiry." *Lowry*, 211 F.3d at 463. Under this hard line approach, "garden-variety attorney inattention" does not meet the *Pioneer* standard of excusable neglect; if such inattention were sufficient to establish excusable neglect, it would be "hard to fathom the kind of neglect that we would not deem excusable." *Id.* at 464; *accord Silivanch*, 333 F.3d at 370; *see also, e.g.*, *In re Town of Killington*, 2003 VT 87A, ¶ 17, 838 A.2d 98, 104 (collecting cases

and describing situations that do not amount to excusable neglect under the hard line approach).

¶ 54 Although in no reported opinion has a Colorado court adopted the *Pioneer* standard as the Supreme Court articulated it, the Colorado courts have referenced it favorably in contexts not involving untimely notices of appeal. *See, e.g.*, *Goodman Assocs.*, 222 P.3d at 321 (explaining that the test for excusable neglect applied in determining whether to set aside a default judgment under C.R.C.P. 60(b)(1) "is not unlike the balancing test established by the United States Supreme Court" in *Pioneer*, though it "is not identical"); *Wiedemer*, 852 P.2d at 442 n.20 (explaining the *Pioneer* standard, then stating "that the best approach for determining whether a defendant satisfies the justifiable excuse or excusable neglect standard . . . is a weighing of the various interests at stake" in the context of pursuing a collateral attack on a judgment pursuant to section 16-5-402(2)(d), C.R.S. 2023).

7. Summary: The Meaning of Excusable Neglect for Purposes of Deciding Whether to Permit an Untimely Appeal in a Civil Case

¶ 55 The above cases show that courts give little, if any, consideration to prejudice in determining whether to accept an

untimely notice of appeal on grounds of excusable neglect in a civil case.

¶ 56 First, the cases that expressly address C.A.R. 4(a)(4) do not mention prejudice at all. *See, e.g.*, *Bosworth Data Servs., Inc.*, 41 Colo. App. at 531, 587 P.2d at 1203; *Ford*, 691 P.2d at 756. Neither does *Farm Deals*, which analyzed an analogous rule — C.A.R. 4.2. *See Farm Deals, LLLP*, ¶ 18, 300 P.3d at 924.

¶ 57 Second, although Colorado courts have considered prejudice *in conjunction* with excusable neglect, they view prejudice and excusable neglect as distinct factors, rather than treating prejudice as a component of excusable neglect. *See Estep*, 753 P.2d at 1248; *Goodman Assocs.*, 222 P.3d at 319; *McMichael*, ¶¶ 13-17, 522 P.3d at 719-20.

¶ 58 Third, to the extent the *Pioneer* standard applies to the analysis of excusable neglect in C.A.R. 4(a)(4), and prejudice may be embedded in the excusable neglect analysis, Colorado law is consistent with the federal courts' hard line approach, which places minimal emphasis on prejudice and maximum emphasis on the reason for the delay. *See Bosworth Data Servs., Inc.*, 41 Colo. App. at 531, 587 P.2d at 1203.

¶ 59 Moreover, three additional considerations support giving little, if any, weight to possible prejudice in determining whether to accept an untimely notice of appeal under the excusable neglect standard in C.A.R. 4(a)(4):

(1) Because notices of appeal in civil cases are expressly excepted from the "good cause" analysis of C.A.R. 26(c), the analysis of excusable neglect in the context of C.A.R. 4(a)(4) does not include additional equitable factors to the same extent as do analyses of an attorney's neglect in contexts where the applicable deadline may be extended for "good cause."

(2) C.A.R. 4(a)(4) materially differs from its federal counterpart, which allows the untimely filing of a notice of appeal in a civil case if the appellant establishes "excusable neglect *or* good cause." Fed. R. App. P. 4(a)(5)(A)(ii) (emphasis added). The omission of "good cause" from the Colorado rule indicates that the supreme court decided to set a higher bar for acceptance of untimely notices of appeal in Colorado state cases than in federal appeals.

(3) Because the timely filing of a notice of appeal is "mandatory and jurisdictional," *Heotis v. Colo. Dep't of Educ.*, 2016 COA 6, ¶ 25, 375 P.3d 1232, 1236, we apply the "somewhat 'elastic concept'" of excusable neglect, *Goodman Assocs.*, 222 P.3d at 319 (quoting *Wiedemer*, 852 P.2d at 442 n.20), more narrowly in the context of civil appeals than in contexts where the applicable deadline is not jurisdictional, such as cases involving C.R.C.P. 60(b)(1) or C.R.C.P. 6(b).

¶ 60 Accordingly, we hold that prejudice to the parties is not a consideration when determining whether the late filing of a civil notice of appeal under C.A.R. 4(a) was attributable to excusable neglect. Rather, consideration of prejudice would be appropriate only if the court first determined that the neglect was excusable and then proceeded to analyze whether it should exercise its direction to extend the time for filing the notice of appeal. *See* C.A.R. 4(a)(4) ("Upon a showing of excusable neglect, the appellate court *may* extend the time to file the notice of appeal . . . .") (emphasis added).

¶ 61 We next apply this standard to the facts of this case.

III. Jonah Energy's Failure to File Its Notice of Appeal by the Forty-Nine-Day Deadline Was Not Attributable to Excusable Neglect

¶ 62 Jonah Energy's failure to file its notice of appeal by the forty-nine-day deadline set forth in C.A.R. 4(a)(1) resulted from its counsel's carelessness and not from an "unavoidable hindrance or accident." *Farmers Ins. Grp.*, 181 Colo. at 89, 507 P.2d at 867. Counsel argues that he "did not fail to read the rules, fail to instruct personnel, or fail to calendar the filing date." While this may be true, the late filing resulted from counsel's failure to supervise his nonlawyer assistant and, even more seriously, his failure to read the submission receipt he received from the district court one minute after his assistant filed the notice of appeal in the wrong court.

¶ 63 Had counsel read the submission receipt, he would have immediately discovered his assistant's mistake. At the time he received the submission receipt, counsel had more than seven hours before the midnight deadline to electronically file the notice of appeal in this court. Counsel does not point to any intervening "hindrance[s] or accident[s]" that prevented him from doing so. *Id.*

¶ 64 Rather than take responsibility for his failure to check the submission receipt, counsel blames his assistant for her deviation from his instructions. But "the misstep of one's staff is neither an explanation nor an excuse for professional deficiencies. An attorney may not excuse errors in matters or pleadings for which he is responsible by throwing his staff under the bus." *In re Thomas*, 612 B.R. 46, 67 (Bankr. E.D. Pa. 2020). This misplaced blame demonstrates counsel's "ignorance of his own professional responsibility to make reasonable efforts to oversee his staff's conduct and ensure compatibility with professional obligations." *In re Montoya*, 2011-NMSC-042, ¶ 53, 266 P.3d 11, 22.

¶ 65 Further, we are not persuaded that counsel's error "would have been completely avoided" had he "been able to exercise direct physical supervision of the filing process," as he asserts. Working remotely did not pose "circumstances which would cause a reasonably careful person to neglect [the] duty" of supervising a nonlawyer assistant to ensure she timely filed a notice of appeal in the correct court. *Farmers Ins. Grp.*, 181 Colo. at 89, 507 P.2d at 867. Regardless of whether counsel for Jonah Energy and his assistant were or were not working in the same physical space,

counsel received the court's submission receipt by email one minute after his assistant's erroneous filing. Upon reviewing that receipt, counsel could have contacted his assistant by email, telephone, or other means — or promptly refiled the notice of appeal in this court himself.

¶ 66 As the tribunal making the threshold determination as to whether counsel's neglect was excusable, we conclude that, even if the untimely filing resulted from "honest mistakes rather than willful misconduct," it was nonetheless the product of counsel's "[c]ommon carelessness and negligence." *McMichael*, ¶¶ 14-15, 522 P.3d at 719 (quoting *Weisbard*, 25 P.3d at 26). Accordingly, we hold that counsel's failure to timely read the district court's submission receipt showing that his assistant filed the notice of appeal in the wrong court does not constitute excusable neglect that can justify an untimely filing of a notice of appeal pursuant to C.A.R. 4(a)(4).

¶ 67 The Colorado cases upon which Jonah Energy relied in its motion for leave are inapposite. In *P.H.* — which involved the "fundamental values" implicated in termination of parental rights proceedings — the lawyer missed the deadline for filing a notice of appeal as a "direct result" of an erroneous trial court ruling

purporting to extend the deadline for filing. 814 P.2d at 912. In contrast, Jonah Energy's late filing was not attributable to misinformation from any court. Thus, the "unique circumstances" exception discussed in *P.H.* is not implicated here. *Id.* at 911 (explaining that, under the "unique circumstances" rule, a court will "grant relief from operation of mandatory language in our procedural rules when [the] failure to comply is the result of reliance on an erroneous trial court ruling"); *see also Hillen v. Colo. Comp. Ins. Auth.*, 883 P.2d 586, 588 (Colo. App. 1994) ("[I]nadvertence and reliance upon the actions of others" are "insufficient [reasons] to show unique circumstances.").

¶ 68 *People v. Greathouse*, 742 P.2d 334 (Colo. 1987), is similarly unavailing because, in that case, the supreme court did not consider whether the late filing of the notice of appeal was attributable to excusable neglect. Rather, the court concluded that the appeal was timely filed because, even though the attorney erroneously filed the notice of appeal in the court of appeals, rather than in the supreme court, section 13-4-110(3), C.R.S. 2023, provides that "[n]o case filed either in the supreme court or the court of appeals shall be dismissed for having been filed in the

wrong court but shall be transferred and considered properly filed in the court which the supreme court determines has jurisdiction." *See Greathouse*, 742 P.2d at 336-37. No statute or other authority provides that a notice of appeal erroneously filed in a district court shall be transferred and considered properly filed in the court of appeals.

¶ 69 Our reading of C.A.R. 4(a)(4) is consistent with the principle that, while there is "an institutionalized but limited flexibility at the margin with respect to rights lost because they have been slept on," the "legal system would groan under the weight of a regimen of uncertainty in which time limitations were not rigorously enforced — where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar." *Silivanch*, 333 F.3d at 368.

¶ 70 Further, we disagree with the assertion of Jonah Energy's counsel during oral argument that a determination of no excusable neglect in this case would make Colorado an outlier. Our decision is consistent with other courts' interpretation of excusable neglect in the context of untimely notices of appeal. *See, e.g.*, *Graphic Commc'ns Int'l Union, Loc. 12-N v. Quebecor Printing Providence, Inc.*,

270 F.3d 1, 8 (1st Cir. 2001) (affirming the district court's dismissal of Worker Adjustment and Retraining Notification Act case based on a finding of no excusable neglect when counsel's failure to comply with the jurisdictional filing deadline was the "result of ignorance of the law and inattention to detail," even though the delay was "brief" and the non-moving party "suffered no prejudice"); *In re Johnson*, 35 B.R. 79, 81-82 (Bankr. D. Conn. 1983) (concluding that clerical staff's mistake is not excusable neglect); *In re Smith*, 38 B.R. 685, 686 (Bankr. N.D. Ohio 1982) (holding there was no excusable neglect when counsel mistakenly filed the notice of appeal with the federal court of appeals before correctly filing it in the bankruptcy court); *Sellers v. FMC Corp.*, 716 S.E.2d 661, 667 (N.C. Ct. App. 2011) (holding that counsel's failure to "definitively determine whether a notice of appeal was filed" was "simply due to insufficient attentiveness" and did not amount to excusable neglect); *see also In re Town of Killington*, ¶ 17, 838 A.2d at 104 (The application of excusable neglect "must remain strict lest there be a de facto enlargement of the appeal-filing time."). *But see In re Old Naples Sec., Inc.*, 223 F.3d 1296, 1302 n.7 (11th Cir. 2000) (concluding that the district court did not abuse its discretion by finding

excusable neglect where the appellant's counsel "mistakenly filed notice of their appeal with the clerk's office for the *bankruptcy* court," causing the notice to arrive in the district court one day after the filing deadline expired).

¶ 71 In sum, Jonah Energy failed to show that it missed the deadline for filing its notice of appeal as a result of its counsel's excusable neglect.

IV. We Are Not Bound by the Motions Division's Order

¶ 72 Jonah Energy asserts that it had the right to rely on the motions division's "discretionary acceptance of this appeal" by expending resources on its merits briefs. While we recognize that, "[g]enerally, a party has the right to rely on orders of the court as law of the case," and "[p]rior relevant rulings made in the same case should be followed," *Blood v. Qwest Servs. Corp.*, 224 P.3d 301, 326 (Colo. App. 2009), *aff'd*, 252 P.3d 1071 (Colo. 2011), we must independently determine our jurisdiction regardless of the motions division's prior order addressing that issue. *Allison v. Engel*, 2017 COA 43, ¶ 22, 395 P.3d 1217, 1222; *see also Hillen*, 883 P.2d at 588 ("[I]nasmuch as the issue of jurisdiction can be raised at any

time during the proceedings, [the motions division's] determination [of jurisdiction] is not binding."). This is particularly true where, as here, we have "serious questions regarding our own jurisdiction," regardless of the motions division's prior ruling on the issue. *FSDW, LLC v. First Nat'l Bank*, 94 P.3d 1260, 1262 (Colo. App. 2004).

¶ 73 Thus, we depart from the ruling of the motions division and dismiss Jonah Energy's untimely appeal in light of our independent determination that its failure to file its notice of appeal in this court by the deadline was not the result of excusable neglect. *See Chavez v. Chavez*, 2020 COA 70, ¶ 13, 465 P.3d 133, 138.

V. We Decline to Award Costs and Attorney Fees to Plaintiffs-Intervenors

¶ 74 Plaintiffs-intervenors requested an award of their costs and attorney fees, pursuant to section 13-17-102(2) and (4), C.R.S. 2023, and C.A.R. 38 and 39.1, if we decided this appeal on the merits in their favor. Because we dismiss this appeal for lack of jurisdiction, we deny the request.

VI. Disposition

¶ 75 The appeal is dismissed with prejudice.

JUDGE TOW and JUDGE GROVE concur.