No. 21-_____

In the
Supreme Court of the United States

TODD W. HUTTON; TAMMY D. HUTTON, IN RESPECT OF THE PROPERTY AT 10270 COUNTY ROAD 213, FORNEY, TEXAS 75126,
Petitioners,
v.
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Ugalahi Offoboche
U.A.C. Offoboche Law Firm
2331 Gus Thomasson Rd., Ste 150
Dallas, Texas 75228
(469) 263-6304
ugy@uacoffobochelaw.com
Counsel for Petitioners

QUESTION PRESENTED

This case presents two questions:

1. Is illness of counsel which results in failure to comply with the local rules, a basis for relief as inadvertence or excusable neglect under Federal Rule of Civil Procedure 60(b)(1)? [5-1 circuit split]

2. Viewing the evidence in the light most favorable to the non-movant, should the district court's summary judgment order be vacated when the evidence raises a genuine dispute in fact under Texas Law?

LIST OF DIRECTLY RELATED PROCEEDINGS

1. *Hutton v. Bank of New York Mellon, N.A.*, No. 103051-CC2, Kaufman County Court at Law No. 2, Texas. Preliminary Injunction entered on August 16, 2019. Diversity Removal Notice to the United States District Court for the Northern District of Texas filed on August 16, 2019.

2. *Hutton v. Bank of New York Mellon, N.A.*, No. 3:19-cv-1962-C, U.S. District Court for the Northern District of Texas. Judgment entered October 19, 2020.

3. *Hutton v. Bank of New York Mellon, N.A.*, No. 3:19-cv-1962-C, U.S. District Court for the Northern District of Texas. Order denying Rule 60(b)(1) Motion for Reconsideration entered November 9, 2020.

4. *Hutton v. Bank of New York Mellon, N.A.*, No. 20-11145, United States Court of Appeals for the Fifth Circuit. Judgment entered May 13, 2021.

5. *Hutton v. Bank of New York Mellon, N.A.*, No. 20-11145, United States Court of Appeals for the Fifth Circuit. Order denying Motion for Rehearing en banc entered June 9, 2021.

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The Order of the court of appeals (App. 1a-2a) denying the Petition for rehearing en banc. The Opinion of the court of appeals (App. 3a-8a) affirming the district court's decisions. The order of the district court (App. 9a-10a) denying Rule 60(b)(1) Motion for Reconsideration. The district court's order (App. 11a-14a) granting summary judgment. The district court's summary judgment (App. 15a-16a).

JURISDICTION

The court of appeals issued its order denying appellants' motion for rehearing en banc on June 9, 2021 (App. A). The court of appeals issued its opinion on May 13, 2021(App. B). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) to resolve a conflict in the Courts of Appeals over the meaning of "excusable neglect" in illness of counsel cases arising from a 5-1 Circuit split.

STATUTORY PROVISIONS INVOLVED

The relevant portion of the Federal Rules of Civil Procedure provides:

RULE 60. RELIEF FROM A JUDGMENT OR ORDER (APP. F)

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct

a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an

earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

STATEMENT

A. Rule 60(b) and Illness of Counsel during a Pandemic

Federal Rule of Civil Procedure 60(b) provides for avenues through which judgments may be vacated. The clauses provide specific reasons or grounds for entitlement to relief. This petition involves the congressional intent to grant relief to litigants under Rule 60(b)(1) from a judgment, on the basis of "mistake, inadvertence, surprise, or excusable neglect."[1] One Rule 60(b) "excusable neglect" or "inadvertence" issue that has created division amongst the courts is whether a court should vacate a judgment where the neglect or inadvertence results from an ill attorney's incapacity to meet a court set deadline or to comply with a local rule. This Court broadly addressed the scope of excusable neglect and inadvertence under Rule 60(b)(1) by setting forth certain factors for courts to consider. *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 393 (1993).

[1]. Rule 60(b)(1) motions to reopen judgments for reasons of "mistake, inadvertence, surprise, or excusable neglect" must be made within one year of the judgment.

In *Pioneer*, the Court was called upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of the Rule, and finding that it can, this court affirmed. *Pioneer Investment Services Co.,* 507 U.S. at 383.

According to the Court, "'excusable neglect' is understood to encompass situations in which the failure to comply with [a legal requirement] is attributable negligence," whereas when a party fails to act for "reasons beyond his or her control" it is not considered to constitute 'neglect.'" *Id.* at 394.

Post-*Pioneer*, the circuits are divided over whether a lawyer's illness resulting in missed deadlines or failure to comply with local rules constitutes excusable neglect justifying relief under Rule 60(b)(1). Specifically, the Third, Fourth, Sixth, Seventh, and Ninth circuits agree that illness of counsel is an appropriate basis for relief under Rule 60(b)(1)'s excusable neglect provision by recognizing the impossibility of predicting illness and other mishaps in the very human life of an attorney. The Fifth Circuit, however, has now taken a much narrower view to illness of counsel as excusable neglect. The Fifth Circuit hangs its hat on blaming the client for the attorney's illness even when the illness is clearly unforeseeable.

This petition arises out of the Fifth Circuit's decision to support a District Court's opinion that

illness of counsel does not constitute excusable neglect under Rule 60(b)(1) where an attorney's incapacity results in failure to comply with the local rules.

B. Underlying Facts

This case presents the unresolved issue of whether notions of fair play and justice are met when a party is punished by the imposition of summary judgment for the attorney's unforeseeable illness resulting in the incapacity to meet a deadline. In essence, are litigants—represented by an attorney whose failure to comply with the local rules deadlines is attributable to serious illness during a pandemic—entitled to relief via a timely filed Rule 60(b)(1) Motion? The petitioners, Todd and Tammy Hutton sought such relief below. The Fifth Circuit[2]—relying on an unpublished Sixth Circuit opinion that does not reflect the Sixth Circuit's policy on the issue—concluded that Petitioners were not entitled to relief under Rule 60(b)(1). The court concluded that neglect by failure to comply with the local rules does not constitute excusable neglect when an attorney is incapacitated by illness. even when the Motion for Summary Judgment raised a disputed question of fact as to a time bar issue and the evidence before the court points to prima facie evidence in support of the

[2] App. B page 3

disputed fact. The following facts put the decision of the Fifth Circuit in context:

I. ADVERSE POSSESSION CLAIM

On October 13, 2004, the Huttons were granted a Warranty Deed from Nexxus Homes, Inc. for their home and have since occupied the property as their homestead with their school age children. ROA.22. The Warranty deed conveyed the property at 10270 CR 213, Forney, Texas 75126 to the Huttons with no reservations from conveyance except as described in the attached Exhibit A which addresses encumbrances. ROA.22, 24. The Huttons signed a Note and Deed of Trust securing their Mortgage with First Horizon Home Loan Corporation (for which defendant BONY Mellon is the Trustee[3]) when the Hutton's purchased their home from Nexxus Homes, Inc., but due to a tax payment issue in which the mortgage servicer for defendant, Nationstar Mortgage LLC[4] ("Nationstar") failed to properly handle the Huttons' loss mitigation applications, defendant sold the Huttons' home on November 3, 2015 to itself at a foreclosure sale.[5]

On November 25, 2015, the Huttons received a Notice to Vacate and demand for Possession from Aldridge Pite LLP, a law firm claiming to represent

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[3] ROA.241
[4] As attorney in fact for present defendant, BONY. ROA.241.
[5] ROA.318

the foreclosure sale purchaser later disclosed to be BONY, which is also the foreclosing entity. ROA.25, 188. The Huttons, holding themselves out to be the owners of the property in actual and visible appropriation of the subject property commenced and continued under claim of right that is inconsistent with and hostile to the claim of BONY, refused to surrender possession and asserted that they are the owners of the home. ROA.18.

II. STATUTE BARRED CLAIMS

On July 19th, 2019, nearly four years after the Huttons received BONY's November 25, 2015-Notice to Vacate, BONY filed suit for forcible detainer in the Justice of the Peace Court citing to their Substitute Trustee's Deed[6]. ROA.45. On August 6, 2019, the Huttons filed suit to quiet title at the County Court at Law as adverse possessors asserting that BONY's claims are statute barred under Texas Civil Practice and Remedies Code §16.024 and tendered their Warranty Deed.[7] BONY did not appear and the County Court at Law granted an Order for Injunctive relief on August 16, 2019. ROA.15, 44.

On August 16, 2019, BONY removed the case to the United States District Court for the Northern District of Texas on diversity grounds. ROA.1. After denying the Huttons Motion to remand, the District Judge

[6] ROA.193
[7] ROA.196

issued a Scheduling Order setting deadlines including for any dispositive motions to be filed by September 15, 2020. ROA.66.

III. UNFORESEEABLE ILLNESS OF COUNSEL

From late August 2020, during the COVID19 pandemic, present counsel for plaintiffs became so ill with extreme symptoms of Idiopathic Intracranial Hypertension (IIH) resulting in temporary blindness but could not receive updated treatment to immediately reverse the effects due to pandemic closures. ROA.353-354. Counsel's symptoms included days of full blindness, double vision, dizziness and headaches. ROA.353-354. The condition which continued through the better part of October 13, 2020 and relatively subsided on October 14, 2020, was so severe that counsel was unable to read or take phone calls due to the headaches, dizziness, double vision and blindness and during the pandemic, there was no access to medical care to get treatment for counsel's severe and incapacitating symptoms. ROA.354.

IV. ILLNESS AND SUMMARY JUDGMENT MOTION

It was within the eight-weeks period of counsel's incapacity that BONY filed its motion for Summary Judgment on September 15, 2020. ROA.145. On October 13, 2020, counsel for plaintiffs was able to see for a few minutes and used the time to file an

Amended Complaint and noticed that something had been filed but could not see what it was before counsel's vision faded again, nor was she able to obtain the services of someone who could read the document to counsel. ROA.353, 360.

Because of counsel's illness, the Huttons were unaware that defendant had filed a Motion for Summary Judgment challenging only one element of the Huttons cause of action for adverse possession until at least October 14, 2020 when counsel's vision returned for long enough and counsel discovered that what defendant had filed was a Motion for Summary Judgment, and in a panic notified the Huttons about the Motion and rushed to prepare the response and objection to the Motion. ROA.348.

In counsel's rush to file the response before her vision faded again, Plaintiffs' counsel inadvertently omitted to file a motion seeking leave to file the response out of time and filed the untimely response on October 15, 2020. ROA.348, 271. Counsel could not file the motion seeking leave to file the response out of time because she was losing the ability to see by the time she electronically submitted the response to the Motion for Summary Judgment on October 15, 2020 and the Huttons had no control over counsel's condition. ROA.348, 271.

V. THE DISTRICT COURT'S DECISION

On October 19, 2020, because the Response was untimely and because counsel, being physically unable to see any longer, had omitted to file a Motion for Leave to file the response out of time with the response, the District Judge struck[8] the Huttons response and granted the Motion for Summary Judgment—dismissing the Huttons claims and quieting title on behalf of defendant. ROA.344, 346.

VI. MOTION FOR RECONSIDERATION

On October 19, 2020, the same day that the court entered the summary judgment, counsel for the Huttons who still had[9] symptoms of IIH, mortified at her omission, filed an immediate Motion for Reconsideration with a declaration under penalty of perjury testifying to the symptoms of her illness and how it had caused her to be unable to respond in a timely manner,[10] that her condition was still bad but improving, that the Huttons were not aware that the Motion for Summary Judgment had been filed prior to the deadline expiring until counsel was able to see

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[8] ROA.3

[9] The number of obvious typographical errors in the Huttons Response to the Motion for Summary Judgment and the Motion for reconsideration are prima facie evidence of counsel's condition. ROA.348 (reversing 15th and 14th when identifying the dates on which counsel was able to review the Huttons affidavits for instance).

[10] ROA.348-349.

again, and sought relief under Federal Rule of Civil Procedure 60(b)(1) citing excusable neglect, inadvertence and mistake arising from illness of counsel. ROA.347-355. Before filing the Motion for Reconsideration counsel for the Huttons contacted opposing counsel about agreeing to the Motion for Reconsideration but opposing counsel stated that he was not authorized to agree. ROA.352.

VII. OPPOSITION TO THE MOTION FOR RECONSIDERATION

Defendant filed its objection to the Motion for Summary Judgment,[11] asserting in summary that while they were sympathetic to present counsel's medical condition, the Huttons were not entitled to relief under Rule 60(b)(1) because the Huttons were not able to request extensions of time prior to the deadline expiring. ROA.360, 365. BONY alleged that Plaintiffs' response to its Motion for Summary Judgment was due on October 5, 2020 when Plaintiffs' response was actually due[12] on October 6, 2020 being 21 days from September 15, 2020. ROA.361, 348. BONY then misinformed the district court that on October 13, 2020[13], the Huttons

[11] ROA.360

[12] Fed. R. of Civ. P. Rule 6(a)(1).

[13] The period of time between October 6 and October 13 of any year is exactly 7 days and not more than a week so the statement in paragraph 8, ROA.362 was also an intentionally misleading exaggeration, and the court relied on it. ROA.365 ("For the reasons stated in Defendant's Response in Opposition…").

responded to the Motion for Summary Judgment with a "rogue amended complaint" when BONY knew from the docket entry that the Amended complaint was not a response to the Motion for Summary Judgment and when BONY knew that at the time the Huttons were completely unaware[14] that BONY had filed a Motion for Summary Judgment. ROA.362, ROA.3 item 14 showing that the Amended Complaint was not filed in response to the Motion for summary judgment but the response, item 15, was filed in response to the Motion for Summary Judgment. ROA.3, 271. BONY stated that on "October 19, 2020, two weeks after filing their amended complaint and more than three weeks after the deadline to oppose BONY's motion for summary judgment, the Huttons filed an objection." ROA.362¶9. However, the period of time between October 13 and October 19, is only six (6) days and not "Two weeks." ROA.362¶9. The deadline to file a response to BONY's Motion for Summary Judgment was October 6, 2020[15], and not October 5, 2020, and the Huttons filed their response on October 15, 2020, and not October 19, 2020— not three weeks after the deadline but nine (9) days after the deadline had expired. ROA.271.

The Huttons however, only became aware that something had been filed when the response was already past due. ROA.354¶4. The Huttons explained

[14] ROA.354¶4.
[15] Fed. R. Civ. P. 6(a)(1).

that due to the incapacitating illness of their counsel they were not aware of the filing of the Motion until at least the 14th of October 2020. ROA.350. In counsel's declaration, she had sworn that the symptoms she experienced were so severe that she was even unable to take calls due to her blindness, dizziness and headaches hence her inability to contact counsel for BONY or the court. ROA.349.

The Motion for reconsideration explains that the Huttons could not comply with the Local Rules requirement to file a response to the Motion for Summary Judgment within 21 days of the filing of the Motion because the Huttons did not have actual knowledge that defendant had filed its Motion for Summary Judgment until the deadline to respond had long expired due to their counsel being sick before the motion was filed and remaining so until after the deadline to respond had passed. ROA.350, 354.

For the Huttons, Counsel for Plaintiffs' medical condition[16] is an extraordinary circumstance that warrants relief because it was not simply forgetting[17] to comply with the rules of court that resulted in these circumstances but the uniqueness of counsel's medical condition and the fact that the Huttons were not aware of the medical condition or the filing of the Motion for Summary Judgment until it was too late

[16] ROA.353-355, Declaration of Counsel
[17] ROA.363.

to request an extension of time to file since time had already expired and because their counsel's inadvertence in omitting to file a Motion for Leave, with the Response constitutes excusable neglect directly attributable to counsel's illness. ROA.347-355.

In the Rule 60(b)(1) Motion which was filed on the same day that the court struck their response and entered its judgment, the Huttons pointed to their attorney's declaration made under penalty of perjury showing that counsel's symptoms of Idiopathic Intracranial Hypertension—double vision, dizziness and days of total blindness—had not reversed itself at the time of filing the Motion for Reconsideration because, due to Pandemic closures, counsel had not yet been able to update her treatment and was only able to file responses when she had a break in the severity of the symptoms. ROA.350. The Huttons applied the *Pioneer* factors in requesting that the court consider the facts that the response delay was only for Nine (9) days; the motion for reconsideration was timely because it was filed on the same day that the court struck the response and granted summary judgment, the defendant suffered no harm from the granting of the motion for reconsideration, and granting the 60(b)(1) motion would have allowed the court to consider the merits of the case. ROA.350-51.

VIII. ORDER DENYING RULE 60(b)(1) MOTION

On November 9th, 2020, the district court denied the Huttons Rule 60(b)(1) Motion for reconsideration, for the reasons stated in Defendant's Response in Opposition, citing failure to show good cause and excusable neglect for why they failed to comply with the local rules and request an extension prior to their response deadline expiring. ROA.365. However, as earlier shown, the Huttons did explain to the court that their response deadline expired before they knew that a Motion for Summary Judgment had been filed and therefore could not request an extension of time prior to their response deadline expiring. ROA.350.

The court ignored all of Plaintiffs' inadvertence explanations in the Motion for Reconsideration in asserting that Plaintiffs waited until after their deadline expired and after the Court entered a final judgment to explain why an extension was needed thereby disregarding the Huttons explanation of inadvertence, mistake and excusable neglect of counsel, who was sick and rushing to file the response before her vision faded on the date of filing, and inadvertently omitted to file a Motion for Leave to file the response out of time, but a full four days before the court entered the Judgment. ROA.365, 350.

Despite the Huttons evidence explaining that their counsel did not know what had been filed because she could not see it until the deadline had expired, the court disregarded the breadth of Rule 60(b)(1) and upheld the sanction of striking the Huttons response

asserting that "[C]ounsel's medical condition may have been grounds to extend Plaintiffs' response deadline had a request been made before or even a reasonable time after the deadline to respond to the Motion for Summary Judgment had passed." ROA.365 footnote 1. "However, the same does not provide a basis to excuse Plaintiffs' failure to comply with the local rules." ROA.365 footnote 1. But when a District Court in Florida made a similar finding that certain conduct could be a basis to excuse Plaintiffs' failure to comply with the local rules but refused to find excusable neglect, the Eleventh Circuit applied *Pioneer* and found abuse of discretion. *Safari Programs Inc. d.b.a. Safari Ltd., v. Collecta Int'l Ltd*, No. 16-10919*14 (11th Cir. 2017, April 25, 2017)(unpublished).

IX. THE CIRCUIT COURT DECISION

The Huttons appealed to the Fifth Circuit Court of Appeals. ROA.366. On May 13, 2021, the Court of Appeals affirmed the decision of the district court holding in sum that taking an attorney at her word, it constitutes gross carelessness that does not amount to excusable neglect under Rule 60(b)(1) for an attorney to be so incapacitated by illness[18] that she is

[18] App. B, 5a-6a. Per the court, an attorney cannot be too incapacitated unless the attorney can produce a medical record even during a once in a lifetime pandemic which prevented counsel from being able see a doctor because of doctor's office closures. ROA.348.

unable to take steps to protect her client's interests during her period of incapacity. App. B. 5a-6a.

Having affirmed the denial of the Motion for Reconsideration, the Court of Appeals then affirmed the order of the District Court striking the summary judgment response for being untimely and affirmed the District Court's summary judgment asserting that "because the district court did not abuse its discretion in striking the Huttons untimely response, it follows that the district court was entitled to accept as undisputed the facts so listed in support of the Bank's Motion for summary judgment." App. B, 7a. Despite the Huttons Warranty Deed raising a disputed question of fact under Texas Law, the Court of Appeals ruled that:

> Viewing the record in this light, we conclude that the Bank "made a *prima facie* showing of its entitlement to [summary] judgment," *id.*, by pointing to the absence of evidence that the Huttons held the property under title or color of title, an element of the Huttons' claim." See TEX. CIV. PRAC. & REM. CODE ANN. §16.024; *Terrill v. Tuckness*, 985 S.W.2d 97, 107 (Tex. App. –San Antonio 1998) (a party cannot claim adverse possession under the three-year limitations period unless he holds

the property under title or color of title).[19] App. B, 7a.

The Huttons timely moved for rehearing en banc but the Panel treated the Petition for Rehearing En Banc as a Petition for Panel Rehearing and on June 9, 2021, the Petition for Rehearing was denied. App. A, 1a-2a.

This court is called upon, first to decide whether under Rule 60(b)(1) it is excusable neglect for an attorney to be so incapacitated by illness as to be unable to take steps to protect her client's interests during her period of incapacity. Secondly, is summary judgment warranted when, under Texas adverse possession Law, the presence of a prior warranty deed on file before the court, raises a question of fact for a jury to determine whether the adverse possessor has title or color of title under § 16.024, yet the federal district court makes a factual finding in order to grant summary judgment to the bank.

X. MOTION FOR REHEARING EN BANC

On May 13, 2021, the Huttons timely filed a Motion for Rehearing En Banc asserting that the panel decision conflicts with the analysis in *Pioneer*

[19] Under current Texas law, where the adverse possession claimant has a Deed on the record from which a jury may determine title or color of title, the deed is not deemed extinguished and summary judgment cannot be granted. See, *Capps v. Gibbs*, No. 10-12- 00294 (Tex. App.—Waco 2013).

Investment Services Co. v. Brunswick Associates L.P., 507 U.S. 380, 395 (1993) because it assumes that negligence of counsel due to illness resulting in failure to comply with a filing deadline cannot constitute excusable neglect even with an explanation spanning the duration of the relevant period when the Supreme Court held that "for purposes of Rule 60(b) "excusable neglect" is understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence".

The Huttons also challenged the Panel decision for being in conflict with previous Fifth Circuit analysis in at least Two (2) prior decisions: *Silas v. Sears, Roebuck Co. Inc.*, 586 F.2d 382, 385 (5th Cir. 1978) and *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980) (failure of counsel to file notice of change of address and failure to timely forward the copy of defendant's motion for summary judgment was reversed as excusable neglect). The Panel decision further conflicts with the decisions of a number of other circuits: *In re Schultz*, 254 B.R. 149, 153-54 (B.A.P. 6th Cir. 2000) (holding that while clerical mistakes or a heavy workload do not constitute excusable neglect, the serious and sudden illness, death, or disability of an attorney, attorney's spouse, or a party coupled with a missed deadline may constitute excusable neglect)." *Cmty. Fin. Servs. Bank v. Edwards (In re Edwards)*, No. 17-8028, at *12 (B.A.P. 6th Cir. June 5, 2018); *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984) (excuse for illness where

ill attorney is only attorney responsible for case); *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966)("excusable neglect includes sudden death, disability or illness of counsel or the party or unusual delay in the mails."); *Ragguette v. Wines*, 691 F.3d 315 (3d Cir. 2012)(abuse of discretion established where court fails to apply the *Pioneer* factors); *Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354 (7th Cir. 1997).

XI. ORDER DENYING MOTION FOR REHEARING EN BANC

The Motion for Rehearing En Banc was treated as a motion for panel rehearing and was denied without consideration by the Fifth Circuit on June 9, 2021.

REASONS FOR GRANTING THE PETITION

Despite counsel's sworn declaration attesting under penalty of perjury that she could not see that a summary-judgment motion had been filed until the response deadline had passed while suffering from sudden severe symptoms of "Idiopathic Intracranial Hypertension" causing "double vision, dizziness and days of total blindness" which caused her to miss the summary judgment deadline, the Fifth Circuit declined to find excusable neglect by refusing to apply the *Pioneer* factors set up by this court. This court should grant this Petition because the Fifth Circuit's application of the "excusable neglect" language of

Rule 60(b)(1) to illness of counsel directly resulting in failure to comply with a local rule is not only contrary to the legislative intent expressed in the language of the Rule but conflicts with this court's precedent in *Pioneer*[20] and the views of the Third[21], Fourth[22], Sixth[23], Seventh[24] and Ninth[25] Circuit courts under similar circumstances.

Even the Eleventh[26] Circuit, the Fifth Circuit's sister court requires district courts to weigh all the *Pioneer* factors in reviewing an excusable neglect question. On the issue of excusable neglect, the Eleventh Circuit held that the district court abused its discretion by failing to apply the proper legal standard. *Safari Programs, Inc. d.b.a. Safari Ltd, v. Collecta Int'l Ltd*, No. 16-10919*12-14 (11th Cir. 2017, April 25, 2017)(unpublished). The Eleventh Circuit concluded that the district court abused its discretion by failing to consider all relevant factors and by failing to properly evaluate the factors that it

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[20] *Pioneer Investment Services Co.,* 507 U.S. at 383.
[21] *Ragguette v. Wines*, 691 F.3d 315 (3d Cir. 2012).
[22] *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966).
[23] *In re Schultz*, 254 B.R. 149, 153-54 (B.A.P. 6th Cir. 2000); *Cmty. Fin. Servs. Bank v. Edwards (In re Edwards)*, No. 17-8028, at *12 (B.A.P. 6th Cir. June 5, 2018).
[24] *Robb v. Norfolk & Western Railway Co.*, 122 F.3d 354 (7th Cir. 1997).
[25] *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984).
[26] *Safari Programs, Inc. d.b.a. Safari Ltd, v. Collecta Int'l Ltd*, No. 16-10919*12-14 (11th Cir. 2017, April 25, 2017)(unpublished).

did consider. *Id.* The Eleventh Circuit pointed out that under *Pioneer*, the determination of excusable neglect is an equitable one that should take into account the totality of the circumstances surrounding the party's omission. *Id.* So that it found abuse of discretion when the district court relied on the Rule 60(b)(1) movant's reasons for the delay and the length of the delay to the exclusion of all other factors to erroneously find that the negligence was not excusable because movant had failed to comply with Rule 12, Fed. R. Civ. P., and had waited over four months after service to respond—hence it's finding of no "good reason" to excuse the four-month delay—but failed to address other factors that both the Eleventh Circuit and the Supreme Court have found relevant to the analysis. *Id.* Those factors include the prejudice to [the nonmovant], whether [the movant] acted in good faith, and the effects on the interests of efficient judicial administration apart from the length of the delay. *Id.*

Except for the Fifth Circuit, there is therefore—even under the same abuse of discretion standard—a consensus amongst the majority of Circuit Courts that district courts in their jurisdictions are required to weigh all the *Pioneer* factors in a Rule 60(b)(1) Motion for reconsideration to ensure determination of cases on their merits. Accepting this case for review by writ of certiorari will allow this court to clarify the necessity to apply *Pioneer* to determining excusable neglect even in cases involving illness of counsel to

ensure determination of cases on their merits and streamline the Fifth Circuit's analysis to that of the other Circuits' and this Court's precedent to allow litigant's the areas under that Circuits jurisdiction, the hitherto denied access to justice on the merits.

This court should also grant this Petition because the Fifth Circuit tends to take the easier path of rubber-stamping summary disposals of meritorious substantive state law cases by applying the summary judgment standard in such a manner as to disregard genuine disputes in fact that should ordinarily preclude summary judgment.

I. RULE 60(b)(1) AND *PIONEER*

In *Pioneer*, the court, when, called upon to decide whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the court can constitute "excusable neglect" within the meaning of the Rule, found that it can. *Pioneer Investment Services Company v. Brunswick Assoc.*, 507 U.S. 380, 383 (1993). "The ordinary meaning of `neglect' is `to give little attention or respect' to a matter, or, closer to the point for our purposes, `to leave undone or unattended to *especially through carelessness*.'" 507 U.S. at 388 (quoting Webster's Ninth New Collegiate Dictionary 791 (1983) (emphasis in original)). In that case, the United States Supreme Court held that "for purposes of Rule 60(b), "excusable neglect" is understood to encompass situations in which the

failure to comply with a filing deadline is attributable to negligence." *Pioneer,* 507 U.S. at 388.

There, the Supreme Court identified four factors pertinent to evaluating the totality of the circumstances for reviewing whether the neglect was excusable: (1) the danger of prejudice to the [opposing party], (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." 507 U.S. 395. The Court held that excusable neglect encompasses situations of negligence within the defaulting party's control and placed primary importance on the absence of prejudice and the interests of efficient judicial administration. *Id.* at 388, 394, 397–99.

II. COURTS OF APPEALS DISPARATELY APPLY RULE 60(B)(1) TO CASES OF ILLNESS OF COUNSEL

Courts that support reading the language of Rule 60(b)(1) within the legislative intent require a *Pioneer* analysis and find abuse of discretion when the analysis is omitted, including the following: *Ragguette v. Wines*, 691 F.3d 315 (3d Cir. 2012)(abuse of discretion established where court fails to apply the *Pioneer* factors); *Raymond v. Ameritech Corp.,* 442 F.3d 600, 606 (7th Cir. 2006) (holding that *Pioneer* applies whenever "excusable neglect"

appears in the federal procedural rules.); *In re Schultz*, 254 B.R. 149, 153-54 (B.A.P. 6th Cir. 2000) (holding that while clerical mistakes or a heavy workload do not constitute excusable neglect, the serious and sudden illness, death, or disability of an attorney, attorney's spouse, or a party coupled with a missed deadline may constitute excusable neglect)." *Cmty. Fin. Servs. Bank v. Edwards (In re Edwards)*, No. 17-8028, at *12 (B.A.P. 6th Cir. June 5, 2018); *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984) (excuse for illness where ill attorney is only attorney responsible for case); *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966)("excusable neglect includes sudden death, disability or illness of counsel or the party or unusual delay in the mails."); *Harris v. Clarke*, Case No. 06-C-0230 (E.D. Wis. Aug. 18, 2006) (excusable neglect found where 15-day delay from the date the answer was due until the date that the party received the proposed answer will not significantly impact the judicial proceedings.).

In *Robb v. Norfolk & Western Railway Co.*, the court commented: "[w]e need not dwell on our `excusable neglect' case law prior to 1993, for in that year the Supreme Court resolved the aforementioned circuit split over the meaning and scope of `excusable neglect,' specifically rejecting the `narrow' approach taken by this circuit and others. 122 F.3d 354 (7th Cir. 1997) (citing *Pioneer*, 507 U.S. at 387). However, the Fifth Circuit has mostly ignored the Supreme Court decision in *Pioneer* and has continued to take a narrow

approach to the meaning and scope of "excusable neglect."

- **Fifth Circuit Pre and Post *Pioneer***

Before *Pioneer*, the Fifth Circuit conducted an in-depth analysis before throwing out a case and found abuse of discretion where there is no clear record of repeated contumacious conduct. *Morris v. Ocean Systems*, 730 F.2d 248, 252 (5th Cir. 1984) (no clear record of delay or contumacious conduct established where counsel failed twice to comply with court-imposed deadlines requiring counsel to notify court of plaintiff's rejection of settlement offers); *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554, 556-58 (5th Cir. 1981) (no clear record of delay or contumacious conduct where counsel failed to comply with scheduling and other pretrial orders); *Burden v. Yates*, 644 F.2d 503, 504-05 (5th Cir. 1981) (although plaintiff's conduct was a "sorely deficient approach to litigation," no clear record of delay or contumacious conduct where plaintiff was late in filing status report, and failed twice to file pretrial order as required by court directive); *Silas v. Sears, Roebuck & Co.*, 586 F.2d 382, 384-85 (5th Cir. 1978) (no clear record of delay or contumacious conduct where counsel failed to appear at pretrial conference, failed to prepare a pretrial stipulation, and failed to reply to interrogatories); and abuse of discretion was found in the above cases.

On the other hand, where a plaintiff has failed to comply with several court orders or court rules, the Fifth Circuit held that the district court did not abuse its discretion by involuntarily dismissing the plaintiff's suit with prejudice. See, e.g., *Salinas v. Sun Oil Co.*, 819 F.2d 105, 106 (5th Cir. 1987) (clear record of delay where plaintiff did nothing to prosecute her case for over two years, despite three warnings of dismissal); *Price v. McGlathery*, 792 F.2d 472, 474-75 (5th Cir. 1986) (clear record of delay and contumacious conduct established when counsel failed to file a pretrial order, failed to appear at pretrial conference, and failed for almost one year to certify that he would comply with district court's orders); *Callip v. Harris County Child Welfare Dept.*, 757 F.2d 1513, 1515-17 (5th Cir. 1985) (clear record of delay and contumacious conduct established by counsel's failure to comply with nine deadlines imposed by rules of procedure or by orders of court).

When it came to Rule 60(b)(1), the Fifth Circuit held that "absent evidence or explanation, illness does not qualify as excusable neglect." *See Shaffer v. Williams*, 794 F.2d 1030, 1033-34 (5th Cir. 1986). In *Shaffer v. Williams*, defendant filed a motion for summary judgment which the district court denied for lack of supporting affidavits and then defendant filed a motion to reconsider based upon one Affidavit. 794 F.2d at 1031. Plaintiff submitted his own affidavit in opposition and the court granted defendant's motion for summary judgment dismissing plaintiff's claim

with prejudice. *Id.* Plaintiff filed a Rule 60(b)(1) Motion seeking relief from the judgment because he had been hospitalized for ten days before and twenty days after the entry of summary judgment and thus was unable to submit additional affidavits in opposition to summary judgment and the district court denied the motion. *Shaffer*, 794 F.2d at 1032. Plaintiff claimed that his failure to procure additional affidavits constituted excusable neglect because his attorney did not know his whereabouts. 794 F.2d 1033-34. Because there was no explanation given for why Shaffer's attorney failed to inform the court of his client's absence, the denial was affirmed. 794 F.2d 1033-34.

In 2016, where there was an explanation for counsel missing the deadline because counsel contacted opposing counsel to seek an extension of time, the court affirmed the denial of Rule 60(b)(1) motion stating that the record lacks evidence showing that counsel's illness prevented him from contacting the court regarding his illness and seeking a timely extension of the summary judgment response deadline or explaining his failure to contact the court because the aforementioned request for extension of time was never filed. *Alverson v. Harrison Cnty.*, 643 F. App'x 412 (5th Cir. 2016).

Since the entry of *Pioneer,* the Huttons have been unable to find a single Fifth Circuit precedent in which the "Abuse of Discretion Standard has not been used to rubber-stamp a district court's refusal to apply

the *Pioneer* factors or in which the Fifth Circuit has interpreted Rule 60(b)(1) by weighing the *Pioneer* factors to grant relief for neglect resulting from illness of counsel even with an explanation or evidence. Rather, when a party challenged a district court's opinion denying a Rule 60(b)(1) Motion for failure to sufficiently analyze all three of the factors described in *Pioneer Investment*, the Fifth Circuit disagreed. *Johnson v. Potter*, 364 F. App'x 159, 164 (5th Cir. 2010). It held that while the court did not provide specific details on the first or second factors, it emphasized the third factor, finding that Johnson had consistently disregarded its orders and notices and that Johnson's failure to appear at trial was not an isolated incident. *Id.* The district court implicitly determined that to the extent the first and second factors militated in favor of granting the motion (if at all), they were outweighed by the third factor. *Id.* It argued that it "cannot say that the district court failed to consider all relevant circumstances surrounding [the party's] omission" or that the district court's decision was "so unwarranted as to constitute an abuse of discretion." *Johnson v. Potter*, 364 F. App'x at 164. The fact that the court did not weigh (1) the danger of unfair prejudice to any party, (2) the length of the delay and its potential impact on judicial proceedings and (3) whether the movant acted in good faith, against factor (4) the reason for the delay, including whether it was within the reasonable control of the movant, had no bearing on the Fifth

Circuits' review of the District Court's opinion. *Id., Pioneer*, 507 U.S. at 395.

In placing "the reason for the delay" as the sole factor for consideration without construing whether the reason for the delay was within the reasonable control of the movant, the Fifth circuit has created a narrow path through which it can impose blame on the client even for the unforeseeable circumstance in which during a once in a life time pandemic wherein access to medical care has been notoriously sporadic at best, the Hutton's lack of control, over the unforeseeable fact that their counsel got so sick with such severe symptoms of Idiopathic Intracranial Hypertension, for the first time that she was completely unable to see that the Motion for Summary Judgment had been filed until after the deadline to respond had passed, was somehow still their fault in the harsh Fifth Circuit environment.

However, prior to this court's *Pioneer* decision, the Fifth Circuit granted relief under Rule 60(b)(1) for excusable neglect, inadvertence, surprise and mistake where counsel had failed to file a notice of change of address with the court, did not receive a notice that was mailed to him as a result and did not know that defendants' had filed a motion for summary judgment, that the time to respond had lapsed or that the district court had granted the motion. *Blois v. Friday*, 612 F.2d 938, 940 (5th Cir. 1980). At the Circuit Court, the Huttons briefed the Fifth Circuit's prior decisions in

Blois[27], *Shaffer*[28], *Alverson*[29] and *Silas*[30], distinguishing them and showed why the Huttons should have been granted relief under Rule 60(b)(1) but their pleas fell on deaf ears.

III. LITIGANT'S IN THE FIFTH CIRCUIT NEED RELIEF

Since, the Supreme Court broadly interpreted the meaning and scope of excusable neglect under Rule 60(b)(1) in 1993[31], however, the Fifth Circuit has made a point of denying relief under Rule 60(b)(1) by placing the blame on the client for the attorney's illness no matter how unforeseeable.

The unique stance taken by the Fifth Circuit is unfairly prejudicial to litigants residing within the Fifth Circuit's Jurisdiction as compared to those residing in the jurisdictions that follow *Pioneer*. For example, if past is prologue, like it did in *Safari*, the Eleventh Circuit would have found excusable neglect and held that the District Court abused its discretion in holding that counsel's illness would have constituted good cause for extending the time to respond but refused to find excusable neglect by failing to apply *Pioneer*. *Safari Programs, Inc. d.b.a.*

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[27] *Blois v. Friday*, 612 F.2d 938.
[28] *Shaffer v. Williams*, 794 F.2d 1030.
[29] *Alverson v. Harrison Cnty.*, 643 F. App'x 412.
[30] *Silas v. Sears, Roebuck Co., Inc.*, 586 F.2d 382, 385 (5th Cir. 1978).
[31] *Pioneer Investment Services Co.,* 507 U.S. at 383.

Safari Ltd, v. Collecta Int'l Ltd, No. 16-10919*12-14 (11th Cir. 2017, April 25, 2017)(unpublished).

Similarly, the Third Circuit would have found abuse of discretion established in this case because the district court completely failed to apply the *Pioneer* factors *Ragguette v. Wines*, 691 F.3d 315 (3d Cir. 2012.

The Seventh Circuit would have held the same view as the Third Circuit and required the District Court to apply *Pioneer* once the question of excusable neglect appears in the Rule at issue. *Raymond v. Ameritech Corp.,* 442 F.3d 600, 606 (7th Cir. 2006). District courts in the Seventh Circuit would not have over-emphasized[32] a Nine (9) day delay for a Motion seeking relief under Rule 60(b)(1) because it did not significantly impact the judicial proceedings especially since, the response was filed before the district court ruled on the Summary Judgment motion. *Harris v. Clarke*, Case No. 06-C-0230 (E.D. Wis. Aug. 18, 2006) (excusable neglect found where 15-day delay from the date the answer was due until the date that the party received the proposed answer will not significantly impact the judicial proceedings.).

Reading the Judgment of the Fifth Circuit—wherein it stated that counsel waited until late October, after an adverse Judgment had been entered—obscures the fact that the response was due

[32] App. B, 4a-6a.

in mid-October and the delay in responding was by only Nine (9) days, filed in mid-October. App.B, 6a.

Further, being incapacitated necessarily means that counsel is unable to take any steps to protect her clients' interests during the eight-week period in which counsel was seriously sick therefore, it came as a shock to the Huttons that the Fifth Circuit couched their attorney's physical disability—blindness, dizziness, headaches—as "gross carelessness" especially in light of Rule 60(b)(1) and *Pioneer*. App. B, 6a. To justify this shocking disregard for counsel's disability, the Fifth Circuit then relied, not on *Pioneer* but first, on its own precedent, a decision that failed to apply any of the *Pioneer* factors involving an attorney who misunderstood the rules of the court and in which, it held the attorney to be grossly careless. App. B, 6a. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993).

It then absurdly cited to *Golden v. Spring Hill Assocs.*, 1993 WL 127942, at*2, 992 F.2d 1216 (6th Cir. 1993) (per curiam) (unpublished) for the proposition that a district court did not abuse its discretion in finding no "excusable neglect" where an attorney failed to inform the district court of his illness until after dismissal and the only evidence of illness was counsel's affidavit. But its reliance on *Golden* is absurd because in *Golden*, the Sixth Circuit denied relief under Rule 60(b)(1) because, amongst other factors, "counsel continued to engage in other litigation tasks in this and several other cases during

the time of his alleged [mental] illness." *Golden v. Spring Hill Assocs.*, 1993 WL 127942, at*2, 992 F.2d 1216 (6th Cir. 1993) (per curiam) (unpublished). That is not the case with the Huttons' counsel whose declaration was not disputed even at the District court. App. C, 9a-10a.

Based on precedent, under circumstances like the present, the Sixth Circuit would most likely find that the kind of serious and sudden physical illness and disability that counsel for the Huttons' suffered during a pandemic, coupled with the missed deadline would constitute excusable neglect especially when counsel's illness was not in dispute by any party and the declaration was not challenged. *In re Schultz*, 254 B.R. 149, 153-54 (B.A.P. 6th Cir. 2000); *Cmty. Fin. Servs. Bank v. Edwards (In re Edwards)*, No. 17-8028, at *12 (B.A.P. 6th Cir. June 5, 2018).

In the Ninth Circuit, being the only attorney responsible for the case, present counsel's illness and disability would have constituted excusable neglect. *Islamic Republic of Iran v. Boeing Co.*, 739 F.2d 464, 465 (9th Cir. 1984).

The Fourth Circuit has always viewed excusable neglect to include illness of counsel or the party and would have found excusable neglect from the circumstances of this case. *Evans v. Jones*, 366 F.2d 772 (4th Cir. 1966).

Whilst in *Robb v. Norfolk & Western Railway Co.*, the Seventh Circuit commented: "[w]e need not dwell

on our `excusable neglect' case law prior to 1993, for in that year the Supreme Court resolved the aforementioned circuit split over the meaning and scope of `excusable neglect,' specifically rejecting the `narrow' approach taken by this circuit and others, the Fifth Circuit has mostly ignored the Supreme Court decision in *Pioneer* and has continued to take a narrow approach to the meaning and scope of "excusable neglect." 122 F.3d 354 (7th Cir. 1997) (*citing Pioneer*, 507 U.S. at 387) but see App. B.

Hence, a review of this case to determine the parameters of excusable neglect in instances of illness of counsel is required to protect the right of litigants in the Fifth Circuit to access to the same uniform justice as litigants in all other federal circuits and the same right to determination of their cases on the merits, within a predictable and consistent federal judicial system.

SUMMARY JUDGMENT SHOULD BE VACATED

Because the summary judgment viewed in the light most favorable to the Huttons raises a genuine dispute of fact under Texas Substantive Law, it was error for the District Court to grant the Motion for Summary Judgment. The Huttons' tendered their Warranty Deed when they sued BONY to quiet title as adverse possessors under §16.024, Tex. Civ. Prac. & Rem. Code because BONY's claims were statute barred under that statute. ROA.11. BONY responded, tendered a Substitute Trustee's Deed, removed this

case to Federal Court and filed a Motion for Summary Judgment. ROA.47, 1, 145.

Due to sudden illness resulting in disability—blindness of counsel—the Huttons' did not know that the summary judgment motion had been filed and their response was late by Nine (9) days. The Court struck the response as untimely and proceeded to consider the Motion for Summary Judgment as though no response had been filed. App.D, 11a-13a.

It is settled law that a Court must view the Summary Judgment evidence in the light most favorable to the non-moving party, the Hutton's. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) (internal quotes omitted); *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001). In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. And an issue as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.*; *Bazan ex rel. Bazan v. Hidalgo County*, 246 F.3d 481, 489 (5th Cir. 2001). At the time that the court ruled on the motion for summary judgment, the court was presented with two deeds—one tendered by the Huttons, thereby satisfying the prima facie burden on the disputed issue under §16.024 of Tex. Civ. Prac. & Rem. Code. Having met this preliminary burden, there was now a genuine dispute in fact as to whether the Huttons' Warranty Deed constitutes title or color of title under

Texas Law. *Capps v. Gibbs*, No. 10-12-00294 (Tex. App.—Waco 2013), ROA.296-297.

The presence of BONY's Substitute Trustee's Deed does not negate the Huttons right to challenge BONY as adverse possessor's because under Texas Law superiority of title is no bar to a claimant for adverse possession. *Grigsby v. May*, 19 S.W. 343, 357-58 (Tex. 1892). The reason appears to be that the adverse possession statute only requires adverse possession Plaintiffs to show that their chain of title is consecutive as to them as the persons in possession under the sovereignty of the soil, but it does not require plaintiffs to disprove defendant's subsequent chain of title. §§16.021(2) and (4) and 16.024, Tex. Civ. Prac. & Rem. Code.

Without construing Texas Law correctly and without viewing the evidence in the light most favorable to the Huttons, as the non-movants, the District Court erroneously resolved the factual dispute in BONY's favor. App. D. Had the District Judge looked at the provisions of the adverse possession statute and the case law in determining the Summary Judgment Motion, he would have arrived at the same conclusion as the *Capps v. Gibbs* court—which is that the determination of whether the Hutton's warranty deed establishes title or color of title is a question of fact for the jury to decide and not a question of law. *Capps v. Gibbs*, No. 10-12-00294 (Tex. App.—Waco 2013), ROA.296-297.

The Circuit Court affirmed the District Court's decision without reviewing the evidence in the light most favorable to the Huttons and held that the district court was entitled to accept as undisputed the facts listed in support of the Bank's motion for Summary Judgment even when the Bank's own summary judgment evidence shows that the Bank lied when it stated that its Exhibit C contains a ruling that the Huttons Warranty Deed had been extinguished by the District Court Order. App. B., 7a, ROA.151@28. This was error because the facts presented by BONY, included alleged disputed and undisputed facts which if viewed in the light most favorable to the Huttons and the applicable Texas Law, precludes summary judgment.

For this reason, the Summary Judgment should be vacated, and this case should be reversed and remanded to the District Court for a trial by Jury on the question of whether the Huttons' Warranty Deed constitutes title or color of title under Texas adverse possession law.

CONCLUSION

This court should grant this Petition for Writ of Certiorari.

APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JUNE 9, 2021

United States Court of Appeals
for the Fifth Circuit

No. 20-11145

TODD W. HUTTON; TAMMY D. HUTTON, IN RESPECT OF THE PROPERTY AT 10270 COUNTY ROAD 213, FORNEY, TEXAS 75126

Plaintiffs—Appellants,

versus

BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-1962

ON PETITION FOR REHEARING EN BANC

(Opinion May 13, 2021, 5 Cir., ____ , ____ F.3D____)

Before JOLLY, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Rehearing is DENIED. No member of the Panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

APPENDIX B—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED MAY 13, 2021

United States Court of Appeals
for the Fifth Circuit

No. 20-11145
Summary Calendar

TODD W. HUTTON; TAMMY D. HUTTON, IN RESPECT OF THE PROPERTY AT 10270 COUNTY ROAD 213, FORNEY, TEXAS 75126

Plaintiffs—Appellants,

versus

BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:19-CV-1962

Before JOLLY, GRAVES, and COSTA, *Circuit Judges.*

PER CURIAM: *

At a foreclosure sale, Bank of New York Mellon Trust Company, N.A. bought property once owned by Todd and Tammy Hutton. Despite the sale, the Huttons refused to vacate the property. They sued the Bank in Texas state court, aiming to establish title to the property by adverse possession under Texas's three-year limitations period, TEX. CIV. PRAC. & REM. CODE ANN. § 16.024.

The Bank removed the case to federal court and then moved for summary judgment. The Huttons did not respond within the 21 days provided under the local rules. *See* N.D. TEX. LOCAL CIVIL RULE 7.1(e). They did not contact the district court or opposing counsel or request an extension. Instead, without explanation, they filed a response nine days late. The district court struck the response, granted summary judgment to the Bank, and entered a take-nothing judgment. The Huttons then moved for relief from the judgment under Federal Rule of Civil Procedure 60(b), contending counsel's illness caused the missed deadline and constituted "excusable neglect." The district court disagreed and denied relief. The Huttons appeal, challenging the denial of Rule 60(b) relief, the

*Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

grant of summary judgment, and the striking of their response.

We begin with the denial of Rule 60(b) relief, and we review for abuse of discretion, *see Silvercreek Mgmt., Inc. v. Banc of Am. Sec., LLC*, 534 F.3d 469, 472 (5th Cir. 2008). Rule 60(b) empowers a district court to relieve a party from a final judgment for "excusable neglect." FED. R. CIV. P. 60(b)(1). The Huttons contend the district court abused its discretion in not finding that it was "excusable neglect" for their counsel to miss the summary-judgment response deadline while suffering from "Idiopathic Intracranial Hypertension" causing "double vision, dizziness and days of total blindness." We cannot agree. "A court may hold a party accountable for the acts and omission of its counsel." *Silvercreek*, 534 F.3d at 472. The illness of counsel is not a per se justification for Rule 60(b) relief. *See Alverson v. Harrison Cnty.*, 643 F. App'x 412, 416 (5th Cir. 2016) (per curiam) (unpublished) (citing *Shaffer v. Williams*, 794 F.2d 1030, 1033-34 (5th Cir. 1986)). Here, the Huttons offered no medical documentation to support the sudden illness counsel claims. True, they did point to the declaration of counsel, who attested under penalty of perjury that she could not see that a summary-judgment motion had been filed until the response deadline had passed. Even taking counsel at her word, however, the Huttons have not shown an abuse of discretion. Counsel started

suffering from the alleged illness in late August, yet she made no effort whatsoever to inform the district court or opposing counsel of the alleged illness—until late October, after an adverse judgment had been entered. Nor did counsel take steps to protect her clients' interests during the eight-week period she claims she was incapacitated. Such "[g]ross carelessness" is not grounds for Rule 60(b) relief. *Edward H. Bohlin Co. v. Banning Co.*, 6 F.3d 350, 357 (5th Cir. 1993); *see also Golden v. Spring Hill Assocs.*, 1993 WL 127942, at*2, 992 F.2d 1216 (6th Cir. 1993) (per curiam) (unpublished) (district court did not abuse its discretion in finding no "excusable neglect" where attorney failed to inform district court of his illness until after dismissal and the only evidence of illness was counsel's affidavit).

We next consider the order striking the Huttons' untimely summary-judgment response. We review the enforcement of local rules for abuse of discretion. *See Klocke v. Watson*, 936 F.3d 240, 243 (5th Cir. 2019). Under the relevant local rules, "[a] response and brief to an opposed motion must be filed within 21 days from the date the motion is filed." N.D. TEX. LOCAL CIVIL RULE 7.1(e). The Bank filed its motion on September 15; a response was due on October 6; and response was filed on October 15. It is therefore undisputed that the Huttons violated the local rules by filing a late response without seeking an extension in advance of the deadline or leave of court

to file a response after the deadline had passed. The district court acted within its discretion in striking the untimely response. *E.g.*, *Kitchen v. BASF*, 952 F.3d 247, 254 (5th Cir. 2020).

Finally, we consider the summary judgment dismissing the Huttons' claim to establish title to property by adverse possession under Texas's three-year limitations period. Our review is *de novo*. *See West v. City of Houston*, 960 F.3d 736, 740 (5th Cir. 2020) (per curiam). Because the district court did not abuse its discretion in striking the Huttons' untimely response, it follows that the district court was entitled to accept as undisputed the facts so listed in support of the Bank's motion for summary judgment. *See Eversely v. MBank Dallas*, 843 F.2d 172, 174 (5th Cir. 1988). Viewing the record in this light, we conclude that the Bank "made a *prima facie* showing of its entitlement to [summary] judgment," *id.*, by pointing to the absence of evidence that the Huttons held the property under title or color of title, an element of the Huttons' claim. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.024; *Terrill v. Tuckness*, 985 S.W.2d 97, 107 (Tex. App.—San Antonio 1998) (a party cannot claim adverse possession under the three-year limitations period unless he holds the property under title or color of title). Consequently, summary judgment was appropriate.

In sum, the district court did not abuse its discretion in denying Rule 60(b) relief or in striking

the Huttons' untimely summary-judgment response. Nor did the district court err in granting summary judgment for the Bank. Accordingly, the district court's judgment is, in all respects, AFFIRMED. [1]

[1] The Bank's motion to substitute real parties in interest is DENIED as moot.

APPENDIX C—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, SIGNED NOVEMBER 9, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TODD W. HUTTON and TAMMY D. HUTTON, *In Respect of the Property at 10270 County Road 213, Forney, Texas 75126*	)	
Plaintiffs,	)	
v.	)	
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,	)	Civil Action No. 3:19-CV-
Defendant.	)	1962-C

ORDER

For the reasons stated in Defendant's Response in Opposition, the Court hereby **ORDERS** that Plaintiffs' Motion for Reconsideration of the Orders to

Vacate Plaintiffs' Response Brief and Order Granting Summary Judgment and Motion for Leave to File Response Out of Time be **DENIED**. More specifically, Plaintiffs fail to show good cause or excusable neglect for why they failed to comply with the local rules and request an extension prior to their response deadline expiring. Rather, Plaintiffs waited until after the deadline expired—and after the Court entered a final judgment—to explain why an extension was needed.[1]

SO ORDERED this 9th day of November, 2020.

/s/ Sam R. Cummings
SAM R. CUMMINGS
SENIOR UNITED STATES
DISTRICT JUDGE

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[1] Counsel's medical condition may have been grounds to extend Plaintiffs' response deadline had a request been made before or even within a reasonable time after the deadline to respond to Defendant's Motion for Summary Judgment had passed. However, the same does not provide a basis to excuse Plaintiffs' failure to comply with the local rules.

APPENDIX D—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, SIGNED OCTOBER 19, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TODD W. HUTTON and TAMMY D. HUTTON, *In Respect of the Property at 10270 County Road 213, Forney, Texas 75126*	)	
Plaintiffs,	)	
v.	)	
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,	)	Civil Action No. 3:19-CV-
Defendant.	)	1962-C

ORDER

On this day, the Court considered Defendant/Counterclaimant The Bank of New York Mellon Trust Co. N.A.'s Motion for Summary

Judgment, filed September 15, 2020. The Court notes the docket in this civil action reflects that Plaintiffs have failed to file a *timely* response to the pending Motion and the time to do so has now expired.[1]

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (internal quotes omitted). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* at 248. In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. *Id.* at 255. Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993).

[1] *See* N.D. Tex. L.R. 7.1(e) "[a] response and brief to an opposed motion must be filed within 21 days from the date the motion is filed."

To defeat a properly supported motion for summary judgment, the non-movant must present more than a scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.*

As noted above, Plaintiffs failed to file a timely response to the pending Motion for Summary Judgment. The Court does not grant summary judgment by default, however, and must still consider whether Defendant is entitled to judgment as a matter of law based on the evidence before the Court. Having carefully considered Defendant's Motion and all supporting evidence, the Court is of the opinion that the Motion is meritorious and that Plaintiffs have failed to meet their burden to present sufficient evidence showing any genuine issue of material fact for trial. Accordingly, Defendant's Motion for Summary Judgment is hereby **GRANTED** and Plaintiff's claims are **DISMISSED**. It is further **DECLARED** that title to the property at issue is quieted in favor of The Bank of New York Mellon Trust Co. N.A. as title holder and owner of the property.

SO ORDERED this 19th day of October, 2020.

/S/ Sam R. Cummings
SAM R. CUMMINGS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX E—ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, SIGNED OCTOBER 19, 2020

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TODD W. HUTTON and TAMMY D. HUTTON, *In Respect of the Property at 10270 County Road 213, Forney, Texas 75126*	)	
Plaintiffs,	)	
v.	)	
BANK OF NEW YORK MELLON TRUST COMPANY, N.A.,	)	Civil Action No. 3:19-CV-
Defendant.	)	1962-C

JUDGMENT

For the reasons stated in the Court's Order of even date, therein granting Defendant's Motion for Summary Judgment,

IT IS ORDERED, ADJUDGED, AND DECREED that Plaintiffs' claims be **DISMISSED**. It is further **ORDERED, ADJUDGED, AND DECLARED** that title to the property at issue is quieted in favor of The Bank of New York Mellon Trust Co. N.A. as title holder and owner of the property. This Judgment fully and finally resolves of all claims asserted in the above-styled and -numbered civil action. Costs shall be taxed against Plaintiffs.

SIGNED this 19th day of October, 2020.

Signed
SAM R. CUMMINGS
SENIOR UNITED STATES
DISTRICT JUDGE

APPENDIX F—RULE 60

RELIEF FROM A JUDGMENT OR ORDER

(a) **Corrections Based on Clerical Mistakes; Oversights and Omissions.** The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) **Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) **Timing and Effect of the Motion.**

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) **Other Powers to Grant Relief.** This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) **Bills and Writs Abolished.** The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.