

IN THE MISSOURI SUPREME COURT

No. SC83350

IN RE: THE ESTATE OF RAYMOND KLAUBER

Appeal from the Circuit Court of St. Louis County, Probate Division
The Honorable Mark Siegel, Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT
CLAYTON HOUSE HEALTH CARE

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POINT RELIED ON

THE CIRCUIT COURT, PROBATE DIVISION, ERRED IN ENTERING ITS JUDGMENT AND ORDER SUSTAINING RESPONDENT'S MOTION TO DISMISS THE CLAIM OF APPELLANT CLAYTON HOUSE, BECAUSE THE CLAIM WAS NOT BARRED BY OPERATION OF THE COURT'S DISMISSAL OF CLAYTON HOUSE'S PRIOR CLAIM AND § 510.150 RSMo, IN THAT THE PRIOR DISMISSAL WAS WITHOUT PREJUDICE PURSUANT TO THE MISSOURI RULES OF CIVIL PROCEDURE.

In re Estate of Desterbecque, 800 S.W.2d 142 (Mo. App. 1990)

In re Estate of Johnson, 912 S.W.2d 560 (Mo. App. 1995)

Rahman v. Matadore Villa Assoc., 821 S.W.2d 102 (Mo. 1991)

Becker Glove Int'l, Inc. v. Jack Dubinsky & Sons, No. SC83294,

2001 WL 410489 (Mo., April 24, 2001)

Rule 41.04

Rule 67.03

§ 472.140 RSMo (1994)

§ 472.141 RSMo (1994)

§ 510.150 RSMo (1994)

§ 511.250 RSMo (1994)

ARGUMENT

THE CIRCUIT COURT, PROBATE DIVISION, ERRED IN ENTERING ITS JUDGMENT AND ORDER SUSTAINING RESPONDENT’S MOTION TO DISMISS THE CLAIM OF APPELLANT CLAYTON HOUSE, BECAUSE THE CLAIM WAS NOT BARRED BY OPERATION OF THE COURT’S DISMISSAL OF CLAYTON HOUSE’S PRIOR CLAIM AND § 510.150 RSMo, IN THAT THE PRIOR DISMISSAL WAS WITHOUT PREJUDICE PURSUANT TO THE MISSOURI RULES OF CIVIL PROCEDURE.

The estate begins its brief by asserting that “appellant’s premise is faulty and inaccurate.” Respondent’s Brief, p. 10. Then, after acknowledging that the Rules of Civil Procedure supersede all conflicting statutes, the estate argues that, although Rule 510.150 conflicts with Rule 67.03, the conflict is “apparent,” but “not real.” Respondent’s Brief, pp. 10-12. According to the estate, the apparent conflict is “not real because Rule 67.03 does not apply, by its very exclusion in Rule 41.01 and because it was never designated by special order of court to be applicable.” Respondent’s Brief, p. 18. In other words, the estate claims that the obvious conflict between the rule and the statute is somehow vitiated because Rule 41.01 does not specifically designate Rule 67.03 as applicable to probate

proceedings. The estate's argument, not appellant's, is based on a faulty and inaccurate premise.

The estate ignores the clear directive in Rule 41.04 that where, as here, no procedure is specially provided by rule, the probate court "shall proceed in a manner consistent with the applicable statute, or statutes, if any, and precedent but not inconsistent with Rules 41 to 101, inclusive." Rule 41.04 required the probate court to apply any applicable procedural statutes only to the extent that they did not conflict with the Rules of Civil Procedure. Rule 41.04 also required the probate court to act in accordance with precedent, and the precedent governing this case established that the first dismissal of Clayton House's claim was without prejudice.

As noted in Clayton House's opening brief, in *In re Estate of Johnson* the Missouri Court of Appeals held that the probate court's order striking appellant's "Objection to Final Settlement" was deemed to be without prejudice because the court's order did not specify otherwise. *In re Estate of Johnson*, 912 S.W.2d 560, 561 n.4 (Mo. App. 1995). Furthermore, in *In re Estate of Desterbecque*, 800 S.W.2d 142 (Mo. App. 1990), the Missouri Court of Appeals addressed the issue of whether the Rules of Civil Procedure supersede conflicting statutes in adversary

probate proceedings.¹ The Court examined Section 472.141, which provides as follows:

1. An adversary probate proceeding shall be governed by the civil code of Missouri and the rules of civil procedure; except that:
 - (1) Where the probate code or any other statute contains a provision prescribing practice, procedure or pleading, applicable to the pending proceeding, the provisions of the probate code or such statute shall govern.

¹ An “adversary probate proceeding” is defined as “any proceeding brought pursuant to any provision of chapters 472, 473, 474 and 475, RSMo, which requires, as a condition precedent to an entry of an order or judgment on the merits, notice of hearing to persons interested in the proceeding.” § 472.140.2. The Claim form used in this proceeding permits the Conservator to waive notice and consent to the claim. L.F. 11. The Conservator in this case did not waive notice. Presumably, the probate court therefore could not have entered an order on the claim without a hearing. This proceeding therefore falls within the definition of “adversary probate proceeding.” However, even if this case were not an adversary proceeding, the *Desterbeque* court’s conclusion that *conflicts* between the rules and statutes should be resolved by applying the rules is applicable here.

§ 472.141.1 RSMo (1994). The Court of Appeals noted that in many instances the rules of civil procedure conflict with the civil code. *Desterbecque*, 800 S.W.2d at 146. The Court also cited well-established precedent holding that the rules supersede all inconsistent statutes. *Id.* at 146-47. After discussing the applicable case law and rules, the Court of Appeals held that “[i]t is reasonable to conclude that in referring to the civil code in the statutes cited, it was the intent of the legislature that *the conflicts* be resolved by applying the civil code *as superseded by the Rules*. This court holds that § 472.141 . . . should be so construed.” *Id.* at 147 (emphasis added).

Under Rule 41.04, the probate court in this case was bound to act in accordance with *Johnson* and *Desterbecque*. The probate court was required to apply the applicable statutes such that the conflicts between the rules and the statutes “be resolved by applying the civil code as superseded by the Rules.” *Desterbecque*, 800 S.W.2d at 147. In addition, Rule 41.04 mandated that the probate court not apply Section 510.150 in a manner inconsistent with Rule 67.03. The Rules of Civil Procedure and precedent mandated that Rule 67.03 govern the first dismissal of Clayton House’s claim.

The estate claims that “*Johnson* appears to be an irregular or errant decision,” and suggests that *Johnson* is inapplicable because “later cases hold differently than *Johnson*.” Respondent’s Brief, p. 15. However, none of the “later

cases” that the estate cites hold differently than *Johnson*. For example, in *Kemp v. Balboa*, 959 S.W.2d 116 (Mo. App. E.D. 1997), the appellant appealed the probate court’s order denying his motion for revocation of letters of administration granted to the decedent’s mother. The probate court’s order in that case was not denominated a “judgment,” and therefore the Court of Appeals was faced with the issue of whether Rule 74.01(a) applied such that the order was not final and appealable. *Kemp*, 959 S.W.2d at 118. In determining the issue, the Court noted that the purpose of Rule 74.01(a) is “to remove confusion that existed as to when a pronouncement or judgment was final for purposes of appeal.” *Id.*, citing *Linzenni v. Hoffman*, 937 S.W.2d 723 (Mo. banc 1997). The Court also examined Section 472.160 RSMo (1994), which sets forth the grounds for appeals from probate orders, judgments or decrees. The Court noted that Section 472.160 “provides a long list of orders, many clearly interlocutory in nature, which may be appealed from a probate proceeding.” *Id.* at 118. The Court found that many of those orders “do not purport to be a final determination of the rights of the parties,” and did not engender “confusion as to when the pronouncement is final for purposes of appeal.” *Id.* Based on the statute and Rule 41.01(b) – which does not specifically designate Rule 74.01 applicable to probate proceedings – the Court of Appeals was “unable to conclude that Rule 74.01 requires that every order in a probate proceeding which is subject to appeal under Section 472.160 must be labeled a

judgment before it can be appealed.” *Id.* Rule 74.01 was therefore inapplicable to that case.

In *In re Estate of Brown*, 955 S.W.2d 940 (Mo. App. S.D. 1997), the Missouri Court of Appeals followed the reasoning of *Kemp*, and found that the appellant/petitioner was entitled to appeal from the probate court’s order granting respondent’s objection to petitioner’s attempt to take against the decedent’s will. *Brown*, 955 S.W.2d at 941. The probate court’s order in *Brown* had been entered pursuant to Section 472.160. *Id.* The Court, citing *Kemp*, held that the order was appealable under the statute.

Finally, in *Estate of Ewing v. Bryan*, 883 S.W.2d 545 (Mo. App. W.D. 1994), the appellant contended that the probate court had impermissibly set aside its order appointing appellant guardian of her father and conservator of his estate. *Estate of Ewing*, 883 S.W.2d at 546. The order had been vacated five months after its entry, based in part on the probate court’s finding that the order was irregular because it had not been entered after a hearing as required by Section 475.075.1 RSMo (1994). The appellant in *Ewing* contended that Rule 75.01 prohibited the court from vacating its order more than thirty days after its entry. The Court of Appeals disagreed. The Court acknowledged that Rule 41.01 does not designate either Rules 75.01 or 74.06(b) – which permits a judgment to be vacated for irregularity more than thirty days after entry – as applicable to probate

proceedings. *Id.* at 546-47. However, the Court found that Section 511.250 RSMo (1994), was “an available remedy to set aside a final probate judgment for irregularity.” Like Rule 74.06(b), Section 511.250 permits the court to vacate its judgment for irregularity more than thirty days after the judgment is entered. § 511.250 RSMo (1994).² The Court therefore found that the probate court acted properly in vacating its order.

The above cases are consistent with *Johnson* and *Desterbecque* in that the probate court’s actions in each of those cases did not contravene the Rules of Civil Procedure. In *Estate of Ewing*, both the Rule of Civil Procedure and the applicable statute authorized the probate court’s actions, and application of either the rule or the statute in that case would have effected the same result. The probate court therefore did not violate Rule 41.04 by proceeding “in a manner consistent with the applicable statute . . . but . . . inconsistent with Rules 41 to 101, inclusive.” Likewise, in *Kemp* and *Brown*, the probate court did not violate the Rules of Civil procedure when it entered appealable interlocutory orders. The Court of Appeals

² Under Rule 74.06(c), a motion to set aside a judgment for irregularity must be made within one year after the judgment was entered. Section 511.250 requires that the motion to set aside the judgment be made within three years after the entry of judgment.

in each of those cases implicitly recognized that Section 472.160 does not conflict with the purpose underlying Rule 74.01. Section 472.160 instead functions to expand the types of judicial pronouncements in the probate court that are appealable. And, notably, in *Kemp* the Court of Appeals did not exclude the possibility that Rule 74.01 is applicable to some orders in the probate court, despite the fact that the Rules do not specifically designate its applicability to probate proceedings. Rather, the Court stated that it was “unable to conclude that Rule 74.01 requires that *every order . . .* subject to appeal under Section 472.160 must be labeled a judgment before it can be appealed.” *Kemp*, 959 S.W.2d at 118.

This Court’s opinion in *Becker Glove International, Inc. v. Jack Dubinsky & Sons*, , No. SC83294, 2001 WL 410489 (Mo., April 24, 2001), also does not compel a determination that the probate court was entitled to act in a manner inconsistent with Rule 67.03. In *Becker Glove*, this Court held that the compulsory counterclaim rule, Rule 55.32, is not applicable to an action filed in the associate circuit court because Section 517.031.2 governs the filing of counterclaims in that court. *Id.* at *2. Section 517.031.2 permits, but does not require, a defendant to file an answer or a counterclaim in response to a petition. *Id.* Because counterclaims need not be asserted at all in associate circuit court, it would be “inconsistent with the simplified nature of Chapter 517 proceedings to apply the use-it-or-lose-it technicality of the compulsory counterclaim rule.” *Id.*

In deciding *Becker Glove*, this Court placed a great deal of reliance on *Rahman v. Matadore Villa Assoc.*, 821 S.W.2d 102 (Mo. 1991). As in *Becker Glove*, in *Rahman* the Court held that the compulsory counterclaim rule did not apply to a rent and possession action filed in the associate circuit court, because procedures in Chapters 535 and 517 governed such actions. *Rahman*, 821 S.W.2d at 103. The Court noted that Rule 41.01(f) provided that “Civil actions pending in the associate circuit division shall be governed by Rules 41 through 101, except where otherwise provided by law.”³ The Court then recognized that “the last phrase, ‘otherwise provided by law,’ is an expression of this Court’s deference to legislative enactments establishing specialized procedures for actions before associate circuit judges.” *Id.* Thus, the compulsory counterclaim rule did not apply in *Rahman*, or in *Becker Glove*, because a procedural statute specifically applicable to cases in associate circuit court and specifically applicable to the situation at hand dictated the procedure to be followed.

Unlike the situation in *Becker Glove* and *Rahman*, the probate court’s judgment in this case was not based on a “legislative enactment establishing specialized procedures for” proceedings before probate judges. The court’s judgment instead was based on Section 510.150. Section 510.150 is not part of the

³ Rule 41.01 has since been revised, and that text currently appears in Rule 41.01(d).

probate code. The only probate statute that arguably applied to the probate court's first dismissal of Clayton House's claim was Section 472.141 which, as discussed above, required the probate court to apply "the civil code as superseded by the Rules." *Desterbecque*, 800 S.W.2d at 147. Under the reasoning of *Becker Glove* and *Rahman*, Section 472.141, not Section 510.150, governed this action.

Contrary to the estate's argument, Rule 41.01(a) does not support the probate court's judgment in this case. Respondent's Brief, pp. 13, 18. As the estate notes, Rule 41.01(a) declares that Rules 41 through 101 shall govern "civil actions pending before a circuit judge *except those actions governed by the probate code.*" (emphasis added). That rule indicates that, as in the associate circuit court, the civil rules will apply to proceedings in the probate court unless the probate code dictates a different procedure. Again, Section 510.150 is not part of the probate code. The probate code does not dictate a different procedure than Rule 67.03 for the dismissal of claims. The probate code, as interpreted by precedent, provides that the probate court shall apply the civil code as superseded by the Rules of Civil Procedure. *Desterbecque*, 800 S.W.2d at 147.

Finally, affirmance of the Court of Appeals' decision in this case will not, as the estate claims, "drastically change" the procedural landscape in probate proceedings. The estate predicts that the Court's opinion, if allowed to stand, will

amount to no less than a judicial obliteration of the probate code. The estate's dire prediction finds no support in either logic or the law, and ignores several key facts.

First, the estate does not identify any rule of probate procedure that is inconsistent with a rule of civil procedure; it only identifies rules that are, as it claims, "different." Respondent's Brief, p. 21. Contrary to the estate's assertion, a probate rule that is "different" is not, of necessity, inconsistent with its counterpart rule of civil procedure. The probate rules that the estate notes in its brief describe filing procedures that recognize the unique nature of the probate courts and facilitate the progression of claims through those courts, but they do not flout the rules of procedure. As in any civil action, those probate rules require that claimants file a claim apprising the court of the grounds for their claim, that the clerk of the probate court notify the respondent estate of the claim, and that the respondent be given an opportunity to respond to and defend against that claim. These probate rules mirror the rules of civil procedure and, in fact, adhere to this Court's mandate in Rule 41.04 that Missouri courts not act in a manner inconsistent with the rules of civil procedure. In contrast, Section 510.150, not part of the probate code, does not recognize the unique nature of the probate court, and prescribes a procedure that is completely inconsistent with the applicable rule of civil procedure.

Second, to the extent that “the probate code was presumably created separate and distinguished from other types of civil actions,” the Court of Appeals’ opinion does not affect the code. The Court of Appeals held that the probate court could not apply Section 510.150 to the extent that it conflicts with Rule 67.03. Again, Section 510.150 is not part of the probate code. Under *Becker Glove* and *Rahman*, if the legislature enacted a probate statute prescribing a different procedure than Rule 67.03, then that statute might be entitled to deference as a “legislative enactment establishing specialized procedures for actions before” probate judges. *See Rahman*, 821 S.W.2d at 103. But the legislature has not, as yet, enacted such a statute, other than Section 421.141. No procedure specifically governing the dismissal of claims in the probate court is “specially provided by rule” or statute. Therefore, again, in accordance with Rule 41.04, *Desterbecque*, and *Johnson*, the probate court was obliged to apply the statutes as superseded by the rules, and to refrain from acting in a manner inconsistent with the rules.

Finally, the Court of Appeals’ opinion is consistent with precedent and the rules. The opinion recognizes that the Rules of Civil Procedure govern the circuit courts of this state, including the probate courts. In accordance with Rule 41.04, the court’s opinion requires that, in the absence of a procedure specially provided by rule, probate judges should specify in their orders that the dismissal of a claim is with prejudice, just as every other circuit court judge in the state is required to

do. The estate offers no explanation, in statute or in logic, why probate judges should be treated differently from other judges with respect to the dismissal of claims or how Section 510.150 speaks to the unique nature of probate proceedings. The requirement that probate judges indicate whether their dismissal of a claim is with prejudice will not impose an onerous burden on those judges, nor will it render any probate statute inoperable, nor will it drastically change the procedural landscape in probate proceedings. The requirement will simply function to expressly inform claimants of when their claims have been finally dismissed and when an appeal should be taken.

The probate court erred in dismissing Clayton House's claim based on Section 510.150. The court's February 14, 2000, order and judgment dismissing Clayton House's claim therefore should be reversed.

CONCLUSION

For the reasons stated above and in the Substitute Brief of Appellant, this Court should reverse the probate court's February 14, 2000, order and judgment dismissing Clayton House's claim against respondent estate. Appellant's claim should be remanded to the probate court for hearing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of the Substitute Reply Brief of Appellant were sent via first class mail on May ____, 2001, to the following:

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CERTIFICATE OF COMPLIANCE WITH SPECIAL RULE NO. 1

The undersigned certifies that the foregoing Substitute Reply Brief of Appellant Clayton House Health Care includes the information required by Rule 55.03, and complies with the requirements contained in Special Rule No. 1(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in appellant's Substitute Reply Brief is 3,523.
