

IN THE MISSOURI SUPREME COURT

No. SC88841

STATE EX REL. JAMES COLE, M.D.

Relator,

vs.

THE HONORABLE DAVID B. MOUTON

Respondent.

**Appeal from the Circuit Court of Jasper County, Mo.
Twenty Ninth Judicial Circuit, Division No. 3
The Honorable David B. Mouton, Judge**

RELATOR'S REPLY BRIEF

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ARGUMENT

Relator Dr. Cole will address below the arguments Judge Mouton raises, but a review of the facts that Judge Mouton admits is helpful:

- James Tolbert died on December 8, 2006 (Resp. Br. 4);
- Dr. Cole’s counsel filed suggestions on or about March 29, 2007 (Resp. Br. 4, 8);
- No probate proceedings had even been started for Mr. Tolbert at that time (Resp. Br. 4, 8);
- The suggestions of death were received by counsel for Betty Tolbert and she had actual knowledge of their filing (Resp. Br. 8, 9);
- Counsel for Betty Tolbert did not file a motion for substitution until July 18, 2007 (110 days after filing of the suggestions of death) (Resp. Br. 5).

Because these facts remain undisputed, the only question for this court is a matter of law—whether counsel’s 20-day delay requires dismissal of James Tolbert’s claim under Rule 52.13. Nonetheless, Judge Mouton claims that the standard of review requires deference to his ruling. He also argues that Relator Dr. Cole had an affirmative duty to contact counsel, file a motion requesting an estate be opened or communicate with Betty Tolbert directly regarding her husband’s estate.

Not only does the standard of review not give any deference to Judge Mouton’s ruling, but as shown below, his arguments that Dr. Cole had a duty to

act on behalf of his party-opponent is without merit. As a result, this Court should disregard Judge Mouton's arguments and dismiss the claims of James Tolbert, deceased, pursuant to Rule 52.13.

Standard of Review Gives No Deference to Judge Mouton's Ruling

This case involves a matter of law which is reviewed by this Court *de novo*, with no deference to the trial court's ruling. Information Technologies, Inc. v. St. Louis County, 14 S.W.3d 60, 62 (Mo. App. E.D. 1999), Fick v. Director of Revenue, 2007 WL 4394465, at 1 (Mo. 2007). Judge Mouton cites Murphy v. Carron, 536 S.W.2d 30 (Mo. 1976) as the standard of review for this case (Resp. Br. 7). He then claims that because he interpreted a case (instead of a statute) his interpretation should be accorded deference by this Court—Judge Mouton cites no authority for this latter claim and Relator Dr. Cole can locate none (Resp. Br. 7).

Dr. Cole does not dispute that Murphy requires this Court to “affirm the decision of the trial court unless it is unsupported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law.” However, Judge Mouton fails to note that this Court does not defer to the lower court on questions of law: “If the facts are not contested, then the issue is legal and there is no finding of fact to which to defer.” Fick, *supra* at 1.

Because these proceedings involve solely a question of law, this Court affords no deference to Judge Mouton's August 1, 2007, denial of Dr. Cole's Motion to Dismiss.

Dr. Cole Does Not Have the Burden to Open or Join James Tolbert's Estate

Judge Mouton does not dispute that after James Tolbert's death, his claims could only be pursued by the personal representative of his estate; he also agrees that when Betty Tolbert's attorneys received suggestions of death in March 2007, no estate was opened for Mr. Tolbert (Resp. Br. 4, 8-11). Nonetheless, Judge Mouton claims that because Dr. Cole did not serve Betty Tolbert with suggestions of death in her capacity as the personal representative for James Tolbert's estate, Dr. Cole failed to join an indispensable party (Resp. Br. 9-11).

Not only does Dr. Cole have no recourse to open an estate of his party-opponent, he has no duty to do so. The claim that Dr. Cole should have joined an indispensable party is an improper attempt to shift the burden of opening an estate and substituting the personal representative from Betty Tolbert's attorneys to Dr. Cole. Recognizing this, Judge Mouton argues that Dr. Cole could petition the court to appoint a personal representative (Resp. Br. 10).

But again, filing such a motion to require the appointment of a personal representative is not Dr. Cole's duty—it is not Dr. Cole's burden to ensure that the party suing him is the proper party in interest. That is Plaintiffs' burden and Judge Mouton's suggestion to the contrary is not only an attempt to improperly shift the burden to Dr. Cole but is also an attempt to graft requirements that do not exist into this Court's applicable Rules.

Contrary to Judge Mouton's argument, Rule 52.13(a) is the law that applies to this situation, and its requirements are unambiguous: suggestions of death may

be filed by any party and a motion for substitution may be filed by any party, but “the action shall be dismissed as to the deceased party without prejudice” if a motion for substitution is not served within 90 days from the filing of suggestions of death. Here, there is no dispute that Betty Tolbert’s attorneys filed a motion for substitution 110 days after they received suggestions of death. James Tolbert’s action “shall be dismissed” as a result.

Rule 43.01(c) Supports Service of Suggestions of Death on Counsel of Record

Judge Mouton contends that Rule 43.01(c) “sets forth the proper procedure Relator should have followed in effectuating service upon Betty Tolbert” (Resp. Br. 11). Subsection (c) refers back to subsection (b) of this Rule which states when service on a party that is represented by counsel is required or permitted, “the service shall be made upon the attorney unless service upon the party is ordered by the court” (A-1). There was no such order of personal service in this case. As a result, contrary to Judge Mouton’s contention, Rule 43.01(c) supports Dr. Cole’s position that service on Betty Tolbert’s attorneys of record is sufficient to begin the 90-day period in Rule 52.13(a).

Rule 4-4.2 Does Not Permit Direct Contact with Plaintiff Betty Tolbert

In response to the prohibition in Rule 4-4.2 against direct communication with Betty Tolbert, Judge Mouton argues (without citation) that Dr. Cole could have:

- 1) “contacted counsel for Betty Tolbert” or

2) “sought an order from the court regarding the appointment of a personal representative” or

3) directly communicated with Betty Tolbert since inquiries about her husband’s estate would be outside the scope of the underlying action (Resp. Br. 12).

Options one and two are additional, improper attempts to place duties on Dr. Cole that he simply does not have—whether or not Dr. Cole or his attorneys *could* have contacted Betty Tolbert’s attorneys or *could* have filed a motion does not confer on them a *duty* to do either. Rather, the duty to open an estate and file a motion for substitution belongs solely to counsel for Betty Tolbert—to the extent they claim Dr. Cole’s attorneys could have contacted them or filed a motion, they *should* have timely filed a motion for substitution. That was their duty, not Dr. Cole’s duty. They failed to meet that duty. Dr. Cole should not be penalized for that failure.

Moreover, the suggestion that Dr. Cole’s attorneys contact Betty Tolbert’s attorneys to determine the status of an estate undermines the argument that serving suggestions of death on them was insufficient. They cannot have it both ways—if contacting counsel is appropriate to inquire about an estate then serving them with suggestions of death is sufficient to begin the 90-day period in Rule 52.13.

The third option is that Dr. Cole should have directly communicated Betty Tolbert with regard to her husband’s estate because such an inquiry would be “outside the scope of the representation, as the underlying cause of action pertains

to medical malpractice and not the estate of James Tolbert” (Resp. Br. 12). This argument inaccurately equates “scope of representation” with “underlying cause.” The initial action filed by Plaintiffs is based on alleged medical negligence, but the scope of the representation of Betty Tolbert’s attorneys could, and has, extended to other legal services—just because counsel filed a medical negligence case for Plaintiffs does not preclude them from providing additional legal services, which would expand the scope of the representation beyond the underlying cause.

That’s exactly what happened here—in addition to filing the initial negligence suit, Betty Tolbert’s attorneys also assisted her with the opening of an estate and appointment of personal representative for her deceased husband James Tolbert. If Dr. Cole’s attorneys had followed Judge Mouton’s suggestion and communicated with Betty Tolbert directly—relying on the argument that the scope of representation was confined only to the underlying lawsuit—their reliance would have been misplaced and their actions would have been unethical under Rule 4-4.2 (A-4). The argument that Dr. Cole’s attorneys contact Betty Tolbert directly is nothing more than a suggestion that they violate this Court’s Rule 4.4-2 to make up for the failure of Betty Tolbert’s attorneys to comply with this Court’s Rule 52.13.

In conclusion, Judge Mouton argues that “dismissal should not be granted” because Dr. Cole “failed to go through the proper channels in effectuating service” (Resp. Br. 13). As shown above, those alleged “proper channels” either

improperly shift a duty to Dr. Cole that is not his or require the violation of this Court's Rules.

Under these circumstances, Judge Mouton's claims are without merit and should be denied. Relator Dr. Cole respectfully requests this Court to issue a permanent Writ of Mandamus and require Respondent Judge Mouton to dismiss the claims of Plaintiff James Tolbert.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 1,686 words, excluding the cover, this certification and the appendix as determined by Microsoft Word software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a disk containing a copy of this brief, were sent via U.S. Mail, postage prepaid, this 10th day of January, 2008, to:

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