

IN THE MISSOURI SUPREME COURT

---

No. SC88841

---

STATE EX REL. JAMES COLE, M.D.

*Relator,*

v.

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

---

**RESPONDENT'S BRIEF**

---

William H. McDonald, Mo Bar #21967  
McDonald, Hosmer, King & Royce, PC  
300 S. Jefferson, Suite 600  
P.O. Box 1245  
Springfield, MO 65801-1245

Jot Hartley, OK Bar #3947  
The Hartley Law Firm, PLLC  
177 W. Delaware, P.O. Box 553  
Vinita, OK 74301

*Attorneys for Betty Tolbert*

Oral Argument Requested

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... 2

TABLE OF AUTHORITIES..... 3

STATEMENT OF FACTS..... 4

POINT RELIED ON..... 6

ARGUMENT..... 7

CONCLUSION..... 13

**TABLE OF AUTHORITIES**

**Cases**

Estate of Munzert,  
887 S.W.2d 764 (Mo.App. E.D. 1994)..... 9

In re Estate of Ripley v. Mortgage One Corp.,  
16 S.W.3d 593 (Mo.App. E.D. 1999)..... 9

Metropolitan St. Louis Sewer District v. Holloran,  
751 S.W.2d 749 (Mo. 1988).....5, 8, 9, 13

Murphy v. Carron,  
536 S.W.2d 30, 32 (Mo. Banc 1976)..... 7

State v. Ruch,  
926 S.W.2d 937, 938 (Mo.App. W.D. 1996)..... 7

Steiner v. Vatterott,  
973 S.W.2d 191 (Mo.App. E.D. 1998)..... 9

**Rules and Other Authorities**

Missouri Supreme Court Rule 4-4.2..... 8, 11, 12

Missouri Supreme Court Rule 43.01..... 5, 8, 11

Missouri Supreme Court Rule 52.13..... 6-13

## **STATEMENT OF FACTS**

The underlying case in this matter is a medical negligence action filed by Plaintiffs James and Betty Tolbert, in Jasper County Circuit Court on February 26, 2003. Plaintiffs' underlying cause of action against Relator arose from the inadequate and negligent medical treatment rendered to Plaintiff by Relator for treatment of a fractured right femur in March 2001. As a result of said treatment, Plaintiff James Tolbert, suffered severe infections of his leg and body, numerous subsequent medical procedures, loss of use of his motor skills and regular daily mobility and activity.

Plaintiff James Tolbert passed away on the 8<sup>th</sup> day of December, 2006 while a resident of the State of Oklahoma. On or after March 29, 2007, Relator filed Suggestions of Death with the Circuit Court of Jasper County, Missouri, Division No. 3. At the time of the filings of Relator's Suggestions of Death, no administration nor other probate proceedings upon the estate of James Tolbert had been commenced.

Relator served the Suggestions of Death on Plaintiff James Tolbert's counsel of record. The Certificate of Service attached to said Suggestions stated that the Suggestions were served upon counsel for the remaining individual Plaintiff, Betty Tolbert, who was also the wife of Co-Plaintiff, James Tolbert. Said Certificate of Service did not demonstrate that said Suggestions were served upon any individual as personal representative of the estate of James Tolbert, nor

upon a successor to James Tolbert, deceased, nor upon any heir or beneficiary of the state of the said James Tolbert, deceased.

On July 2, 2007, Relator filed a Motion to Dismiss for Failure to Substitute Parties with the Circuit Court of Jasper County, Missouri, Division No. 3. On July 18, 2007, Counsel filed a Motion to have Betty Tolbert substituted as Plaintiff for the claims of James Tolbert.

On August 1, 2007, Respondent, relying on *Metropolitan St. Louis Sewer District v. Holloran*, 751 S.W.2d 749 (Mo. 1988), ruled that an attempted service of Suggestions of Death on the attorney of record for a deceased party was not effective service under Missouri Supreme Court Rule 43.01 because the attorney's agency for the deceased party terminates upon the deceased party's death.

**POINT RELIED ON**

Relator's request for an Order in Mandamus requiring Respondent to dismiss the claims of James Tolbert, deceased, should be denied because service of Relator's Suggestions of Death upon counsel for James Tolbert or upon counsel for the other individual Plaintiff in the underlying case, Betty Tolbert, in her individual capacity as a Co-Plaintiff and not as a personal representative of the estate of the decedent, was legally insufficient to commence the running of the ninety day limitation set forth in Missouri Supreme Court Rule 52.13(a).

## ARGUMENT

Relator's request for an Order in Mandamus requiring Respondent to dismiss the claims of James Tolbert, deceased, should be denied because service of Relator's Suggestions of Death upon counsel for James Tolbert or upon counsel for the other individual Plaintiff in the underlying case, Betty Tolbert, in her individual capacity as a Co-Plaintiff and not as a personal representative of the estate of the decedent, was legally insufficient to commence the running of the ninety day limitation set forth in Missouri Supreme Court Rule 52.13(a).

### *A. Standard of Review*

Statutory construction is a question of law, not fact; when the lower court rules on a question of law, it is not a matter of discretion. *State v. Ruch*, 926 S.W.2d 937, 938 (Mo.App. W.D. 1996). The judgment of the trial court will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. Banc 1976). Because the Respondent based his August 1, 2007 decision on an interpretation of case law and not a statute, the Standard of Review cited by Relator in their brief is not applicable. Instead, the August 1, 2007 decision by Respondent should be afforded deference by this Honorable Court.

### ***B. Relevant Facts***

On or after March 29, 2007, Relator filed its Suggestions of Death and served them upon the deceased's counsel of record. At the time of the filings of Relator's Suggestions of Death and Relator's Motion to Dismiss, no administration nor other probate proceedings had yet been commenced upon the state of James Tolbert, and no person had yet been appointed administrator, executor, or personal representative of the estate of James Tolbert.

Betty Tolbert was later appointed as personal representative of the estate of James Tolbert in the State of Oklahoma. At no point in time did Relator serve Suggestions of Death Betty Tolbert in her capacity as personal representative of the estate of James Tolbert.

### **C. Argument**

As shown below, the mailing of the Relator's Suggestions of Death to counsel for James Tolbert or upon counsel for the other individual Plaintiff in the case, Betty Tolbert, in her individual capacity as a Co-Plaintiff and not as a personal representative of the estate of the decedent, was legally insufficient to commence the running of the ninety day limitation set forth in Missouri Supreme Court Rule 52.13(a) because:

1. The holding in *Holloran* is controlling;
2. Service upon Betty Tolbert in her individual capacity did not comply with Rules 52.13 and 43.01;
3. Supreme Court Rule 4-4.2 would not have barred proper service;

4. Dismissal should not be granted.

As a result, the claims of James Tolbert, deceased, should be allowed to proceed and Relator's request for a permanent Alternative Writ of Mandamus be denied.

### **1. The Holding in *Holloran* is Controlling**

While the Relator attempts to argue that *Holloran* is factually distinguishable from the case at bar, the holding of *Holloran* is applicable here. Relator served Suggestions of Death upon the deceased's attorney, who also happened to represent Betty Tolbert. There is no arguing that counsel for James Tolbert could receive service on his behalf, as an attorney's authority to receive service terminates with the death of their client. *Metropolitan St. Louis Sewer District v. Holloran*, 751 S.W.2d 749 at 751. While Betty Tolbert may not dispute that she had actual knowledge of the filing of Suggestions of Death by service on her attorneys, one of the fundamental concepts to be extracted from holding in *Holloran* is that "service is an essential part of the filing under Missouri Supreme Court Rule 52.13(a)." *Id.*

The Missouri Court of Appeals for the Eastern District has held that in all proceedings against the state of a deceased person, the administrator or executor is an indispensable party. *See Steiner v. Vatterott*, 973 S.W.2d 191 (Mo.App. E.D. 1998) and *Estate of Munzert*, 887 S.W.2d 764 (Mo.App. E.D. 1994). This same Court has also held that failure to join an indispensable party is fundamental and jurisdictional. *In re Estate of Ripley v. Mortgage One Corp.*, 16 S.W.3d 593

(Mo.App. E.D. 1999). Mailing of Relator's Suggestions of Death to counsel for James Tolbert or upon counsel for the other individual Plaintiff in the underlying case, Betty Tolbert, in her individual capacity as a Co-Plaintiff and not as a personal representative of the estate of the decedent not only failed to join an indispensable party, but was legally insufficient to commence the running of the ninety day limitation set forth in Rule 52.13(a).

Relator attempts to put forth a "slippery slope" analogy in support of their argument. On page 14 of their brief, Relator argues that:

"taken to its logical end, Plaintiffs' argument would require parties to determine if a personal representative had been appointed; if not, defendants would have to be at the mercy of plaintiffs to appoint same and only after plaintiffs had appointed a personal representative could service of suggestions of death be effected."

Counsel for Plaintiff Betty Tolbert is by no means arguing that a Defendant should have to wait in perpetuity for a Plaintiff to appoint a personal representative. As the parties who are bringing suit, it certainly would not benefit the Plaintiff to delay the litigation, as memories fade, witnesses may die, etc.

Counsel for a Defendant in such a position would not be without a remedy. They could file a Motion with the Court requiring a Plaintiff to appoint a personal representative in accordance with Rule 52.13(a) so that the progress of any such litigation would not be impeded. Irrespective of this, case law in Missouri has held that an attorney's agency for a party ceases upon that person's death and in all proceedings against the estate of a deceased person, the administrator or executor is an indispensable party. By failing to serve Suggestions of Death upon

a personal representative of the estate of James Tolbert, Relator's actions were legally insufficient.

**2. Service Upon Betty Tolbert in Her Individual Capacity Did Not Comply with Rules 52.13 and 43.01**

Missouri Supreme Court Rule 52.13(a) states in relevant part that, "Suggestion of death may be made by any party or person in interest by the service of a statement of the fact of the death as provided herein for the service of a motion. As was previously mentioned, in all proceedings against the estate of a deceased person, the administrator or executor is an indispensable party. Relator should have served the Suggestions of Death upon a personal representative of James Tolbert's estate, being that the estate is an indispensable party. At the time the Suggestions of Death were served, Betty Tolbert had not yet been appointed as personal representative of James Tolbert's estate. James Tolbert's attorney's authority to receive service on his behalf terminated upon his death. With respect to Rule 43.01, section (c) of this Rule sets forth the proper procedure Relator should have followed in effectuating service upon Betty Tolbert.

**3. Supreme Court Rule 4-4.2 Would Not Have Barred Proper Service**

Prior its amendment, which became effective July 1, 2007, Missouri Supreme Court Rule 4-4.2 stated that: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, *unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.*

Under the language of this rule, counsel for Relator could have contacted counsel for Betty Tolbert to inquire as to when or if a personal representative had been appointed for the estate of James Tolbert. Furthermore, counsel could have sought an order from the court regarding appointment of a personal representative of James Tolbert's estate so that service of the Suggestions of Death could be effectuated.

Comment Number 4 to Rule 4-4.2 states that: "Rule 4-4.2 does not prohibit communication with a represented, or an employee or agent of such a person, concerning matters outside the representation." Any questions pertaining to appointment of a personal representative of the estate of James Tolbert would concern questions outside the scope of representation, as the underlying cause of action pertains to medical malpractice and not the estate of James Tolbert. Accordingly, this Court should allow Betty Tolbert to proceed as personal representative of her husband's estate against Relator for alleged medical negligence and deny Relator's request for a Permanent Order in Mandamus.

#### **4. Dismissal Should Not Be Granted**

The mailing of the Relator's Suggestions of Death to counsel for James Tolbert or upon counsel for the other individual Plaintiff in the underlying case, Betty Tolbert, in her individual capacity as a Co-Plaintiff and not as a personal representative of the estate of the decedent, was legally insufficient to commence the running of the ninety day limitation set forth in Rule 52.13(a).

When the Missouri Supreme Court interpreted Rule 52.13 in *Metropolitan St. Louis Sewer District v. Holloran*, one of the caveats in the decision was that *service was an essential part under the rule*. Here, Relator failed to go through the proper channels in effectuating service. Furthermore, Respondent's Order overruling Relator's Motion to Dismiss did not violate well-established case law, as Courts in Missouri have set forth the requirements pertaining to proceedings against the estate of a deceased person as well as service under Rule 52.13.

**D. Conclusion**

Counsel for Plaintiff Betty Tolbert respectfully request that this Court allow the medical negligence action to proceed and to deny Relator's request for this Court to issue a permanent Writ of Mandamus.

Respectfully submitted,

McDONALD, HOSMER, KING & ROYCE

By: \_\_\_\_\_/s/\_\_\_\_\_

William H. McDonald, MO Bar #21967  
300 S. Jefferson, Ste. 600  
P.O. Box 1245  
Springfield, MO 65801-1245

Jot Hartley, OK Bar #3947  
177 W. Delaware, P.O. Box 553  
Vinita, Oklahoma 74301-0553  
918/256-2100 FAX 918/256-2121

*Attorneys for Plaintiff Betty Tolbert*

McDONALD, HOSMER, KING & ROYCE, P.C.  
300 S. Jefferson, Suite 600  
P.O. Box 1245  
Springfield, MO 65806  
Telephone: (417) 869-0581  
Facsimile: (417) 831-7852  
e-mail: [admin@mhkr.com](mailto:admin@mhkr.com)

**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 2,846 words, excluding the cover, this certification and the appendix as determined by Microsoft Word software; and
2. That the 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 2<sup>nd</sup> day of January, 2008, to:

**Joel Block**, 242 S. National Avenue, Springfield, MO 65802

McDONALD, HOSMER, KING & ROYCE

By: \_\_\_\_\_/s/\_\_\_\_\_  
William H. McDonald, MO Bar #21967  
300 S. Jefferson, Ste. 600  
P.O. Box 1245  
Springfield, MO 65801-1245

Jot Hartley, OK Bar #3947  
177 W. Delaware, P.O. Box 553  
Vinita, Oklahoma 74301-0553  
918/256-2100 FAX 918/256-2121

*Attorneys for Plaintiff Betty Tolbert*