

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. 88266

JOE BOB LAKE, an individual, and JOE BOB LAKE, as personal representative of the
Estate of Julia K. Lake,

Appellant,

vs.

SHARON E. PROHASKA, M.D.,

Respondent.

RESPONDENT SHARON E. PROHASKA, M.D.'S SUBSTITUTE BRIEF
PURSUANT TO MO. R. CIV. P. 83.08(b)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... iii

STATEMENT OF FACTS..... 1

ARGUMENT..... 3

I. Introduction 3

II. Appellant’s substitution attempts were improper and untimely..... 4

 A. Factual overview of the motions at issue 4

 B. Appellant must follow the rules 5

 C. Appellant’s August 8, 2006 motion to substitute Ms. Grossman 6

 1. The August 8, 2006 motion asked the Missouri Court of Appeals to exercise its jurisdiction outside Missouri..... 6

 2. Appellant improperly served the August 8, 2006 motion..... 7

 D. Appellant’s November 22, 2006 motion for rehearing or transfer..... 8

 1. The November 22, 2006 motion was untimely 8

 2. The November 22, 2006 motion was improperly served..... 9

 3. Appellant’s untimely and improperly served November 22, 2006 motion cannot “relate back” to his substantively improper and defectively served August 8, 2006 motion..... 10

 (a) The plain language and clear intent of Mo. R. Civ. P. 52.13(a)(1) requires proper service of a proper motion for substitution 10

(b)	Appellant’s “relation-back” argument has been flatly rejected in analogous situations.....	13
(c)	Missouri courts cannot extend the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1).....	14
(d)	Mo. R. Civ. P. 55.33(c).....	14
(e)	Mo. R. Civ. P. 41.03	15
(f)	Conclusion	15
E.	Excusable neglect is no excuse under Mo. R. Civ. P. 52.13(a)(1).....	15
F.	Mo. Rev. Stat. § 507.100 does not apply	16
G.	Conclusion.....	16
III.	Respondent’s counsel properly opposed Appellant’s improper and untimely substitution attempts.....	17
	CONCLUSION	19
	CERTIFICATE OF COMPLIANCE	21
	CERTIFICATE OF SERVICE.....	22

TABLE OF AUTHORITIES

CASES

Clark v. Fitzpatrick

801 S.W.2d 426 (Mo. Ct. App. 1990) 18

Gardner v. Mercantile Bank of Memphis

764 S.W.2d 166, 168-69 (Mo. Ct. App. 1989)..... 16

Gillespie v. Rice

WD No. 65751, 2006 WL 3770774 at *4 (Mo. Ct. App. Dec. 2006)..... 5, 15

Holmes v. Arbeitman

857 S.W.2d 442, 443 (Mo. Ct. App. 1993) 5, 8, 11, 15, 18

In the Estate of Livingston

627 S.W.2d 673, 678 n.3 (Mo. Ct. App. 1982) 7

Lunde v. Scardacci

175 S.W.3d 676, 682 (Mo. Ct. App. 2005) 13, 14

Metropolitan St. Louis Sewer Dist. v. Holloran

751 S.W.2d 749, 751 (Mo. 1988)..... 8

New York Life Ins. Co. v. Head

234 U.S. 149, 161 (1914) 7

Richie v. Laususe

950 S.W.2d 511 (Mo. Ct. App. 1997) 11, 18

State ex rel. Illinois Farmers Ins. Co. v. Gallagher

811 S.W.2d 353, 354 (Mo. 1991)..... 8

State ex rel. Mercantile Nat’l Bank at Dallas v. Rooney

402 S.W.2d 354, 357 (Mo. 1966)..... 7, 10

State Farm Mut. Auto. Ins. Co. v. Campbell

538 U.S. 408, 421 (2003) 7

State v. Ivory

609 S.W.2d 217, 220 (Mo. Ct. App 1980) 7

State v. Reese

920 S.W.2d 94, 95 (Mo. 1996)..... 5

Williams v. Patterson

218 S.W.2d 156, 170 (Mo. Ct. App. 1949) 18

Wormington v. City of Monett

198 S.W.2d 536, 538 (Mo. Ct. App. 1946) 8, 17

Wormington v. City of Monett

204 S.W.2d 264 (Mo. 1947)..... 9

MISSOURI RULES OF CIVIL PROCEDURE

Mo. R. Civ. P. 41.03 15

Mo. R. Civ. P. 43.01 5, 12

Mo. R. Civ. P. 44.01(b) 6, 8, 15

Mo. R. Civ. P. 52.13(a)(1)..... 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19

Mo. R. Civ. P. 54.01 8

Mo. R. Civ. P. 54.02 8

Mo. R. Civ. P. 54.13.....	8
Mo. R. Civ. P. 54.14.....	8
Mo. R. Civ. P. 55.33(c).....	14
Mo. R. Civ. P. 74.05(d)	13
Mo. R. Civ. P. 84.04(f).....	1

STATUTES

Mo. Rev. Stat. § 507.100.....	3, 16
Mo. Rev. Stat. § 507.100.1(3)	16

PRACTICE MATERIAL

15 Mo. Pract. § 52.13-2.....	16
5C Mo. Pract. § 1735.....	7

STATEMENT OF FACTS

Appellant opted not to file a substitute brief with this Court. Therefore, pursuant to Mo. R. Civ. P. 84.04(f), Respondent will identify the facts relevant to the **only issue** before this Court, namely, whether Chief Judge Howard's November 7, 2006 dismissal of the underlying appeal due to Appellant's failure to comply with Mo. R. Civ. P. 52.13(a)(1) was proper. The relevant facts are as follows:

1. The sole Respondent in the underlying appeal, Dr. Sharon Prohaska, died on April 29, 2006.

2. Respondent's counsel filed the Suggestion of Death on May 12, 2006. See Suggestion of Death, Appendix at A1-2.

3. On August 8, 2006, Appellant moved to substitute an out-of-state executor of Respondent's estate, Ms. Susan Grossman. See Motion for Substitution, Appendix at A3-9. Ms. Grossman is a Virginia resident. Id. at A4, 7, 9. Respondent was a Kansas resident, and her estate is being administered in Kansas. Id. at A6. Appellant served his August 8, 2006 motion by mailing and faxing a copy of the motion to Respondent's counsel and Mr. Dick Woods, the attorney representing Respondent's estate in the Johnson County, Kansas probate proceeding. Id. at A4-5.

4. On August 14, 2006, Respondent opposed Appellant's motion for substitution and moved to dismiss the appeal because the Missouri Court of Appeals had no jurisdiction over Ms. Grossman.

5. On August 21, 2006, Appellant filed a Motion for Leave to Have a New Personal Representative Appointed. Appellant's August 21, 2006 motion did not

request a particular person or entity be substituted; instead, it asserted that other potential substitute Respondents may exist. See November 7, 2006 Order at 2, Appendix at A10-11.

6. On August 28, 2006, Respondent opposed Appellant's August 21, 2006 Motion for Leave to Have a New Personal Representative Appointed and, again, moved to dismiss the appeal.

7. On November 7, 2006, Chief Judge Howard dismissed the appeal because Appellant failed to serve a proper motion for substitution within 90 days, as required by Mo. R. Civ. P. 52.13(a)(1). See November 7, 2006 Order, Appendix at A10-11.

8. On November 22, 2006, Appellant filed a Motion for Rehearing, and, in the Alternative, Transfer to the Supreme Court. This motion, although not styled as a motion for substitution, identified Mr. Frank McCollum ("Mr. McCollum") as potential substitute Respondent. Notably, the November 22, 2006 motion was not served on Mr. McCollum. See Certificate of Service of Appellant's November 22, 2006 motion, Appendix at A13-14.

9. The same day, on November 22, 2006, the clerk of the Missouri Court of Appeals entered a Mandate stating "it is ordered that the appeal be dismissed and that Respondent recover against the Appellant the costs and charges herein expended on appeal and have execution therefor." See November 22, 2006 Mandate, Appendix at A15.

10. On January 3, 2007, the Missouri Court of Appeals denied Appellant's November 22, 2006 Motion for Rehearing, and, in the Alternative, Transfer to the Supreme Court. See January 3, 2007 Order, Appendix at A16.

11. Over 330 days have now passed since the Suggestion of Death was filed, and no Respondent has been substituted.

ARGUMENT

I. INTRODUCTION

Since Appellant elected not to file a substitute brief, Respondent's brief does not "contain headings identifying the points relied upon contained in the appellant's brief to which each such argument responds." See Mo. R. Civ. P. 84.04(f). However, based on the pleadings filed by Appellant with this Court and the Missouri Court of Appeals, Appellant raises four issues in an effort to avoid dismissal of his appeal: (1) whether Appellant's request to substitute Mr. McCollum in a motion for rehearing or transfer on November 22, 2006 – over **180 days** after the Suggestion of Death was filed – was proper and timely; (2) whether, due to Respondent's death, her counsel had authority to oppose Appellant's improper and untimely attempts to substitute a Respondent; (3) whether Appellant's failure to comply with Mo. R. Civ. P. 52.13(a)(1) should be pardoned due to excusable neglect; and (4) whether Mo. Rev. Stat. § 507.100 permits Appellant's untimely request to substitute Mr. McCollum. Each of Appellant's arguments are flawed, contrary to Missouri law, and will be addressed in turn.

II. APPELLANT’S SUBSTITUTION ATTEMPTS WERE IMPROPER AND UNTIMELY

A. Factual overview of the motions at issue

Respondent’s counsel filed the Suggestion of Death on May 12, 2006. See Appendix at A1. On August 8, 2006, Appellant moved to substitute Ms. Grossman. Id. at A3. As will be discussed below, the August 8, 2006 motion requested substitution of an improper party, as it asked the Missouri Court of Appeals to exercise its jurisdiction extraterritorially. Additionally, the August 8, 2006 motion was defectively served. Id. at A4-5. Appellant’s August 8, 2006 motion, therefore, was properly denied by the Missouri Court of Appeals. Id. at A10-11.

Appellant’s next motion, filed on August 21, 2006, was not styled as a motion for substitution, nor did it “ask that a particular person or entity be substituted.” Id. at A11. As such, Appellant’s August 21, 2006 motion cannot be construed as a motion for substitution pursuant to Mo. R. Civ. P. 52.13(a)(1) and, therefore, is irrelevant to the issues herein.

On November 22, 2006, and after the Missouri Court of Appeals had dismissed his appeal, Appellant filed a Motion for Rehearing or, alternatively, Transfer to the Missouri Supreme Court. Although not styled as a motion for substitution, Appellant asserted in his November 22, 2006 motion that Mr. McCollum could be substituted as Respondent. Notably, even if Mr. McCollum was a proper substitute Respondent, the November 22, 2006 motion was filed and served well outside the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). Additionally, the November 22, 2006 motion was

not served on Mr. McCollum (by any method of service) and, therefore, did not comply with the strict service requirements of Mo. R. Civ. P. 52.13(a)(1). Id. at A13-14. Thus, to date, Appellant has not served any motion that complies with the service requirements of Mo. R. Civ. P. 52.13(a)(1).

B. Appellant must follow the rules

Appellate courts “have jurisdiction to render judgments for or against viable entities only. A dead person is by definition not a viable entity.” Holmes v. Arbeitman, 857 S.W.2d 442, 443 (Mo. Ct. App. 1993). As such, appellate courts have “no power to issue an opinion on the merits without substitution for a deceased party.” State v. Reese, 920 S.W.2d 94, 95 (Mo. 1996). If the “rule-based requirements for substitution have not been met,” the appeal must be dismissed. Gillespie v. Rice, WD No. 65751, 2006 WL 3770774 at *4 (Mo. Ct. App. 2006); see also Mo. R. Civ. P. 52.13(a)(1). Proper substitution of parties, therefore, is “required for the appellate court to retain jurisdiction because it lacks power to substitute outside the scope of authorizing law.” Id.

Here, the “rule-based requirements” concerning substitution are found in Mo. R. Civ. P. 52.13(a)(1). Under the rule, a court may, “upon motion, order substitution of the **proper** parties.” (emphasis added). See Mo. R. Civ. P. 52.13(a)(1). Mo. R. Civ. P. 52.13(a)(1) contains specific service requirements and requires that motions to substitute “be served upon the parties as provided in Rule 43.01, and upon persons not parties in the manner provided for the service of a summons.” Id. “Unless a motion for substitution is served within 90 days after a suggestion of death is filed,” a court must dismiss the appeal “as to the deceased party without prejudice.” Id. Importantly, no

Missouri court has authority “to extend the time for taking any action under rule[] 52.13 [.]” See Mo. R. Civ. P. 44.01(b).

Appellant did not follow these rules, and Mo. R. Civ. P. 52.13(a)(1) in particular. Appellant’s only motion that, arguably, requested substitution of a proper party was filed on November 22, 2006 – over **180 days** after the Suggestion of Death was filed and well outside the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). In addition to being late, Appellant did not serve his November 22, 2006 motion on the requested substitute respondent (a non-party), as required by Mo. R. Civ. P. 52.13(a)(1). Currently, over **330 days** have passed since Respondent’s counsel filed the Suggestion of Death, and no Respondent has been substituted. Under these circumstances, no Missouri court has jurisdiction to entertain the underlying appeal, and Chief Judge Howard’s November 7, 2006 dismissal was proper and required. See Mo. R. Civ. P. 52.13(a)(1) and 44.01(b).

C. Appellant’s August 8, 2006 motion to substitute Ms. Grossman

Appellant’s August 8, 2006 motion requested substitution of an improper party, was defectively served, and was properly denied by the Missouri Court of Appeals. Accordingly, this motion did not secure the jurisdiction of the Missouri Court of Appeals pursuant to Mo. R. Civ. P. 52.13(a)(1).

1. The August 8, 2006 motion asked the Missouri Court of Appeals to exercise its jurisdiction outside Missouri

There is no question Appellant’s August 8, 2006 motion to substitute requested substitution of an improper party. Specifically, this motion asked the Missouri

Court of Appeals to substitute Ms. Grossman – a Virginia resident acting as executrix of a Kansas estate – as Respondent. See Appendix at A3-9. Missouri courts cannot operate extraterritorially. See State v. Ivory, 609 S.W.2d 217, 220 (Mo. Ct. App 1980); see also e.g., State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003) (citing New York Life Ins. Co. v. Head, 234 U.S. 149, 161 (1914) (stating “It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state[.]”). For this reason, a Missouri court cannot substitute a foreign executor for a deceased defendant. State ex rel. Mercantile Nat’l Bank at Dallas v. Rooney, 402 S.W.2d 354, 357 (Mo. 1966); In the Estate of Livingston, 627 S.W.2d 673, 678 n.3 (Mo. 1982); see also 5C Mo. Pract. § 1735 (stating “an action cannot be maintained against a personal representative in his representative capacity except in courts having territorial jurisdiction over the state of his appointment.”).

Accordingly, because Appellant’s August 8, 2006 motion asked the Missouri Court of Appeals to exercise its jurisdiction outside Missouri, it was properly denied by the Court of Appeals. See Appendix at A10 (stating “Missouri courts do not have authority to exercise jurisdiction over a foreign executor.”) (citing State ex rel. Mercantile Nat’l Bank at Dallas, 402 S.W.2d at 357).

2. Appellant improperly served the August 8, 2006 motion

Under Mo. R. Civ. P. 52.13(a)(1), motions to substitute “shall be served . . . upon persons not parties in the manner provided for service of a summons.” Appellant did not comply with the service requirements of Mo. R. Civ. P. 52.13(a)(1), as he simply faxed and mailed a copy of his August 8, 2006 motion to Ms. Grossman’s counsel. See

Appendix at A4-5. Instead, as directed by Mo. R. Civ. P. 52.13(a)(1), Appellant must serve Ms. Grossman, a non-party, “in the manner provided for service of summons[.]” This required Appellant to have a summons issued and delivered to Ms. Grossman. See Mo. R. Civ. P. 54.01, 54.02, 54.13, and 54.14.

This Court has emphasized the importance of proper service under Mo. R. Civ. P. 52.13(a)(1). See Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749, 751 (Mo. 1988). Moreover, if a party is not properly served, “the court is without authority to proceed.” State ex rel. Illinois Farmers Ins. Co. v. Gallagher, 811 S.W.2d 353, 354 (Mo. 1991). Thus, even if Ms. Grossman were a proper substitute Respondent, which she was not, Appellant’s failure to properly serve Ms. Grossman did nothing to secure the jurisdiction of the Missouri Court of Appeals.

D. Appellant’s November 22, 2006 motion for rehearing or transfer

Appellant’s November 22, 2006 motion was not styled as a motion for substitution. Moreover, although Appellant asserted in the November 22, 2006 motion that Mr. McCollum could be substituted as Respondent, he did not serve Mr. McCollum with the motion. Appellant’s November 22, 2006 motion was untimely, improperly served, and, like the August 8, 2006 motion, did not secure the jurisdiction of the court.

1. The November 22, 2006 motion was untimely

Missouri courts are unable to extend the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). See Mo. R. Civ. P. 44.01(b); see also Holmes, 857 S.W.2d at 443 (stating “[t]he time limitations contained in the Rule are in the nature of a statute of limitation.”) (internal quotes omitted). In fact, in Wormington v. City of Monett, 198

S.W.2d 536, 538 (Mo. Ct. App. 1946), aff'd 204 S.W.2d 264 (Mo. 1947), this Court agreed that, if the time for substitution has expired:

Any action this court would now take in the cause would be null and void. There cannot be a suit without two parties, a plaintiff and a defendant. The death of the plaintiff and **the failure to timely substitute his successors or representatives have robbed us of our jurisdiction to proceed with the case on the merits.**

Id. (emphasis added).

Based on this authority, it cannot be disputed that Appellant's November 22, 2006 motion was filed outside the 90 jurisdictional period established by Mo. R. Civ. P. 52.13(a)(1) – a period that cannot be extended by any Missouri court.¹

2. The November 22, 2006 motion was improperly served

As mentioned previously, Mo. R. Civ. P. 52.13(a)(1) has strict service requirements for non-parties. Although Appellant's November 22, 2006 motion requested substitution of Mr. McCollum, Appellant did not serve Mr. McCollum with the motion. See Appendix at A13-14. Thus, even if Appellant's November 22, 2006 motion were construed as a proper motion for substitution, Appellant's failure to properly serve the motion precludes compliance with Mo. R. Civ. P. 52.13(a)(1). Moreover, the failure

¹ The 90 day jurisdictional period expired on August 10, 2006.

to properly serve Mr. McCollum means that, to date, Appellant has not served a single motion that complies with the service requirements of Mo. R. Civ. P. 52.13(a)(1).

3. Appellant's untimely and improperly served November 22, 2006 motion cannot "relate back" to his substantively improper and defectively served August 8, 2006 motion

Whether it be for lack of jurisdiction over Ms. Grossman, or the failure to properly serve Ms. Grossman, Appellant's August 8, 2006 motion to substitute Ms. Grossman was properly denied. Indeed, Appellant does not dispute this point in the multiple briefs he filed with this Court and the Missouri Court of Appeals. Nevertheless, in a last-ditch effort to avoid dismissal, Appellant argues his untimely and defectively served November 22, 2006 motion should relate back to his equally improper August 8, 2006 motion. Appellant's argument is illogical, contrary to Missouri law, and must be rejected.

(a) The plain language and clear intent of Mo. R. Civ. P. 52.13(a)(1) requires proper service of a proper motion for substitution

Mo. R. Civ. P. 52.13(a)(1) cannot permit a party to serve a motion that requests substitution of a patently improper party. Under the rule, the court, "upon motion," may only substitute "**proper** parties." See Mo. R. Civ. P. 52.13(a)(1) (emphasis added). Clearly, a party that resides outside the jurisdiction of the court is not "proper," and any request to substitute such a party should be summarily denied. State ex rel. Mercantile Nat'l Bank at Dallas, 402 S.W.2d at 357. Accordingly, unless a party serves a

proper motion for substitution within the 90 jurisdictional period established by Mo. R. Civ. P. 52.13(a)(1), the case must be dismissed without prejudice, as directed by the rule.

To hold otherwise would defeat the purpose and obvious intent of Mo. R. Civ. P. 52.13(a)(1). Specifically, if the rule did not require service of a motion that requested substitution of a “proper” party, a party could move to substitute a clearly improper party (which could be virtually anyone), and a Missouri court would be powerless to dismiss the action under Mo. R. Civ. P. 52.13(a)(1) as long as the motion was served within 90 days. Clearly, such an absurd result cannot be envisioned by Mo. R. Civ. P. 52.13(a)(1). See also Holmes, 857 S.W.2d at 444 (noting that a purpose of Mo. R. Civ. P. 52.13(a)(1) is to prevent “a state of judicial impotence.”).²

Indeed, the requirement that a party timely file a “proper” motion for substitution is so obvious that it was not even discussed in Richie v. Laususe, 950 S.W.2d 511 (Mo. Ct. App. 1997), a case that has factual similarities to the case at bar. In Richie, the respondent timely filed a motion to substitute “in accord with Rule 52.13(a)(1)[.]” Id. at 512. Ultimately, however, the Missouri Court of Appeals concluded the party respondent moved to substitute was improper. Id. at 514. Thus, even though “neither side . . . raised the issue of whether [the] appeal [was] properly before [the] court,” the

² If the rule so allowed, one could envision a number of improper and frivolous motions to substitute. For example, a party could move to substitute a deceased or fictitious party and, if such motion were served within 90 days after the filing of a suggestion of death, a Missouri court would retain jurisdiction and have no ability to dismiss the case.

court concluded it was compelled to evaluate its jurisdiction *sua sponte*. Id. at 513. The court then cited Mo. R. Civ. P. 52.13(a)(1) for the proposition that, “[i]f a proper party is not substituted or joined, the action against the deceased party should be dismissed for lack of personal jurisdiction.” Id. at 514. Although respondent timely moved to substitute a party, the Missouri Court of Appeals dismissed the action because the proposed substitute respondent was improper and, therefore, the court “lacked jurisdiction[.]” Id. at 515. Notably, this Court denied transfer on September 30, 1997.

In similar fashion, Mo. R. Civ. P. 52.13(a)(1) necessarily requires **proper service** of a motion to substitute (i.e., service that complies with Mo. R. Civ. P. 43.01 or rules regarding “service of a summons”). The reason for this is simple: Mo. R. Civ. P. 52.13(a)(1) expressly requires courts to dismiss an action “[u]nless a motion for substitution is **served** within 90 days after a suggestion of death is filed[.]” (emphasis added). If proper service were not required, a party could serve a motion for substitution by any method and comply with the rule. Obviously, this cannot be the intent of Mo. R. Civ. P. 52.13(a)(1), especially since the propriety of dismissal is contingent on service of the motion to substitute.

In short, the plain language and clear intent of Mo. R. Civ. P. 52.13(a)(1) demonstrates that, unless a **proper motion** for substitution is **properly served** within 90 days after a suggestion of death is filed, Missouri courts lose jurisdiction over the matter. To construe Mo. R. Civ. P. 52.13(a)(1) in any other fashion would turn the rule on its head and defeat the clear intent and purpose of the rule. Accordingly, since Appellant’s August 8, 2006 motion to substitute was defectively served and substantively improper,

the motion cannot permit Appellant's subsequent and untimely November 22, 2006 request to substitute Mr. McCollum.

(b) Appellant's "relation-back" argument has been flatly rejected in analogous situations

In Lunde v. Scardacci, 175 S.W.3d 676, 682 (Mo. Ct. App. 2005), the Missouri Court of Appeals flatly rejected the relation-back "logic" employed by Appellant to save his appeal. In Lunde, defendant timely filed a motion to set aside default judgment pursuant to Mo. R. Civ. P. 74.05(d). Id. at 678. The motion, however, was overruled. Id. at 681. After the time for filing a motion to set aside default judgment had expired, defendant filed another motion to set aside default judgment – a motion which defendant argued "was timely . . . because it renewed or was directed at her original [timely] motion to set aside[.]" Id. at 682 (internal quotes omitted). Although the court found the subsequent motion cured the defects of the first motion, the court held the subsequent motion was untimely. Id. The court reasoned that, if it were to hold otherwise, defendant would have "infinite bites at the apple" to file a proper motion to set aside the default judgment – a result that was "contrary to the time limits of Rule 74.05(d) and to the spirit of the rule in promoting timeliness in arriving at a final conclusion." Id.

The situation here is almost identical to the situation in Lunde. Specifically, Appellant argues his timely, but patently defective and improperly served, August 8, 2006 motion to substitute permits subsequent "bites at the apple." Id. As the Lunde court aptly noted, however, Appellant should not get multiple "bites at the apple"

because the “time limits” and “spirit” of Mo. R. Civ. P. 52.13(a)(1) clearly indicate that, to comply with the rule, motions to substitute must be timely and proper.

(c) Missouri courts cannot extend the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1)

The authority for this proposition is well-accepted and has been discussed in Section D1, supra. That being said, the fact that the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1) is absolute and cannot be extended belies Appellant’s assertion that his request to substitute Mr. McCollum – a request which occurred over **180 days** after the Suggestion of Death was filed – is proper and timely. To the contrary, 90 days means 90 days, and there is no authority suggesting that a motion filed over 180 days after a suggestion of death is filed is timely, proper, or can relate back to a previously filed, improper motion.

(d) Mo. R. Civ. P. 55.33(c)

Mo. R. Civ. P. 55.33(c) governs relation-back of amendments to add a new party. Under the rule, an amendment to add a new party relates back **only if** the amendment is filed “within the period provided by law for commencing the action against the party[.]” See Mo. R. Civ. P. 55.33(c). In other words, if the amendment is not filed “within applicable time period prescribed by law,” it cannot relate back. See also e.g., Lunde, 175 S.W.3d at 682.

Here, Appellant’s November 22, 2006 motion was not filed “within applicable time period prescribed by law,” namely, the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). As such, Appellant’s November 22, 2006 motion cannot

relate back to his August 8, 2006 motion. That is especially true where, as here, the August 8, 2006 was improperly served and requested substitution of an improper party.

(e) Mo. R. Civ. P. 41.03

Mo. R. Civ. P. 41.03 requires courts to interpret the Missouri Rules of Civil Procedure in a fashion that “secure[s] the just, speedy, and inexpensive determination of every action.” According to Appellant, he can serve a wholly improper motion for substitution and, thereafter, wait as long as he wants to substitute a proper Respondent. Such an interpretation of Mo. R. Civ. P. 52.13(a)(1) would not “secure the just, speedy, and inexpensive determination of every action.” To the contrary, it would stand Mo. R. Civ. P. 41.01 and 52.13(a)(1) on their head and result in the state of “judicial impotence” the Missouri Court of Appeals in Holmes, 857 S.W.2d at 444, sought to avoid.

(f) Conclusion

There is no logical or legal support for Appellant’s assertion that his untimely and improperly served November 22, 2006 motion for rehearing or transfer can “relate-back” to an equally improper motion filed and served on August 8, 2006.

E. Excusable neglect is no excuse under Mo. R. Civ. P. 52.13(a)(1)

In his motion for transfer, Appellant repeatedly argues he was “misled” into thinking Ms. Grossman’s attorney would “accept service of process on behalf of Ms. Grossman[.]” See Motion for Transfer at 1, 3. In addition to being untrue and irrelevant, excusable neglect does not excuse failure to comply with Mo. R. Civ. P. 52.13(a)(1). See Mo. R. Civ. P. 44.01(b); Gillespie, 2006 WL 3770774 at * 1 (stating “[t]his court has no discretion to allow late motions for substitution after a party dies,

even when due to excusable neglect of a party.”). Thus, even if Appellant’s assertions were correct, which they are not, the fact that Appellant’s lawyer may have thought Ms. Grossman’s lawyer would “accept service of process” of his August 8, 2006 motion for substitution does not excuse Appellant’s failure to comply with Mo. R. Civ. P. 52.13(a)(1).

F. Mo. Rev. Stat. § 507.100 does not apply

Appellant also argues that Mo. Rev. Stat. § 507.100 permits “attempted replacement of [a] personal representative” within nine months and, therefore, his attempted substitution was timely. See Motion for Transfer at 9. Simply put, Mo. Rev. Stat. § 507.100 does not apply, and Mo. R. Civ. P. 52.13(a)(1) is the controlling authority. Gardner v. Mercantile Bank of Memphis, 764 S.W.2d 166, 168-69 (Mo. Ct. App. 1989) (stating “Rule 52.13(a)(1) is obviously intended to shorten the time period of nine months under . . . § 507.100.1[.]”); see also 15 Mo. Pract. § 52.13-2 (explaining Mo. Rev. Stat. § 507.100.1(3) applies if “no suggestion of death is filed”). Accordingly, nothing in Mo. Rev. Stat. § 507.100. permits Appellant to file a motion for substitution outside the 90 day deadline in Mo. R. Civ. P. 52.13(a)(1).

G. Conclusion

Appellant did not comply with Mo. R. Civ. P. 52.13(a)(1). By filing the Suggestion of Death on May 12, 2006, Respondent’s counsel established a deadline of August 10, 2006 for Appellant to properly serve a proper motion for substitution. Although Appellant served a motion for substitution on August 8, 2006, this motion (1) was defectively served, (2) asked the Missouri Court of Appeals to operate

extraterritorially, and (3) was properly denied by Chief Judge Howard. Even if Appellant's November 22, 2006 motion is construed as a motion for substitution, this motion (1) was filed and served outside the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1), (2) was improperly served, and (3) does not relate back to the patently defective August 8, 2006 motion.

In conclusion, at the time Chief Judge Howard dismissed Appellant's appeal, the Suggestion of Death had been on file for nearly six months, and no substitute Respondent had been named. Accordingly, Chief Judge Howard correctly observed the Missouri Court of Appeals had been "robbed" of jurisdiction to entertain the appeal and dismissed the action. Wormington, 198 S.W.2d at 538. Chief Judge Howard's November 7, 2006 Order should be reinstated.

III. RESPONDENT'S COUNSEL PROPERLY OPPOSED APPELLANT'S IMPROPER AND UNTIMELY SUBSTITUTION ATTEMPTS

Appellant argues that Respondent's counsel could not oppose his substitution attempts. This argument (1) makes little sense, (2) is contrary to law, and (3) is irrelevant because the Missouri Court of Appeals is obligated to *sua sponte* evaluate its jurisdiction.

First, Respondent's counsel represented her throughout the five-year lawsuit in the Circuit Court of Jackson County, Missouri and until her death on April 29, 2006. According to Appellant, however, Respondent's counsel may not, after filing the Suggestion of Death, oppose Appellant's improper and untimely substitution attempts. This makes no sense.

Appellant’s position is also contrary to law. Indeed, Holmes, 857 S.W.2d at 444, made clear a lawyer is a “person in interest” following the death of a client. See also Mo. R. Civ. P. 52.13(a)(1) (permitting filings by a “person in interest” and “representative of the deceased party”). Holmes also observed the “logic” of permitting former counsel to file certain pleadings following the death of a client. Id. The same is true here, as Respondent’s attorneys are clearly “persons in interest” and the “most logical” persons to oppose Appellant’s attempts at substitution. See also Williams v. Patterson, 218 S.W.2d 156, 170 (Mo. Ct. App. 1949) (stating “the death of the client does not terminate the relation or revoke the authority of the attorney . . . where the attorney is specifically retained to conduct the case to judgment or conclusion[.]”).

Perhaps more importantly, the Missouri Court of Appeals was obligated to dismiss the underlying appeal with **or without** any motion to dismiss filed on behalf of Respondent. The reason for this is simple: compliance with Mo. R. Civ. P. 52.13(a)(1) is a jurisdictional requirement, and the Court of Appeals is obligated to *sua sponte* evaluate its jurisdiction. Richie, 950 S.W.2d at 513; Clark v. Fitzpatrick, 801 S.W.2d 426 (Mo. Ct. App. 1990). Accordingly, since the Court of Appeals dismissed the underlying appeal for want of jurisdiction, dismissal was required even if Respondent’s counsel had not opposed Appellant’s improper and untimely substitution attempts.

Thus, Appellant’s argument that Respondent’s counsel could not oppose Appellant’s untimely and improper substitution attempts is incorrect, irrelevant, and quickly discarded.

CONCLUSION

Appellant lost the case at the trial court level because he could not make a submissible medical malpractice case against Respondent. Thereafter, the Missouri Court of Appeals dismissed Appellant's appeal because he failed to comply with Mo. R. Civ. P. 52.13(a)(1). Most recently, after this Court granted transfer, Appellant elected not to file substitute briefing with this Court. Simply put, Appellant has run out of chances.

In summary, Appellant's August 8, 2006 motion to substitute was properly denied by the Missouri Court of Appeals, as the motion requested substitution of an improper party and was defectively served. Even if Appellant's November 22, 2006 motion were construed as a motion for substitution, this motion was filed and served outside the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1) and, like the August 8, 2006 motion, was improperly served. Accordingly, the Court of Appeals lost jurisdiction over the case, and the appeal was properly dismissed. Chief Judge Howard's November 7, 2006 Order should be reinstated.

WHEREFORE, counsel for Respondent Sharon E. Prohaska respectfully request Chief Judge Howard's November 7, 2006 Order be reinstated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word and contains 5,455 words and 494 lines, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3-1/2 inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk. Further, the brief includes the information required by Rule 55.03 of the Missouri Rules of Civil Procedure.

Michael J. Kleffner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was served via hand delivery this 27th day of April, 2007, to:

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