

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 BRIEF

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Oral Argument Requested

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JURISDICTIONAL STATEMENT

These writ proceedings arise from Respondent's denial of Relator's Motion to Dismiss for Failure to Substitute Parties. In response, Relator filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Southern District on August 10, 2007—case no. SD28653. The Southern District entered its Preliminary Order on September 4, 2007, in favor of Relator. Respondent waived service of the Preliminary Order. On September 19, 2007, the Southern District entered a subsequent Order denying Relator's Petition; no opinion was issued. Relator then filed a Petition for Writ of Mandamus in this Court on October 1, 2007.

This action does not involve the construction of the United States Constitution or the Missouri Constitution or the validity of a treaty or statute of the United States, or any authority exercised under the laws of the United States, the construction of the Revenue Laws of this state, title to any office under this state or a criminal offense involving a sentence of death or imprisonment. Jurisdiction in this Court is proper because on October 30, 2007, this Court issued an Alternative Writ of Mandamus, pursuant to Supreme Court Rule 84.

STATEMENT OF FACTS

The facts giving rise to this proceeding are undisputed: Relator filed suggestions of death for Plaintiff James Tolbert on March 30, 2007, Plaintiffs¹ did not file their motion for substitution until 110 days later and Respondent denied Relator's resulting motion to dismiss based on the 90-day requirement in Rule 52.13(a) (A1-A9).

The underlying case is a medical negligence action filed by Plaintiffs James and Betty Tolbert, husband and wife, in Jasper County Circuit Court on February 26, 2003. Plaintiffs alleged that Relator negligently performed orthopedic surgery on James Tolbert in March 2001 and follow-up care; Betty Tolbert claimed loss of consortium. This case is currently set for a five-day jury trial starting on January 14, 2008. James and Betty Tolbert remained husband and wife until James Tolbert passed away on December 8, 2006.

On March 30, 2007, Relator filed suggestions of death, serving them on Plaintiffs' counsel of record via U.S. Mail (A1). On July 2, 2007, Relator filed a Motion to Dismiss for Failure to Substitute Parties (A2-A3). On July 18, 2007, 110 days after suggestions of death were filed, Plaintiffs filed a Motion for Substitution, seeking substitution of Betty Tolbert for her deceased husband; no personal representative was appointed at that time (A4-A7).

¹ Plaintiffs plural is used because the caption shows two Plaintiffs; counsel makes no admission regarding the parties by using Plaintiffs in the plural sense.

On August 1, 2007, Respondent overruled Relator's Motion to Dismiss and held that Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749 (Mo. 1988), controlled and that service of suggestions of death on James Tolbert's attorneys of record was insufficient because James Tolbert was deceased at the time of service (A6-A7). The parties do not dispute that these same attorneys have also continuously represented Betty Tolbert since the inception of this suit in February 2003.

Relator then filed a Petition for Writ of Mandamus in the Missouri Court of Appeals, Southern District on August 10, 2007, case no. SD28653. The Southern District entered its Preliminary Order on September 4, 2007, in favor of Relator. Respondent waived service of the Preliminary Order. On September 19, 2007, the Southern District entered a subsequent Order denying Relator's Petition; no opinion was issued.

In the meantime, on August 17, 2007, Plaintiffs filed letters of administration in Jasper County Circuit Court to support their motion for substitution. Respondent then granted Plaintiffs' motion for substitution and permitted Betty Tolbert to be substituted for her deceased husband.

Relator filed his Petition for Writ of Mandamus in this Court on October 1, 2007. This Court issued its Alternative Writ of Mandamus on October 30, 2007 and Respondent filed his required answer on November 28, 2007. This brief follows pursuant to Rule 84.24(i).

POINT RELIED ON

Relator is entitled to an Order in Mandamus requiring Respondent to dismiss the claims of James Tolbert, deceased, because Supreme Court Rule 52.13(a) requires a motion for substitution to be filed within 90 days of the filing of suggestions of death in that Plaintiffs did not file a motion for substitution until 110 days after the filing of suggestions of death.

Bradley v. Weber, 657 S.W.2d 286 (Mo. App. E.D. 1983)

Gillespie v. Rice, 224 S.W.3d 608 (Mo. App. W.D. 2006)

State v. Reese, 920 S.W.2d 94 (Mo. banc 1996)

Supreme Court Rule 52.13

Supreme Court Rule 43.01

Supreme Court Rule 4-4.2

ARGUMENT

Relator is entitled to an Order in Mandamus requiring Respondent to dismiss the claims of James Tolbert, deceased, because Supreme Court Rule 52.13(a) requires a motion for substitution to be filed within 90 days of the filing of suggestions of death in that Plaintiffs did not file a motion for substitution until 110 days after the filing of suggestions of death.

The parties do not dispute that Relator filed suggestions of death on March 30, 2007, which were received by Plaintiffs' counsel of record. Nor is there a dispute that Plaintiffs did not file their motion for substitution until 110 days later or that Rule 52.13(a) requires this motion for substitution to be filed within 90 days of the filing of suggestions of death: "Unless a motion for substitution is served within 90 days after a suggestion of death is filed, the action shall be dismissed as to the deceased party without prejudice."

The dispute arises because Respondent ruled that under Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749 (Mo. banc 1988), service of suggestions of death on James Tolbert's attorneys of record was ineffective because he was deceased at the time of service. Respondent's ruling does not recognize that counsel of record for James Tolbert have both also continuously represented his wife Betty Tolbert since the inception of this suit. She sought to be substituted for her deceased husband.

A. Standard of Review

As a result, the only issue is a question of law for this Court’s independent determination: “If the only issue is whether the facts of a particular case fall within the meaning of a statute, that issue is a question of law.” Information Technologies, Inc. v. St. Louis County, 14 S.W.3d 60, 62 (Mo. App. E.D. 1999).

“Courts interpret Supreme Court Rules by applying principles similar to those used for state statutes.” State ex rel. Vee-Jay Contracting Co. v. Neill, 89 S.W.3d 470, 471-72 (Mo. 2002). “Where the trial court rules on a question of law, it is not a matter of discretion.” Information Technologies, supra. Moreover, “The judgment of the trial court is afforded no deference when the law has been erroneously declared or applied.” Id.

B. Relevant Facts

After the filing of the underlying medical negligence action in the Circuit Court of Jasper County on February 26, 2003, Plaintiffs remained husband and wife until James Tolbert died on December 8, 2006.

On March 30, 2007, Relator served suggestions of death on Plaintiffs’ counsel of record via U.S. Mail (A1). No motion for substitution having been filed in the intervening 94 days, Relator filed a Motion to Dismiss for Failure to Substitute Parties on July 2, 2007 (A2-A3). In response, on July 18, 2007, Plaintiffs filed suggestions opposing Relator’s Motion to Dismiss and also filed a Motion for Substitution of Surviving Spouse as Party Plaintiff—these motions

were filed 110 days after the filing of suggestions of death (A4-A5). The parties do not dispute that no personal representative had been appointed at that time.

On August 1, 2007, Respondent overruled Relator's Motion to Dismiss and found that Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749 (Mo. 1988), rendered service of suggestions of death on Plaintiff James Tolbert's attorneys ineffective because he was deceased at the time of service (A6-A7).

C. Argument

As shown below, serving counsel of record for Betty Tolbert with suggestions of death was effective to begin the 90-day period in Rule 52.13(a) and Holloran does not hold otherwise because:

1. Holloran is factually distinguishable;
2. Service complied with Rules 52.13 and 43.01;
3. Direct communication with Mrs. Tolbert is prohibited by Rule 4-4.2.

As a result, this Court should make its Alternative Writ of Mandamus permanent and require Respondent to dismiss the claims of James Tolbert, deceased, under Rule 52.13.

1. Holloran is Factually Distinguishable

The majority holding in Metropolitan St. Louis Sewer Dist. v. Holloran, 751 S.W.2d 749 (Mo. 1988) does not control here because in that case the party that was eventually substituted for the deceased person was not represented by counsel when the suggestions of death were filed. In contrast, in the present case Plaintiff Betty Tolbert sought substitution and she is and has continuously been

represented by counsel of record who do not dispute that they received suggestions of death on or about March 30, 2007. Betty Tolbert does not dispute that she had actual knowledge of the filing of suggestions of death by service on her attorneys.

Holloran was a property dispute between Hazel Harris and Joseph Fenlon. Id. at 750. Fenlon was *pro se* but Harris was represented by attorney John Essner. Id. Harris appealed the trial court's judgment against her. Id. During the appeal, Harris died. Id. Fenlon filed suggestions of death and delivered them to Harris' attorney Essner. Id. About six days after the 90-day period expired, Rennard Harris, who was not a party and who was not represented by counsel of record in the pending appeal, filed a motion for substitution. Id.

Since more than 90 days had expired between the filing of the suggestions of death and the motion for substitution filed by Rennard Harris, the court of appeals dismissed the appeal under Rule 52.13(a). Id. This Court granted transfer and required the appellate court to permit substitution. Id. at 752.

In a 5-2 decision, this Court held that Harris' attorney Essner had no authority to accept suggestions of death on behalf of Harris because she was dead; as a result of her death, attorney Essner was no longer her agent. Id. at 751. Nor did he have "express or implied authority to receive service on behalf of Hazel's successors." Id. Accordingly, when attorney Essner received the suggestions of death he did not represent a party he could notify regarding the 90-day limitation in Rule 52.13(a). Id. As a result, because Harris' successors, specifically Rennard

Harris, were not served with suggestions of death—personally or by counsel—this Court permitted substitution of the parties. Id. at 751-52.

Holloran is distinguishable from the present case because Betty Tolbert, the party that Plaintiffs purport to substitute for her deceased husband, was and continues to be represented by counsel of record who received suggestions of death on or about March 30, 2007. The attorney-client relationship and resulting agency is now and has always been intact between Betty Tolbert and her attorneys of record. Therefore serving counsel with suggestions of death is sufficient. Supreme Court Rules 43.01 and 52.13(a).

Conversely, in Holloran, there is no record that Harris’ devisee, Rennard Harris, had an attorney who received the suggestions of death on his behalf, or that he personally received the suggestions of death, or that he was aware of their significance. Id. Indeed, this Court noted that any “informal communication” between attorney Essner and Rennard Harris was insufficient for purposes of service of suggestions of death. Id. at 751. This Court concluded that “One who wants to put opposing parties in interest out of court by the expiration of a time limit must take appropriate formal steps to bring them before the court.” Id.

Here, Plaintiff Betty Tolbert is “before the court” since she has been a party from the inception of this suit and has always been represented by attorneys of record—i.e., James Tolbert’s death did not extinguish or modify Betty Tolbert’s relationship or agency with her attorneys. As a result, service of suggestions of

death on counsel of record for Betty Tolbert is sufficient to begin the 90-day period in Rule 52.13(a).

Plaintiffs also claim that Holloran requires the personal representative of James Tolbert's estate to be personally served with suggestions of death. This argument, too, fails because Plaintiffs admit that no personal representative had been appointed when the suggestions of death were filed. Judge Donnelly's dissent in Holloran addressed this issue: "where, *as here*, no representative had been named at the time the suggestion of death was filed, I would hold the service on counsel was effective." Id. at 752. Similarly, in this case, service on counsel was effective because when the suggestions of death were filed neither Betty Tolbert nor anyone else had been appointed personal representative for James Tolbert. Id.

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. While Supreme Court Rule 52.13(a) contemplates the progress of litigation, Respondent's position undermines that progress by requiring parties to wait until the appointment of a personal representative before filing suggestions of death under Rule 52.13.

Further, Respondent's ruling implies that service on attorneys of record for a surviving spouse is not sufficient to serve that surviving spouse. Under this

ruling, service of any pleading would require the surviving spouse be personally served since serving counsel alone would be insufficient. Rule 84.07, which applies to this brief, dictates to the contrary: service “on the attorney of record of the adverse party shall be deemed service on such party.”

Respondent and Plaintiffs also claim this Court should consider the interests of the heirs and beneficiaries of James Tolbert’s estate. That contention is meritless, too, because Plaintiffs have not identified any of those alleged heirs and none of them, whoever they may be, are parties to this action. But James Tolbert’s wife, Betty Tolbert, was and has always been a party to this action and has continuously been represented by the same counsel of record who represented her husband. Those attorneys are charged with the duty to safeguard her rights and interests; their receipt of suggestions of death was effective under Rule 52.13(a). Relator should not be penalized for opposing counsel’s failure to comply with this Court’s Rule 52.13(a).

Plaintiffs also rely on Gardner v. Mercantile Bank of Memphis, 764 S.W.2d 166 (Mo. App. E.D. 1989), but Gardner did not directly address the issue of personal service raised here because the person who was appointed personal representative was not a party to the pending action nor represented by an attorney of record. Id. at 167. As a result, the appellate court had him personally served: “because [counsel] has not purported to represent Gardner’s estate or survivors, we also served our order upon one Larry Phillips.” Id. But in this case, Plaintiff

Betty Tolbert sought to be substituted as personal representative and was represented by counsel of record who were served with suggestions of death.

Moreover, Gardner explains the differences between Rule 52.13(a) and §507.100, RSMo, which allows nine months for substitution of a deceased party. Id. at 168-69. Gardner holds that nine months are permitted for substitution under §507.100, RSMo, if no suggestions of death have been filed. Id. But if suggestions of death have been filed, then Rule 52.13(a)(1) controls and only 90 days are allowed for a motion for substitution. Id. This limitation is “intended to avoid unnecessary delay in an action which survives the death of a party” because the “failure of survivors to take action, whether from lack of interest or from lack of knowledge of the pending litigation, cannot perpetuate such judicial impotence interminably.” Id. at 169.

2. Service of Suggestions of Death Complied with Supreme Court Rules

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.” Id. The Rule expressly permits service of suggestions of death “as provided herein for the service of a motion.” Id. Service of motion is governed by Rule 43.01 which permits a motion to be served on counsel of record. Here, suggestions of death were served on counsel of record. As a result, service complied with Supreme Court Rules 52.13(a) and 43.01 to start the 90-day period in Rule 52.13(a).

Moreover, in a situation where service on the attorney is required, service on the client alone is insufficient. City of Carthage v. Fairview Realty and Development Co., 624 S.W.2d 886, 888 (Mo. App. S.D. 1981) (“service on the attorney was mandatory under Rule 43.01(b) and service on the client insufficient.”); In re D.J.W., 994 S.W.2d 60, 65 (Mo. App. W.D. 1999) (“When a party is represented by an attorney of record, service on the party is insufficient.”); Tompkins v. Baker, 997 S.W.2d 84, 88 (Mo. App. W.D. 1999).

3. Rule 4-4.2 Prohibited Communication Directly with Betty Tolbert

The implication of Respondent’s August 1, 2007, Order is that service of suggestions of death on Betty Tolbert’s attorneys was not effective to notify her and therefore she should have been personally served with suggestions of death. But Supreme Court Rule 4-4.2 prohibits defense counsel from communicating with Plaintiff Betty Tolbert personally about this case since she is represented by counsel: “In representing a client, a lawyer shall not communicate about the subject of the representation with a party 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 by law to do so.”²

² This Court amended Rule 4-4.2 on March 1, 2007, changing “authorized by law to do so” to “authorized to do so by law or a court order.” This change and the corresponding comments were effective July 1, 2007, and do not apply to the suggestions of death filed March 30, 2007.

This Rule's comment provides an example regarding when counsel might be "authorized by law" to contact a represented party, which is in the case of a dispute with a government agency. Otherwise, counsel would be in violation of Supreme Court Rule 4-4.2 if he contacted Plaintiff Betty Tolbert personally. Counsel can locate no case law or other legal requirement that personal service of suggestions of death as implied by Respondent's Order is permitted by Rule 4-4.2.

Rule 4-4.2 and Respondent's Order place counsel in an untenable position regarding contacting Betty Tolbert for personal service of suggestions of death. Respondent's Order apparently fails to consider the practical and legal effect of Rule 4-4.2 as well as other service requirements. Accordingly, this Court should issue its Permanent Order in Mandamus to confirm the well-established requirements of Rule 52.13(a), as well as to reinforce the ethical considerations in Rule 4-4.2.

4. Failure to Timely File Motion for Substitution Requires Dismissal

Missouri law is well-established that failure to comply with the 90-day period in Rule 52.13(a) for filing a motion for substitution requires the dismissal of James Tolbert's claims without prejudice. Bradley v. Weber, 657 S.W.2d 286 (Mo. App. E.D. 1983). "The time limitations contained in the Rule are in the nature of a statute of limitation," and "Rule 44.01(b) authorizing enlargement of time for actions required by the Rules specifically provides that the court may not extend the time for taking any action under Rule 52.13." Holmes v. Arbeitman, 857 S.W.2d 442, 443 (Mo. App. E.D. 1993).

Neither can the 90-day requirement in Rule 52.13(a) be extended for excusable neglect. Gillespie v. Rice, 224 S.W.3d 608, 610 (Mo. App. W.D. 2006) (“This court has no discretion to allow late motions for substitution after a party dies, even when due to the excusable neglect of a party.”); *see also* Rowland v. Rowland, 121 S.W.3d 555, 556 (Mo. App. E.D. 2003); State v. Reese, 920 S.W.2d 94, 95 (Mo. banc 1996) (“The plain language of Rule 52.13(a)(1) requires dismissal unless such a motion is served within 90 days after the filing of a suggestion of death.”); Clark v. Fitzpatrick, 801 S.W.2d 426 (Mo. App. W.D. 1990); Green v. Tullock, 158 S.W.3d 239, (Mo. App. E.D. 2005). This is because “Courts have jurisdiction to render judgments for or against viable entities only. A dead person is by definition not a viable entity.” Holmes, supra. Meadows v. Jeffreys, 929 S.W.2d 746, 748 (Mo. App. S.D. 1996); Loven v. Davis, 783 S.W.2d 152, 154 (Mo. App. S.D. 1990).

Because a deceased person is not a viable entity, failure to substitute for that person causes unnecessary delay in litigation. Gardner, supra. With a pending suit, that potential delay is mitigated by Rule 52.13(a) which provides 90 days for the filing of a motion for substitution. In this case, Plaintiffs had almost seven months to file such a motion: James Tolbert died on December 8, 2006, and the 90 days, begun by the filing of suggestions of death, ended on June 28, 2007.

Even then, Plaintiff Betty Tolbert’s Motion for Substitution did not cure the delay that Rule 52.13(a) is designed to mitigate because when her motion was filed 20 days late, no estate was opened nor was a personal representative

appointed. Because this case is now a survival action, it can only be pursued by a duly appointed personal representative. Section 537.020, RSMo; Carter v. Pottenger, 888 S.W.2d 710 (Mo. App. S.D. 1994); Sauter v. Schnuck Markets, Inc., 803 S.W.2d 54 (Mo. App. E.D. 1990). As a result, the filing of Plaintiffs' Motion for Substitution prolonged the delay in this case until Respondent granted Plaintiffs' Motion for Substitution more than 30 days later on August 20, 2007.

Bradley, supra, is instructive—it involved a will contest where the sole plaintiff died during the pendency of the case. Bradley, 657 S.W.2d at 287. Defense counsel filed suggestions of death and no motion for substitution was filed within 90 days. Id. Defense counsel filed a motion to dismiss and the personal representative of the deceased plaintiff filed a motion for substitution of the parties (after 90 days expired). Id. The trial court overruled the motion to dismiss and granted the motion for substitution. Id.

The appellate court reversed the trial court's decision due to the expiration of the 90-day requirement in Rule 52.13(a), ordering the trial court to grant the motion to dismiss and deny the motion for substitution. Id. at 288. The court noted that this action would extinguish the plaintiff's claim since the statute of limitations had expired, but even that result did not abate the requirements of Rule 52.13(a). Id.

Similarly, Plaintiffs' failure to comply with Rule 52.13(a) requires the dismissal of James Tolbert's claims. Respondent's Order to the contrary not only violates well-established case law but also undermines the purpose of Rule 52.13.

D. Conclusion

Relator respectfully requests this Court to issue permanent Writ of Mandamus and require Respondent 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 4,239 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 11th day of December, 2007, to:

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