IN THE
SUPREME COURT OF MISSOURI

No. SC88266

JOE BOB LAKE, AS PERSONAL REPRESENTATIVE
OF THE ESTATE OF JULIA LAKE, and
AS AN INDIVIDUAL,
Appellant,

v.

SHARON E. PROHASKA,
Respondent.

Appeal from the Missouri Court of Appeals
for the
Western District of Missouri

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from the Order of the Missouri Court of Appeals for the Western District of Missouri, dated November 7, 2006, dismissing the appeal of appellant Joe Bob Lake on the ground that appellant's motion to substitute the estate of defendant, Dr. Sharon Prohaska, for Dr. Prohaska, following her death, was deficient because it named an out-of-state personal representative for that estate. The appeal involves the construction of Mo. Rev. Stat. 507.100.1 and Mo. Sup. Ct. R. 52.13(a)(1), regarding such substitution. This Court has jurisdiction of this appeal, which involves the construction and application of this statute and rule, under the general appellate jurisdiction provided in Mo. Const. art. V, Sec. 3.

This is also an appeal from the judgment of the Circuit Court of Jackson County, Missouri, the Honorable Preston Dean, granting J.N.O.V. to defendant Prohaska under Mo. Sup. Ct. R. 72.01(b). The appeal involves the application of that rule, as well as Mo. Sup. Ct. R. 75.01. This Court has jurisdiction of this appeal under the general appellate jurisdiction provided in Mo. Const. art. V, Sec. 3.

In addition, all of the issues are matters of general interest.

STATEMENT OF FACTS

A. The Motion for J.N.O.V.

This is a medical malpractice action. Plaintiff, Julia Lake ("Julia"), at the time of the malpractice incident, on June 28, 1999, was a 49-year old female, suffering from bouts of migraine headaches, among a number of other illnesses. On June 28, 1999, while experiencing a sudden, severe migraine headache, she went to see her regular physician, defendant, Dr. Sharon Prohaska, in Kansas City, Jackson County, Missouri, and was given a shot of a combination of Nubain and Vistaril. After receiving the shot, Julia experienced a convulsion and fainting spell in Dr. Prohaska's office, which caused her to severely injure her right shoulder. As a result of the incident, her shoulder became so painful that the artificial joint that had been implanted there previously had to be surgically removed. Her shoulder caused her so much pain after this incident, that she became bed-ridden for the rest of her life, only able to get out of bed for a few hours a day. Julia passed away, from other illnesses, on July 5, 2005, prior to trial; her estate was substituted for her, prior to trial.

Earlier that year, in March, Julia had experienced a severe reaction to this same combination of medications, from a shot given to her at Dr. Prohaska's office. After suffering that first reaction, Julia had instructed Dr. Prohaska and her office staff to never give her such medications again. Julia

had called the office to report that reaction, and had even gone to the office and had told Dr. Prohaska, herself, about the reaction and had instructed her to never again administer those medications to her. She also had demand that her medical chart in Dr. Prohaska's office be annotated accordingly.

Despite these instructions, Dr. Prohaska proceeded to authorize the shot a second time, on June 28, which was given to Julia before Julia learned what it contained. Dr. Prohaska took the position at all times thereafter that the earlier reaction, in March, was relatively insignificant, and that no convulsion or fainting spell, or injury of any kind, occurred on June 28, even though she immediately admitted Julia to the hospital that day, and later wrote in her Discharge Summary that Julia had experienced a fainting spell in her office that day. Julia, by means of a deposition in lieu of actual testimony, testified to these events, and her caregiver, who attended her that day, wrote in her log, and testified, that the convulsions had happened, that the shoulder injury had occurred, and that Julia was in severe pain as she was wheeled in a wheelchair to be admitted to the hospital next door to the office.

Joe Bob Lake ("Joe Bob"), Julia's husband, also testified to the condition in which he found Julia at the hospital on June 28, shortly after the shot had been administered. He also testified that Dr. Prohaska had expressed to him that day that she was sorry for what had happened. Joe Bob asserted a

claim against Dr. Prohaska in this action for the loss of consortium he suffered for six years following the incident.

At the conclusion of a thirteen day jury trial, the jury awarded Julia's estate $100,000, and awarded Joe Bob $25,000. Legal File (hereafter "L.F.") at 33. On September 12, 2005, judgment was entered for the estate and for Joe Bob, based on the verdict. L.F. at 36, Appendix at A-1. On January 6, 2006, the Honorable Preston Dean granted judgment for Dr. Prohaska on all claims, based upon a J.N.O.V. motion filed 34 days after judgment had been granted to Julia's estate and to Joe Bob. L.F. at 74, Appendix at A-6. In its January 6th J.N.O.V., the court wrote that the judgment originally granted to the Lake parties was not a judgment, after all, and, therefore, the J.N.O.V. motion was not untimely. The court took this position even though previously it had taken the position that the J.N.O.V. motion was untimely, since it was filed 34 days after the judgment. On December 14, 2005, the Court had issued an order, reciting that the J.N.O.V. motion was untimely since it was filed 34 days after the judgment of September 12, and requested briefs from the parties on that issue. L.F. at 52, Appendix at A-4. Copies of the briefs submitted by the parties are within the Legal File, at 54 and 60. Following the submission of such briefs, the Court changed its mind that the September judgment was a final judgment, for purposes of filing a J.N.O.V. motion, and characterized it as

something other than a "judgment." Therefore, the Court concluded that the J.N.O.V. motion was not out of time.

In granting the J.N.O.V. motion, the Court ruled that the motion by Dr. Prohaska for a directed verdict at the end of plaintiff's case, upon which the Court deferred a ruling, was being granted. L.F. at 76, Appendix at A-8. This is the only ruling mentioned by the Court in its J.N.O.V. ruling. Id. Thus, after Dr. Prohaska put on her evidence in defense, and after the case was submitted to the jury, the Court felt it could rule upon a directed verdict motion made at the end of plaintiff's case.

B. The Motion to Substitute Dr. Prohaska's Estate for Dr. Prohaska

Julia's estate and Joe Bob appealed the J.N.O.V. ruling to the Missouri Court of Appeals. The current appeal was commenced by filing a notice on March 17, 2006.[1] L.F. at 89. This appeal was stayed by the Court of Appeals, following the filing of a Suggestion of Death of Dr. Prohaska, on May 12, 2006. By order, appellant was given ninety (90) days from May 12 within

[1] The initial appeal, Case No. WD66562, was dismissed, and the current appeal was commenced under Rule 81.07 of the Missouri Rules of Civil Procedure.

which to file a motion for substitution, to substitute the estate of Dr. Prohaska for Dr. Prohaska.

During most of the ninety-day period, no estate for Dr. Prohaska had been opened, and her will had not been admitted to probate. Finally, on August 3, the will was admitted to probate and an estate was opened. Susan Grossman, Dr. Prohaska's daughter, was named executrix of the estate. Appellant filed a motion to substitute Susan Grossman personal representative of the estate, as a party, on August 8, five days after she was appointed executrix. This was within the ninety (90) day period.

At the time Susan Grossman was designated the executrix of the estate, her attorney, Dick Woods, of the firm of Kirkland & Woods, P.C., stated to Mick Lerner, counsel for appellant, that although Ms. Grossman resided outside the State of Missouri, he would accept service of process on behalf of her in connection with this case. Based upon that representation, appellant filed his Motion for Substitution in the Court of Appeals, and served Mr. Woods with a copy of it, all of which was done in timely fashion, on August 8, 2006. The motion was also served on Dr. Prohaska's former legal counsel at that time.

Without authority, because their client was deceased, the former legal counsel for Dr. Prohaska filed a Consolidated Motion to Dismiss the Appeal. Mick Lerner, counsel for appellant, again contacted Dick Woods, and

this time learned that Mr. Woods was unwilling to take any position with respect to whether his client, Susan Grossman, would submit to the jurisdiction of Missouri courts. This constituted a change from the understanding appellant's counsel had as of August 3, when Mr. Woods agreed to accept service of process.

On November 7, 2006, the Court of Appeals dismissed the appeal on the ground raised by Dr. Prohaska's former counsel in their motion, namely, the fact that Susan Grossman was an out-of-state resident.

Because Ms. Grossman became unwilling to submit to the jurisdiction of Missouri courts, in his response to the Consolidated Motion to Dismiss appellant sought leave to substitute someone else as the personal representative of the respondent's estate. He asked for leave to substitute Frank B.W. McCollum, a Missouri resident, as the personal representative for the estate. Mr. McCollum had been designated to represent Dr. Prohaska's estate in three other actions pending in Missouri. The Court of Appeals, however, declined to allow appellant to make that substitution. The Court of Appeals also denied appellant's motion for rehearing.

This Court granted appellant's application for transfer. This Court, having received a Substitute Brief from the former attorneys for Dr. Prohaska, instructed appellant to file this brief, and to title it "Appellant's Substitute

Brief." This Brief is being filed in timely fashion, appellant having filed and served the Record on Appeal in timely fashion on November 8, 2007.

Dr. Prohaska's former attorneys, from the Shook Hardy & Bacon law firm, continue to represent her in this action, even though she died over two and a half years ago, and even though no estate has been substituted for her in this action. In fact, those attorneys have demanded that the costs be paid by appellant to their law firm.

POINTS RELIED ON

1. **The trial court erred in granting a J.N.O.V. on January 6, 2006, because the J.N.O.V. motion was filed out of time, in that 34 days had elapsed since the entry of the final judgment.**

Rule 72.01(b) of the Missouri Supreme Court Rules

Rule 75.01 of the Missouri Supreme Court Rules

River Salvage, Inc. v. King, 11 S.W.3d 877 (Mo. App. W.D. 2000)

K&K Investments, Inc. v. McCoy, 875 S.W.2d 593 (Mo. App. E.D. 1994)

2. **The trial court erred in granting the J.N.O.V. based upon the directed verdict motion made at the close of plaintiff's case, because defendant had waived any error with respect to that motion, in that defendant had proceeded to present evidence after the court had deferred ruling on the motion.**

Unnerstall Contracting Co., Ltd. v. City of Salem, 962 S.W.2d 1 (Mo. App. S.D. 1997)

St. Francis Medical Center v. Penrod, 937 S.W.2d 343 (Mo. App. S.D. 1996)

Keithley v. St. Louis Public Service Co., 379 S.W.2d 149 (Mo. App. 1964)

3. The court of appeals erred in dismissing the appeal on November 7, 2006, because the motion to dismiss was filed without authority of a party, in that defendant had died.

Holmes v. Arbeitman, 857 S.W.2d 442 (Mo. App. E.D. 1993)

Wilkerson v. Williams, 141 S.W.3d 530 (Mo. App. S.D. 2004)

Rowland v. Rowland, 121 S.W.3d 555 (Mo. App. 2003)

4. The court of appeals erred, in its order of November 7, 2006, in not granting leave to appellant to name a replacement personal representative for the out-of-state representative once appellant learned that the out-of-state representative had elected to not submit to the jurisdiction of Missouri courts, in that appellant had been led to believe that the personal representative would submit to the

jurisdiction, and did not learn anything to the contrary until after the ninety-day period for substitution had elapsed.

Berger v. Cameron Mutual Insurance Co., 173 S.W.3d 639 (Mo. banc 2005)

Sherrill v. Wilson, 653 S.W.2d 661 (Mo. banc 1983)

Mo. Sup. Ct. R. 52.13(a)

Section 507.100.1 R.S.Mo.

ARGUMENT

Standard of Review

There are four rulings in issue here, two by the trial court and two by the Court of Appeals. All of them are procedural. All of them involve the interpretation, or application, of a Missouri statute or a rule of procedure. Thus, all of them constitute matters of law, rather than matters of fact.

As a result, the review by this Court is de novo, and no deference is given to the trial court's determinations of such matters. An appellate court can set aside a ruling of a trial court interpreting or applying a statute or a rule. See, e.g., Westwood Partnership v. Gogarty, 103 S.W.3d 152, 158 (Mo. App. E.D. 2003). Likewise, this Court can reverse a ruling of the Court of Appeals based on a procedural matter, when that ruling is erroneous.

1. The trial court erred in granting a J.N.O.V. on January 6, 2006, because the J.N.O.V. motion was filed out of time, in that 34 days had elapsed since the entry of the final judgment.

When the trial court granted the J.N.O.V. on January 6, 2006, it granted a motion that was filed out of time. The final judgment was entered on September 12, 2005. Any J.N.O.V. motion was due by October 13. The

motion here was filed on October 17, the 34th day. It was untimely. The trial court had lost jurisdiction at that point to take any action whatsoever.

Under Supreme Court Rules 72.01(b) and 75.01, any motion for J.N.O.V. must be filed within thirty days of the date of the judgment. The motion here was filed on the 34th day after the date of the judgment. There is no basis upon which such motion could be deemed timely. Therefore, the grant of the J.N.O.V. motion is void, and the original judgment in favor of appellant remains valid and enforceable.

The thirty-day time period in Supreme Court Rule 72.01(b) for the filing of such a motion is absolute. There is plenty of support within the Supreme Court Rules, themselves, for the proposition that the thirty-day period in Rule 72.01(b) is absolute. Under Rule 75.01, the Court loses jurisdiction over the action upon the expiration of thirty days after entry of final judgment. Under Rule 44.01(b), no enlargement of time can be granted, even by the Court, for motions under Rule 72.01. Furthermore, the only deadlines that can be extended by virtue of Rule 44.01(e) are those deadlines requiring a response after a party is served with either a notice or another paper by mail. See Mo. Sup. Ct. R. 44.01(e). No such service by mail is involved in the computation of time under Rule 72.01(b), or under Rule 75.01. It is also noteworthy that defendant never contended that Rule 44.01(e) applies.

There is no case law which allows a J.N.O.V. motion to be filed after the expiration of the thirty-day period. Under Missouri cases, the power of a trial court to correct, amend, vacate, reopen or modify a judgment upon its own motion (and for good cause) is limited to thirty days after entry of the judgment; after that thirty-day period the court's jurisdiction is limited to granting relief sought by one of the parties in a timely-filed after trial motion, for reasons stated in that motion. Hopkins v. North American Company for Life and Health Insurance, 594 S.W.2d 310, 317 (Mo. App. S.D. 1980), citing Wiseman v. Lehmann, 464 S.W. 539, 543 (Mo. App. 1971); see also, Dickinson v. Ronwin, 935 S.W.2d 358, 361 (Mo. App. S.D. 1996). Any order entered by a trial court more than thirty days after the entry of judgment for reasons not contained in a properly filed after trial motion is void. See Hopkins at 317. It has no legal force, or effect; it is absolutely null, and without any legal efficacy. See K&K Investments, Inc. v. McCoy, 875 S.W.2d 593, 596 (Mo. App. E.D. 1994). Therefore, the thirty-day time period is absolute, and the Court loses jurisdiction after thirty days. The trial court here had absolutely no jurisdiction to grant the untimely filed J.N.O.V. motion.

Although the trial court, subsequent to the thirty days, undertook to characterize the original judgment of September 12 as something different from a final "judgment," the trial court not only lacked jurisdiction to do so at that

late date, but also it gave an inadequate excuse for trying to change the nature of its prior ruling after the fact. There is no doubt that the trial court subsequently tried to change the character of its prior ruling based solely upon the fact that defendant failed to file a timely post-trial motion which the court had anticipated would be filed. When defendant failed to file such post-trial motion by the deadline, the trial court could have granted J.N.O.V. on its own motion, but would have had to do so by the thirtieth day. It did not do so.

There are several reasons why the September 12 judgment constituted a final judgment under Rules 72.01(b) and 75.01. First, even the trial court, itself, originally deemed the September 12 judgment as the final judgment in the case. That is why the court issued its December 14, 2005 Order, stating that the post-trial motion was out of time. L.F. at 52, Appendix at A-4. In that Order, the court even stated that the J.N.O.V. motion "was untimely filed," in effect confirming that the court had intended the ruling to be a final judgment. Id.

The trial court did not change its view of the September 12 judgment until after it had pointed out to all parties, in its Order of December 14, 2005, that the J.N.O.V. motion was untimely. And when it did change its view, it attempted to justify the change on a totally erroneous basis; it stated that the original judgment should not have been denominated a judgment, but,

instead, should have been denominated as something akin to "Trial Minutes" in a criminal case. It is noteworthy that there is no such animal in civil cases. It is also noteworthy that once the judgment had been entered, there was no way to withdraw it, or alter it, after thirty days had elapsed. Likewise, after thirty days had elapsed there was no way to rule on any matter deferred earlier by the court.

Second, the September 12 judgment had all the attributes of a final judgment. Under Missouri case law, the fact that a document is entitled "judgment" is a significant indication that it was intended to be a final judgment. See, e.g., River Salvage, Inc. v. King, 11 S.W.3d 877, 879 (Mo. App. W.D. 2000). A judgment exists when it is a writing, when it is signed by a judge, when it is denominated a "judgment," and when it is filed. Id. The document in issue was denominated a "judgment," was signed by the court, was entered, as of September 12, and was served upon all counsel. There are other indications of the intent of the court that the document be deemed a final judgment. The document disposed of all the issues in the case as of the date of its entry. The document referenced the verdict, granted judgment to the party who received the verdict, in the amounts awarded by the jury in the verdict, and awarded costs to the prevailing party. These are additional indications that the court intended it to be a final judgment. In addition, the document recited all of

the procedural events leading up to the verdict, as well as all of the procedural events surrounding that verdict. It conformed to the form of judgment normally used by trial courts in this State.

Although the document did mention the two directed verdict motions as being deferred, from the court's statement on this subject, the court intended that it would rule upon any post-trial motion respondent might make, if such motion was filed in timely fashion, which it was not. See, e.g., Tr. at 1381, L.F. at 38, Appendix at A-3. Even though the court might have expected such a motion to be filed in timely fashion, when no motion was filed in timely fashion the court lost all jurisdiction to take any further action.

Third, until defendant realized that her J.N.O.V. motion was untimely, she never made the argument that the September 12 ruling was not a final judgment. In her J.N.O.V. motion, which she apparently attempted to file in timely fashion, on the 34th day, but filed out of time, she deemed the September 12 document a final judgment; that is why she filed a J.N.O.V. motion. Throughout her motion, she deemed the September 12 judgment a final judgment, against which a motion for J.N.O.V. could be, and was, filed. L.F. at 39.

There is not one mention in the J.N.O.V. motion regarding the fact that the directed verdict motions needed to be ruled on in order for the judgment

to be final. Id. Thus, the lack-of-finality argument, made by defendant after she missed her deadline, is simply an afterthought, and was made only because she missed that deadline.

Fourth, the statements in the judgment regarding the fact that both directed verdict motions were "deferred," do not detract from appellant's position with respect to the finality of the judgment. Unless the Court granted the directed verdict motions, the case was deemed submitted to the jury. Rule 72.01(b) refers to motions either denied "or for any reason . . . not granted. . . ." Thus, under 72.01(b) the deferral of a motion is equivalent to the motion being "not granted." In other words, Rule 72.01(b) specifically covers the situation at hand. When a directed verdict motion is not granted, the case is deemed submitted to the jury subject only to a timely J.N.O.V. motion being filed thereafter. Therefore, the fact that the Court referred, in the September 12 document, to the directed verdict motions as being "deferred," does not alter the effect of the Court's failure to grant them at that stage of the trial.

When the trial court did not grant defendant's motions for directed verdict at the close of plaintiff's evidence and at the close of all the evidence, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motions, but only if a timely

J.N.O.V. motion is filed, or if the court, on its own, grants a J.N.O.V. within thirty days of its entry of judgment. Neither of these two things happened here.

Rule 72.01(b) suggests that those two directed verdict motions are deemed denied if they are not granted at the time they are made. It reads, in part:

> Whenever such [directed verdict] motion
> is denied or for any reason is not granted,
> the court is deemed to have submitted the action
> to the jury subject to a later determination
> of the legal questions raised by the motion.

(Emphasis added.) The rule goes on to prescribe when a J.N.O.V. motion must be filed, in order to allow the Court to entertain such legal questions at a later date. In other words, unless the Court grants the directed verdict motions, prior to the presentation of defendant's evidence and prior to submitting the case to the jury, it is deemed to have submitted the action for determination by the jury, subject only to the filing of a timely post-trial motion. Since no post-trial motion was filed in timely fashion, and the court did not act sua sponte within thirty days, the Court is precluded from granting any relief on either of defendant's directed verdict motions.

The Rules provide that following a jury trial, the trial court may entertain motions for new trial and/or for judgment notwithstanding the verdict. However, no other motions are contemplated or allowed by the rules. See State ex rel. Missouri Highway and Transp. Comm'n v. Pully, 737 S.W.2d 241, 246 (Mo. App. E.D. 1987), citing Hopkins v. North American, at 317. Therefore, no directed verdict motion held over from before submission of the action to the jury can be granted after the verdict is rendered.

The Court's statement in its J.N.O.V. of January 6 that each of the two motions for directed verdict was "deferred" does not detract from the operation of Rule 72.01(b). L.F. at 74-75, Appendix at A-6-A-7. No matter what the Court stated, if it did not grant the motions at the time they were made, it was deemed to have submitted the case to the jury, and to have left to defendant her rights under 72.01(b) to file a motion for J.N.O.V., but in timely fashion. In addition, the term "deferred" means deferred until after the verdict, assuming a timely J.N.O.V. motion is filed, which meaning is consistent with Rule 72.01(b).

A trial court cannot indefinitely reserve a ruling on directed verdict motions until after the verdict is rendered. It can, even on its own motion, take a verdict away from a plaintiff due to insufficiency of the evidence, but if it

does so it must act within thirty days of its judgment, or rule on a motion filed by a party within the thirty days.

The Court does retain the right, within thirty days after entry of judgment, to act upon a timely J.N.O.V. motion filed by a party, or even to act sua sponte. However, when it does so, it must do so in a J.N.O.V. context. Therefore, it must do so on motions filed within the thirty-day period, or while it still has jurisdiction, i.e., within the same thirty days.

For all of these reasons, the "Judgment" of September 12 must be deemed a final judgment, and the trial court cannot change its mind, after thirty days have elapsed, and characterize it as something else. If trial courts were able to so alter the nature of judgments after thirty days, arguably they would be able to retain jurisdiction over cases indefinitely, and thereby circumvent the absolute restriction imposed upon them by Rules 72.01(b) and 75.01.

2. The trial court erred in granting the J.N.O.V. based upon the directed verdict motion made at the close of plaintiff's case, because defendant had waived any error with respect to that motion, in that defendant had proceeded to present evidence after the court had deferred ruling on the motion.

In granting the J.N.O.V., the trial court explicitly held that it was granting defendant's motion for directed verdict at the close of plaintiff's evidence. Legal File at 76, Appendix at A-8. Elsewhere in its J.N.O.V. ruling, the court concedes that it had deferred a ruling on such motion at the time. Legal File at 74, Appendix at A-6.

However, once a defendant proceeds to present evidence after its motion for directed verdict at the close of plaintiff's case is over-ruled, or not granted, that defendant waives any error in connection with the directed verdict ruling. See Unnerstall Contracting Co., Ltd. v. City of Salem, 962 S.W.2d 1, 7 (Mo. App. S.D. 1997), citing Flanigan v. City of Springfield, 360 S.W.2d 700, 704[2] (Mo. 1962); see also St. Francis Medical Center v. Penrod, 937 S.W.2d 343, 346 (Mo. App. S.D. 1996). Any alleged error committed by the trial court in over-ruling a motion for directed verdict made at the close of plaintiff's evidence, or in not granting such motion, cannot be raised in an appellate court for review because the defendant waived its motion by introducing evidence thereafter. See Keithley v. St. Louis Public Service. Co., 379 S.W.2d 149, 151 (Mo. App. 1964).

Since the trial court actually ruled, in its J.N.O.V. ruling of January 6, on defendant's directed verdict motion made at the close of plaintiff's case, even if the court had acted within thirty days of its judgment it was error to

grant a motion that had been waived, and this Court cannot review a grant of a directed verdict under such circumstances.

3. The court of appeals erred in dismissing the appeal on November 7, 2006, because the motion to dismiss was filed without authority of a party, in that defendant had died.

The motion to dismiss the appeal was filed by the Shook Hardy & Bacon attorneys who had represented Dr. Prohaska, long after the death of their client. These former attorneys for Dr. Prohaska did not have the authority to file any motion following the death of their client. Under the authority of Holmes v. Arbeitman, 857 S.W.2d 442 (Mo. App. E.D. 1993), a dead person is, by definition, not a viable entity, and courts have jurisdiction to render judgments for or against only viable entities. Id. at 443. See also Wilkerson v. Williams, 141 S.W.3d 530, 536 (Mo. App. S.D. 2004). Although the Court of Appeals in Arbeitman ruled that a former counsel has the authority to file a Suggestion of Death, that is the only thing a former counsel can do. Arbeitman at 444. The November 7 Order dismissing the appeal is contrary to Arbeitman in that it allows the filing of a motion to dismiss an appeal. The Arbeitman decision expressly holds that an attorney's representation of his client terminates upon the client's death. Id. Likewise, a motion to dismiss cannot be

filed on behalf of a deceased party. Rowland v. Rowland, 121 S.W.3d 555, 556 (Mo. App. 2003).

Therefore, unless and until a personal representative of the decedent's estate is substituted for the decedent, no court should take any action for or against that decedent. The personal representative of a decedent's estate, once that personal representative is substituted for the decedent, might choose to change legal counsel, or might choose to take a position different from that taken by the decedent's former counsel. That personal representative might even pursue a claim against the decedent's former counsel. Therefore, there are many good reasons why the former counsel for a deceased party should be prevented from acting on behalf of that party following the death of the party.

The anomaly of allowing a deceased party to file a motion to dismiss an appeal is further demonstrated by the fact that the lawyers for that deceased party are continuing to act on her behalf, and by the fact that they have made an attempt to collect taxable costs, and to have them paid to themselves. The Shook Hardy & Bacon firm is now attempting to enforce the J.N.O.V. order awarding costs to respondent, despite the fact that respondent is deceased. The Shook Hardy & Bacon firm has demanded that the taxable costs be paid to that law firm. In other words, the law firm which objected to the substitution of Susan Grossman as the personal representative of the estate, and

which filed the motion to dismiss the appeal on behalf of a deceased party, now seeks to have taxable costs paid to itself. Again, this flies in the face of the Arbeitman holding.

It is also worth noting that the medical malpractice insurance carrier for Dr. Prohaska, which was identified to the prospective jurors, is subject to the jurisdiction of Missouri courts, but apparently is paying the Shook Hardy & Bacon firm to oppose the substitution of the estate for the decedent.

These issues are of general importance and interest, because litigants need to know what filings can, and cannot, be made on behalf of a party who dies during the pendency of an action.

4. The court of appeals erred, in its order of November 7, 2006, in not granting leave to appellant to name a replacement personal representative for the out-of-state representative once appellant learned that the out-of-state representative had elected to not submit to the jurisdiction of Missouri courts, in that appellant had been led to believe that the personal representative would submit to the jurisdiction, and did not learn anything to the contrary until after the ninety-day period for substitution had elapsed.

Another matter of general interest and importance is how the Court should respond to an attempt by a party to replace a personal representative who has elected not to submit to the Court's jurisdiction, after having suggested otherwise. Under all of the circumstances here, appellant complied with Rule 52.13(a) of the Missouri Rules of Civil Procedure and the Order of this Court; he filed and served his Motion for Substitution within the ninety (90) days.[2] As is detailed in the Statement of Facts, the Motion to Substitute was based upon a representation by the personal representative's attorney that he would accept service of process on behalf of his client, and, thereby, counsel for appellant was misled into believing that Ms. Grossman would submit herself to the jurisdiction of Missouri courts. The court of appeals should have granted appellant leave to name an alternative personal representative for the estate of Dr. Prohaska. Appellant sought leave to name the personal representative serving in such capacity, for such estate, in three other Missouri cases, and he had agreed to serve in this case.

At the time leave to name an alternative personal representative was sought, there were three other medical malpractice actions against Dr. Prohaska's estate pending in the Circuit Court of Jackson County, and Frank B.

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[2] The rule does not require the Court to take action upon that filing within ninety days.

W. McCollum, an attorney who resides in Jackson County, Missouri, and the person appellant sought to name as the alternative personal representative, had been named the personal representative of Dr. Prohaska's estate for purposes of those three actions, and was serving in that capacity. The cases were: David Berger v. Dr. Sharon Prohaska, Case No. 0616-CV-06632; Julia Berger v. Dr. Sharon Prohaska, Case No. 0616-CV-06631; and Theresa Mosqueda, et al. v. Dr. Sharon Prohaska, Case No. 03-CV-223325.

In addition, Mr. McCollum was willing to be named the personal representative of the estate of Dr. Prohaska in this action. Since he was serving as the personal representative of the estate in the other three Missouri actions, and was willing to serve in that capacity in this appeal, under all of the circumstances it would have been appropriate for him to be substituted for Susan Grossman, as the personal representative in this action, since she is now unwilling to submit to the jurisdiction of Missouri courts.

The Court of Appeals also misconstrued the law in the following respects. Section 507.100.1 R.S.Mo. provides that "proper parties" should be substituted for a decedent, but allows the moving party to substitute within nine months after the filing of the first notice of letters testamentary. Although the time period for filing and serving the Motion for Substitution is limited by Supreme Court Rule 52.13(a)(1) to ninety days, the rule does not preclude the

replacement of a personal representative named in the original motion, if the motion is filed within the ninety days, but the replacement occurs within the nine months. The attempted replacement of the personal representative here occurred after the ninety days had elapsed, but immediately after objection was first raised to the originally-named personal representative, and immediately after appellant learned that the originally-named personal representative was unwilling to submit to the jurisdiction of this Court. The attempted replacement occurred within nine months of the filing of the first notice of letters testamentary.

In the cases cited by the Court of Appeals in its Order of November 7, 2006, no attempt to replace the personal representative of the decedent's estate was made, within the nine-month period, or at all. For all of these reasons, those cases do not apply.

Furthermore, there are instances in which a designated personal representative, substituted for a decedent, might need to be replaced after the ninety-day period. If the representative would die, a new representative would need to be designated. If the representative, for some reason, would have to cease serving in that capacity, a replacement would be needed. Likewise, if the representative initially announced that he would submit to this Court's jurisdiction, but later elected to not do so, a replacement would be needed. In

none of these situations should the court preclude such replacement. These situations are not appreciably different from what occurred here, namely, the suggestion by the personal representative's counsel that the personal representative would submit to the jurisdiction, followed by a drastic change in the personal representative's decision to do so. Under such circumstances, especially where nine months from the date of the issuance of the notice of the letters testamentary have not elapsed, a replacement should be allowed.

Appellant did file and did properly serve his Motion for Substitution within the ninety-day period. He did seek to substitute the estate of the decedent, for the decedent, herself. If the personal representative originally selected by appellant cannot serve as a personal representative, for whatever reason, appellant should be given leave to replace her, especially when appellant acted so quickly in attempting to do so.

There is another reason why the appeal should not have been dismissed. In Missouri, there is an important policy underlying the judicial system that cases should be heard on the merits, if possible, and statutes and rules governing the orderly administration of justice should be construed liberally in favor of allowing appeals to proceed. See Sherrill v. Wilson, 653 S.W.2d 661, 663 (Mo. banc 1983). The Missouri Supreme Court recently reaffirmed this principle, holding:

> Cases should be heard on the merits if possible, and court rules should be construed liberally to allow an appeal to proceed.

Berger v. Cameron Mutual Insurance Co., 173 S.W.3d 639, 641 (Mo. banc 2005), citing Sherrill, 653 S.W.2d at 663. The dismissal of the appeal on the ground given by the court of appeals, under all of the circumstances set out herein, is in conflict with this judicial policy.

CONCLUSION

For all of the foregoing reasons, the appeal should not have been dismissed, and the J.N.O.V. granted to defendant should be a nullity. The judgment for appellant on the jury verdict should be restored, and appellant's motion to substitute the estate of Dr. Prohaska for Dr. Prohaska should be granted, with Frank B.W. McCollum being named the personal representative of the estate for whatever additional, limited litigation might occur following this ruling by the Supreme Court, if any.

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type and volume limitations of Mo. Sup. Ct. R. 84.06(b). It contains no more than 31,000 words of text (specifically, containing 6720 words). It was prepared using MS Word 2000 for Windows. The enclosed floppy disk also complies with Mo. Sup. Ct. R. 84.06(g) in that it has been scanned and is virus free. The files on the floppy disk contain the brief in MS Word 2000 format.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and ten copies of Appellant's Substitute Brief was sent via FedEx to the Clerk of the Court for filing, and two copies of Appellant's Substitute Brief and a floppy disk containing the word processing file of same in MS Word 2000 format were served by FedEx this 27th day of November, 2007, on:

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