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 SECOND SUBSTITUTE BRIEF

---

Michael D. Moeller, #42324
Michael J. Kleffner, #50431
Bryan T. Pratt, #48798
SHOOK, HARDY & BACON L.L.P.
2555 Grand Boulevard
Kansas City, Missouri 64108-2613
Telephone: 816.474.6550
Facsimile: 816.421.5547

ATTORNEYS FOR RESPONDENT
SHARON E. PROHASKA, M.D.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**ERROR! NO TABLE OF AUTHORITIES ENTRIES FOUND.**

**ERROR! NO TABLE OF AUTHORITIES ENTRIES FOUND.ERROR! NO TABLE OF AUTHORITIES ENTRIES FOUND.PRACTICE MATERIAL**

## JURISDICTIONAL STATEMENT

Dr. Prohaska "is dissatisfied with the accuracy . . . of the jurisdictional statement in the appellant's brief" and, pursuant to Mo. R. Civ. P. 84.04(f), is including a separate Jurisdictional Statement. See Mo. R. Civ. P. 84.04(f).

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). Likewise, 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, 224 S.W.2d 608, 611 (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. at 612.

Dr. Prohaska, the sole Respondent, died on April 29, 2006. Counsel for Dr. Prohaska filed the Suggestion of Death on May 12, 2006. To date, Appellant has not filed and served a proper motion for substitution, and no party has been substituted for Dr. Prohaska. **Therefore, the Court has no jurisdiction to entertain this appeal because a dead person is the sole Respondent, and Appellant has not satisfied the "rule-based requirements for substitution" set forth in Mo. R. Civ. P. 52.13(a)(1).** Accordingly, the appeal must be dismissed for want of jurisdiction.

## STATEMENT OF FACTS

### A. Appellant's Statement of Facts Violates Mo. R. Civ. P. 84.04(c)

Appellant's statement of facts is not a "fair and concise statement of the facts relevant to the questions presented for determination without argument." See Mo. R. Civ. P. 84.04(c). Appellant's statement of facts contains substantial argument, including argument that is irrelevant to the questions presented by this appeal. Importantly, Appellant does not contest the trial court's conclusions that (1) Appellant's expert did "not properly define the applicable standard of care," (2) plaintiff's experts did not "provide substantial evidence that plaintiff sustained non-economic damages as a direct result of defendant's negligence," (3) there was "not sufficient evidence to submit this case to the jury," and (4) "the verdict [was] not supported by adequate evidence[.]" See January 3, 2006 Final Judgment, Legal File (hereinafter "LF") at 76. Even though Appellant does not contest these findings, Pages 2, 3, and 4 of Appellant's statement of facts recites numerous contested facts relating the underlying medical malpractice case. Such argument – argument which constitutes approximately 30% of Appellant's statement of facts – is improper, violates Mo. R. Civ. P. 84.04(c), and should be disregarded.

### B. Additional Facts Presented by Dr. Prohaska

Dr. Prohaska is also "is dissatisfied with the accuracy [and] completeness of the . . . statement of facts in the appellant's brief[.]" See Mo. R. Civ. P. 84.04(f).

Accordingly, Dr. Prohaska will detail facts relevant to the issues in this appeal, many of which were omitted in Appellant's statement of facts.

**1. Facts Relevant to the Trial Court Proceedings**

a. During trial, Dr. Prohaska filed motions for directed verdict at the close of plaintiff's case and at the close of evidence. See LF at 24, 29. The trial court deferred the directed verdict motions at the time they were filed and argued.

b. After trial, on September 12, 2005, The Honorable Preston Dean (hereinafter "Judge Dean") entered an interlocutory judgment which again "deferred" Dr. Prohaska's motions for directed verdict. See September 12, 2005 interlocutory judgment, LF at 36, 37. Additionally, in his September 12, 2005 interlocutory judgment, Judge Dean did not decide the following important (and contested) issues: (1) whether plaintiff's sole medical liability expert recited the applicable and/or appropriate standard of care; (2) whether the evidence supported the verdict; (3) whether plaintiff established the requisite causal connection between the alleged negligence and her alleged injuries and damages; and (4) whether plaintiff established a submissible medical malpractice case.

c. On Monday, October 17, 2005, Dr. Prohaska filed her JNOV motion (hereinafter "JNOV"). In her JNOV, Dr. Prohaska argued (1) plaintiff failed to define the applicable standard of care in a medical malpractice case; and (2) plaintiff failed to present substantial evidence from which the jury could find that plaintiff

sustained non-economic damages as a direct result of the alleged malpractice. See LF at 40-43 (Point 1), 43-49 (Point 2).

d. On or about October 31, 2005, Appellant served his opposition to Dr. Prohaska's JNOV motion. Appellant did not include his opposition to Dr. Prohaska's JNOV in the Legal File, nor is it discussed in his Substitute Brief. Notably, in his opposition, Appellant did not contest the timeliness of Dr. Prohaska's JNOV. See Dr. Prohaska's Appendix (hereinafter "App.") at A1.[1]

e. On December 14, 2005, Judge Dean *sua sponte* issued an order inviting the parties to brief the issue of whether Dr. Prohaska timely filed her JNOV. See LF at 52. Judge Dean's order also asked "…how long do I have to rule [on] the Motions for Directed Verdict which I deferred at trial?" Id.

f. On December 19, 2005, Dr. Prohaska responded to Judge Dean's December 14, 2005 request. See LF at 54. In her brief, Dr. Prohaska reminded the trial court that it had not resolved several important issues, including whether plaintiff established a submissible medical malpractice case at trial. Id. As such, Dr. Prohaska showed the trial court the September 12, 2005 interlocutory judgment was not a final

[1] Appellant's Legal File is incomplete and does not contain the materials required by Mo. R. Civ. P. 81.12(a). Accordingly, pursuant to Mo. R. Civ. P. 81.12(c), Dr. Prohaska is filing contemporaneously with this brief "additional parts of the record on appeal," which are contained in the Appendix.

judgment, and Dr. Prohaska timely (and, in fact, prematurely) filed her JNOV because final judgment had not been entered. Id. at 54-56.

g. Judge Dean agreed with Dr. Prohaska's analysis. See Final Judgment, LF at 74. On January 4, 2006, Judge Dean entered Final Judgment. Id. In his January 4, 2006 Final Judgment (hereinafter "Final Judgment"), Judge Dean agreed he had "deferred" Dr. Prohaska's motions for directed verdict, and he commented that "entering judgment [on September 14, 2005] was misleading." Id. at 75. After discussing plaintiff's burden of proof in a medical malpractice action, Judge Dean concluded: (a) "Dr. Rushing, plaintiff's liability expert, [did] not properly define the applicable standard of care; (b) "None of plaintiff's experts provide[d] substantial evidence that plaintiff sustained non-economic damages as a direct result of defendant's negligence;" (c) "there [was] not sufficient evidence to submit this case to the a jury;" (d) "the verdict [was] not supported by adequate evidence, and it is set aside;" and (e) "**all issues** are resolved in favor of defendant."[2] Id. at 75, 76 (emphasis added). The Final Judgment also expressly granted Dr. Prohaska's motion for directed verdict at the close of plaintiff's evidence, as well as her JNOV. Id. at 74, 76.

**2. Facts Relevant to the Appellate Court Proceedings**

Appellant's Legal File and Appendix do not include the pleadings filed and Orders entered in the Missouri Court of Appeals. This is true even though Appellant's Third and Fourth Points Relied On directly relate to the appellate court proceedings. The

[2] Notably, Appellant does not dispute these findings in his appeal.

omitted pleadings include, but are not limited to, the Suggestion of Death, pleadings relating to Appellant's failed attempts to substitute a Respondent, and one of the orders from which Appellant appeals, the November 7, 2006 Order of Dismissal entered by Chief Judge Howard.[3] Dr. Prohaska respectfully directs the Court to her Appendix for these pleadings and orders.

**Dr. Prohaska died over 1½ years ago. Likewise, Dr. Prohaska's counsel filed the Suggestion of Death over 1½ years ago. To date, Appellant has not substituted a Respondent, nor has he timely filed and served a proper motion for substitution pursuant to Mo. R. Civ. P. 52.13(a)(1). The relevant facts and pleadings at the appellate court level, beginning with the death of Dr. Prohaska, are set forth below.**

a. Dr. Prohaska, the sole defendant in the underlying lawsuit and sole Respondent in the appellate court proceedings, died on April 29, 2006. See App. at A44, 46.

b. Dr. Prohaska's counsel filed the Suggestion of Death on May 12, 2006. Id. at A44.

[3] Thus, in addition to the omitted pleadings filed at the trial court level, Appellant's Legal File is also incomplete because it does not include these appellate court materials. See Mo. R. Civ. P. 81.12(a).

c. On August 8, 2006, Appellant moved to substitute an out-of-state executrix of Dr. Prohaska's estate, Ms. Susan Grossman. See Motion for Substitution, App. at A46. Ms. Grossman is a Virginia resident. Id. at A47, 50, 52. At the time of her death, and at all times relevant to the underlying case, Dr. Prohaska was a Kansas resident, and her estate is being administered in Kansas. Id. at A49. Appellant served his August 8, 2006 motion by mailing and faxing a copy of the motion to Dr. Prohaska's counsel and Mr. Dick Woods, the attorney representing Dr. Prohaska's estate in Johnson County, Kansas probate proceedings. Id. at A47-48. Appellant did not serve Ms. Grossman with his August 8, 2006 motion to substitute. Id.

d. On August 14, 2006, Dr. Prohaska opposed Appellant's motion for substitution and moved to dismiss the appeal. See App. at A53. Citing authority from this Court, Dr. Prohaska argued that Missouri courts have no jurisdiction to substitute foreign executors for deceased defendants, and Appellant's August 8, 2006 motion to substitute – which requested substitution of a Virginia resident acting as executrix of a Kansas estate – asked the Missouri Court of Appeals to operate extraterritorially and exceed its jurisdiction. Id. at A54. Additionally, Dr. Prohaska moved to dismiss the appeal because the 90 day jurisdictional time limit in Mo. R. Civ. P. 52.13(a)(1) had expired. Id. at A55.

e. On August 21, 2006, Appellant opposed Dr. Prohaska's motion to dismiss and moved to have a new personal representative appointed. See App. at A66. 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 Id. at 69-70; see also November 7, 2006 Order at 2, App. at A78-79.

f. On August 28, 2006, Dr. Prohaska opposed Appellant's August 21, 2006 Motion for Leave to Have a New Personal Representative Appointed and, again, moved to dismiss the appeal. See App. at A73. In her motion, Dr. Prohaska argued that Appellant's August 21, 2006 motion did "**nothing** to correct the obvious problem in his Motion to Substitute, namely, that the Court lacks jurisdiction over an out-of-state executor." See App. at A74 (emphasis in original). Specifically, and although Appellant's August 21, 2006 motion recognized that Ms. Grossman was not subject to the jurisdiction of the court, the motion did "**not request the Court substitute a new or different Respondent *ad litem*.**" Id. at A75 (emphasis in original); see also November 7, 2006 Order at 2, App. at A78-79. Accordingly, Dr. Prohaska argued the Missouri Court of Appeals was outside the 90 day jurisdictional period in Mo. R. Civ. P. 52.13(a), and dismissal was warranted. Id. at A75-77.

g. On November 7, 2006, Chief Judge Howard of the Missouri Court of Appeals, Western District, 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, App. at A78. In his Order, Chief Judge Howard: (1) denied Appellant's August 8, 2006 motion to substitute Ms. Grossman because "Missouri courts do not have the authority to exercise jurisdiction over a foreign executor;" (2) Appellant's August 21, 2006 motion did "not ask that a particular person

or entity be substituted;" and (3) based on Mo. R. Civ. P. 52.13(a)(1) and authority promulgated by this Court, dismissed the appeal. Id. at A78-79.

h. On November 22, 2006, Appellant filed a Motion for Rehearing, and, in the Alternative, Transfer to the Supreme Court. See App. at A80. This motion, although not styled as a motion for substitution, identified Mr. Frank McCollum ("Mr. McCollum") as potential substitute Respondent. Id. at A82. Additionally, like the August 8, 2006 motion, Appellant did not serve the November 22, 2006 motion on the proposed substitute Respondent. See Certificate of Service of Appellant's November 22, 2006 motion, App. at A90-91.

i. 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 App. at A92.

j. On December 12, 2006, Dr. Prohaska opposed Appellant's Motion for Rehearing, and, in the Alternative, Transfer to the Supreme Court. See App. at A93. In this motion, Dr. Prohaska argued that, contrary to Mo. R. Civ. P. 84.17(a)(1), Appellant's November 22, 2006 motion re-argued points previously raised by Appellant, and the motion should be denied on that basis alone. Id. at A95-96. Dr. Prohaska also contended that, for the reasons explained previously, Chief Judge Howard properly applied the law, and his November 7, 2006 Order should not be disturbed. Id. at A96-97. With respect to Appellant's newly-raised argument that the Missouri "survival" statute,

Mo. Rev. Stat. § 507.100.1(3), prevented dismissal of the appeal, Dr. Prohaska argued that: (1) Appellant did not raise this point in any previously-filed pleading and could not raise it for the first time in a motion for rehearing, and (2) more importantly, Mo. Rev. Stat. § 507.100.1(3) did "not excuse Appellant's failure to timely file and serve an appropriate motion for substitution within the ninety day jurisdictional period set forth in Mo. R. Civ. P. 52.13(a)(1)." Id. at A97-99. Finally, Dr. Prohaska argued that, even if Mr. McCollum were "willing" to serve as a substitute Respondent, (1) this point was previously considered and rejected by the Missouri Court of Appeals, and pursuant to Mo. R. Civ. P. 84.17 (a)(1), Appellant could not reargue this point in a motion for rehearing, and (2) a party's "willingness" to serve as substitute Respondent does not effectuate proper substitution, establish compliance with Mo. R. Civ. P. 52.13 (a)(1), or permit the Missouri Court of Appeals to substitute Mr. McCollum over 200 days after the Suggestion of Death was filed. Id. at A99-100.

k. 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, App. at A104.

l. On January 18, 2007, Appellant filed his Application for Transfer to the Missouri Supreme Court. See App. at A105.

m. On March 5, 2007, Dr. Prohaska opposed Appellant's Motion for Transfer to the Missouri Supreme Court. See App. at A133.

n. By Order dated March 20, 2007, this Court granted Appellant's Motion to Transfer. See App. at A140.

o. On April 27, 2007, and pursuant to Mo. R. Civ. P. 83.08(b), Dr. Prohaska timely filed her Substitute Brief with this Court. See App. at A141.

p. Appellant initially opted not to file a Substitute Brief with this Court. After the Court placed the appeal on the dismissal docket, Appellant's counsel contacted Dr. Prohaska's counsel to request consent to take the appeal off the dismissal docket, to extend the deadline to compile the record on appeal, and to permit Appellant to file a substitute brief. See e.g., August 7, 2007 proposed unopposed motion, App. at A169. Appellant's counsel requested consent even though Appellant has repeatedly argued Dr. Prohaska's counsel have no "authority to file any motion following the death of their client." See Substitute Brief at 23. In other words, throughout this appeal, Appellant has argued that Dr. Prohaska's counsel cannot oppose Appellant's motions; however, after the Court threatened to dismiss the appeal, Appellant's counsel asked Dr. Prohaska's counsel to consent to extend his deadline to file a Substitute Brief and compile the record on appeal. In the spirit of cooperation, Dr. Prohaska's counsel consented. On or about August 8, 2007, Appellant filed an unopposed motion to extend the period of time to compile the record on appeal and file a substitute brief, which the Court granted. See App. at A176.

q. On November 28, 2007 – four months after Dr. Prohaska filed her first Substitute Brief with this Court – Appellant filed his Substitute Brief.

Appellant did not serve Mr. McCollum with a copy of the Substitute Brief. See Substitute Brief at Certificate of Service.

**r. Over 570 days have now passed since the Suggestion of Death was filed, and no party has been substituted for Dr. Prohaska. This one-sided appeal is proceeding without a viable Respondent.**

## ARGUMENT

### A. Standard of Review

Appellant does not dispute Judge Dean's express findings that: (1) "[n]one of plaintiff's experts provide[d] substantial evidence that plaintiff sustained non-economic damages as a direct result of defendant's negligence," (2) "[t]here [was] not sufficient evidence to submit this case to a jury," and (3) [t]he verdict [was] not supported by adequate evidence[.]" See LF at 76. Thus, as it relates to Appellant's First and Second Points Relied On, Appellant does not dispute, for purposes of this appeal, the evidentiary basis to support the entry of JNOV and Judge Dean's granting of Dr. Prohaska's directed verdict motions. Rather, Appellant's First and Second Points Relied On contest Judge Dean's ability to grant these motions because of procedural issues, which presents a question of law. The standard of review for "questions of law" is *de novo*. Williams v. Kimes, 996 S.W.2d 43, 44-45 (Mo. 1999) (citation omitted). Therefore, the Court should apply the *de novo* standard of review to Appellant's First and Second Point Relied On.

Likewise, Appellant's Third and Fourth Points Relied On contest Chief Judge Howard's dismissal of Appellant's appeal because the Missouri Court of Appeals lacked jurisdiction due to Appellant's failure to comply with Mo. R. Civ. P. 52.13(a)(1). Thus, Appellants Third and Fourth Points Relied On also present questions of law, to which the *de novo* standard of review applies. Id.

**B. To save his appeal, Appellant must overcome three separate and independent obstacles**

Although there are several disputed issues in this appeal, two important issues are undisputed. First, Appellant makes **no attempt** to dispute Judge Dean's strongly-held belief that Appellant failed to make a submissible medical malpractice case at trial, and there was "not sufficient evidence to submit this case to a jury." See LF at 76. Likewise, Appellant does not oppose Judge Dean's finding that "plaintiff's liability expert [did] not properly define the standard of care." Id. Thus, Appellant asks this Court to reinstate a jury verdict that, based on the undisputed facts, should not have been entered in the first place. Second, Appellant does not dispute the fact that, even though the Suggestion of Death was filed over 570 days ago, he still has not substituted a Respondent for Dr. Prohaska. Nevertheless, Appellant asks this Court to hear a one-sided appeal.

Given these undisputed facts, Appellant faces a tremendous burden to save his appeal. First, Appellant must convince this Court it has jurisdiction to grant relief against a dead person. Appellant's request ignores established jurisdictional principles.

Second, even if Appellant leaps this jurisdictional hurdle, he must convince the Court that Chief Judge Howard erred in dismissing his appeal even though Appellant did not file and serve a proper motion for substitution within the ninety day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). In fact, even as of today's date, Appellant has not accomplished this important jurisdictional requirement. Third, even if (1) this Court has jurisdiction to grant relief against a dead person, and (2) Chief Judge Howard erred in dismissing the appeal for want of jurisdiction, Appellant must also prove that Judge Dean erred in granting a JNOV that was both proper on the merits and, per Missouri law, timely filed.

Appellant cannot overcome this heavy burden. The appeal should be dismissed.

## RESPONSE TO POINT NUMBER ONE

### A. Introduction

Appellant does not contend in Point Number One – or any other point – that Judge Dean's entry of JNOV was improper on the merits.[4] Rather, Appellant argues

[4] Notably, one of the cases cited by Appellant, Hopkins v. North Am. Co. for Life and Health Ins., 594 S.W.2d 310 (Mo. Ct. App. 1980), states "it would be plain error and **manifest injustice** to permit a judgment for plaintiff to stand where plaintiff had failed to make a case[.]" Id. at 318 (citing Williams v. Southern Pac. R.R. Co., 338 S.W.2d 882, 884 (Mo. 1960)) (emphasis added). Although this appeal

Judge Dean ignored Missouri law and erred in granting Dr. Prohaska's JNOV because it was untimely. Appellant is wrong. Although Appellant argues that Judge Dean's September 12, 2005 judgment was a final judgment, he simultaneously concedes the September 12, 2005 judgment left issues for future determination. See Substitute Brief at 17, 18. As such, the September 12, 2005 judgment cannot be a final judgment. Moreover, Missouri law provides that post-trial motions may be filed **at any time** before entry of final judgment. Because Judge Dean entered Final Judgment on January 4, 2006, and Dr. Prohaska filed her JNOV long before that date, Dr. Prohaska timely filed her JNOV. Appellant's first point should be rejected.

**B. Dismissal of Disingenuous Argument**

Two collateral arguments raised in Appellant's Substitute Brief must be addressed and quickly discarded. First, Appellant states "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." See Appellant's Substitute Brief at 17. Appellant's criticism is unfounded and ironic. Putting aside the fact that Dr. Prohaska timely filed

---

should be dismissed for a number of reasons, "manifest injustice" would occur if a verdict is reinstated that the trial court expressly and unambiguously found was "not supported by adequate evidence[.]" See LF at 76. That is especially true where, as here, Appellant does not dispute the trial court's finding that Appellant failed to make a submissible case at trial.

her JNOV, there is no reason she would raise the finality issue in that motion, or any other. The reason is simple: there was never any question – by either party – that the September 12, 2005 judgment did not resolve all issues and was not final. Moreover, Appellant hides the fact that, in his opposition to Dr. Prohaska's JNOV, **he did not question the timeliness of the JNOV.** See App. at A1.

Second, Appellant argues "there is no doubt the trial court subsequently tried to change the character of its [September 12, 2005] ruling based solely upon the fact that defendant failed to file a timely post trial motion which the court had anticipated would be filed." Id. at 15. The only logical interpretation of this argument is that, other than faithfully following the law, Judge Dean mischaracterized his September 12, 2005 judgment to comport to facts. In addition to being disrespectful, this argument is wrong, as Judge Dean correctly applied the law and entered JNOV in favor of Dr. Prohaska.

### C. The September 12, 2005 Interlocutory Judgment Did Not Resolve the Most Important Issue in the Case and Was Not a Final Judgment

The September 12, 2005 judgment was not a final judgment. Nor could it be, as the judgment did not dispose of the **most important issue** in the underlying case: whether plaintiff made a submissible medical malpractice case. Included within this question was whether (1) plaintiff's sole medical liability expert recited the applicable and/or appropriate standard of care; (2) the evidence supported the verdict; and (3) plaintiff established the requisite causal connection between the alleged negligence and her alleged injuries and damages. Without question, these issues – none of which were

resolved in the September 12, 2005 interlocutory judgment – are important and materially affect the finality of the judgment.

A judgment that does not dispose of **all issues** or leaves **any issue** for future determination is **not a final judgment**. Williams v. Williams, 41 S.W.3d 877, 878 (Mo. 2001) (a judgment that "fails to dispose of all issues between the parties is not a final judgment"); Kozeny-Wagner, Inc. v. Shark, 709 S.W.2d 149, 151 (Mo. Ct. App. 1986) ("[g]enerally, a final and appealable judgment is one that disposes of all issues in the case and leaves nothing for future determination") (also holding that, because the "court did not designate its ruling on the **motion for directed verdict** as final," the judgment was not final) (emphasis added); In re Trust of Bornefeld, 36 S.W.3d 424, 426 (Mo. Ct. App. 2001); see also Mo. R. Civ. P. 74.01 (defining "judgment" as including "a decree or order from which an appeal lies."). Notably, Appellant does not discuss this well-established case authority in his Substitute Brief.

Likewise, when "the trial court's judgment does not dispose of all the issues in the case, the trial court retains jurisdiction to change the judgment[,]" **and the time limitations set forth in Rule 75.01 do not apply.** Crangle v. Crangle, 809 S.W.2d 474, 475 (Mo. Ct. App. 1991) (also stating "where the 'judgment' in question is not final, the 30 day limit does not apply"); see also Williams, 41 S.W.3d at 877 ("where the judgment in question is not final, Rule 75.01 does not apply, and the trial court retains jurisdiction to enter final judgment") (internal quotes and citations omitted); Kozeny-Wagner, Inc., 709 S.W.2d at 151 (because the trial court had not issued a final ruling on a **directed**

**verdict motion**, the time limitations in Rule 75.01 did not apply, and the trial court retained jurisdiction); Trimble v. Pracna, 51 S.W.3d 481, 491, n. 6 (Mo. Ct. App. 2001) (stating "the constraints of Rule 75.01 do not apply" where a judgment is not final); see also id. at 492.

At trial, and again in his September 12, 2005 interlocutory judgment, Judge Dean "deferred" both directed verdict motions. See LF at 36, 37 (stating the directed verdict motions were "deferred"). Under Kozeny-Wagner, Inc., 709 S.W.2d at 151, a judgment that does not resolve a directed verdict motion cannot be final, and "the time limits of Rule 75.01 are not applicable[.]" See also Williams, 41 S.W.3d at 877; In re Trust of Bornefeld, 36 S.W.3d at 426. By not resolving the directed verdict motions, Judge Dean left undecided **the most important** issue in the underlying case, namely, whether plaintiff made a submissible medical malpractice case. Likewise, Judge Dean did not decide whether: (a) plaintiff's sole medical liability expert recited the applicable and/or appropriate standard of care in a medical malpractice case; (b) plaintiff established the requisite causal connection between the alleged negligence and her alleged damages; and (c) the evidence supported the verdict.[5] Thus, contrary to Appellant's assertions, the September 12, 2005 judgment cannot be a final judgment because it did not resolve "all issues"; rather, it left multiple issues for future determination. Indeed, the plain and unambiguous language of the September 12, 2005 interlocutory judgment demonstrates this point.

[5] Judge Dean **did** resolve these issues in his January 4, 2006 Final Judgment.

Because Judge Dean did not enter final judgment on September 12, 2005, he did not lose "jurisdiction over the action upon expiration of thirty days[.]" See Appellant's Substitute Brief at 13. To the contrary, the thirty-day period in Mo. R. Civ. P. 75.01 **does not apply** when a trial court has not entered final judgment. Kozeny-Wagner, Inc., 709 S.W.2d at 151; Trimble, 51 S.W.3d at 492. For this reason, Appellant is incorrect that Judge Dean was automatically stripped of jurisdiction to enter final judgment thirty days after entry of the September 12, 2005 interlocutory judgment. Indeed, the opposite is true: he retained jurisdiction to enter final judgment.[6]

Simply stated, Appellant is wrong on two important points. Judge Dean's September 12, 2005 judgment did not, by its express and unambiguous terms, resolve "all issues" and cannot be a final judgment. Williams, 41 S.W.3d at 877; In re Trust of Bornefeld, 36 S.W.3d at 426; Kozeny-Wagner, Inc., 709 S.W.2d at 151. Additionally, because the September 12, 2005 judgment was not, nor could be, a final judgment, Judge Dean retained jurisdiction to enter final judgment. Id.; Crangle, 809 S.W.2d at 475; Trimble, 51 S.W.3d at 491, n. 6

[6] As discussed in Section II E, infra, the interaction of Mo. R. Civ. P. 74.01 and 75.01 also disproves Appellant's point.

### D. Dr. Prohaska Filed Her JNOV Early

Because Judge Dean's September 12, 2005 judgment was not a final judgment, Dr. Prohaska timely filed her October 17, 2007 JNOV. In fact, she filed it early.

This issue was squarely addressed in Sanders v. Hartville Milling Co., 14 S.W.3d 188 (Mo. Ct. App. 2000). In Sanders, the trial court issued "trial minutes" on March 11, 1998 which accepted the jury verdict and entered judgment in favor of plaintiff. Id. at 216. At the time it entered judgment, however, the trial court had not resolved issues relating to prejudgment interest because that issue had been taken "under advisement." Id. Defendant subsequently filed a JNOV on April 20, 1998 – thirty-nine days after the trial court entered judgment in accord with the jury verdict. Id. Thereafter, on June 30, 1998, the trial court ruled on the prejudgment interest issue and entered an amended judgment that incorporated its ruling on this issue. Id.

In his motion for rehearing and/or transfer to this Court, plaintiff argued that, because defendant filed its JNOV thirty-nine days after entry of judgment, defendant did not comply with Mo. R. Civ. P. 72.01(b), and defendant's JNOV was untimely. Id. at 217. In a separate portion of the opinion dealing specifically with this issue, the Missouri Court of Appeals disagreed. Id. In holding defendant's JNOV was timely, the court found:

> The judgment that adjudicated the last of the pending issues was entered June 30, 1998. [Defendant's] motion was filed

> April 20, 1998. At that time the trial court had pending the issue of prejudgment interest. [Defendant's] motion addressed that issue even though at the time the motion was filed, the issue had not been finally decided. In that regard, it was arguably premature. Nevertheless, it was filed . . . as provided by Rule 72.01(b), not later than thirty days after entry of judgment[.] Plaintiff's claim that [defendant's] post-trial motion was not timely filed is without merit.

Id. at 217 (internal quotes omitted). Notably, this Court denied transfer on April 25, 2000. Id. at 188. See also Trimble v. Pracna, 51 S.W.3d 481, 492 (Mo. Ct. App. 2001) (stating, because final judgment had not been entered, **"any post-trial motions were premature and deemed filed immediately after judgment became final."**) (emphasis added); see also 24 Mo. Prac. § 4.18 (stating "until a final judgment has been entered, **an after-trial motion can be filed at any time, even after the expiration of the 30 days set forth in Rule 78.04**.") (emphasis added); see also cases cited in Section II C, supra.

The situation here is identical to that in Sanders. As discussed above, the September 12, 2005 interlocutory judgment did not "adjudicate[] the last of the pending issues[.]" Sanders, 14 S.W.3d at 217. Indeed, the September 12, 2005 interlocutory judgment expressly "deferred" both directed verdict motions, left unresolved the most important issue in the case (e.g., whether plaintiff established a submissible medical malpractice case), and was not a final judgment. Rather, "the judgment that adjudicated

the last of the pending issues" was entered on January 4, 2006 when Judge Dean resolved each of these important issues. Thus, like in Sanders, Dr. Prohaska's JNOV was "arguably premature" and, therefore, timely because she filed the motion before Judge Dean "adjudicated the last of the pending issues" and entered final judgment on January 4, 2006.[7] See also Trimble, 51 S.W.3d at 492.

Notably, Appellant's Substitute Brief does not discuss or attempt to distinguish Sanders. Although Appellant cites cases standing for the proposition that Missouri trial courts retain jurisdiction beyond thirty days after entry of judgment only where post-trial motions are filed, none of the cases cited by Appellant involved a situation where, as here, a party filed a post-trial motion before the trial court entered final judgment. See Cases Cited in Appellant's Substitute Brief at 14. Nor do the cases address a situation where the trial court entered an initial judgment which, on its face, expressly deferred important matters or left issues for future determination. Thus, the cases cited by Appellant are distinguishable in these important respects.[8] Moreover,

[7] The facts of this case are more compelling than in Sanders because the unresolved issue in Sanders related to prejudgment interest. Here, the unresolved issue related to the submissibility of plaintiff's case to the jury.

[8] Additionally, in Wiseman v. Lehmann, 464 S.W.2d 539 (Mo. Ct. App. 1971), the court observed that "[p]laintiff filed no after trial motions," and the defendant merely sent a "letter … that … sought a new trial." Id. at 543. In Hopkins v. North Am.

Appellant ignores the substantial authority cited above – including authority from this Court (i.e., Williams, 41 S.W.3d at 878) – providing that Missouri courts retain jurisdiction **beyond** thirty days to enter final judgment.

Simply put, Sanders is directly on point; the cases cited by Appellant are not. Sanders confirms a post-trial motion filed before entry of final judgment is timely. See also Trimble, 51 S.W.3d at 492; 24 Mo. Prac. § 4.18. Here, Dr. Prohaska filed her JNOV on October 17, 2007 – over 75 days before Judge Dean entered Final Judgment. As such, Dr. Prohaska timely filed her JNOV.

**E. The Missouri Rules of Civil Procedure Support this Position**

Appellant's Substitute Brief does not cite or discuss Mo. R. Civ. P. 74.01(a). Importantly, this rule states, "'Judgment' as used in these rules includes a decree and any order from which an appeal lies." See Mo. R. Civ. P. 74.01(a). In other words, when the term "judgment" is used in the Missouri Rules of Civil Procedure, the term necessarily contemplates **final** judgments because a party can only appeal a final judgment. In re Trust of Bornefeld, 36 S.W.3d at 426.

---

Co. for Life and Health Ins., 594 S.W.2d 310 (Mo. Ct. App. 1980), the trial court directed a verdict in favor of defendant even though defendant only asked for a new trial. Id. at 317. These situations are appreciably different from the facts here.

Appellant dedicates a substantial portion of his Substitute Brief to discussing Mo. R. Civ. P. 72.01(b) and 75.01, both of which use the term "judgment." Appellant, however, overlooks the effect Mo. R. Civ. P. 74.01(a) has on these rules. Specifically, the time limitations in Mo. R. Civ. P. 72.01(b) and 75.01 are triggered upon the "entry of judgment." By definition under Mo. R. Civ. P. 74.01(a), the term "judgment" "includes a decree and any order from which an appeal lies" and, therefore, contemplates entry of final judgment. See also e.g., Kozeny-Wagner, Inc. 709 S.W.2d at 151 (stating "the term 'entry of judgment' used in [Mo. R. Civ. P. 75.01] has been interpreted to refer to a final, appealable judgment that disposes of all parties and all issues in a case."). In other words, – and consistent with Sanders, Crangle, Kozeny-Wagner, Inc., and Williams – the time limitations in Mo. R. Civ. P. 72.01 and 75.01 begin to run upon entry of a final judgment, and a party may file post-trial motions at any time before entry of final judgment.

Mo. R. Civ. P. 74.01(b) also supports Dr. Prohaska's position. This rule permits a trial court to, upon finding that "there is no just reason for delay," resolve fewer than all of the issues in a case. Id. Any such judgment, however, "shall not terminate the action . . . [and] is subject to revision ***at any time*** before the entry of judgment adjudicating all the claims and rights and liabilities of all the parties." Id. (emphasis added). The situation here is analogous, as Judge Dean expressly "deferred" a number of important issues in his September 12, 2005 interlocutory judgment. As such, and consistent with the case law and procedural rules discussed herein, Judge Dean retained

jurisdiction to enter final judgment, and the time limits set forth in the rules were not triggered until entry of final judgment.

**F. Logic Supports this Position**

There are any number of reasons a judgment may not be final. As in Sanders, the trial court may not resolve issues regarding prejudgment interest. As in this case, the trial court may not resolve issues regarding the submissibility of the case to the jury. Whatever the reason, the issuance of a final judgment may materially affect the type of post-trial motions filed by a party and the party that files them.[9] Thus, logic dictates that a trial retains jurisdiction to enter final judgment, and the time period for filing of post-trial motions commence upon entry of final judgment.

**G. Conclusion**

Judge Dean correctly applied the law and entered JNOV in favor of Dr. Prohaska. Because Judge Dean "deferred" important issues in his September 12, 2005 interlocutory judgment, that judgment was not, nor could be, a final judgment. Consistent with established law, Judge Dean retained jurisdiction to enter final judgment,

[9] This case presents a good example. If Judge Dean had not deferred Dr. Prohaska's directed verdict motion but, instead, granted the motion (as he conceded he should have done in his Final Judgment), **Appellant** would have been the party filing post-trial motions.

which he did on January 4, 2006. Because Dr. Prohaska filed her JNOV before Judge Dean entered final judgment, the motion was timely.

Finally, one important comment deserves mention: **no** speculation or guesswork is required to ascertain how Judge Dean viewed his judgments, or what issues he did (or did not) resolve in his judgments. The Final Judgment makes abundantly clear plaintiff did not make a submissible medical malpractice case (for multiple reasons), and "all issues" were "resolved in favor of defendant." See LF at 76. The Final Judgment makes equally clear these important issues were not resolved in the September 12, 2005 interlocutory judgment, which Judge Dean described as "misleading" and a "nullity." Id. at 74, 75. Under these circumstances, "it would be plain error and manifest injustice" to not uphold Judge Dean's unambiguous intent and express findings that this case never should have gone to the jury. Hopkins, 594 S.W.2d at 381 (citing Williams v. Southern Pac. R.R. Co., 338 S.W.2d 882, 884 (Mo. 1960)). That is especially true where, as here, Dr. Prohaska timely moved for JNOV. Point One should be denied.

## RESPONSE TO POINT NUMBER TWO

### A. Appellant's Second Point Relied On Does Not Apply to this Case

Appellant's Second Point Relied On states Judge Dean erred in granting Respondent's JNOV because Dr. Prohaska (Respondent) waived any error with the directed verdict ruling by presenting evidence at trial. Appellant's Second Point Relied On is completely inapplicable because Dr. Prohaska never claimed any error regarding

the JNOV or directed verdict rulings. To the contrary, Dr. Prohaska believes Judge Dean **did not commit error** by granting her JNOV and directed verdict motions.

The cases cited in Appellant's Substitute Brief all relate to a defendant claiming error for the trial court's denial of the defendant's directed verdict motion at the close of plaintiff's evidence. Again, these cases simply do not apply because Dr. Prohaska has never claimed error regarding Judge Dean's JNOV or directed verdict rulings. Accordingly, Appellant's entire Second Point Relied On is inapplicable because no such error is claimed by Dr. Prohaska.

**B. A Trial Judge Has Authority to Rule On <u>All</u> Motions**

Missouri law clearly allows a trial judge to rule on directed verdict and JNOV motions: "Logic and justice would seem to indicate that a trial court should be permitted to retain control of every phase of a case so that it may correct errors, or, in its discretion, modify or set aside orders or judgments until its jurisdiction is extinguished by the judgment becoming final and appealable." <u>Woods v. Juvenile Shoe Corp.</u>, 361 S.W.2d 694, 695 (Mo. 1962). Indeed, a trial judge's authority in this regard is wholly consistent with the case authority cited in Section II C, <u>supra</u>, which confirms a trial court retains jurisdiction to resolve "all issues" and enter final judgment. Accordingly, Judge Dean had complete authority under Missouri law and Supreme Court precedent to rule on Respondent's JNOV <u>and</u> directed verdict motions, including the motion for directed verdict at the close of plaintiff's evidence.

### C. The Court Should Deny Appellant's Second Point Relied On

There is an inherent irony in Appellant's Second Point Relied On. Appellant **does not dispute** Judge Dean's substantive finding in his Final Judgment that "I should have granted defendant's Motion for Directed Verdict at the Close of Plaintiff's Evidence." See LF at 76. At the same time, Appellant argues Judge Dean should not have granted the directed verdict motion because Dr. Prohaska presented evidence which **further demonstrated** the propriety of directing a verdict in favor of Dr. Prohaska. Despite the irony of this position, the argument and cases cited in Appellant's Second Point Relied On are completely inapplicable because Dr. Prohaska never claimed the trial judge erred in granting her JNOV or motion for directed verdict at the close of plaintiff's evidence. To the contrary, Dr. Prohaska believes Judge Dean's granting of these motions was proper, as Missouri law permitted Judge Dean to retain control over "every phase of a case" – including pending motions – until his jurisdiction was "extinguished" by entry of final judgment. Woods, S.W.2d at 695.

## RESPONSE TO POINT NUMBER THREE

### A. Introduction

The jurisdictional problem confronting this Court is dispositive of this appeal. Specifically, Appellant asks this Court to grant relief against a dead person. No court in Missouri can do this. Moreover, **570 days** have passed since the Suggestion of Death was filed, and Appellant still has not filed and served a proper motion for substitution. Under these circumstances, the Court lacks jurisdiction to hear this appeal.

Appellant dodges this fundamental jurisdictional issue in his Substitute Brief. Instead of directly addressing the jurisdictional issue, Appellant challenges Chief Judge Howard's November 7, 2007 Order of Dismissal on the basis that the "attorneys for Dr. Prohaska did not have authority to file any motion following the death of their client." See Substitute Brief at 23. This argument is flawed in multiple respects. First, Dr. Prohaska's counsel can oppose Appellant's defective August 8, 2006 substitution attempt and subsequent pleadings. Second, Appellant assumes the Missouri Court of Appeals would not have dismissed the appeal if Dr. Prohaska had not filed motions dismiss the appeal for want of jurisdiction. This assumption is incorrect because all Missouri courts must *sua sponte* consider their jurisdiction. Thus, even if Dr. Prohaska's counsel had not defended their deceased client's interests (as Appellant incorrectly and illogically suggests should have occurred), the Missouri Court of Appeals would have *sua sponte* evaluated its jurisdiction, concluded it had no jurisdiction, and dismissed the appeal. Third, and most importantly, Chief Judge Howard's November 7, 2006 Order of Dismissal followed the law and was proper.

**B. Factual overview of the motions at issue**

Although detailed in the Statement of Facts, a brief overview of the motions relevant to the substitution process is warranted. Dr. Prohaska's counsel filed the Suggestion of Death on May 12, 2006. See App. at A44. On August 8, 2006, Appellant moved to substitute Ms. Susan Grossman as Respondent. Id. at A46. Importantly, Ms. Grossman is a **Virginia** resident and the executrix of Dr. Prohaska's **Kansas** estate. Id. at

A46, 47, 50, 51. The Missouri Court of Appeals properly denied Appellant's August 8, 2006 motion to substitute Ms. Grossman because it asked the court to exercise its jurisdiction extraterritorially. Additionally, Appellant defectively served his August 8, 2006 motion because he did not serve Ms. Grossman with the motion, as required by Mo. R. Civ. P. 52.13(a)(1). Id. at A47-48.

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 A79; see also Id. at A66. As such, Appellant's August 21, 2006 motion is not a motion for substitution pursuant to Mo. R. Civ. P. 52.13(a)(1) and is irrelevant to the issues herein.

On November 22, 2006, and after the Missouri Court of Appeals dismissed his appeal, Appellant filed a Motion for Rehearing or, alternatively, Transfer to the Missouri Supreme Court. See App. at A80. Although not styled as a motion for substitution, Appellant asserted in his November 22, 2006 motion that Mr. Frank McCollum was "willing" to be substituted as Respondent. Id. at A82. 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 A90-91.

The bottom line is this: Appellant filed one motion within the 90 day jurisdictional time period set forth in Mo. R. Civ. P. 52.13(a)(1), and this motion named a patently improper party and was defectively served. To date, and even though 570 days have passed since the Suggestion of Death was filed, Appellant still has not filed and served a proper motion for substitution. Thus, because this appeal is proceeding without a viable Respondent, the Court lacks jurisdiction to entertain the appeal.

### C. Dr. Prohaska properly opposed Appellant's improper and untimely substitution attempts

As mentioned, Appellant's sole contention in Point Three is that Dr. Prohaska's counsel improperly opposed Appellant's improper substitution attempts and moved to dismiss the appeal. Appellant's position is illogical and contrary to law.

Dr. Prohaska'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, after the Suggestion of Death was filed, Dr. Prohaska's counsel should have sat on their hands, stopped defending Dr. Prohaska's interests, and ignored Appellant's patently improper substitution attempts. This is illogical. Appellant's position is also ironic given that, after this Court placed his appeal on the dismissal docket, Appellant's counsel contacted Dr. Prohaska's counsel – the same lawyers who purportedly have no authority to oppose Appellant's motions – to request their **consent** to take the appeal off the dismissal docket and extend the time to compile the record on appeal and file Appellant's Substitute Brief. See App. at A169, 171, 173. Thus, when it

suits his purpose, Appellant contends Dr. Prohaska's counsel may do nothing; at other times, and when it suits his purpose, Appellant requests Dr. Prohaska's counsel's consent to save his appeal. Appellant cannot have it both ways.

Appellant's position is also contrary to law. Indeed, Holmes v. Arbeitman, 857 S.W.2d 442, 444 (Mo. Ct. App. 1993), which Appellant cites in his brief, makes 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"). Id. Thus, because a lawyer remains a "person in interest," the Holmes court concluded the decedent's lawyer was the "most logical person" to file a suggestion of death. Id. If the "most logical person" was not permitting to file such pleadings, Missouri courts would be unable to "proceed with [their] business" and would be trapped "in a state of judicial impotence." Id. Holmes also observed that, because our judicial system is adversarial in nature, "the burden of continuing the jurisdiction of the appellate court should rest on the party whose interest is served by the continuation of the appeal process." Id.

What was "logical" to the Holmes court is something different to Appellant. Specifically, Appellant disregards the fact that Dr. Prohaska's long-time counsel are still "persons in interest" under Mo. R. Civ. P. 52.13(a)(1) and case law interpreting same. Likewise, Dr. Prohaska's attorneys are the "most logical persons" to oppose Appellant's improper substitution attempts. That is especially true where, as here, Appellant's proposed substitute respondent, Ms. Susan Grossman, was beyond the jurisdiction of the

court. Moreover, and although the Missouri Court of Appeals would have *sua sponte* recognized it lacked jurisdiction, Dr. Prohaska's motions to dismiss promptly alerted the court to the jurisdictional problem, expedited the dismissal process, and avoided the "state of judicial impotence" the Holmes court sought to avoid. Finally, Appellant's contention that Dr. Prohaska's counsel must sit on their hands is flatly inconsistent with the adversarial process, as well as the fact that it is Appellant's burden to continue "the jurisdiction of the appellate court[.]" – something Appellant has not done. Id.

Thus, in addition to being highly illogical, it is legally incorrect to assert, as Appellant does, that Dr. Prohaska's counsel must stick their heads in the sand and ignore Appellant's patently improper attempts to substitute a Respondent. See also e.g., Williams v. Patterson, 218 S.W.2d 156, 170 (Mo. Ct. App. 1949) ("the death of the client does not terminate the relationship or revoke the authority of the attorney . . . where the attorney is specifically retained to conduct the case to judgment or conclusion[.]").

**D. Compliance with Mo. R. Civ. P. 52.13(a)(1) is a jurisdictional requirement, and the Missouri Court of Appeals must *sua sponte* evaluate its jurisdiction**

Appellant's Point Three also improperly assumes the Missouri Court of Appeals would not have dismissed the appeal had Dr. Prohaska's counsel not opposed Appellant's substitution attempts. Like many assumptions, Appellant's assumption is incorrect because compliance with Mo. R. Civ. P. 52.13(a) is a **jurisdictional** requirement, and Missouri courts must *sua sponte* evaluate jurisdiction. Richie v.

Laususe, 950 S.W.2d 511, 513 (Mo. Ct. App. 1997); Clark v. Fitzpatrick, 801 S.W.2d 426 (Mo. Ct. App. 1990); In re Trust of Bornefeld, 36 S.W.3d at 426; Holmes, 857 S.W.2d at 443. Thus, even if Dr. Prohaska had not moved to dismiss the appeal, the Missouri Court of Appeals would have evaluated Appellant's compliance with Mo. R. Civ. P. 52.13(a)(1) and determined whether he secured the jurisdiction of the court. Because Appellant did neither, the Missouri Court of Appeals would have dismissed the appeal without any motion by Dr. Prohaska. As a result, Appellant's Point Three – which is premised entirely on an incorrect assumption – must fail.

### E. Chief Judge Howard Properly Dismissed the Appeal[10]

Appellant did not file and serve a proper motion for substitution within the ninety day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). Importantly, the ninety day period in Mo. R. Civ. P. 52.13(a)(1) cannot be extended by any Missouri court. See Mo. R. Civ. P. 44.01(b). For these reasons, and others, Chief Judge Howard correctly observed the Missouri Court of Appeals lacked jurisdiction and dismissed the appeal.

[10] Appellant's Point Number Three only disputes the ability of Dr. Prohaska's counsel to move to dismiss the appeal. However, pursuant to Mo. R. Civ. P. 84.04(f), Dr. Prohaska is presenting "additional arguments in support of" Chief Judge Howard's November 7, 2006 Order of Dismissal.

### 1. Missouri courts cannot grant relief for or against dead people, and Mo. R. Civ. P. 52.13(a)(1) requires substitution of proper parties

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).[11] 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, 224 S.W.3d 608, 611 (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) also 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

[11] In his Substitute Brief, Appellant cites Holmes for this same proposition. See Appellant's Substitute Brief at 23-24. Thus, if this Court follows Appellant's authority, the appeal must also be dismissed.

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).

Currently, over **570 days** have passed since Dr. Prohaska's counsel filed the Suggestion of Death, and no Respondent has been substituted. Under these circumstances, no Missouri court (including this Court) has jurisdiction to entertain the underlying appeal, and Chief Judge Howard correctly dismissed the appeal. See Mo. R. Civ. P. 52.13(a)(1) and 44.01(b).

**2. Appellant did not comply with Mo. R. Civ. P. 52.13(a)(1)**

Appellant did not follow Mo. R. Civ. P. 52.13(a)(1). As discussed below, Chief Judge Howard properly denied Appellant's August 8, 2006 motion to substitute Ms. Grossman because that motion asked the Missouri Court of Appeals to exceed its jurisdiction. Additionally, Appellant improperly served the August 8, 2006 motion. Appellant's next motion to request substitution of a 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). For these reasons, Chief Judge

Howard properly observed the Missouri Court of Appeals had lost jurisdiction and dismissed the appeal.

**a. The Missouri Court of Appeals properly denied the August 8, 2006 motion to substitute Ms. Grossman**

Appellant's August 8, 2006 motion to substitute requested substitution of a patently improper party because it asked the Missouri Court of Appeals to exercise its jurisdiction over an out-of-state executrix. Additionally, Appellant improperly served the motion. For these reasons, Appellant's August 8, 2006 motion did not secure the jurisdiction of the Missouri Court of Appeals pursuant to Mo. R. Civ. P. 52.13(a)(1).

**i. Missouri courts cannot operate extraterritorially**

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 App. at A46, 47, 50, 51. 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[.]")).

Recognizing these jurisdictional principles, this Court has held that Missouri courts 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 Rooney, this Court overturned a defense verdict and ordered a new trial. Id. at 356. Before the new trial began, the defendant, a Texas resident, died. Id. Plaintiff attempted to substitute Mercantile National Bank, a Texas resident and executor of defendant's estate. Id. Although the circuit court permitted substitution, this Court concluded the substitution was inappropriate, as the circuit court had no authority to impose its jurisdiction over the foreign executor. Id. at 357; See also In the Estate of Livingston, 627 S.W.2d 673, 678 n.3 (Mo. 1982) (stating Mo. Rev. Stat. § 507.100 also "does not extend to the substitution of a foreign executor or administrator."); 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.").

The facts here are identical to those in Rooney. Specifically, in his August 8, 2006 motion, Appellant asked the Missouri Court of Appeals to exercise its jurisdiction over a Virginia resident and executrix of a Kansas estate. Per Rooney, as well as established jurisdictional principles, no Missouri court can effectuate such a substitution, and Chief Judge Howard properly denied Appellant's August 8, 2006 motion to substitute. See November 7, 2006 Order, App. at A78 (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).

**ii. The motion was improperly served**

Chief Judge Howard could have denied Appellant's August 8, 2006 motion for another reason: it was improperly served. 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 strict 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 App. at A47-48. 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). Therefore, even if Ms. Grossman were a proper substitute Respondent, which she was not, Appellant's failure to properly serve Ms. Grossman rendered the Missouri Court of Appeals "without authority to proceed." Id.

**b. Appellant untimely filed and improperly served his November 22, 2006 Motion for Rehearing or Transfer**

Appellant filed his next "substitution" motion on November 22, 2006. See App. at A80. Notably, Appellant filed the November 22, 2006 motion – which was not styled as a motion for substitution – after the Missouri Court of Appeals had dismissed

the appeal for want of jurisdiction. Even if Appellant's November 22, 2006 motion is construed as a motion for substitution, Appellant filed the motion long after the ninety day jurisdictional period – a period which cannot be extended – in Mo. R. Civ. P. 52.13(a)(1) had expired. Additionally, and like the August 8, 2006 motion, Appellant did not serve the proposed substitute Respondent, in violation of Mo. R. Civ. P. 52.13(a)(1).

**i. 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).

The words of this Court in Wormington are equally applicable here: Appellant's failure to substitute a Respondent "robbed" the Missouri Court of Appeals –

as well as this Court – of its "jurisdiction to proceed with the case on the merits." This means that any motion served outside the ninety day deadline,[12] including Appellant's November 22, 2006 motion for rehearing and/or transfer, cannot substitute a Respondent and secure the jurisdiction of the Court.

**ii. Appellant improperly served the November 22, 2006 motion**

Although Appellant's November 22, 2006 motion requested substitution of Mr. McCollum, a non-party, Appellant did not serve Mr. McCollum with the motion. See App. at A90-91. 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). See Metropolitan St. Louis Sewer Dist., 751 S.W.2d at 751; State ex rel. Illinois Farmers Ins. Co., 811 S.W.2d at 354. Moreover, the failure 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), and no court has "authority to proceed." State ex rel. Illinois Farmers Ins. Co., 811 S.W.2d at 354.

**3. Appellant cannot comply with Mo. R. Civ. P. 52.13(a)(1) by issuing a patently improper and defectively served motion to substitute**

[12] The 90 day jurisdictional period expired over sixteen months ago, on August 10, 2006.

Notwithstanding the patent impropriety of Appellant's two "substitution" motions, Appellant argues he fully complied with Mo. R. Civ. P. 52.13(a)(1) because "he filed and served his [August 8, 2006] motion for substitution within the ninety (90) days." See Substitute Brief at 26; see also Id. at 30. According to Appellant, he can – at the very end of the ninety day period – defectively serve a motion for substitution that requests substitution of a clearly improper party, have that motion denied, and, thereafter, wait indefinitely to substitute a Respondent. Appellant's position ignores the plain language of the rule, is illogical, and would turn the rule on its head.

First, the plain language and clear intent of Mo. R. Civ. P. 52.13(a)(1) requires proper service of a proper motion for substitution. 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. Such an illogical result cannot be envisioned by Mo. R. Civ. P. 52.13(a)(1).[13] See also e.g., 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.").

Indeed, the requirement that a party timely file a "proper" motion for substitution is so obvious that it was not 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 determined 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 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

[13] 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.

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 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, defeat the clear intent and purpose of the rule, extend the jurisdiction of Missouri courts for an indefinite period of time, and result in the "state of judicial impotence" feared by the Holmes court. Accordingly, contrary to Appellant's illogical assertions, the issuance of a patently improper and defectively served motion to substitute cannot comply with Mo. R. Civ. P. 52.13(a)(1) or secure the jurisdiction of the Missouri Court of Appeals (or this Court).

**4. Appellant's untimely, subsequent requests to substitute a respondent cannot "relate back" to the August 8, 2006 motion**

In his Substitute Brief, Appellant asks the Court "to substitute the estate of Dr. Prohaska for Dr. Prohaska[.]" See Substitute Brief at 31. **Per Rooney, 402 S.W.2d at 357, this request is improper, as this Court has no jurisdiction over a Kansas estate.**[14] Even if this were a proper request, which it is not, the instant brief – or any other untimely filed substitution motion – cannot "relate back" to the patently improper and defectively served August 8, 2006 motion to substitute Ms. Grossman.

In Lunde v. Scardacci, 175 S.W.3d 676, 682 (Mo. Ct. App. 2005), the Missouri Court of Appeals flatly rejected a "relation-back" argument similar to that which Appellant must use 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

[14] Even if Appellant is actually requesting that Mr. McCollum be substituted (which is contrary to the plain language of Appellant's request), Appellant did not serve Mr. McCollum with a copy of the Substitute Brief and, therefore, did not comply with Mo. R. Civ. P. 52.13(a)(1). See Id. at Certificate of Service (showing service on "Attorneys for Respondent").

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 that in Lunde. Specifically, Appellant argues his timely, but patently improper and defectively served, August 8, 2006 motion to substitute permits subsequent "bites at the apple." Id. As the Lunde court aptly noted, however, Appellant gets only one bite 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. That is especially true where, as here, no Missouri court can extend the ninety day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). See Mo. R. Civ. P. 44.01(b).

Finally, Mo. R. Civ. P. 55.33(c) is instructive. Under this 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 (as well as his instant request to substitute

Dr. Prohaska's Kansas estate) 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 – or any subsequent motion – cannot relate back to his defective August 8, 2006 motion.

**5. Appellant's request is contrary to 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 at the eleventh hour, have that motion denied, and 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 To Point Number Three**

Appellant's third point avoids the big issue: was Chief Judge Howard's November 7, 2006 Order of Dismissal proper or not? It was proper. Mo. R. Civ. P. 52.13(a)(1) does not permit parties to substitute whoever they want, especially if that party is beyond the jurisdiction of the court. Likewise, Mo. R. Civ. P. 52.13(a)(1) does not permit parties to serve motions for substitution on whoever they want, or in any

manner they see fit. To construe Mo. R. Civ. P. 52.13(a)(1) in this fashion, as Appellant does, would render the rule's jurisdictional requirements virtually meaningless.

Recognizing this, Appellant dodges the core issue and simply argues that Dr. Prohaska's counsel should have turned their heads and ignored Appellant's improper and untimely substitution attempts. In addition to being illogical, Appellant's argument ignores the fact that Dr. Prohaska's long-time counsel remained "person[s] in interest" following the death of their client, and they are the "most logical" persons to oppose Appellant's improper substitution attempts. Holmes, 857 S.W.2d at 444. More importantly, even if Dr. Prohaska's attorneys had closed their eyes to Appellant's improper substitution attempts, the Missouri Court of Appeals would have *sua sponte* determined Appellant failed to comply with Mo. R. Civ. P. 52.13(a)(1) and dismissed the appeal for want of jurisdiction. Just like it did.

## RESPONSE TO POINT NUMBER FOUR

### A. Introduction

In his fourth point, Appellant contends he was "misled" by Ms. Grossman's attorney and, therefore, this Court should excuse his failure to comply with Mo. R. Civ. P. 52.13(a)(1). See Substitute Brief at 27. Notably, and contrary to Mo. R. Civ. P. 84.04(i), Appellant includes no record support for this point in his Legal File or Appendix. Additionally, and although not recited in his "Point Relied On," Appellant argues the Missouri Court of Appeals "misconstrued" the Missouri "survival" statute, Mo. Rev. Stat. § 507.100.1, and should have permitted substitution after the ninety day

jurisdictional period in Mo. R. Civ. P. 52.13(a)(1) expired. Each argument is without merit.

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

In his Substitute Brief, and without citation to **any** document, portion of the record, or other authority, Appellant argues Ms. Grossman's attorney advised "he would accept service of process on behalf of his client, and, thereby, counsel for Appellant was misled into believing Ms. Grossman would submit herself to the jurisdiction of Missouri courts." See Substitute Brief at 26-27. Even if this were true, excusable neglect does not excuse compliance with Mo. R. Civ. P. 52.13(a)(1). See Mo. R. Civ. P. 44.01(b); Gillespie, 224 S.W.3d at 612 (stating, with respect to a motion to substitute filed 92 days after the suggestion of death, "[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, the fact that Appellant's lawyer believed 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).

Finally, one important fact deserves mention: viable substitute Respondents have existed since the day the Suggestion of Death was filed. Indeed, in his Substitute Brief – and in other pleadings – Appellant has observed that Dr. Prohaska's insurance carrier "is subject to the jurisdiction of the Missouri courts" and could have been substituted. See Substitute Brief at 25; see also Appellant's August 21, 2006

Motion, App. at A69 (noting, in the portion of his brief dealing with potential substitute Respondents, "[c]learly the medical malpractice insurance carrier for Dr. Prohaska, **which was identified in the jury trial**, is subject to the jurisdiction of this Court.") (emphasis added).

Additionally, review of "Case.net" shows that Mr. McCollum was named personal representative of Dr. Prohaska's estate in the Theresa Mosqueda case (referenced by Appellant in his Substitute Brief at 27) on August 2, 2006 – **before** the ninety day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1) expired in the instant case. See App. at A192. In other words, assuming *arguendo* Mr. McCollum is a proper substitute Respondent, this option was available to Appellant before the Missouri Court of Appeals lost jurisdiction. Under these circumstances, Appellant's excusable neglect is even less "excusable." In any event, excusable neglect cannot extend the ninety day jurisdictional period in Mo. R. Civ. P. 52.13(a)(1). See Mo. R. Civ. P. 44.01(b); Gillespie, 224 S.W.3d at 612.

**C. Mo. Rev. Stat. § 507.100 does not apply**

Although not recited in his "Point Relied On," Appellant argues the Missouri Court of Appeals "misconstrued" the Missouri "survival" statute, Mo. Rev. Stat. § 507.100, and this statute excuses Appellant's failure to comply with Mo. R. Civ. P. 52.13(a)(1). See Substitute Brief at 28; see also id. at 28-29. Simply put, Mo. Rev. Stat. § 507.100 does not apply, and Mo. R. Civ. P. 52.13(a)(1) is the controlling authority. See 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"); Gillespie, 224 S.W.2d at 612 (stating "Supreme Court rules, not a statute, limit this court's power to act"). Accordingly, Mo. Rev. Stat. § 507.100 does not permit Appellant to file a motion for substitution outside the 90 day deadline in Mo. R. Civ. P. 52.13(a)(1), and the Missouri Court of Appeals did not "misconstrue" this statute.

## CONCLUSION

Appellant lost his case at the trial court level because he failed to make a submissible medical malpractice case. Indeed, Appellant does not dispute this point in his appeal. Recognizing there was "not sufficient evidence to submit this case to a jury," Judge Dean properly granted Dr. Prohaska's timely filed JNOV. See January 4, 2006 Final Judgment, LF at 76.

Appellant lost his case at the intermediate appellate court level because he failed to comply with Mo. R. Civ. P. 52.13(a)(1) and, therefore, did not secure the jurisdiction of the court. Now, Appellant asks this Court to grant relief against a dead person even though Appellant agrees no Missouri court can do that. See Substitute Brief at 23-24. That is especially true where, as here, 570 days have passed since the Suggestion of Death was filed, and Appellant still has not filed and served a proper motion for substitution.

Appellant has run out of chances, and the appeal should be dismissed.

WHEREFORE, for the reasons stated herein, counsel for Respondent Sharon E. Prohaska respectfully requests Appellant's appeal be dismissed, or, in the alternative, affirm the trial court's entry of JNOV in favor of Respondent. Further, Respondent respectfully requests that, pursuant to the November 27, 2006 Order of the Missouri Court of Appeals and by further Order of this Court, that "Respondent recover against the Appellant the costs and charges herein expended on appeal and have execution therefor."

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

By_____
Michael D. Moeller, #42324
Michael J. Kleffner, #50431
Bryan T. Pratt, #48798

2555 Grand Boulevard
Kansas City, Missouri 64108-2613
Telephone: 816.474.6550
Facsimile: 8164215547

ATTORNEYS FOR RESPONDENT
SHARON E. PROHASKA, M.D.

## 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 approximately 12,345 words and 995 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 two true and correct copies of the above and foregoing pleading, the appendix to same, and disk was served via hand delivery this 17th day of December, 2007, to:

Mick Lerner, Esq.
Law Office of Mick Lerner, P.A.
10875 Benson, Suite 220
Overland Park, Kansas 66210
Telephone: 913.317.8000
Facsimile: 913.317.8001

ATTORNEY FOR APPELLANT

_____
Michael J. Kleffner