

IN THE SUPREME COURT OF MISSOURI

RONALD FENNEWALD, AS BROTHER OF)
THOMAS FENNEWALD, DECEASED,)

Relator,)

Case No. SC96219

vs.)

THE HONORABLE PATRICIA S. JOYCE,)
PRESIDING JUDGE OF THE)
CIRCUIT COURT OF COLE COUNTY,)
MISSOURI)

Respondent.)

APPEAL FROM THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
THE HONORABLE PATRICIA S. JOYCE, CIRCUIT JUDGE
CASE NO. 16AC-CC00256
WESTERN DISTRICT COURT OF APPEALS NO. WD80433

REPLY BRIEF OF RELATOR

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POINT REPLIED TO AND ARGUMENT

I.

IN REPLY TO RESPONDENT’S POINT NO. II, RELATOR HAS NOT MISCONSTRUED THE ORDER AS AN UNLIMITED MEDICAL RECORDS AUTHORIZATION IN THAT THE OPERATIVE EFFECT OF RESPONDENT’S ORDER LIES IN THE “ORDER OR DECRETAL” PORTION THEREOF RATHER THAN IN ANY ACCOMPANYING RECITALS, FINDINGS, MEMORANDUM OR OPINION.

Casper v. Lee, 245 S.W. 2d 132 (Mo. 1952)

Estate of Monia, Matter of, 902 S.W.2d 379 (Mo. App. E.D. 1995)

Estate of Ingram v. Rollins, 864 S.W.2d 400 (Mo. App. E.D. 1993)

ARGUMENT AND AUTHORITY

Respondent, in Point II of her Brief, maintains that the Order at issue herein is not an unlimited medical records authorization in that the order should be interpreted, in effect, to include the information contained in the recitals and that even the Defendant's underlying motion should be incorporated by reference in such order.

Respondent cites in support thereof two cases describing construction of contracts under Missouri law and only one case which addresses construction of court orders, i.e. Woodfill v. Shelter Mutual Insurance Co., 878 S.W.2d 101 (Mo. App. S.D. 1994).

Rules of contract construction don't apply to the interpretation of an order representing the decision of a judge after a hearing upon disputed issues. Missouri Courts have drawn a *distinction* between the construction of things such as a consent decree (which are contractual in nature) versus judgments or orders representing the opinion or decision of a judge after a hearing upon disputed issues. See Boillot v. Conyer, 887 S.W.2d 761 (Mo. App. E.D. 1994).

As stated in the Boillot case, supra, in the case of *consent* decrees, the general rule of contract construction applies and the intention of the parties as gleaned from the agreement viewed in its entirety is applicable. Boillot v. Conyer, supra at 763-764.

In contrast however, the construction of a *court order* is a question of law. See, Estate of Monia, Matter of, 902 S.W.2d 379 (Mo App. E.D. 1995). As further stated by the Eastern District of Missouri:

The question implicated in the present case-- the construction of a court order-- is a question of law. Where a question of law is involved, it is a matter for the independent judgment of the reviewing court.

House of Lloyd, Inc. v. Director of Revenue, 824 S.W. 2d 914, 916 (Mo.banc 1992). No deference is due the lower court's judgment.

Estate of Ingram v. Rollins, *supra*. at 402-403.

Furthermore, the uniform law of Missouri is that "the operative effect of an order lies in the order or the decretal portion itself rather than in any accompanying recitals, findings, memorandum or opinion." Lane v. State, 641 S.W.2d 132, 136 (Mo. App. 1982), Estate of Ingram v. Rollins, 864 S.W.2d 400, 403 (Mo. App. E.D. 1993). As further stated by this Court in Casper v. Lee, 245 S.W.2d 132, 141 (Mo. 1952):

'Mere recitals are not indispensable parts of judgments. The judgment or decree does not reside in its recitals, but in the mandatory or decretal portion thereof, which adjudicates and determines the issues in the case and defines and settles the rights and interests of the parties as far as they relate to the subject matter of the controversy. * * *' It has also been held that if there is an inconsistency between the recitals and the decretal part of a judgment, an express adjudication controls mere recitals. Casper v. Lee, *supra* at 141, citing 49 C.J.S., Judgments, Sec. 437, p. 870; Lackender v. Morrison, 231 Iowa 899, 2 N.W.2d 286 (Iowa, 1942).

Interestingly, even the one case cited by Respondent in support of her position that the “recitals” (perhaps inarticulately referred to by Relator as the “preamble”) should be determinative as to whether or not the order at issue is an unlimited release, Woodfill v. Shelter Mutual Insurance Company, supra, that case expressly quotes from Casper v. Lee, supra, to the effect of “[I]f there is an inconsistency between the recitals and the decretal part of a judgment, an express adjudication controls mere recitals.” Woodfill v. Shelter, supra, at 104.

The order at issue herein contains five paragraphs of recitals. Following the recitals there is a paragraph break and then a heading which states “THEREFORE, IT IS ORDERED AND ADJUDGED...”.

Relator would respectfully suggest that what precedes the heading “THEREFORE, IT IS ORDERED AND ADJUDGED” constitutes recitals and that what follows the heading of “THEREFORE, IT IS ORDERED AND ADJUDGED” constitutes the “mandatory or decretal portion thereof”. What follows the heading of “THEREFORE, IT IS ORDERED AND ADJUDGED” inarguably constitutes an unlimited release of the decedent’s medical records of all kinds regarding all parts of his body and all conditions from August 1, 1987 to the present.

Furthermore, Relator would respectfully call this Court’s attention to the real world ramifications of this order. The purpose of obtaining this order on the part of the defendants is to present it to healthcare providers to force them to produce the medical record of the decedent. The healthcare providers to whom this order is presented would not have a copy of “Defendants’ Motion for an Order Authorizing the Release of Medical

Records”, would not have access to any definition of what might be meant by “medically significant injury or illness”, would not have access to “the allegations set forth in Plaintiff’s wrongful death action”, would not have access to any of “Mr. Fennewald’s comorbidities and medical history” or for any of the other things discussed in the recitals. What the receiving medical provider would have is a court order compelling it to “disclose said protected records and/or medical information in any form” without limitation.

Respondent concedes in her brief “Respondent agrees with the black letter law cited by Relator that Missouri does not allow unlimited medical authorizations”. See, Brief of Respondent, page 16, footnote 6. The mandatory, decretal portion of the order at issue here is such an unlimited medical records authorization and, by Respondent’s own admissions, must be prohibited.

CONCLUSION

Relator has not misconstrued the Order at issue herein, such Order is in fact a world at large unlimited medical records authorization and must be prohibited. WHEREFORE, for the foregoing reasons, Relator prays that this Honorable Court make its Preliminary Writ permanent, for costs expended herein and for all such other relief the Court deems just and proper.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was filed on **July 31, 2017** electronically with the Clerk of Court. A true and correct copy was emailed to **Scott R. Pool**, pool@gptlaw.com, Gibbs Pool and Turner, P.C., 3225 Emerald Lane, Suite A, Jefferson City, MO 65109-6864, Attorneys for Defendants Jefferson City Medical Group, P.C., Dr. Thomas Schneider and Dr. Christopher Case and sent by Federal Express to **The Honorable Patricia S. Joyce**, Presiding Judge of the Circuit Court of Cole County, Missouri, Cole County Courthouse, 19th Judicial Circuit, 301 East High Street, Jefferson City, MO 65101.

/s/ Mark T. McCloskey
Mark T. McCloskey, #36144

CERTIFICATE OF COMPLIANCE

As required by the Missouri Supreme Court Rule 84.06, I hereby certify that this Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b) and states the number of words in the brief, as follows:

This brief is prepared using Microsoft Word, is proportionally spaced, and contains 1416 words.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ Mark T. McCloskey

Mark T. McCloskey, #36144