

No. _____

In The
Supreme Court of the United States

JIM R. NASH

Petitioner,

V.

NORMA NASH, INDIVIDUALLY AND AS TRUSTEE
OF THE NORMA F. NASH LIVING TRUST, ET AL.

Respondents.

**On Petition For Writ Of Certiorari
To The Arkansas Court Of Appeals**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) If several states following close versions of Rule 25 (FRCP) have held that judgments without jurisdiction of the decedent are a nullity, and those same state courts and at least two U.S. Circuit Courts have condemned such treatment of the substitution process, does judgment without jurisdiction here violate petitioner's right to due process of law under the Fourteenth Amendment?

2) The effects of state court judgments can cross many borders. Are we allowing tactics in litigation to circumvent the importance of personal jurisdiction?

PARTIES TO THE PROCEEDING

Petitioner Jim R. Nash was the plaintiff in the state circuit court proceedings and the appellant in the state court of appeals proceedings. Respondents Norma Nash, John Nash, Jr., Pam Glover, Susan Lyle and Perry Nash were the defendants as individuals and as trustees for the Norma Nash trust in the state circuit court and the appellees in the state court of appeals proceedings. Norma Nash died a year before the trial in circuit court.

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RELATED CASES

Jim R. Nash v. Norma Nash, et al, Pulaski County Circuit Court, Case No. 60-CV-15-1789, Judgment entered on June 22, 2017.

Jim R. Nash v. Pul. Cnty. Cir. Crt, 2nd Div. before Arkansas Supreme Court, Re: Mandamus, Case No. CV-17-54, Order entered on Mar. 2, 2017.

Jim R. Nash v. Norma Nash, et al, Arkansas Court of Appeals, Case No. CV-17-827, Opinion delivered on Mar. 13, 2019.

Jim R. Nash v. Norma Nash, et al, Arkansas Court of Appeals, Case No. CV-17-827, Order Denying Petition for Rehearing filed on April 17, 2019.

Jim R. Nash v. Norma Nash, et al, Arkansas Supreme Court, Case No. CV-17-827, Order denying Petition for Review filed June 20, 2019.

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PETITION FOR WRIT OF CERTIORARI

Jim R. Nash, pro se, an attorney, petitions for a writ of certiorari to review the judgment of the Arkansas Court Of Appeals, Division II, which was let stand by the Arkansas Supreme Court by its Denial of Review on June 20, 2019.

OPINIONS BELOW

The Court of Appeals opinion is reported at *Jim R. Nash v. Norma Nash, Individually and as Trustee of the Norma F. Nash Living Trust, et al*, 2019 Ark. 173 and reproduced at Ap1-20. The Supreme Court order denying the Writ of Mandamus to the Pulaski County Circuit Court is reproduced at Ap25-26. The dissent from the denial of the Writ of Mandamus is reproduced at Ap23-24. The judgment of the Pulaski County Circuit Court is reproduced at Ap21-22..

JURISDICTION

The Court of Appeals entered judgment on March 13, 2019. Ap1. The court denied a timely petition for rehearing on April 17, 2019. Ap27. The Arkansas Supreme Court denied a timely Petition for Review on June 20, 2019. Ap28. The denial of the Petition for Review was entered on the Pulaski County Circuit Court docket on June 25, 2019. Ap29. This Court has jurisdiction under U.S.C. Sec. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves due process of law under the Constitution's Fourteenth Amendment, and the requirements of Full Faith and Credit under Article IV, Sec. 1 of the Constitution to state court judgments.

The U. S. Constitution, Amendment XIV, Sec.1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The U. S. Constitution, Article 4, Sec. 1, states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

STATEMENT OF THE CASE

The credible treatment of jurisdiction is one of our most precious safeguards against injustice in our nation. It is basic law that judgments without jurisdiction are a nullity. At least since *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1877), determinations of personal jurisdiction have played an integral part in issues of due process of law under the Fourteenth Amendment and Full Faith and Credit under Article IV, Sec. 1 of the U. S. Constitution. This case emphasizes once again that the best tool we have to protect us from the inconsistencies in our systems of justice and the exacting effects of court judgments is our due process of law guarantee by way of the Fourteenth Amendment.

The fact that substitution issues come from death of a party makes the way a case is handled all the more important. Death so often automatically triggers interstate effects in our culture because of various forms of interests around the country. The effects go beyond the litigation at hand and cross state lines in many ways. Especially is that true when a judgment is involved.

There is no doubt that the decision in this case for the decedent was without personal jurisdiction because substitution was refused and defense counsel openly stated on the record during the trial that the decedent played no part in the trial. Yet, the trial court entered

a judgment in favor of the decedent.

Prior to the trial, petitioner sought to force compliance with Arkansas' Rule 25 by mandamus from the Arkansas Supreme Court but that was denied. In the appeal, petitioner cited several decisions from other states which dealt with the same substitution issue and which held such judgments to be a nullity. Also federal cases were cited to show compliance with the purpose and intent of the substitution process. None of these cases are acknowledged in the Opinion from the state's Court of Appeals and the Supreme Court denied the petition for review. Essentially, this is a one issue case in that all the other issues fall under whether or not this judgment without jurisdiction is a nullity.

Petitioner is an attorney appearing pro se. Petitioner performed legal work for his brother and wife in their business operations for twenty three years with the agreement being that he would be compensated from their property interests when all three reached retirement age. The legal services and other work included substantial litigation in all levels of state courts and several state agencies. Petitioner's brother died in 2012 at age 78. Immediately, and without the knowledge of petitioner, the brother's son took the wife to defense counsel who placed all property into a new living trust for the wife and wrote a will

appointing son and daughter as executors and trustees. Payment of any amount to petitioner was refused. Suit for breach of contract followed. The defendant wife died over a year prior to trial.

As in most states, the Federal Rule 25¹ gave birth to Arkansas' Rule 25² on substitution for a deceased

¹ Federal Rule 25 (a) **Death.** (1) *Substitution if the Claim Is Not Extinguished.* If a party dies and the claim is not extinguished, the court may order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.

² Arkansas Rule 25. Substitution Of Parties. (ARCP)

(a) **Death.** (1) If a party dies and the claim is not thereby extinguished, the Court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party, and such substitution may be ordered without notice or upon such notice as the Court may require. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by the service upon the parties of a statement of the fact of death, the action may be dismissed as to the deceased party.

(2) Upon the death of a plaintiff the proper party for substitution shall be his personal representative or, where the claim has passed to his heirs or to his devisees, the heirs or devisees may be substituted for the deceased party. Upon the death of a defendant in an action wherein the claim survives against his personal representative, the personal representative shall be the proper party for substitution. Except in an action for the recovery of real property only, or for the adjudication of an interest therein, the

party during litigation. A timely motion for substitution was filed stating that a special administrator was warranted and asking the court to appoint the same son and daughter as co-special administrators. Petitioner repeated to the court the exact reasoning for Rule 25, i.e., time is of the essence and the Rule provides procedure that is fair to both sides with opportunities for changes that may need to be made at a later time. Petitioner also reminded the court that defense counsel had refused any discovery for six months. Defense counsel argued against substitution stating only that "special administrators are usually appointed to get assets for the estate, not

heirs, devisees or personal representative may be the proper parties for substitution as the Court may determine. Where the deceased party is acting in the capacity as personal representative, his successor shall be the proper party for substitution.

(3) Upon the death of any party the Court before which such litigation is pending may, upon the motion of any party, appoint a special administrator who shall be substituted for the deceased party. The powers of such special administrator shall extend only to the prosecution and defense of the litigation wherein he is appointed. No special administrator shall be appointed where there is a general personal representative subject to the jurisdiction of the Court for the deceased party. Where such a general personal representative qualifies after the appointment of a special administrator, the general personal representative shall, upon the motion of any party, or the general personal representative, be substituted for such special administrator. Costs taxed against a special administrator shall not constitute a personal obligation. AR Civil Proc. Rule 25 Substitution of Parties (Arkansas Rules of Civil Procedure (2018 Edition))

defend estates" and the matter should be continued as a separate action.

The trial court refused to follow Arkansas' Rule 25 and appoint as co-special administrators the two heirs who were named as executors and trustees in decedent's will. Instead, the court directed petitioner to amend the complaint and serve the "proper parties". Petitioner filed and served an amended complaint naming the same people as estate administrators and as co-defendants for tortious interference with the contract and raising the issue of the violation of petitioner's rights to due process of law under the Fourteenth Amendment.

Without a motion or even notice, defense counsel secured an order dismissing the claim against the decedent without prejudice on the grounds that "proper parties" is limited to probate representatives and no representative under probate law had been served within the ninety days from the suggestion of death. The 90 day period as calculated by the defense ended 34 days after the hearing on substitution. Petitioner timely filed a motion for reconsideration of the order that had dismissed the claim against the decedent, and in the pleadings reminded the circuit court of section (3) under Rule 25 (ARCP) which counters any claim

that substitution under the rule is limited to probate representatives.³ Petitioner again noted the violation of plaintiff's right to due process under the Fourteenth Amendment.

Petitioner could not get a hearing on the motion so he then filed a petition for certiorari and mandamus with the Arkansas Supreme Court, seeking to force compliance with Arkansas' Rule 25, and citing the abuse of petitioner's rights to due process of law and access to the courts in violation of Article 2, Section 8 of the Constitution of the State of Arkansas and of the Fourteenth Amendment to the U. S. Constitution. The entire record at the time was presented with the Petition but the writ was denied with one descent noting that there was no jurisdiction of the decedent, the substitution should be granted, and the majority believed the petitioner could still appeal. Ap23.

Subsequent amendments to the complaint used the word "substitutes" in anticipation of a court order but that was never granted. At all points in all of the proceedings after the dismissal of the decedent, defense counsel repeatedly contended that there was no

³ (3) Upon the death of any party the Court before which litigation is pending may, upon the motion of any party, appoint a special administrator who shall be substituted for the deceased party... Where such a general personal representative qualifies after the appointment of a special administrator, the general personal representative shall... be substituted for such special administrator.

substitute for the decedent appointed in the case. Also late in the trial of what remained of the case which was tortious interference against the children of decedent, defense counsel stated to the court on the record that the decedent *"is not here. She's not part of this."*⁴

Clearly, the decedent's role was in name only as it related to the tortious interference claim against the other defendants. Evidence of the existence of a contract basis for tortious interference was offered by the petitioner by extensive documentation. The defense was initially oral denials of any work by petitioner, then became "paid in cash" for a great deal of work. The defense offered no documentation.

The decedent was the only entity with whom petitioner had a contract. Two verdict forms were submitted to the jury based on interference with the contract and referencing two different groups. One form referenced the decedent and her substitutes and heirs acting together. The second form referenced the substitutes and heirs acting together. There was no verdict form for the decedent acting as an individual because she was not a party to the proceedings, and obviously, the defense would have objected to such a form. The jury returned a verdict for the defense on the

⁴ "Norma Nash is not here. She's not part of this. This is only against the trust and the four children, individually and as trustees." (R.318)

two forms. Defense counsel initiated the probate case for the decedent the next day. That took place a year and a half after her death.

As is the custom in Arkansas, the defense counsel drafted the proposed judgment for the court. The proposal ended with the statement, "All claims by Plaintiff against the Defendants are dismissed with prejudice." Petitioner refused to approve of the proposed form of the judgment but it was accepted by the court and entered. Ap21. It is now being used to block petitioner's timely claim in the probate proceeding for the decedent's estate.

The Arkansas Court of Appeals upheld the judgment and refused to rule on the issue of personal jurisdiction saying only that the verdict resolved all issues. The Arkansas Supreme Court denied review on June 20, 2019. Ap28.

Accordingly, the heart of the case turns on whether the judgment for the decedent without personal jurisdiction is a violation of petitioner's rights to both substantive and procedural due process of law under the Fourteenth Amendment to the U. S. Constitution. That depends in great part on whether the defense can take the position that the decedent played no part in the trial, and then be allowed to form a judgment in her favor that dismisses all claims of the petitioner with prejudice.

REASONS FOR GRANTING THE PETITION

I. The State Court Did Not Have Personal Jurisdiction Of The Decedent And Judgment In Her Favor Is A Nullity.

In the decision herein by the Arkansas Court of Appeals, it is said that petitioner based his appeal on just the consideration of subject matter jurisdiction. Actually, petitioner cited one case, *Koonce v. Mitchell*, 341 Ark. 716, 19 S.W.3d 603 (2000), on subject matter jurisdiction but essentially all of the brief was on the nullification of judgments in other states which had been rendered without personal jurisdiction. Three of the noted cases were from the states of Oklahoma, Alabama, and Ohio. These are only a few of cases condemning the treatment of substitution procedure as we saw it in this case and these were quoted at great length in appellant's brief but none of these cases nor the nullity principle are discussed in the Opinion.

Though petitioner tried to establish personal jurisdiction by substitution, he was unable to do so. Whether or not there was court error in denying substitution, the result is beyond question: the judgment in her favor is a nullity under the law. Nowhere in the Opinion is there a finding of personal jurisdiction of the decedent.

In *Campbell v. Campbell*, 1994 OK 84, 878 P.2d 1037 (Okla. 1994), a case where a party died during proceedings at trial level, the Supreme Court of Oklahoma, after quoting much of the language in

Alabama's *Wells v. Wells*, *infra*, stated as follows:

Based on federal application of Rule 25 and the interpretation and application given it by persuasive state law, we conclude that the trial court's authority in the instant case was suspended by Appellee's death and any subsequent action taken by the court could only follow the substitution of Appellee by her representative pursuant to the procedure outlined in 12O.S.1991, Sec. 2025(A)(1).

* * *

The instant action was suspended with Appellee's death. There is no authority under which any further proceedings could have taken place until a substitution was made following the suggestion of Appellee's death as outlined in Sec. 2025. The action halts at the party's death and can only be reactivated by the proper application of Sec. 2025. Since proper application was not made, the action remains (suspended) with Appellee's death.

Indeed, in the often cited *Wells v. Wells*, 376 So.2d 750 (Ala. Civ. App.), a 1979 case which involved the death of a party during litigation and the court's application of Alabama's own "Rule 25(a) ARCP", the court said:

The issue before this court, although not raised by either party through their able counsel, is whether the trial court had jurisdiction to act where a party before the court dies and proper substitution of parties under Rule (25(a), was not made. We determine that the trial court did not have authority to proceed, in this instance, and reverse and remand.

The question of jurisdiction is always fundamental, and if there is an absence of jurisdiction over either the person or the subject matter, a court has no power to act. (Case cited).

* * *

In this instance, there was subject matter jurisdiction in the instant case. However, there was no party-defendant before the court. By statute, if a claim survives it is against the personal representative of the deceased. No such representative was personally served under ARCP and no personal representative was substituted as defendant under Rule 25(a).

* * *

In the instant appeal, there is nothing in the record nor is it suggested that the deceased's attorney had status as the legal representative of the decedent's estate. The authority of defense counsel to act for the decedent was terminated by the decedent's death. (Case cited.) Therefore, even under the most liberal construction of jurisdiction, there was no party-

defendant before the court.

It would be possible, under proper circumstances, for the personal representative of the deceased to waive the formal substitution of Rule 25(a) and for the court to obtain jurisdiction over such a person. (Cases cited.) That is, if the “proper party” actually defends the suit, such a defense may constitute a waiver by that “proper party” of the right to a formal substitution. However, in the instant case no such personal representative defended the husband’s petition. Therefore, no waiver occurred and the court did not obtain jurisdiction under any theory of waiver.

The case of *Third Federal Savings and Loan of Cleveland v. Doles*, 2014 Ohio 5181 (Ohio App. 2014), involved a foreclosure action where a summary judgment was entered several months after the defendant died though there had been no substitution of the proper parties. On appeal by a subsequently appointed executor of the decedent’s estate, the Ohio Court of Appeals held the judgment to be void. Other cases from Ohio in their application of Ohio Civil Rule 25 present the same result. See *Lake Ski I-80, Inc. v. Habowski*, 57 N.E. 3d 215 (Ohio App. 2015).

Rule 25 (FRCP) sets the standards for substitution of parties to litigation. Some other examples of the close versions of Rule 25 (FRCP) are Arizona Rules of

Civil Procedure 25, Colorado Rules of Civil Procedure 25, Indiana Rules of Trial Procedure, Rule 25, Florida's Rules of Civil Procedure, Rule 1.260, Illinois Rules of Civil Procedure, Rule 2-1008.

At no point during the trial of this case was there any contention by the defense that the trial court had personal jurisdiction of the decedent after her death. In fact, it would have been outrageous to do so since defense counsel's position was just the opposite. During his motion for directed verdict at the end of plaintiff's case, he stated to the court explicitly and on the record that the decedent "is not here. She's not part of this." (R318)

It is difficult to understand why defense counsel's statement was not mentioned in the Opinion. It was argued explicitly in the appellant's briefs. The statement is part waiver and part admission and it is overwhelming in its importance to the issue of the lack of personal jurisdiction of the decedent. Additionally, the trial record shows that at the time that the statement was made, petitioner offered no argument that there was personal jurisdiction of the decedent.

Furthermore, at no time in the history of this case did petitioner allege that he had a contract with any entity other than the decedent. The defense is on record

as claiming there was no privity of contract between petitioner and the trust. Moreover, the trustees were named because of the allegation of fraudulent transfer of property into the decedent's new trust. But the petitioner's instruction on that issue was refused by the trial court. (R 359-362)

Due process under the Fourteenth Amendment was raised before the trial court, in the Petition For Mandamus to the Arkansas Supreme Court, and after the trial by motions. All of this was argued again in the appellant's briefs.

II. The Abuse Of The Substitution Process Is In Violation Of Due Process Of Law Under The Fourteenth Amendment And In Conflict With The Full Faith And Credit Provisions Of The U. S. Constitution.

The arbitrary treatment of substitution in this case is an important error that can best be illustrated by the positions of the two sides at the hearing on May 3, 2016 on petitioner's motion for substitution. Petitioner contended that Arkansas' Rule 25, as all of them, sets a script to provide justice to both sides at a point in a case when time is of the essence and the Rule allows the parties to subsequently make changes as they may be needed. Defense counsel argued that substitution was not the proper course because Rule 25 is only for

the purpose of allowing parties to gather assets and the case should proceed as a separate action. (CR166-170) Yet, that statement is in conflict with the provisions and intent of the Rule, particularly Sec. (3).⁵

There was no evidence or claim of any prejudice should the motion be granted.⁶ Yet the Court refused to appoint as special administrators the two named executors in decedent's will and instead directed petitioner to file an amended complaint against the "proper parties".

Petitioner soon learned that "proper parties" would be limited by the court to a probate representative. Defense counsel, without a motion or even notice, secured an order from the court dismissing without prejudice the claim against the decedent because no estate representative had been served.

⁵ (3) Upon the death of any party the Court before which litigation is pending may, upon the motion of any party, appoint a special administrator who shall be substituted for the deceased party... Where such a general personal representative qualifies after the appointment of a special administrator, the general personal representative shall... be substituted for such special administrator.

⁶ "Given the preference for deciding cases on their merits, a motion for substitution should be granted in the absence of prejudice." *Schwartz v. Montefiore Hospital and Medical Center*, 305 A.D.2d 174, 761 N.Y.S.2d 5 (N.Y. App. Div., 2003).

Essentially, the trial court's discretion was delegated to the defense.⁷ Petitioner was given the burden of establishing within a few days a probate proceeding over and against the obvious intentions of the defense counsel and the two executors named in the decedent's will. They were also trustees of her trust which contained all of her property and thus, were in a strong position to contest and delay every step of such an effort. These are the very circumstances that substitution rules are designed to avoid, as noted in both *Rende* and in *Unicorn Tales, Inc., infra*.

Some of the language from the federal courts concerning Rule 25 (FRCP) seems especially pertinent to the events in this case. In the case of *Rende v. Kay*, 415 F.2d 983, 134 U.S. App.D.C. 403 (D.C. Cir., 1969), the court required a clear designation in the suggestion of death of the representatives of the decedent's estate in order to avoid the tactic of obstructing the application of Rule 25. Clearly, the Rule provides a script designed to provide justice to both sides:

In our opinion the Rule, as amended, cannot fairly be construed, as the defendant's attorney argues, to make his suggestion of death operative to trigger the 90-day period even though he was neither a successor or representative of the deceased, and gave no

⁷ "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139, 126 S.Ct. 707, 163 L.Ed.2d 547 (2005).

indication of what person was available to be named in substitution as a representative of the deceased. Counsel's construction would open the door to a tactical maneuver to place upon the plaintiff the burden of locating the representative of the estate within 90 days.

* * *

The tactic of the defendant's attorney would place on plaintiff the burden, where no conventional representative was appointed for the estate in probate court, of instituting machinery in order to produce some representative of the estate ad litem, pending appointment of the representative contemplated by law of the domicile of the deceased.

In 1998, in the case of *Unicorn Tales, Inc. v. Banerjee*, 138 F.3d 467 (C.A.2 (N.Y.), 1998) the Second Circuit disagreed with the requirement that an estate (probate) representative be named in the suggestion of death but based its difference on the discretion given to the courts under Rule 6(b) to extend time periods for required acts stating, "Were there no other manner in which to avoid the particular dilemma identified by the court in *Rende*, we might see the wisdom of the requirement."

In the more recent case of *Lizarazo v. Miami-Dade Corrections and Rehab Dept.*, 878 F.3d 1008 (11th Cir. 2017), cases from several other circuits are cited which show the approach by the circuit courts to Rule 25 to consistently allow more time under Rule 6(b) to avoid barring "otherwise meritorious actions." One of the

cases cited is the Per Curiam in *McSurely v. McClellan*, 753 F.2d 88 (D.C. Cir. 1985). Citing *Rende v. Kay, supra*, the *McSurely* court held that two widows named in two decedents' wills as executors were "proper parties" even though they were not appointed in estate proceedings as estate representatives.

Consistent with *Unicorn Tales, Inc.*, petitioner filed timely pleadings asking the court to set aside the order dismissing the decedent from the case and noting that Arkansas Rule 25 is not limited to probate representatives. (CR202) Petitioner's requests for a hearing were not granted. Then petitioner's petition to the Arkansas Supreme Court to force compliance with the substitution process by *mandamus* was denied with one dissent indicating that there was no jurisdiction of the decedent, that substitution should be ordered, and that the majority believed petitioner could still appeal. Ap23.

After the trial, the Arkansas Court of Appeals, in rendering its Opinion upholding the trial court's refusal of the substitution process, cited sections (1) and (2) of Rule 25 but omitted any reference to the language of section (3) quoted above. Clearly, Arkansas' Rule 25 does not need to be revised in order to be consistent with the common purpose of the substitution process across the country, which is to provide a script that is fair to both sides and not to give an advantage to either side. But when a good rule

is misapplied, we have the Fourteenth Amendment to force compliance with the underlying national purpose of the Rule.⁸

Under the Full Faith and Credit provisions of the U. S. Constitution, the states must honor the legal proceedings of other states, and the death of a party in one state can affect property interests and legal proceedings in other states for some time. With respect to judgments, "the full faith and credit obligation is exacting." *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 118 S.Ct. 657, 139 L.Ed.2d 580 (1998).

Rule 25 (FRCP) has been followed by many states which have enacted highly similar rules for resolving substitution problems during litigation. It is the commonality of the definition of due process of law by way of the Fourteenth Amendment that provides the best tool to avoid needless conflicts over bad judgments being forced upon several other states. In just this one case alone, the evidence and argument for substitution were substantial and the reason for denying

⁸ Recently, in the case of *Muntaqim v. Hobbs*, et al, 2017 Ark. 97 (Ark. 2017), the Arkansas Supreme Court said, 'When the Arkansas Rules of Civil Procedure are "substantially identical" to the corresponding Federal Rules of Civil Procedure, we may consider federal interpretations.' Unfortunately, in this case the Arkansas courts did not comply with *Muntaqim* in their treatment of Rule 25 of Arkansas Rules of Civil Procedure, even though it provides essentially the same script for such proceedings as does Federal Rule 25.

substitution was the defense's misstatement of the law and the purpose of the Rule.

Petitioner respectfully contends that the trial court abused its discretion and committed reversible error in refusing the substitution process and in delegating its discretion to the defense. But court error or not, after her death, there was no personal jurisdiction of the decedent and the judgment in her favor is void.

III. Petitioner Did Not Waive Jurisdiction Of The Decedent, Revivor, Or Substitution, And At No Time During Trial Or On Appeal Did The Defense Claim Waiver Of Any Kind.

It is well established that waiver has to show a well understood relinquishment of a known right. It has also been held that waivers of constitutional rights must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124 (Tex. 2004). In order for the doctrine of waiver to apply here, petitioner would have to knowingly and pointedly relinquish a known right in his favor. By operation of law, the decedent was not involved in the proceedings after her death. Petitioner had no right or power to waive jurisdiction or there would have been no petition

to the Arkansas Supreme Court for writ of mandamus.

The Opinion alleges two separate waivers in this case, but upon examination, neither alleged waiver is cited by the court to actually show personal jurisdiction of the decedent after her death. The Opinion uses the same basis for each alleged waiver, i.e., that petitioner amended his complaint and went to trial against Norma Nash, the decedent, without substitution. Ap10-11.

First is the alleged waiver of revivor on that basis. Yet, that is contrary to the language of the trial court's order directing petitioner to amend his complaint and that the filing would constitute revivor, which petitioner did. Additionally, if there was any waiver of the revivor issue, it was waived by the defense, not the petitioner. The defense did not argue lack of revivor and went to trial without such a contention.

Second is the finding at the same point in the Opinion that petitioner waived the substitution issue by amending his complaint and going to trial against Norma Nash, the decedent. Ap10-11. The case law cited is a catchall for waivers but does not apply here because petitioner did not go to trial against the decedent without there being a substitute. The decedent was not a defendant in the trial. She had been deceased for over a year and there was no substitution.

The defense never claimed waiver and the Opinion's view on waiver ignores the statement of defense counsel that the decedent **"is not here. She's not part of this."**

Additionally, this second alleged waiver presents a conflict within the Opinion itself in that it treats at length the petitioner's contention of alleged error in the trial court's refusing substitution and then, at the same time, holds that petitioner abandoned that issue. Furthermore, only someone who has a right and lawful power to waive jurisdiction of a decedent could do so, such as a probate representative for the decedent as was noted in *Wells v. Wells, supra*. If petitioner had such a power he would have used it before trial. Again, logic has to apply to the doctrine of waiver as to anything else or it becomes a tool of injustice. Petitioner could not waive a right that he did not possess.

In truth, the only evidence of waiver involved in this case is the openly stated and made with full knowledge waiver by defense counsel relinquishing any claim for an attorney's fee based on breach of contract by the decedent. As he said, "*She's not part of this.*" Although, the Opinion sends the case back for the ministerial assessment of an attorney's fee, the constitutional issues which should halt that effort are here and now before the United States Supreme Court. Thus, the

rules as to finality are satisfied in full. See *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975).

IV. Why The Main Issue On Appeal Was Ignored.

It began with the Opinion's changing of the Appellant's Points On Appeal at page 5 of the published Opinion. Ap5-6. After that, the nullity issue is ignored. Why the statement by defense counsel that the decedent had no part in the trial was also ignored is very hard to understand. It was set out in the briefs and its significance was clear. The following comment in the Opinion illustrates the problem:

...the dismissal was rendered harmless because those claims were ultimately tried to a jury and a defense verdict returned. There is no explanation of how this happened when the claims had been earlier dismissed. Both sides acknowledge in their briefs that the contract claim was tried to the jury. Ap11.

That is incorrect. At no point in the briefs did petitioner agree that the trial of the case went beyond tortious interference. Petitioner's briefs said otherwise, repeatedly. As one example, petitioner stated at page 10 of the Argument section in the Appellant's Brief:

Obviously, those paragraphs set out under the "Breach Of Contract" section and the "Equitable Or Constructive Trust" section in the complaint became ineffectual with the death of Norma Nash and the lack of substitution for Norma Nash. The remaining claims were for intentional interference by the named defendants in facilitating and encouraging the decedent in what she did.

The trial court as well did not seem to distinguish at times between the two theories of recovery. Especially was that true with defense counsel's change in position after the trial in an attempt to obtain an attorney's fee that was only available on a contract claim against the decedent. There was no substitution for the decedent and as defense counsel had stated, she was not a party. Though the term *substitutes* was used in amendments in anticipation of an order to that effect, that could not accomplish substitution for a decedent in litigation. *Motley v. Sifford*, 547 S.W.3d 470 (Ark. App. 2018).

As is the custom in Arkansas, the defense counsel was allowed to draft the proposed judgment for the court. But it ended with the statement, "All claims by Plaintiff against the Defendants are dismissed with prejudice." Petitioner refused to approve the proposed form but it was accepted by the court and entered. Ap21-22. Two weeks later defense counsel moved for

an attorney's fee based on decedent's contract with the petitioner, the only contract ever in the case.

Again, at no point in the appeal did petitioner argue or agree that the trial went beyond tortious interference. Furthermore, there has not been any contention by the defense or by the courts that the trial court regained jurisdiction of the decedent after her death. In the appellees' brief to the Court of Appeals they do not claim personal jurisdiction but say that her name was on one of the jury forms so a judgment could be rendered "for" her. Yet, for justice to be served, jurisdiction must precede a verdict. Clearly, even from the defense, the judgment for the decedent is without personal jurisdiction and is a nullity.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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