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March 15, 2012

Ms. Carolynne M. Kieffer - via regular mail
1011 Boland Place
St. Louis, Missouri 63117

**In re: Carolynne M. Kieffer vs. Jennifer Icaza, Ramiro Icaza, and Dianne Icaza
Supreme Court No. SC92098**

Dear Ms. Kieffer:

This is to advise that appellant's substitute brief was ordered filed "as is" with service in the above-entitled cause on March 14, 2012.

Yours very truly,

BILL L. THOMPSON

Kathy K. Fletchall
Deputy Clerk, Court en Banc

cc: Mr. Brice Reed Sechrest - via electronic filing system

SCANNED

IN THE SUPREME COURT OF MISSOURI

SC92098

CAROLYNNE M. KIEFFER,

Appellant/Plaintiff,

v.

JENNIFER ICAZA, RAMIRO ICAZA, and DIANNE ICAZA

Respondents/Defendants.

Appeal from the Circuit Court of the City of St. Louis

22nd Judicial Circuit

Honorable Michael Mullen, Circuit Judge

SUBSTITUTE BRIEF OF APPELLANT CAROLYNNE M. KIEFFER

**Carolynne M. Kieffer
Appellant, pro se
1011 Boland Place
St. Louis, Missouri 63117
314-644-2400**

FILED

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JURISDICTIONAL STATEMENT

This is an appeal from the Order of the Missouri Court of Appeals for the Eastern District of Missouri, dated August 30, 2011, applying the doctrine of the law of the case to bar consideration of appellant's Points I, III, IV and V, concluding that they were matters that appellant could have but did not raise in an earlier appeal, in which appellant brought the matter of a void judgment to the Court for relief. The appellant appeals the appellate court's order affirming the denial of her motion for jury trial, Point II, because of its application of Rule 44.01 in the matter of timeliness.

This Court has jurisdiction of this appeal under the general appellate jurisdiction provided in Mo. Const. art. V, Sec. 10.

This is also an appeal from the judgment dated March 3, 2010, of the associate circuit division of the Circuit Court of the City of St. Louis, Missouri, the Honorable Michael Mullen, who was incorrectly assigned to the case by the office of the clerk and who was appointed by the sitting judge on the basis of an application for change of judge which had been withdrawn. Appellant raises the questions of whether the judge had jurisdiction to enter his judgment in that he was appointed in violation of Rule 51.05(e) and of a local rule and was appointed only to hold a hearing. Appellant also appeals the issues of whether the court in reversible error denied appellant's request for jury trial, enforced respondents' motion to compel in violation of local rules and whether the court entered its judgment against the weight of the evidence.

The Missouri Supreme Court sustained Appellant's motion to transfer to this Court. In addition, all of the issues are matters of general interest.

STATEMENT OF FACTS

This case, transferred from the Missouri Court of Appeals, Eastern District, follows two appeals from a breach of contract action.

Appeal ED91742 appealed from the original lawsuit, Cause No. 220250-11687-01 (hereinafter "Case 1"), in the Circuit Court of the City of St. Louis and concluded with orders to remand the action back to the trial court. (ASC4)

Appeal ED95203 was an appeal from the case that followed the remand, Cause No. 11687-02), (hereinafter "Case 2.")

The legal file and transcript from ED91742 were transferred to the file in ED95203 during the pendency of the second appeal. Throughout this brief the appellant will cite to the legal file and transcript in the first appeal as "LFA" and "TRA," and in the second appeal as "LFB" and "TRB." Items in the appendix of the ED95203 brief will be given the heading "A" and in the instant brief as "ASC."

Events Prior to Litigation

On or about the first week of July 1998 Jennifer Icaza (hereinafter "Jennifer") requested and was granted a walk-through of a luxury condominium in a secured building with an alarm system located in the condominium and with covered, gated parking located at the rear (LFA13, Article 41) in St. Louis City's Central West End, near St. Louis University (LFA72, lines 1,2). The walk-through was conducted by the owner and lessor, Carolynne M. Kieffer, (hereinafter "lessor"). (LFA9-13)

Approximately two days later, on July 9, 1998, Jennifer returned with her mother, Dianne Icaza (hereinafter "Dianne") for a second walk-through of the condominium (hereinafter "the premises"). (TRA89, lines 13-14) Jennifer represented that she was

to be a first-year law student on the nearby campus of St. Louis University and the premises was close to the law school. (TRA72, lines 1-2; TRA141, lines 21, 22)

At the completion of the second visit, Jennifer and Dianne indicated that they wished to lease the condominium. Lessor stated that she would require Jennifer's signature, Dianne's signature, and the signature of Jennifer's father, Dr. Ramiro Icaza (hereinafter Dr. Icaza) to appear on the Lease before she would allow Jennifer to move into the condominium. (TRA105, lines 1-3)

On July 9, 1998, in the presence of the lessor, Jennifer and Dianne signed the Lease Agreement document. Article 1 of the document provided for a term of two years and sixteen days to begin on July 16, 1998, and to terminate on July 31, 2000, pursuant to Article 1 of the Lease. (LFA9) Article 2 (LFA9) provided for total rent due in the amount of \$23,275.00, payable in advance in successive equal monthly installments of \$950.00 plus \$20.00 per month pursuant to a rider providing a washer and dryer in the premises, for total monthly rent of \$970.00. (TRA31, lines 20-22) Article 2 also provided terms for remitting late fees. (LFA9) When they departed on July 9, 1998, Dianne and Jennifer purportedly took the lease document to their residence in Jackson, Missouri, in order for Dr. Icaza to sign it and initial each page as required by the Lessor. (TRA105, lines 1-2, lines 15-24; TRA106, line 1)

On July 13, 1998, lessor received the lease via U.S. mail bearing the signatures of Jennifer and Dianne and the purported signature of Dr. Icaza (hereinafter the "Lessees). (LFA13; TRA104, lines 16-25) Upon receipt of the signed Lease Agreement (hereinafter "the lease), Lessor cashed lessees' check #4679 (LFA101, 102) submitted in the amount

of \$475.00 for pro-rated July rent pursuant to paragraph 2 of the Lease and \$950.00 for the security deposit submitted pursuant to Article 3 of the Lease (LFA9).

On July 18, 1998, Jennifer, Dianne and family members, absent Dr. Icaza, returned to the condominium and did a final walk-through. (LFA9, Article 5 of the Lease) Lessees agreed in Article 5 that they had inspected the premises prior to execution of the Lease and found everything to be in good order, condition and repair with no exception noted. (LFA9, article 5)

Upon completion of the walk-through, Dianne wrote two additional checks, check #4709 for \$1,940.00 for the first and last month's rent (LFA101), pursuant to Article 2 of the Lease (LFA9) and check #4710 for \$110 (LFA101) (\$10 deposit for keys and \$50 deposit for remote gate opener under Article 34 (LFA12) plus \$50 (remitted as a guarantee against damage to common area for the Greenwich Condominium Association. (Article 9; LFA101)

Jennifer moved into the condominium on the 28th of July. (TRA79, lines 3,9; TRA143, line 3) She informed the Lessor that until classes were to begin she would remain in Jackson, Missouri, to finish an "incomplete" at school. (LF72, 112, 2nd para.) Jennifer then began requesting the Lessor to perform tasks on her behalf, with each request (LFA69,72) requiring the lessor to travel to, enter, and wait in the condominium for a period of time. (LFA69, 72)

Lessor met representatives of Southwestern Bell Telephone to install and later repair telephone lines and Dillard's Department Store between July 18 and the time of her moving in (LFA69,70); TCI cable (LFA70) on August 4, 1998; and Famous-Barr

Department Store on August 5, 1998, and returned to meet representatives of Dillards and Famous-Barr to obtain estimates of damage done to a mirror and hallways. (LFA70)

Lessor worked with and then reinstructed Jennifer in the proper operation of locks and deadbolts on the premises (LFA112) and at Jennifer's request reset the four-digit code to the alarm system on numerous occasions. (LFA72). Jennifer complained that the electric dryer did not work but denied access to lessor to inspect or make repairs.

(LFA72. Jennifer denied access for Lessor to meet repair persons to repair damage done by Famous-Barr and Dillards. (LFA70) Jennifer complained about the alarm system; Lessor notified the lessees that she wanted the alarm system to be kept in the same good order, condition and repair as at the beginning of the Lease. (LFA71,72)

On September 14, 1998, Lessor notified the Lessees that she wanted the alarm system to be kept in the same good order, condition and repair as at the beginning of the Lease. (LFA72)

On September 16, 1998, lessor by certified mail pointed out that that the lessees were violating the lease when they refused access to make repairs (LFA72, para. 1; LFA10, para. 10); kept a pet in the premises (LFA72, para 2); and refused access to the lessor to inspect the dryer and, if necessary, make repairs. (LFA72, para. 3). The lessor referred the lessees to Article 27 of the Lease which states that the lessees shall be responsible for keeping the unit in good order, condition and repair. (LFA72, para. 4) She stated that it was her understanding that the dryer was in good order, condition and repair at the beginning of the Lease." (LFA72, LFA9)

In a letter dated September 25, 1998, lessor pointed out Jennifer's requirement that lessor work through Ramiro Icaza to have access to make repairs and requested that the lessees work with her to solve the problem of access. (LFA74)

On September 29, 1998, lessor hand-carried a letter, addressed to the three lessees, requesting access on the following day, September 30, 1998, to inspect and, if necessary, repair the dryer, and left the notice under the door. (TRA128, lines 3-6; TRA92, lines 11-13; LFA75)

On September 30, 1998, lessor took a repairman with her to inspect the clothes dryer and, if necessary, to repair it, pursuant to a message she had left announcing that she would be at the premises at a designated time with a repairman. Lessor and repairman got no response when they rang the intercom doorbell outside of the entry door to the building, or when they followed up by knocking on the entry door to the condominium. After Lessor opened the entry door with her key and she and the repairman were waiting on the threshold, calling out "Landlord! Landlord!" Jennifer and a woman that she identified as a fellow student came from down the hallway and told lessor and the repairman to leave or Jennifer would call the police. Lessor and the repairman left. (TRA128, lines 1-21; TRA93, lines 16-21) Jennifer later claimed, in testimony, that she and her friend had discovered the lessor and the repairman going through drawers in the premises (TRA93), lines 6-25) and that they had called the police. (TRA93, lines 6-13; TRA149, lines 1-6)

The lessees did not remit any monthly payment to lessor for October 1998.

On or about October 1, 1998, Lessees sent a letter to the lessor stating that they would vacate the premises on October 5, 1998. (TRA34,lines 14-17).

On October 2, 1998, the Lessor mailed certified letters making demands upon all lessees to cure the defaults. The letter demanded that the lessees remove the dog from the premises or sign Rider C and remit a \$200 pet deposit, and allow access to the premises in compliance with Article 10 of the Lease. (LFA 113, 114, and 114-a).

The Lessees vacated the premises on October 5, 1998, without paying October rent or returning the keys or gate opener. (LFA80; TRA34, lines 22-25; TRA35, lines 1-4; 17-19)

The Lessor notified lessees of the final “walk-through” to identify damages caused by lessees, and accounted for their deposit by mail. (TRA60-63) They did not respond or appear at the walk-through, and later claimed that they received no notice. (LFA36)

Procedural History, Case 1, Cause 22050-11687-01

Lessor Carolynne M. Kieffer (hereinafter “plaintiff”) filed suit against the three lessees, Jennifer Icaza, Dianne Icaza, and Ramiro Icaza (hereinafter “defendants”) on September 6, 2005, under the “savings statute” (Cause No. 22050-11687) after Cause No. 22030-12444 in the Circuit Court of the City of St. Louis. (LFA7,8) The case with its two counts of breach of contract and property damage was assigned to the associate circuit court division for an amount of less than \$25,000. (LFAA1) Defendants were served with process on September 27, 2006. (LFA2)

An attorney, Jonah T. Yates, did not enter an appearance on behalf of the defendants but filed a motion for change of venue (LFA14-18) The defendants filed an

affidavit (LFA18) signed by Dr. Icaza and Dianne Icaza stating that none of the three defendants had ever lived in St. Louis City or in St. Louis County. The condominium is located in the City of St. Louis. (LFA7)

The motion for change of venue was denied. (LFA21)

On June 4, 2007, attorney Kenneth McManaman of Cape Girardeau filed defendants' first answer to plaintiff's petition, stating, inter alia, that the defendants were constructively evicted from the premises and that plaintiff did not undertake and complete certain duties, obligations and responsibilities as conditions precedent to defendants' duties and obligations to undertake and complete the lease. (LFA25-29)

Also, on June 4, 2007, attorney McManaman filed a motion to dismiss for failure to state a cause of action on behalf of the defendants. (LFA 23-24)

On or about June 6, 2007, plaintiff received a conference call from Andrea Weiss (hereinafter "Ms. Weiss"), a St. Louis attorney, and defendants' attorney McManaman. Ms. Weiss informed plaintiff that it was her intention to enter her appearance on behalf of the three defendants and to work with Mr. McManaman on the case. Plaintiff immediately objected, stating that Ms. Weiss had been her attorney on a related matter, and that Ms. Weiss had a conflict of interest in representing the defendants, and that plaintiff would assert that conflict if Ms. Weiss were to attempt to enter her appearance. (LFA42-43; 51-53; 59-60)

On July 10, 2007, Ms. Weiss called and informed plaintiff that she was going to appear in court a day earlier than the hearing scheduled for the following day, July 11, 2007. (LFA4) Plaintiff engaged attorney Irwin Roitman (LFA41) and they met Ms.

Weiss in the courtroom as she had announced earlier that day. Ms. Weiss entered an appearance for the defendants. (LFA31) In the midst of a small claims docket Ms. Weiss approached the court and requested leave to enter an appearance as defendants' attorney. Plaintiff filed and informed the court of her motion to disqualify attorney Weiss for conflict of interest. (LFA42,43) The court granted leave for attorney Weiss to enter conditionally as defendants' co-counsel until the matter of conflict of interest could be heard. (LFA103)

On July 10, 2007, Ms. Weiss filed a counterclaim on behalf of defendants (LFA36-38) She asked for leave to file defendants' amended answer and counterclaim out of time. (LFA39) Leave was never granted. (LFA39; LFA4-6; TRA lines 7-16)

On July 10, 2007, plaintiff filed a motion for interlocutory order of default against defendants. (LFA44,45)

Defendants' counterclaim alleged that plaintiff had accepted, for deposit, in violation of Section 535.300.1 RSMo, the amount of \$1,980, which would be in excess of twice the monthly rental of \$970.00. The Lease provided for payment of monthly rent of \$950.00. (LFA9, article 2) plus a \$20 monthly payment pursuant to a rider providing for the use of a clothes washer and dryer by lessees. (TRA31, lines 20-21) Article 3 provided for a security deposit in the amount of \$950.00. (LFA9)

In their counterclaim, leesees alleged that the deposit that they had paid--\$1,980— included (a) a deposit of \$950.00 (LFA9, art. 3) plus (2) \$970 that they had paid as rent in advance (LFA9, bottom of page; TRA31, lines 7-11) plus (3) incidental deposits of \$10 and \$50 for keys and gate opener (LFA36,37), in violation of RSMo Section 535.300.1.

They further alleged, Count II, that plaintiff did not provide an accounting of their deposit in violation of RSMo Section 535.300.2. The defendants requested, then, pursuant to RSMo 535.300.2, double the amount of their alleged deposit of \$1,980, or \$3,960. (LFA 37; TRA52-57; TRA59)

On September 27, 2007, defendants filed their motion to compel plaintiff's responses to discovery. (LFA48,49; LFA4)

Plaintiff's attorney, Irwin Roitman, filed a certificate of service and actual responses to defendants' request for discovery with the Court. The court file in Case 1 is absent those documents; see LFB72-82; also TRA27, lines 5-17)

On October 3, 2007, plaintiff's attorney withdrew. (LFA80) This contested case was transferred, pursuant to Local Rule 6.1.1.1, from Division 27 to Division 28, for trial on November 15, 2007. (LFA54) Docket entry on October 3, 2007, shows trial setting on March 21, 2008, at 1:30 p.m. (LFA5)

On October 12, 2007, defendants requested continuance of the trial date. (LFA55,56). The court granted defendants' request for continuance of the trial date (LFA55,56) to February 13, 2008, at 2:00 p.m. (LFA81)

On November 8, 2007, plaintiff filed copies of documents that she submitted to defendants in response to their requests for discovery. (LFA68-80; LFA5)

On November 8, 2007, defendants' motion to compel was sustained with the requirement that plaintiff respond to discovery by no later than December 6, 2007, or issues pertaining to interrogatory responses not responded to by said date would not be permitted to be addressed at trial. (LFA81; LFA5)

On December 6, 2007, plaintiff filed with the court her certificate of mailing her responses to defendants' requests for discovery. (LFA82; LFA5)

Docket entry on December 31, 2007, reflects the following statement: "Judge Assigned. Effective January 1, by order of the Presiding Judge, cause reassigned (sic) to Judge Michael Mullen." (No document appears in the physical case file reflecting this assignment.)

Effective January 1, 2008, judges assigned to the associate circuit division of the 22nd Judicial Circuit, as displayed in Appendix in Appellant's Brief, page 6 and following unnumbered page, were:

Division 27 Judge Michael Mullen, uncontested cases

Division 28 Judge Michael Steltzer, contested cases

Division 29 Judge Elizabeth Hogan, contested cases with jury demands

On January 31, 2008, plaintiff filed a motion/application for change of judge, date-stamped on January 31, 2008. (LFA83,84) (The pleading is entered in the minutes as filed on January 31 and on February 4, 2008. [LFA6])

On February 8, 2008, plaintiff filed a request for jury trial, date-stamped on February 8, 2008. (LFA85,86) (The pleading appears in the docket entries as if filed on February 11, 2008. (LFA6)

On February 8, 2008, plaintiff filed her Motion to Correct the Record. (LFA87,88) (Pleading appears in docket entries as filed on February 11, 2008. [LFA6]) (A prior pleading to correct the record had been filed by plaintiff on November 8, 2007. [LFA66, 67])

On February 11, 2008, plaintiff withdrew her application for change of judge. (LFA89) (The pleading does not appear in the docket entries.)

Plaintiff, having requested a jury trial (LFA85,86), appeared in Division 28 on February 13, 2008, the date on which the case had been set for trial.(LFA104) The sitting judge in Division 28 was Judge Michael Steltzer, not Judge Michael Mullen. (LFA5,6) The docket entries are absent any reference to Judge Michael Steltzer at any point in this case. (LFA1-6)

Although plaintiff had withdrawn her motion for change of judge on February 11, 2008 (LFA89), Judge Steltzer on February 13, 2008, granted the motion for change of judge and assigned the case “for hearing” to Judge Mullen, pursuant to the purported motion for change of judge. (LFA92)

The Honorable David L. Dowd, Judge, also signed the order assigning the case to Judge Mullen in Division 27 for “hearing.” (LFA92) The file is absent any information as to the role played by Judge Dowd in his signing of the order dated February 13, 2008. (LFA92)

Judge Thomas C. Grady was the presiding judge in 2008. (Appendix to Appellant’s Brief in ED95203, page 6 and following unnumbered page.)

Judge Mullen, Division 27, held an immediate hearing off the record with only attorney Weiss and attorney Michael Nack, an attorney hired by plaintiff to represent her in the lawsuit and to whom she had remitted \$1,000, being present. (LFB39-40, para. 7; TRA2, 43—lines 3-15) Attorney Nack arranged for plaintiff to remain in the hallway while the hearing was going on. (LFB39-40, para. 7)

Judge Mullen proceeded immediately to hold a trial. Prior to the trial, he held a hearing on the record in which he stated that he had denied plaintiff's request for jury trial and for continuance which had been presented by attorney Nack in the hearing that was held off the record. (TRA2) The judge stated that attorney Nack had stated that he would represent plaintiff only if the continuance were granted. (TRA2) The attorney left after advising plaintiff to have the judge put in the record that his reason for denying the jury trial was because plaintiff had not notified attorney Weiss of her request for jury trial. (LFA39-40, para. 4)

Judge Mullen stated that "we are here today pursuant to—We are sitting in Division 28 physically, but the case was assigned to Division 27 about half an hour ago, pursuant to the Plaintiff's motion and application for a change of judge from Division 27, and the cause was sent to me in Division 28. We are physically seated in Division 28 because my own division, Division 27, does not have a recording device. I explained all that to the Plaintiff." (TRA2, lines 8-15)

Judge Mullen also denied plaintiff's motion to disqualify defendants' attorney Weiss on the basis of a conflict of interest in that attorney Weiss had represented plaintiff Kieffer in a related matter and had also advised Kieffer in the construction of the article (LFA15) on lessee abandonment in the residential lease used with the Icazas. (LFA51,59, and LFA93)

Judge Mullen held pretrial motions, and repeated his order denying plaintiff's request for jury trial because the plaintiff did not send a copy of her request for jury trial to Andrea Weiss even though plaintiff established that she had mailed and faxed a copy

to the attorney of record, Kenneth McManaman. (TRA3; TRA4, lines 8-13) Judge Mullen then denied plaintiff's motion to shorten time because she had not notified Andrea Weiss of that motion. (TRA14, lines 15-23)

Immediately thereafter, plaintiff objected to lack of notice from defendants on an impromptu, oral motion by their attorney, Andrea Weiss, to exclude her evidence from the impending trial. Over plaintiff's objections of surprise and no notice, Judge Mullen heard the oral motion (LFA22-29) on the part of attorney Weiss to prevent the plaintiff from using her evidence at trial on the basis of an alleged prior court order pursuant to a motion to compel. Plaintiff objected and stated that she had complied with discovery. (LFA22-29) Plaintiff argued surprise (TRA28, line 23) and stated that it was not fair to hear the oral motion with no notice. (TRA28, lines 23, 24, 25) The judge then granted defendants' motion to exclude plaintiff's evidence at the trial, which followed immediately. (LFA28; LFA29, lines 1, 2)

The judge ordered plaintiff to begin the bench trial, representing herself. (TRA2-line 25; TRA3-lines 1,2; TRA4-lines 20,21) She argued in support of her request for jury trial. (TRA3-5) Plaintiff stated that her attorney had told her that there would be a jury trial. (TRA6, lines 4-7)The judge again denied the plaintiff's request for jury trial because plaintiff had not notified Ms. Weiss, even though she had faxed and mailed a copy to co-counsel McManaman. (TRA4,5)

In the trial, evidence was presented that the parties had agreed to the terms of the lease for two years and sixteen days (TRA30, lines 9-14) for a total of \$23,275; (LFA30; TRA94, lines 7-14), that late fees were provided under Article 2 of the Lease; (TRA62,

lines 13-14); and that lessees abandoned the premises some 22 months early, on or about October 5, 1998; (TRA34, lines 13-17) and otherwise breached the lease by keeping a dog in violation of the lease (TRA33, lines 17); denying lessor access to make inspections and/or repairs to items complained about by lessee, in violation of the lease (TRA85); and causing damage to the premises. (LFA44, lines 18-19) In the trial Jennifer stated that the alarm system and the automatic dryer (TRA86) did not work in the condominium, that the only time she received letters from the lessor was in the middle of the living room floor (TRA86, lines 22-25) and that she was scared to be in the condominium alone (TRA93, lines 11-13; TRA97, lines 21-22) and that she would come home and find everything out of “disorder” (sic), with drawers and cabinets open, and letters on the floor. (TRA97, lines 22-25) Jennifer testified that she stayed in law school for two semesters. (TRA71, lines 21, 22)

Jennifer testified that “I ‘d never hung a picture up on the walls.” (TRA59, line 25) Dianne testified that her husband, Dr. Icaza, had not signed the lease, and that she had signed his name as a lessee because Jennifer needed to have a place to live. (TRA104, lines 16-22; TRA105, lines 1-3).

Dianne testified that there was a missing “step” immediately outside of the condominium and that she was afraid of heights. She stated that the lessees could not go up the back steps because there was a step missing. (TRA113, lines 16-19; TRA115, lines 12-18; TRA116, lines 4-5) She also testified that she was not even sure that the fireplace worked (TRA114, lines 8-10) but acknowledged that the lessees may not have stayed long enough to use the fireplace. (TRA114, lines 21-23)

Dianne testified that she could have paid a pet deposit for the dog's being in the condominium, but that she did not remember. (TRA109, lines 8-25; TRA110, lines 1-4)

Dianne also testified that the air conditioning did not work consistently. (TRA9-14)

At trial Jennifer discussed having received letters from the Lessor. She said "I don't remember receiving a lot of letters." (TRA84, lines 1,3) "... the only time I received letters from you was in the middle of my living room floor. . . ." (TRA86, lines 23-25) "I mean, you wrote letters every single day that I lived there, and I always received them in the middle of my living room floor." (TRA100, lines 12-18) In the transcript, two lines later, she states "I can't remember which letter was for what. I mean, I can't, you know, under oath say that. But I remember receiving several letters from you." (TRA100, lines 20-22)

Attorney Weiss acknowledged having in her file letters provided by plaintiff in discovery, specifically letters August 4, September 12, September 14, September 16th, September 25th, September 29th, October 1st, and "a few letters dated October 2nd, and a letter dated October 26th. TRA167, lines 3-8)

On February 13, 2008, the case was taken under submission. (LFA122, LFB6-10)

On March 6, 2008, lessor filed a motion for mistrial. (LFA115, 116) Attorneys for the defendants claimed in a letter to plaintiff dated July 23, 2008, that the judge had, ex parte, informed them, Kenneth McManaman and Andrea Weiss, that he intended to deny plaintiff's motion for mistrial. (LFB17, 110, 111) The record reflects that the court did not rule on plaintiff's motion for mistrial. (LFA6; LFA122)

On May 29, 2008, the court entered its judgment out of time, 106 days after the case was taken under submission, in violation of RSMo 517.111.2. (LFA122; LFB6-10)

On March 6, 2008, plaintiff filed a motion requesting a mistrial. (LFA115,116) Attorney Kenneth McManaman alleged in July 2008 that in March 2008 Judge Mullen had communicated with both attorneys for the defendants to the effect that he intended to deny plaintiff's motion requesting a mistrial. (LFB110,111) The Court did not rule on the motion for mistrial in Case 1.

On May 29, 2008, a purported judgment was entered in this case. (LFA122)

On July 1, 2008, the court entered its judgment nunc pro tunc in an attempt to amend the purported judgment of May 29, 2008. (LFA127)

First Appeal, E.D.91742

On September 24, 2008, plaintiff filed her Notice of Appeal. (LFA6) In her Points Relied On, appellant Kieffer argued in Point I that the Court erred in denying her demand for jury trial, because the plaintiff notified only the attorney of record and failed to notify co-counsel Andrea Weiss, and in Point II that RSMo Section 517.111.2 requires that the judgment in a case tried under Chapter 517 shall be entered within thirty days of the case being taken under submission and that the purported judgment was entered on May 29, 2008, 106 days past the date on which the case was taken under submission, and was void. Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009)

The Eastern District remanded the case to the circuit court with directions that the judge who rendered the purported May 29, 2008, judgment shall set a date on which he

shall enter an order setting aside the May 29, 2008, judgment, treat the case as finally submitted on said new date, and enter such judgment as the judge shall deem proper.

(ASC6-9) The December 8, 2009, Mandate (ASC4) does not require the same judge who rendered the purported May 29, 2008, judgment to set it aside and enter a new judgment.

(ASC4)

Procedural History Upon Remand, Case 2, Cause 22050-11687-02

During the pendency of the appeal Judge Michael Mullen had been appointed as a Circuit Court Judge. All proceedings in Case 2 were held before Judge Mullen in Division 2. (ASC10)

Post-remand, on February 11, 2010, the plaintiff, pro se, and the defendants through counsel attended a hearing called by Judge Mullen, who at that time announced that he was setting aside the May 29, 2008, judgment in accordance with the decision of the Court of Appeals, Eastern District, E.D.91742. (LFB14,15) The judge requested that the parties submit proposed judgments by Friday, February 26, 2010. (LFB16)

Plaintiff's proposed Judgment was filed and entered in the record. (LFB22-24)

Plaintiff filed a motion for the judge to disqualify himself on the basis of statements made in a letter from Kenneth McManaman, attorney for the defendants, to plaintiff alleging ex parte communication he and Andrea Weiss had had with the judge during Case 1, in March 2008, after the February 13, 2008, trial and before the judge entered his purported judgment on May 29, 2008. (LFB17,110,111) Plaintiff noticed up for an evidentiary hearing her motion for the judge to disqualify himself. (LFB18) On the notice the judge wrote "denied" and signed the denial, without a date. Said denial

appears in the docket entries on February 22, 2010. (LFB18) Plaintiff filed a verified motion to reconsider the decision. (LFB25)

Defendants submitted Kenneth McManaman's affidavit stating he had not had ex parte communication with the judge prior to the trial. (LFB114-119) The letter had alleged ex parte communication that took place after the trial and before the judgment was entered. (LFB110,111)

Plaintiff filed her proposed judgment and in the alternate her proposed Orders declaring a mistrial and granting plaintiff's amended motion to disqualify Andrea Weiss as counsel for defendants because of her conflict of interest and violation of canons of professional ethics. (LFB22-24)

In his judgment, the judge adopted verbatim the defendants' proposed order, which was submitted on February 25, 2010, but did not appear in the case file or docket entries. (ASC41,42) The judgment stated that the judge had reviewed a verbatim transcript of the trial testimony and Exhibits adduced at trial. (ASC11, ASC42) At trial the judge had returned plaintiff's evidence, saying it did not pertain to him. (TRA196, lines 12-15) Judge Mullen entered defendants' proposed order as his judgment on March 3, 2011, again ruling in favor of defendants on plaintiff's petition and in favor of plaintiff on defendants' counterclaim. In this judgment he denied plaintiff's demand for jury trial for the reason that it was untimely (ASC11) and not for the reason that plaintiff had not notified defendants' co-counsel, Andrea Weiss, as he had ruled at the trial on February 13, 2008. (TRA4, lines 8-19)

Defendants did not appear at the hearing on plaintiff's timely filed motion for new trial, held on June 30, 2010. (LFB107; TRB1) The court denied plaintiff's motion. (LFB107) Plaintiff filed her notice of appeal (LFB133-154).

Second Appeal, E.D.95203

In her first point on appeal, appellant argued that the disqualified judge in Division 28 erred when he, after sustaining plaintiff's application for change, assigned the case to Judge Mullen in violation of Rule 51.05(e). (Appellant's Brief, 17, 18)

In her second point on appeal, appellant argued that the trial court erred, in violation of local rules, in failing to transfer the case to Division 29. (Appellant's Brief, 19,20)

In her third point on appeal, the appellant argued that the trial court exceeded its jurisdiction in excluding her evidence at trial for alleged failure to comply with discovery requests in that defendants' motion to compel discovery did not meet the minimal threshold for specificity pursuant to Local Rule 32.6(a). (Appellant's Brief, 21,22)

In her fourth point on appeal, the appellant argued that the circuit court erred in granting her application for automatic change of judge which had been withdrawn. (Appellant's Brief, 22-24)

In her fifth point on appeal, appellant argued that the trial court erred in entering in favor of defendants on plaintiff's petition because the judgment was against the weight of the evidence. (Appellant's Brief, 24-26.)

The Eastern District, in its Order filed on August 30, 2011, applied the law of the case doctrine and ordered that the doctrine bars consideration of appellant's Points I, III,

IV and V of her appeal, ordering that they were matters that the appellant could have raised in her first appeal but did not. (ASC19)

The Eastern District court considered appellant's Point II because the point, although alleged to be somewhat different, was raised in the prior appeal. The Court concluded that appellant's motion for jury trial, which was filed five days prior to the date set for trial, pursuant to Section 517.091.1, was filed out of time on the basis that Rule 44.01(a) would expand the five-day statutory period to seven days. (ASC19)

ARGUMENT

POINTS RELIED ON

- I. JUDGE STELTZER, DIVISION 28, COMMITTED REVERSIBLE ERROR WHEN HE EXCEEDED HIS JURISDICTION IN ASSIGNING THE CASE TO JUDGE MULLEN BECAUSE RULE 51.05(E) AND LOCAL RULE 6.5.3 EACH STATE THAT THE DISQUALIFIED JUDGE SHALL NOTIFY THE PRESIDING JUDGE WHO SHALL ASSIGN THE CASE TO ANOTHER JUDGE IN THAT JUDGE STELTZER ASSIGNED THE CASE TO JUDGE MULLEN AND FAILED TO NOTIFY THE PRESIDING JUDGE, AND THEREFORE ALL ACTIONS BY JUDGE MULLEN TAKEN THEREAFTER WERE NULL AND VOID.**

Henningsen v. Independent Petrochem Corp., 875 S.W.2d 117, 120 (Mo. App. 1994).

Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009)

Miller v. Mauzey, 917 S.W.2d 633 (Mo.App.W.D.1966)

Reynolds v. Reynolds, 6 S.W.3d 183, 199 Mo.App. LEXIS 2183 (Mo.Ct.App.,1999)

Rule 51.05(e)

Local Rule 6.5.3

On December 31, 2007, a docket entry (LFA5) showed that the presiding judge had assigned Judge Mullen, division 27, to appellant's case (Cause No. 22050-11687-1) in the associate circuit division of the Circuit Court of the City of St. Louis.

On January 31, 2008, plaintiff filed a motion for change of judge to disqualify the purported then-assigned Judge Mullen. (LFA83,84; LFA25)

Plaintiff's case had been set for trial in Division 28 on February 13, 2008, at 2:00 p.m. (LFA81)

Judge Steltzer, Division 28, (see Appendix in Appellant's Brief, page 6 and the following unnumbered page) granted plaintiff's application for change of judge and reassigned the case to Judge Michael Mullen, Division 27, *for hearing*. (LFA92)

The order states: "Plaintiff's Motion for Change of Judge granted. Case assigned immediately to Judge Mullen Div 27 for hearing." (LFA92)

Judge David Dowd wrote on the same document, "SO ORDERED David L. Dowd, Judge." (LFA92)

Judge Steltzer violated Rule 51.05(e) when he as a disqualified judge assigned Judge Mullen and a second time when he failed to notify Judge Thomas C. Grady, who was the presiding judge in 2008. (See Appellant's Brief, Appendix page 6 and the following unnumbered page)

Once Judge Steltzer sustained the application for change of judge, he had no jurisdiction other than to follow what is prescribed in Rule 51.05(e). (Miller v. Mauzey, 917 S.W.2d 635 (Mo.App. W.D.1996)

In addition to his violation of Rule 51.05(e), Judge Steltzer's assignment of the case to Judge Mullen also violated Local Rule 6.5.3 (ASC30) of the Circuit Court of the City of St. Louis. Local Rule 6.5.3 states that "(i)f a judge in the probate division, a motion/non-jury division, the family court or **an associate circuit division** (emphasis added) is disqualified, the disqualified judge **shall** (emphasis added) notify the Presiding judge who shall assign the case to another judge."

The plaintiff received no notice from the Court at any time to the effect that Judge Michael Steltzer was the judge assigned to her case. (LFA5,6) The docket entries in this case are absent any reference to Judge Steltzer or Judge Grady. (LFA1-6) The docket entries fail to show that Judge Steltzer was disqualified in the February 13, 2008, order; nor do they reflect that Judge Mullen was appointed in the same order. (LFA1-6; LFA92) The court did not at any time provide the appellant with the correct name of the judge assigned to the case in 2008. (LFA5,6)

In his February 1, 2008, order, Judge Steltzer disqualified himself and assigned the case "immediately to Judge Mullen Div 27 **for hearing.**" (emphasis added) (LFA92) It did not state that the case was assigned immediately for **trial**.

Judge Mullen acted without jurisdiction on February 13, 2008, because Judge Steltzer appointed him without the jurisdiction to do so, and all actions taken by Judge Mullen thereafter were null and void.

The Western District held in Miller v. Mauzey, 917 S.W.2d 633 (Mo.App. W.D.1996) that the decisions by an associate court judge who was appointed by a disqualified judge who was not the presiding judge were null and void. In Miller, the

trial court granted a timely filed motion for disqualification. *Id.* at 634. Since the trial judge was the only circuit judge in the circuit, he assigned the case to an associate circuit judge. *Id.* The Western District held that the circuit judge committed reversible error in assigning the case to the only other judge in the circuit. *Id.* at 635. After setting forth the proper procedure for assigning a case to another judge after disqualification relying upon Rule 51.05, the court went on to say, "[i]f the Supreme Court had intended to give a disqualified circuit court judge the power to personally assign a case to an associate circuit judge of his choosing, it would have said so." *Id.* As stated in Miller at 635 (internal quotations omitted), "(o)nce an application to change the judge is properly filed the court must grant the motion and is without jurisdiction to take any further action in the cause. Logically, this would include the action of assigning the case to (another) judge."

Similar to the opinion in Miller, the Eastern District in Reynolds v. Reynolds, 6 S.W.3d 183 (Mo.App. E.D.1999) held that, when the disqualified judge who was not the presiding judge assigned the case to a judge of his choosing, the assignment was improper, and was done without jurisdiction, and the order assigning the case to the new judge was "null and void." *Id.* The Eastern District in Reynolds, at 570, went further to state that the judge to whom the case was assigned was also without jurisdiction, and treated this point as dispositive.

It follows that Judge Mullen in this case had no jurisdiction to hold the hearings and trial that he held on February 13, 2008, and that all orders entered on that date and thereafter were null and void.

Further, the word “shall,” as emphasized above in the statement of Local Rule 6.5.3, is mandatory. The Missouri Supreme Court stated that the use of the word “shall” connotes a mandatory duty. Neske v. City of St. Louis, 218 S.W.3d 417 (2007) Bauer v. Transitional Sch. Dist. of the City of St. Louis, 111 S.W.3d 405, 408 (Mo. Banc 2003)

In the second hearing held by Judge Mullen immediately after he was assigned plaintiff’s case on February 13, 2000, heard on the record, Judge Mullen again denied plaintiff’s request for jury trial because plaintiff did not send a service copy to attorney Weiss, one of defendant’s attorneys. He then denied plaintiff’s motion to disqualify attorney Weiss (TRA14, lines 15-17), and plaintiff’s motion to shorten time on hearing plaintiff’s motions on February 13, 2008 (TRA14, lines 22-23) and took under submission plaintiff’s motion for interlocutory order of defendants, which he later denied. (TRA19, lines 18,19; TRA20, lines1,2; LFA129) He then heard and granted defendants’ impromptu oral argument, with no notice to plaintiff, to apply sanctions against plaintiff for reportedly not having responded to discovery requests. (TRA22,29)

Judge Mullen then held a bench trial (TRA *passim*), took the case under submission, and submitted a purported judgment on May 29, 2008 and a judgment pursuant to remand instructions from the Eastern District on March 3, 2010. (ASC10-13)

Because Judge Steltzer's assignment of Judge Mullen to plaintiff's case was without jurisdiction, all actions taken by him on February 13, 2008, chronicled above, including the bench trial that he held, were without jurisdiction, and all orders entered by him on February 13, 2008, and thereafter, including that on remand, and thereafter were null and void.

Procedural errors and reversible errors of the court in acting in excess of its jurisdiction placed the plaintiff before the judge she had attempted to avoid, given the incorrect information she was provided on December 31, 2007 (LFA5), and she was denied her due process rights.

The "law of the case" rule does not apply and does not preclude the appellant from raising matters of jurisdiction in this appeal because there was no final judgment but only a purported, void judgment, and the issues were not ripe for appeal. (Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App.E.D. 209) (ASC6-9) RSMo Section 512.020 (ASC37)

When Judge Steltzer sustained plaintiff's application for change of judge, he only had jurisdiction that was granted to him under Rule 51.05. He failed to follow the procedures set forth in Rule 51.05(e), and in Local Rule 6.5.3.

In addition to the requirement that Judge Steltzer follow the procedures set forth in Rule 51.05, as established in Miller at 635, he was also required to follow the procedures set forth in Local Rule 6.5.3. Henningsen v. Independent Petrochem Corp., 875 S.W.2d 117, 120 (Mo. App. 1994).

Although an appellate court may be reluctant to interfere with a trial court's construction of its own rule, fundamental fairness and due process require that the rule be

applied as written. The Eastern District held in Henningsen at 120 that “(f)undamental fairness and due process require that a trial court is not allowed to dispense with a procedural rule of its own making.”

Judge Steltzer had no jurisdiction to do anything in excess of those procedures established in Rule 51.05(e) and in Local Rule 6.5.3, and any actions that he took in assigning a new judge to the case constituted a nullity.

As a result, Judge Steltzer was without jurisdiction to assign the case to Judge Mullen. It follows that, since the assignment to Judge Mullen was improper, associate circuit judge Mullen was without jurisdiction to rule on plaintiff’s request for continuance presented by her lawyer, Michael Nack, or on her request for jury trial, or on her motion to shorten time, her motion to disqualify Andrea Weiss, her motion for interlocutory order of default, or to hold a trial, or enter a judgment in this case. All of these actions by Judge Mullen were null and void.

Standard of Review

An appellate court must affirm the circuit court’s judgment unless there is no substantial evidence to support the award, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. App. 1976).

II. THE JUDGE IN DIVISION 27 ERRED IN FAILING TO TRANSFER THE CASE TO DIVISION 29 BECAUSE LOCAL RULE 6.1.1.1 STATES THAT ANY CASE PENDING IN DIVISION 27 IN WHICH A JURY TRIAL HAS BEEN REQUESTED SHALL BE HEARD IN DIVISION 29 AND THE ORDER ENTERED BY JUDGE STELTZER ON FEBRUARY 13, 2008, CLEARLY STATES “CASE ASSIGNED IMMEDIATELY TO JUDGE MULLEN FOR

HEARING” IN THAT PLAINTIFF REQUESTED A JURY TRIAL ON FEBRUARY 8, 2008, AND THAT JUDGE MULLEN HELD A TRIAL IN VIOLATION OF THE FEBRUARY 13, 2008, ORDER AND ALL ACTIONS TAKEN BY HIM ON FEBRUARY 13, 2008, WERE WITHOUT JURISDICTION.

Henningsen v. Independent Petrochem Corp., 875 S.W.2d 117, 120 (Mo.App.1994)

Neske v. City of St. Louis, 218 S.W.3d 417 (2007)

Local Rules 6.1.1.1, 6.1.1.5, 6.1.1.6, Circuit Court of the City of St. Louis

On October 3, 2007, this case was transferred from Division 27 to Division 28.

(LFA24)

On December 31, 2007, the presiding assigned Judge Michael Mullen to this case.

(LFA5)

Effective January 1, 2008, judges assigned to the associate circuit division of the 22nd Judicial Circuit were:

Division 27 Judge Michael Mullen, uncontested cases

Division 28 Judge Michael Steltzer, contested cases

Division 29 Judge Elizabeth Hogan, contested cases with jury demands (See Appendix in Appellant’s Brief, page 6 and following unnumbered page)

On February 8, 2008, plaintiff filed her demand for jury trial. (LFA85,86)

On February 13, 2008, the date set for trial in this case (LFA81), Judge Steltzer granted plaintiff’s application for change of judge and assigned the case to Judge Mullen, Division 27, for hearing. (LFA92)

Judge Mullen erred by exceeding his jurisdiction in failing to transfer the case to Division 29 in compliance with Local Rule 6.1.1.1. Local Rule 6.1.1.1 states that “(a)ny

case pending in Division 27 in which a jury trial has been requested shall be heard in Division 29.” (ASC25)

Local Rule 6.1.1.5(a) states that “(u)nless the counsel for plaintiff designates in writing at the time of filing the case that it shall be heard and determined under the civil practice and procedure applicable before circuit judges, the Clerk shall forthwith assign to Division 27 all civil actions for the recovery of money, whether such action be founded upon contract or tort, or upon a bond or undertaking given in pursuance of law in any civil action or proceeding, or for penalty or forfeiture given by any statute of this state, when the sum demanded, exclusive of interests and costs, does not exceed \$25,000.” (ASC26)

Local Rule 6.1.1.5 continues to further state in (d) that “(u)pon the return date of any civil action pending in Division 27, other than a small claims case, in the event that the defendant appears in person or by attorney and indicates to the Court that the matter will be contested, the associate circuit judge presiding in said Division **shall** forthwith assign said case to Division 28 for further proceedings. Contested cases in which a jury trial is requested **shall** be assigned to Division 29.” (emphasis added) (ASC27)

Local Rule 6.1.1.6, “Division 28,” states that “(c)ontested cases pending in Division 27 in which a jury trial has not been requested **shall** also be heard in Division 28.” (emphasis added) (ASC27)

As emphasized above, each of Local Rules 6.1.1.1, 6.1.1.5(d) and 6.1.1.6 makes use of the word **shall** in establishing the division to which cases are to be assigned. The Missouri Supreme Court stated that the use of the word “shall” connotes a mandatory

duty. Neske v. City of St. Louis, 218 S.W.3d 417 (2007) Bauer v. Transitional Sch. Dist. of the City of St. Louis, 111 S.W.3d 405, 408 (Mo. Banc 2003)

Pursuant to plaintiff's request for jury trial (LFA85,86) Local Rule 6.1.1.1, "Division 29," required plaintiff's case to be treated as a contested case with jury demand, which would require its transfer from Division 27 to Division 29 for jury trial. (ASC25)

Although an appellate court may be reluctant to interfere with a trial court's construction of its own rule, fundamental fairness and due process require that the rule be applied as written. The Eastern District held in Henningsen v. Independent Petrochem Corp., 875 S.W.2d 117, 120 (Mo. App. 1994) that "(f)undamental fairness and due process require that a trial court is not allowed to dispense with a procedural rule of its own making."

None of the local rules under Local Rule 6, "Assignment of Judges, Cases and Transfer of Cases," (ASC25-32) allows for the transfer of a contested case with jury trial application to be heard in Division 27 or 28; in fact, Local Rule 6 requires transfer of a contested case with a jury trial application to Division 29. (ASC25-32) This procedural rule must be interpreted according to the plain and ordinary meaning of the words used.

Judge Steltzer failed to transfer the case to Division 29, in violation of Local Rule 6.1.1.6. Judge Mullen, upon having the case improperly assigned to him by Judge Steltzer on February 13, 2008, failed to transfer the case to Division 29, as was required by Local Rule 6.1.1.5.

At the opening of the trial on February 13, 2008, Judge Mullen stated that “we are sitting in Division 28 physically, but the case was assigned to Division 27 about a half hour ago, pursuant to the plaintiff’s motion and application for a change of judge from Division 27 and the case was sent to me in Division 28. (sic) We are physically seated in Division 28 because my own division, Division 27, does not have a recording device.” (TRA2, lines 8-15)

It follows, therefore, that Judge Mullen in this case had no jurisdiction to hold the hearings and trial that he held on February 13, 2008, and that all orders entered on that date and thereafter were null and void.

In the second hearing held by Judge Mullen immediately after he was assigned plaintiff’s case on February 13, 2000, heard on the record, Judge Mullen again denied plaintiff’s request for jury trial because plaintiff did not send a service copy to attorney Weiss, one of defendant’s attorneys. He then denied plaintiff’s motion to disqualify attorney Weiss (TRA14, lines 15-17), and plaintiff’s motion to shorten time on hearing plaintiff’s motions on February 13, 2008 (TRA14, lines 22-23) and took under submission plaintiff’s motion for interlocutory order of defendants, which he later denied. (TRA19, lines 18,19; TRA20, lines 1,2; LFA129) He then heard and granted defendants’ impromptu oral argument, with no notice to plaintiff, to apply sanctions against plaintiff for reportedly not having responded to discovery requests. (TRA 22,29)

Judge Mullen then held a bench trial (TRA *passim*), took the case under submission, (LFA104), and submitted a purported judgment on May 29, 2008 and a

judgment pursuant to remand instructions from the Eastern District on March 3, 2010)
(A10-13)

Because Judge Steltzer's assignment of Judge Mullen to plaintiff's case was without jurisdiction, all actions taken by him on February 13, 2008, chronicled above, including the bench trial that he held, were without jurisdiction, and all orders entered by him on February 13, 2008, and thereafter, including that on remand, and were null and void.

Judge Mullen had no jurisdiction other than to pass the case on to Division 29 as required by Local Rule 6.1.1.1 and 6.1.1.5(d). (ASC25-27)

The failures of Judge Steltzer and of Judge Mullen to follow Local Rules 6.1.1.1, 6.1.1.5(a) and (d) and 6.1.1.6 constitute reversible error and resulted the Judge Mullen's having entered multiple orders and a judgment (ASC10-13) that were void, *ab initio*.
(Henningsen at 120)

Standard of Review

An appellate court must affirm the circuit court's judgment unless there is no substantial evidence to support the award, it is against the weight of the evidence, or it erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. App. 1976).

III. THE TRIAL COURT EXCEEDED ITS JURISDICTION, ABUSED ITS DISCRETION AND ENTERED AN ORDER AGAINST THE WEIGHT OF THE EVIDENCE IN ENFORCING SANCTIONS UPON APPELLANT IMMEDIATELY BEFORE TRIAL BECAUSE LOCAL RULE 32.6(1) REQUIRES SPECIFICITY CONCERNING MATTERS ARISING IN THE COURSE OF DISCOVERY AND LOCAL RULE 32.4 REQUIRES A MOTION FOR

SANCTIONS, NOTICE OF HEARING AND A CERTIFICATE OF ATTEMPT TO RESOLVE, AND LOCAL RULE 33.5 PROHIBITS THE COURT FROM HEARING ORAL ARGUMENTS OR TAKING UNDER SUBMISSION MOTIONS PERTAINING TO DISCOVERY UNLESS THE PARTY CALLIG FOR THE HEARING HAS FILED WITH THE COURT, TOGETHER WITH A NOTICE OF HEARING, A CERTIFICATE OF ATTEMPT TO RESOLVE IN THAT THE JULY 20, 2007, MOTION TO COMPEL AND THE OCTOBER 18, 2007, AND NOVEMBER 8, 2007, COURT ORDERS DID NOT SPECIFY WHICH DISCOVERY REQUESTS WERE NOT ANSWERED AND DEFENDANTS DID NOT FILE A MOTION FOR SANCTIONS, NOTICE OR CERTIFICATE OF ATTEMPT TO RESOLVE AND THE COURT ON FEBRUARY 13, 2008, HEARD DEFENDANTS' ORAL ARGUMENT IN VIOLATION OF LOCAL RULE 33.5 AND ENTERED AN ORDER OF SANCTIONS IN VIOLATION OF LOCAL RULES 32.4(1) AND 32.6 AND IN ADDITION ENTERED THE ORDER AGAINST THE WEIGHT OF THE EVIDENCE, AND THE TRIAL COURT'S ORDER EXCLUDING PLAINTIFF'S EVIDENCE WAS VOID.

Trotter v. Distler, 260 S.W.3d 913, Missouri Court of Appeals, Eastern District, 2008.

Walton v. City of Berkeley, 223 S.W.3d 126, (Missouri Supreme Court, 2007)

Wilkerson v. Prelutsky et al., 943 S.W.2d 643, 648 (Mo.banc 1997)

Zimmer et al., v. Delmar U. Fisher, 171 S.W.3d 76, 79 (Mo.App.E.D. 2005)

Local Rules 32.4(1), 32.6 and 33.5

The defendants' motion to compel contained a two-sentence motion which states "(o)n or about July 17, 2007, Defendants propounded discovery requests to Plaintiff" and "(m)ore than thirty days have elapsed and Plaintiff has failed to respond to said requests." (LFA48)

The court's own Local Rule 32.6 states in pertinent part that "motions pertaining to discovery shall separately set out in full each question together with any response, objection or other matter material thereto, so that the Court may consider and rule on each question without referring to any other matter in the Court file." (ASC34)

Defendants did not specify which questions were not answered or documents that

plaintiff failed to provide. Respondents' two-sentence motion to compel cannot be construed even marginally to meet the required standards for specificity.

In sustaining the defendants' motion, the court abused its discretion. "Judicial discretion is abused when the trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." Wilkerson v. Prelutsky, 943 S.W.2d 643, 648 (Mo.banc 1997) (internal quotation marks omitted) quoting Anglin v. Missouri Pacific R.R., 832 S.W.2d 298, 303 (Mo.banc1992).

On October 18, 2008, defendants misrepresented to the court that they had received no discovery from plaintiff. (LFA94-97;TRA24-29) On November 8, 2007, defendants failed to inform the court that they had received responses to discovery on September 27, 2007 and again on November 8, 2007. (TRA24-29; LFA94-97) Again on February 13, 2008, the defendants failed to inform the court that they had received responses to discovery requests on or about December 6, 2007. (LFA82 During the trial attorney Weiss continued to bring up documents that were provided to her in discovery.

Attorney Weiss in the later portion of the trial on February 13, 2008, admitted that (she has) "letters dated August 4, September 12th, September 14th, September 16th, September 25th, September 29th, October 1st, and a few letters dated October 2nd, one letter dated October 26th." (TRA167, lines 3-8)

The court's own rule, 33.5, requires that a certificate of attempt to resolve together with the notice of hearing be on file prior to the court hearing oral argument on any motion pertaining to discovery or for evidence or for sanction to enforce discovery.

(LFA35) The record is absent any evidence that the plaintiff or the court received notice of hearing or a certificate of attempt to resolve. (LFA5,6) As a result, the trial court was barred from holding a hearing on defendants' motion to compel. In addition, defendants' motion to compel was not properly before the trial court since defendants failed to file a Certificate of Attempt to Resolve. (Trotter v. Distler, 260 S.W.3d 914, Missouri Court of Appeals, Eastern District, 2008)

Further, in the instant case, as in Trotter at 917, the plaintiff responded to discovery requests and cured any alleged defects. The plaintiff in the instant case continued to inform the court that she had responded to all of respondents' requests for discovery in four separate installments. (TRA, passim, throughout the trial) However, it was impossible in the instant case for this appellant or the court to have had any idea as to what those defects might have been because of the inadequacy of respondents' pleadings.

In appellant's case, unlike that of Trotter, defendants did not file a motion for sanctions or provide any list of responses to discovery to which plaintiff had not responded.

When properly adopted, the rules of court are binding on courts, litigants, and counsel, and it is the court's duty to enforce them." Sidelines, L.L.C. v. Pentstar Corp., 213 S.W.3d 703, 707 (Mo.App. E.D. 2007)

No notice was provided to the plaintiff to the effect that defendants' attorney, Andrea Weiss, was calling up for hearing on February 13, 2008, any motion pertaining to discovery, i.e., any motion to compel or for sanctions against the plaintiff. (LFA4-6) In addition, plaintiff had no reason to believe that the defendants had not received her final

responses to discovery mailed to them on December 6, 2007. (LFA82; TRA24-29) On February 13, 2008, both prior to and during the hearing, plaintiff objected to the court's hearing the matter of excluding plaintiff's evidence without notice. (TRA24, lines 6-9; TRA25, lines 23-25; TRA26, line 22; TRA27, lines 19-23; TRA28, lines 17-18; 23-24; TRA29, lines 4-6)

Respondents' motion to compel was, in error, in violation of local rules, sustained in Division 28 on October 18, 2007. (LFA58) On November 8, 2007, the court required in its order that plaintiff file documents in response to defendants' ill-defined discovery requests by December 6, 2007, or issues pertaining to interrogatory responses (sic) not responded to by December 6, 2007, will not be permitted to be addressed at trial." (LFA81)

Plaintiff's attorney Roitman answered discovery requests on September 27, 2007. (LFB72-82) Plaintiff further responded to discovery requests on November 8, 2007 (LFA61-88) and on December 6, 2007 (LFA82) The court's files remained absent any reflection of requests to discovery that, allegedly, had not been answered. (LFA5,6) The record is also absent any request for sanctions or the filing of a Certificate of Attempt to Resolve." (LFA5, 6)

Judge Mullen erred when he exceeded his jurisdiction in violation of Local Rules 32.4, 32.6 and 33.5 in hearing respondents' pretrial oral request for sanctions and in applying sanctions by excluding plaintiff's evidence at trial.

The law of the case does not apply because this appeal followed an appeal from a void judgment. Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009) (ASC6-9) ,

Further, if the law of the case were to apply, and it does not, an appellate court has discretion to refuse to apply the doctrine where the first decision was based on a mistaken fact or resulted in manifest injustice or where a change in the law intervened between the appeals. Walton v. City of Berkeley, 223 S.W.3d 126, (Missouri Supreme Court, 2007)

In the instant case, the first decision by Judge Mullen to exclude plaintiff's evidence from trial was based upon the mistaken belief on the part of the judge that the defendants had complied with local rules 32.4, 32.6 and 33.5. He was also mistaken in believing the sworn, albeit statements or affidavits of the defendants' attorneys to the effect that defendants had not received discovery from the plaintiff. The affidavit of attorney Kenneth C. McManaman, #24528, can be found in LFA94-96. The affidavit of attorney Andrea L. Weiss #34076 can be found in LFA97.

Even if the law of the case could conceivably be applied to Point III, an exception should apply in consideration of the mistaken facts and the manifest injustice involved.

Standard of Review

The Court of Appeals may disturb the trial court's discovery sanctions decision only upon a clear showing of abuse of discretion. Zimmer v. Fisher, 171, S.W.3d 76, 79 (Mo.App. E.D. 2005)

IV. THE COURT ERRED WHEN THE DIVISION 28 JUDGE EXCEEDED HIS JURISDICTION IN SUSTAINING PLAINTIFF'S APPLICATION FOR CHANGE OF JUDGE AND ASSIGNING THE CASE TO JUDGE MULLEN IN DIVISION 27 BECAUSE THE MATTER OF CHANGE OF JUDGE WAS NOT BEFORE THE COURT ON FEBRUARY 13, 2008, IN THAT THE MOTION WAS WITHDRAWN ON FEBRUARY 11, 2008, AND HENCE THE JUDGE HAD NO JURISDICTION TO SUSTAIN THE APPLICATION FOR CHANGE OF JUDGE,

HIS ASSIGNMENT WAS VOID, AND ALL ACTIONS TAKEN THEREAFTER BY JUDGE MULLEN WERE VOID.

In the Matter of Buford, 577 S.W.2d 809, Mo. Supreme Court 1979.

Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009) (ASC6-9)

Memco, Inc. v. Chronister 27 S.W.3d 871, 875 (Mo. App. 2000)

RSMo 517.061

Rule 51.05(e)

On December 31, 2007, an entry on Casenet represented that the presiding judge had assigned Judge Michael Mullen to plaintiff's case, effective January 1, 2008. (LFA5)

On January 31, 2008, appellant filed her application for change of judge (LFA83,84) prior to the deadline for requesting change of judge in the associate court division. RSMo 517.061 requires that the application for change of judge be filed no more than five days before the date set for trial. (ASC39) The trial was set to be heard on February 13, 2008, and appellant's application for change of judge was hence filed some thirteen days prior to the date set for trial.

On February 11, 2008, appellant filed her withdrawal of her application for change of judge. (LFA89)

When plaintiff appeared in division on February 13, 2008, the date set for trial (LFA81), Judge Steltzer was the judge. (TRA2, lines 8-15)

Judge Steltzer granted plaintiff's motion for change of judge which had been withdrawn on February 11, 2008, and assigned Judge Michael Mullen, Division 28, as the judge in plaintiff's case. (LFA92)

There was no motion before Judge Steltzer when he considered plaintiff's motion for change of judge and her motion to withdraw the application. (LFA89)

There being no motion before Judge Steltzer at the time, he lacked subject matter jurisdiction to enter his order granting the motion.

It is axiomatic that a trial court cannot enter a judgment on a cause of action not pleaded. Memco, Inc. v. Chronister 27 S.W.3d 871, 875 (Mo. App. 2000) It follows that a trial court cannot enter an order sustaining a motion not pleaded.

In the Matter of Buford, this Court ruled that "(n)o judge has *any right* to impede, forestall, or delay sustaining a motion for change of judge when it is timely filed in proper form and presented to the court and that a judge "can wait until the motion is presented to him or "called up" before ruling on it." In the Matter of Buford, at 828. It would follow that when the motion for change of judge is presented to the judge as a withdrawn motion, the judge must decide that he has no subject matter jurisdiction over the matter, and hence he cannot sustain the motion.

Appellant has found no case in Missouri on the issue of a motion that has been withdrawn.

The law of the case does not apply in that the second appeal followed an appeal from a void judgment. Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009) (ASC6-9)

Standard of Review

An appellate court must affirm the circuit court's judgment unless there is no substantial evidence to support the award, it is against the weight of the evidence, or it

erroneously declares or applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. App. 1976).

V. THE TRIAL COURT ERRED IN ENTERING ITS JUDGMENT AGAINST THE WEIGHT OF THE EVIDENCE WHEN IT DENIED PLAINTIFF'S PETITION AND DID NOT ENFORCE THE CONTRACT ON BEHALF OF LESSOR BECAUSE LESSOR PROVED A PRIMA FACIE CASE OF BREACH OF CONTRACT, PRODUCED EVIDENCE PROVING THE EXISTENCE OF A VALID LEASE AND EVIDENCE ESTABLISHING LESSEES' FAILURE TO PERFORM THEIR OBLIGATION TO PAY RENT AND THE AMOUNT OF RESULTANT DAMAGES.

TA Realty Associates Fund V.I.P., Appellant v. NCNB 1500, Inc., Respondent, 144 S.W.3d 343, 2004 Mo. App. LEXIS 1369.

This was a suit for breach of contract with damages and for property damage on a lease of a condominium owned by the appellant in the City of St. Louis in the Central West End. (LFA7,8)

On March 3, 2010, the court in its first paragraph of its Judgment stated that “the (c)ourt makes the following Findings of Fact, Conclusions of Law, and Judgment. . . .” (ASC10)

In said Judgment the court denied plaintiff's petition and ruled in favor of plaintiff on defendants' counterclaim. (ASC12) With regard to the court's decision on breach of contract, the court ignored the overwhelming and uncontroverted testimony and exhibits (LFA9-13; TRA32, lines 13,14; TRA32, lines 22, 23) offered by the appellant and received by the trial court without objection from respondents. (TRA32, line 19)

The defendants' attorney stated at trial that “(t)he lease speaks for itself.” (TRA168, line 13)

The plaintiff testified that (t)he lease was for a period of two years and sixteen days, commencing on the 16th day of July 2000, for a period of, again, two years and sixteen days, for a total of \$23,275, \$950 per month, with late fees provided under Article 2 of the lease.” (TRA30, lines 9-14) Lessor testified that there was a rider to the lease for laundry accommodations for an additional \$20 a month. (TRA31, lines 20, 21)

The lessor testified that the tenants moved from the property on or about October 1, 1998.(TRA33, 21-25) and the tenants quit paying rent at that time as well. (TRA34, lines 3-6)

Jennifer Icaza testified that she signed the lease for the condominium. (TRA71) Dianne also testified that she signed the lease (TRA line 4) and that the lessees vacated the premises on October 5, 1998. (TRA114, lines 8-10; lines 21-23)

The court’s judgment was against the weight of the testimony and evidence offered by the plaintiff and supported by testimony and evidence provided by the respondents. (TRA, *passim*) The court did not at any time rule that the contract was not valid. (ASC10-13)

Plaintiff’s testimony and Exhibit 1, the Lease, Article 4 (LFA105-119) establish that the lease was executed in the amount of \$23,275.00 and that the Lessees vacated the premises on October 5, 1998 having paid no installments on the balance due under the contract after October 1, 1998. (TRA30, lines 9-14; TRA31, lines 20-22; TRA33, lines 24-25; LFA105-114-a)

The lessor established at trial the existence of a contract or agreement and the terms of the contract. (LFA105-110) The lessor performed by providing a

condominium, the premises, which was occupied by the lessees until their sudden abandonment on October 5, 1998.) (TRA34, lines3-6) In their execution of the contract, the lessees agreed that they had inspected the premises prior to the execution of the lease and found it to be in good order, condition and repair with no exceptions having been noted. (LFA9, Article 5) The lessor established that she performed and tendered performance. (LFA69-80, LFA111-114-a)

The lessor established that the lessees did not perform and breached the lease by, inter alia, having a dog in the premises, (LFA233) violating article 10 by denying access to lessor for the purpose of inspection or making repairs,(LFA10, article 10) and by abandoning the premises two months and twenty-one days after having entered into a contract to perform by leasing the property for twenty-four months and twenty-one days. (TRA114, lines 8-10; lines 21-23) West Cent. Missouri Regional Lodge No. 50, 939 S.W.2d at 567. TA Realty Associates Fund V.I.P., Appellant v. NCNB 1500, Inc., Respondent, 144 S.W.3d 343, 2004(Mo App. LEXUS 1369.

The lessor established that a remaining unpaid balance was due on the value of the contract pursuant to the Article 2 of the Lease and the facts produced at trial. After applying credit for payments made by lessees in the total amount of \$3,385.00, the remaining balance due was \$19,890.00. Defendants made monthly installments of \$475 for the month of July and two monthly installments of \$970 plus one prepaid installment for the last month's rent of \$970 for July 2000, the total of which, \$3,385.00, applied as credit against the total unpaid balance due, (excluding late fees) leaves a balance of

\$19,890.00. (LFA101-102) The amount of late fees owed by lessees remains to be determined.

The trial court erred in failing to order the lessees to fulfill the contract by paying the unpaid balance due and in failing to order the lessees to late fees owed.

The law of the case does not apply to Point V because ED95203 represented the first appeal after an appeal from a void judgment. Kieffer v. Icaza, 296 S.W.3d.495 (Mo. App. ED 2009).

Standard of Review

On review of court-tried actions, the court will affirm the judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976)

VI. THE APPELLATE COURT, EASTERN DISTRICT, ERRED WHEN IT APPLIED THE LAW OF THE CASE DOCTRINE TO ARGUMENTS MADE IN POINTS I, III, IV AND V OF APPELLANT'S BRIEF BECAUSE THE JUDGMENT WAS ENTERED OUT OF TIME IN THAT THE PURPORTED JUDGMENT IN THIS CASE, WHICH WAS GOVERNED BY CHAPTER 517 OF THE REVISED STATUTES OF THE STATE OF MISSOURI, WAS ENTERED 106 DAYS AFTER THE CASE WAS TAKEN UNDER SUBMISSION IN VIOLATION OF RSMO 517.111.2 WHICH REQUIRED A JUDGMENT TO BE ENTERED WITHIN 30 DAYS OF ITS BEING TAKEN UNDER SUBMISSION AND AS A RESULT THERE WAS NO JUDGMENT.

Francis v. Richardson, 951 S.W.2d 365, 366 (Mo.App. 1997)

Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009)

RSMo Section 512.020

RSMo 517.111.2

The Eastern District erred in applying the doctrine of law of the case to this remanded case. The case was governed by Chapter 517 of the Revised Statutes of the State of Missouri. Section 517.111.2 (ASC40) states that “(w)hen a case is tried before a judge without a jury, judgment shall be entered by the judge within thirty days after the case is submitted for final decision unless the parties consent to a longer period of time.”

This case was taken under submission on February 13, 2008, and a purported judgment was entered on May 29, 2008, 106 days after the case was taken under submission. In the first appeal, E.D.91742, the appellate court stated in its Opinion (ASC6-9) that “(b)ecause the trial court entered its judgment more than thirty days after it took the case under submission and without the consent of the parties, the judgment is void.” Kieffer v. Icaza, 296 S.W.3d 495, 497. (ASC6-9)

RSMo Section 512.020 (5) in pertinent part states that “Any party to a suit aggrieved by any judgment of any trial court in any civil cause from which an appeal is not prohibited by the constitution, nor clearly limited in special statutory proceedings, may take his or her appeal to a court having appellate jurisdiction from any . . . (5) (f)inal judgment in the case or from any special order after final judgment in the cause; but a failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in the case.”

The right of appeal is statutory. The applicable statutory provision is RSMO Section 512.020. (City of St. Louis v. Hughes, 950 S.W.2d 850, Mo. Supreme Court, 1997.) In Hughes, the Missouri Supreme Court, quoting Boyles v. Knowles, 905

S.W.2d 86, 88 (Mo. Banc 1995) (citations omitted) stated that “(a)Absent one of the exceptions expressly set out in section 512.020, RSMo 1994, “[a] prerequisite to appellate review is that there be a final judgment.”

RSMo, Section 517.111.2 requires the judgment in a bench-trying case to be entered within thirty days after the case was taken under submission. (ASC4040) The judgment in appellant’s Case 1 was entered 106 days after the case was taken under submission, and the Eastern District in its Opinion stated that the purported judgment was void. Kieffer at 495 (ASC6-9)

The appellate courts have created an accommodation to allow parties with a purported judgment to appeal the judgment to the appellate court, which then remands the case back to the circuit court for them to enter a judgment in compliance with Chapter 517.111.2. Francis v. Richardson, 951 S.W.2d 361 (Mo. App. 1997), Kamp v. Grantham, 937 S.W.2d 258, 259 (Mo.App. 1996), Larimar v. Robertson, 800 S.W.2d 154 (Mo. App. 1990), and Stellwagon v. Gates, 758 S.W.2d 15 (Mo.App. 1998) These courts order a remand for entry of a final judgment.

As stated in Reichardt Motor Co. v. Standard Accident Ins. Co., 237 Mo.App. 902,179 S.W.2d 112, 114 (1944), “(w)e know of nothing more futile in the law than a decision and opinion by a court in a cause whereof it has no jurisdiction.”

Restating, the fifth and final exception delineated in RSMo 512.020.5 provides that parties can file an appeal once they receive a final judgment.

The instant appeal was remanded by the Eastern District for entry of a final judgment. (ASC4,5) On March 3, 2010, the final judgment was entered (ASC10), thereby making all issues ripe for appeal under RSMo Section 512.020. 5.

This appellant appealed in ED95203. (ASC14-19) The court entered its Opinion stating that appellant's points I, III, IV and V were the law of the case. The case on which the court relied was State v. Johnson, 22 S.W.3d 183, 189 (Mo. Banc 2000), but in that case, unlike in the instant case, a final judgment was entered in Johnson's first appeal.

The instant case would appear to be a case of first impression. Appellant's research has uncovered no state case law in Missouri that has the same factual situation as that in the instant case. Appellant could find no other case in which the decision in an appeal from a remanded RSMo Section 517.111.2 case was affirmed because of the application of the doctrine of the law of the case.

STANDARD OF REVIEW

On review of court-tried cases, the court will affirm the judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law or unless it erroneously applies the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976)

VII. THE COURT OF APPEALS, EASTERN DISTRICT, ERRED WHEN THEY DENIED PLAINTIFF'S POINT II FOR REASONS OF TIMELINESS BECAUSE THE PLAINTIFF FILED A TIMELY REQUEST FOR JURY TRIAL FIVE DAYS BEFORE THE DATE SET FOR TRIAL AND THE APPLICATION OF RULE 44.01(A) TO DETERMINE TIMELINESS REQUIRES THE APPELLANT TO

**PROVIDE MORE NOTICE TO THE DEFENDANTS THAN SHE WAS
REQUIRED TO PROVIDE TO THE COURT PURSUANT TO RSMO 517.091.1.**

Kieffer v. Icaza, 296 S.W.3d 495 (Mo. App. E.D. 2009)

RSMO 517.091.1.

Rule 43.01(g)

Rule 44.01(a)

The court's Judgment of March 3, 2010, denied plaintiff's motion for jury trial for reasons of timeliness. (ASC10-13) However, on February 13, 2008, the court denied her motion for jury trial because plaintiff did not notify Andrea Weiss. (TRA3-5) Kieffer v. Icaza, 296 S.W.3d 495 (Mo. App. E.D. 2009) (ASC6-9)

RSMo 517.091.1 states that "(i)n any case triable before a jury, a trial by jury shall be deemed waived unless written demand be filed not later than five days before the return date of summons or the date set for trial, whichever is later. For good cause shown, the judge may grant any party's request for jury trial."

The case was set for trial on February 13, 2008. (LFA81) The plaintiff filed her request for jury trial on February 8, 2008, five days prior to the date set for trial.

In the Opinion in the first appeal, the court in dicta stated that, applying Rule 44.01(a), appellant's request for jury trial was not timely because plaintiff did not file her request seven days before the date set for trial. Kieffer v. Icaza, *id.*

Informed by dicta, Judge Mullen then, upon remand, changed his basis for denying plaintiff's basis for jury trial, no longer for the reason that she had not notified Andrea Weiss, but for the reason that plaintiff's request for jury trial was not timely.

The appellate court erred in applying Rule 44.01(a) to deny plaintiff's Point II because Rule 43.01(g) (ASC22) states that "(w)hen provision is made for the time of filing papers and none is made for the time of service thereof, copies shall be served on the day of filing or as soon thereafter as can be done."

RSMo 517.091.1 does not makes provision for the time of filing the request for jury trial, but makes no provision for the time of service thereof.

It follows, therefore, that the Court of Appeals, Eastern District, erred in its Opinion by applying Rule 44.01(a).

Standard of Review

On review of court-tried cases, the court will affirm the judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law or unless it erroneously applies the law.

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. Banc 1976)

CONCLUSION

For all the foregoing reasons, Appellant Carolynne M. Kieffer respectfully requests this Court to enforce the terms of Article 2 of the contract in the amount of Nineteen thousand eight hundred and ninety dollars (\$19,890.00) as the unpaid balance due plus late fees pursuant to Article 2 of the Lease in an amount to be determined, and to remand the case to the Circuit Court of the City of St. Louis for a hearing on damages, or, in the alternate, order a new trial.



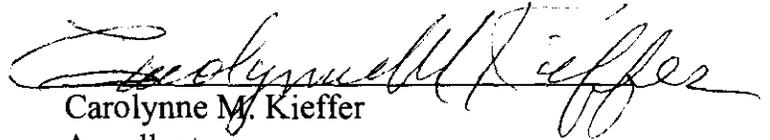
Carolynne M. Kieffer
Appellant, pro se
1011 Boland Place
St. Louis, Missouri 6317
314/644-2400

**CERTIFICATE OF SERVICE AND COMPLIANCE
WITH RULE 84.06(b), (c) and (g)**

The undersigned certifies that on this 14th day of March, 2012, two true and correct copies of the foregoing brief and of the Appendix in this foregoing matter and one disk containing the foregoing brief were mailed, first-class postage prepaid, to Brice Reed Sechrest, attorney for appellants, 105 Science St., P.O. Box 667, Park Hills, MO 63601.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief:

- (1) contains the information required by Rule 55.03;
- (2) Complies with the limitations in Rule 84.06(b) and contains 12,924 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Office Word 2010; and
- (3) the labeled CD-R mailed to the attorney for the defendants has been scanned for viruses and is virus-free.



Carolynne M. Kieffer
Appellant, pro se
1011 Boland Place
St. Louis, Missouri 63117
314/644-2400