

Case No. SC89315

IN THE MISSOURI SUPREME COURT

DORIS KESLER-FERGUSON, et al.,

Plaintiff/Respondent

v.

HY-VEE, INC.,

Defendant/Appellant

SUBSTITUTE REPLY BRIEF OF APPELLANT HY-VEE, INC.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
HONORABLE MARCO ROLDAN

CIRCUIT COURT NO. 04CV233741

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I. RESPONSE TO RESPONDENT’S ARGUMENTS

A. Respondent Cannot Argue at this Late Stage that Appellant Failed to Preserve Issues for Appeal.

Respondents’ Substitute Brief is the first time they argue that Appellant failed to preserve issues for appeal. This argument was never presented to the Court of Appeals and Respondents cannot raise this issue at this late stage. Missouri Rule of Civil Procedure 83.08 prohibits Respondents from raising arguments in this Court that were not raised in the Court of Appeals. Rule 83.08 states, “The substitute brief ... shall not alter the basis of any claim that was raised in the court of appeal brief.” MO. R. CIV. P. 83.08 (b) (2008). Respondents may not raise these arguments now.

Furthermore, Respondents failed to raise this argument in their response to Appellant’s Motion for New Trial. Thus, Respondents did not preserve this issue for appeal and cannot raise it in this Court. *Overton v. Tesson*, 355 S.W.2d 909, 913 (Mo. 1962). Thus, Respondents’ argument was not preserved for purposes of this appeal, and this Court should disregard Part II of Respondents’ Substitute Brief.

B. The Trial Court held Appellant to an Incorrect Standard and Improperly Shifted the Burden to the Striking Party

This appeal centers on the characterization of the trial court’s statement that “[t]here was nothing negative out of that” when rejecting Appellant’s reason for striking Juror Number 26. Tr. 12:19-20. Respondent argues that this statement indicates that the trial court “considered the credibility of the strike under the totality of the circumstances and found that the reasons were not believable and that the strike was racially motivated.”

Resp. Br. at 25. This argument is unsupportable because the trial court stated on the record, “[t]here’s no other – there’s no neutral reason that I can see other than that they know each other. There was nothing negative out of that.” Tr. 12:17-20. This statement indicates that the trial court found Appellant’s explanation for the strike to be race-neutral, but rejected it because it did not negatively affect the juror’s ability to serve.

Appellant does not appeal the *Batson* procedure followed in this case. Appellant and Respondent agree on the appropriate procedure for a *Batson* challenge in Missouri, and agree that the three steps were followed by the trial court. See Aplt. Br. at 7-8.

Appellant and Respondent disagree on whether the trial court applied the appropriate standard when it evaluated the evidence in light of the totality of the circumstances and upheld the *Batson* challenge. Respondent claims that the trial court found Appellant’s race-neutral explanation unacceptable, not believable, lacked logical relevance to facts of the case, and was purposeful discrimination. Resp. Br. at 28, 41. But this is simply wishful thinking on Respondent’s part and is unsupported by the record.

i. Trial Court Clearly Required More than a Race-Neutral Explanation

Respondent’s main contention is that “The court found, however, that it did not believe Hy-Vee with respect to the third strike (Number 26), stating there was **nothing negative** about 26 knowing 31.” Resp. Br. at 28. Respondent’s own argument confirms that the trial court held Hy-Vee to an inappropriate standard, i.e. requiring Hy-Vee to show a negative reason for the strike. In fact, the trial court explicitly stated on the

record that the reason was neutral, Tr. 12:18-19, which under the *Batson* paradigm meets the burden at Step 2. *Purkett v. Elem*, 514 U.S. 765, 767 (1995); *State v. Parker*, 836 S.W.2d 930, 934 (Mo. banc 1992).

Following Respondent's argument for pretext, the trial court must assess the genuineness of the race-neutral explanation for the strike to determine whether the challenger has met its burden to show pretext. *Id.*; *State v. Stanley*, 990 S.W.2d 1, 6 (Mo. Ct. App. 1998). The court should not assess whether the race-neutral reason is sufficient grounds to strike a juror, e.g. the reasonableness of the strike. *Purkett*, 514 U.S. at 769. In fact, the reason "need not be persuasive or even plausible." *Id.* at 768. *See also Bows v. Scarborough*, 950 S.W.2d 691, 701 (Mo. App. W.D. 1997). The only issue before the court after step 3 is whether the race-neutral reason denies equal protection. *Purkett*, 514 U.S. at 769. A reason will be found to be race-neutral "unless some discriminatory intent is inherent in the explanation given." *Bows*, 950 S.W.2d at 701.

In *Purkett*, the U.S. Supreme Court clarified what is meant by a "race-neutral explanation." *Purkett*, 514 U.S. at 769. The prosecutor in *Purkett* explained that he struck a juror merely because he had long, unkempt hair, a mustache, and a beard. *Id.* The Supreme Court held that reason to be race-neutral because "the wearing of beards is not a characteristic that is peculiar to any race," nor is "the growing of long, unkempt hair." *Id.* In fact, the Court explained that what is meant by "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." *Id.* While it

may not make sense to the trial court that an attorney would be concerned with a juror's hair and beard, that reason is race-neutral.

Similarly, in this case, Appellant struck Juror Number 26 because he knew Juror Number 31. Acquaintance with other people, even other jurors, is not a characteristic peculiar to any particular race. In fact, it is a characteristic of all people, regardless of race. Whether the trial court thought there was anything “negative” about Juror Number 26's acquaintance with Juror Number 31 is irrelevant. The reason behind a peremptory strike need not make sense – it must only be race-neutral. Appellant's reason for striking Juror Number 26 was race-neutral.

Benedict v. Northern Pipeline Construction, 44 S.W.3d 410 (Mo. Ct. App. 2001), cited frequently by Respondent, is a good example of the proper analysis that the trial court must undertake after Step 3 and highlights the trial court's error in this case. In *Benedict*, the trial court upheld the *Batson* challenge despite the striking party's race-neutral explanation. *Id.* at 419. The court did so for three reasons that it explained on the record: 1) the court did not observe the jurors' nonverbal behavior that was given as a reason for the strike, 2) there were similarly situated white jurors who were not struck, and 3) the trial court observed counsel's behavior when the court rejected striking one of the same jurors for cause. *Id.* at 419-420. The appellate court considered whether the trial court erred in finding that the reasons were racially motivated. *Id.* at 420. In doing so, the court listed the factors to be properly considered by the trial court in its determination of whether the striking party has met its burden to show pretext: 1) whether any similarly situated white jurors were not struck, 2) the degree of logical

relevance between the explanation and the case to be tried, 3) the striking attorney's demeanor or statements during voir dire, and 4) the court's prior experiences with the striking attorney. *Id.* at 420 (citing *State v. Parker*, 836 S.W.2d 930, 940 (Mo. banc 1992)). The appellate court found that the trial court properly considered several of these factors and, therefore, the court did not have a firm conviction that a mistake had been made. The appellate court upheld the trial court's finding that the strikes were improper. *Id.* at 421.

This case is distinguishable from *Benedict* in one critical aspect. In *Benedict*, the trial court clearly weighed only the genuineness of the race-neutral reasons and followed the objective and subjective factors to be considered. Here, the court did not consider the factors to determine whether the strike was pretextual and did not consider Respondent's argument for pretext. *See* Tr. 12. Instead, the trial court considered whether the strike was reasonable when it demanded a race-neutral explanation that also negatively affected the juror's ability to serve. Tr. 12: 19-20.

Respondent argues that this court should take the trial court's lack of analysis of these factors to mean that the court did consider the factors, but simply failed to do so on the record. Aplt. Br. at 26. This argument might be believable if the court had upheld the strike with no explanation. Because the trial court stated that the race-neutral explanation was insufficient in that "[t]here was nothing negative out of that," it is clear that the trial court inappropriately considered whether Appellant provided a race-neutral reason that also negatively affected the juror's ability to serve. Thus, the trial court applied an

inappropriate standard and improperly placed the burden on the striking party. See Aplt. Br. at pp. 9-14.

ii. The Trial Court Did Not Consider the Factors that Respondent Offers in Hindsight and This Court Cannot Consider Them Now

Respondent argues that several factors existed that could have led the trial court to determine that Appellant's race-neutral explanation was pretextual. Resp. Br. at 29-30. These factors are pure speculation because the record is devoid of any indication that the trial court considered any of these factors. Tr. 11-12. These factors lead this Court into an unnecessary factual dispute about whether the strike was racially motivated. The only question before the Court is whether the trial court held Appellant to an incorrect standard and improperly shifted the burden when it demanded a **negative** race-neutral reason for striking Juror Number 26. The factual dispute raised by Respondent is a red herring.

Furthermore, this Court cannot consider these factors because Respondents did not raise them at trial. For the first time on appeal, Respondents argue that six factors "establish" that Appellant's race-neutral explanation was pretextual. Resp. Br. at 29-30. Respondents did not raise these factors at trial. Tr. 7-12. Instead, at Step 3 Respondents merely stated that Juror Number 26 had assured the court that he could be neutral despite his acquaintance with Juror Number 31. Tr. 10:14-17. Failure to raise these factors at trial at Step 3 precludes Respondents from raising them now. *State v. Moore*, 88 S.W.3d 31, 34-35 (Mo. Ct. App. 2002); *Overton*, 355 S.W.2d at 913.

In *Moore*, at Step 3 the challenger's only argument was that the trial court did not witness the demeanor that the striking party claimed was the race-neutral reason for the strike. *Id.* at 35. The trial court overruled the strike and on appeal, the challenger (appellant) raised a new argument for pretext that similarly situated white persons were not struck. *Id.* The appellate court refused to entertain this argument for pretext because it was raised for the first time on appeal: "Since Appellant failed to challenge the State's explanation in the trial court as pretextual, he may not challenge the State's explanation on appeal." *Id.* (citing *State v. Aziz*, 861 S.W.2d 803, 806 (Mo. Ct. App. 1993)).

Similar to *Moore*, Respondent cannot argue in hindsight that Appellant's race-neutral reason was pretextual based on six new factors. On appeal, Appellant cannot support its argument with facts that it did not raise at trial. Following *Moore*, this Court should not consider the factors listed by Respondent.

Even if the trial court did consider other factors when it sustained the *Batson* challenge, the factors listed by Respondent are insufficient to sustain the *Batson* challenge and are unsupported by the record.

First, the trial court cannot rely solely on the juror's assurances that he or she can be unbiased. *State v. Lovell*, 506 S.W.2d 441, 444 (Mo. banc 1974) (citation omitted). *See also* Aplt. Br. at 15-16.

Second, Appellant's failure to ask questions about the acquaintance is not an indication of pretext in this case. There are certain juror characteristics that lawyers find sufficient to strike without further inquiry. Examples include acquaintance with a witness, acquaintance with a lawyer, or acquaintance with another juror. Further inquiry

and assurance that the juror will not be affected by that acquaintance is not necessary because the mere existence of the acquaintance is enough to justify the strike. Respondent cites *State v. McFadden*, 191 S.W.3d 648 (Mo. 2006) on this point, but in that case the court found the reason for the strike (the failure to recognize gun shots) to be pretextual because the striking party did not inquire of the entire panel as to their inability to recognize a gunshot, but still used this as a basis for striking a particular juror. *Id.* at 654. Respondent also cites *State v. Hopkins*, 140 S.W.3d 143 (Mo. Ct. App. 2004), on this point, but in that case as well, the reason for the strike was not put to the entire venire panel. Here, the entire panel was asked whether they were acquainted with another juror and only Numbers 26 and 31 responded in the affirmative. Tr. 4:13-15.

Third, Respondent makes much of a “long delay and a pause” that it claims preceded Appellant’s race-neutral explanation for the strike and the fact that Respondent appeared to struggle to remember the explanation for the strike. Resp. Br. at 29-30. Appellant disputes that the pause occurred and pauses, of course, are not reflected in a written transcript. This Court cannot rely on matters not reflected in the transcript. *American Express Travel Related Services v. Mace*, 26 S.W.3d 613, 615 (Mo. Ct. App. 2000). And Appellant’s “struggle” to remember the strike is not evidence of pretext, but instead shows a desire to strike the characteristic—acquaintance with another juror—

rather than the individual.¹ Counsel for Appellant wanted to make sure he was striking the right person, e.g. the one who knew another juror.

Thus even if this Court decides to consider these factors, they are insufficient to justify the strike. However, as stated above, this factual dispute need not be resolved because the only issue before the Court that the trial court held Appellant to an improper standard and improperly shifted the burden to the striking party.

C. Proper Remedy for the Trial Court's Error is a New Trial

Respondent claims that, in order to receive a new trial, Appellant must show that the result of the trial would have been different had the trial court overruled the *Batson* challenge. Resp. Br. at 35. Respondent cites no authority for this point because there is none. If the trial court clearly errs on a *Batson* challenge, the striking party is entitled to a new trial without any showing that the outcome would have been different without the juror on the panel. In *State v. Stanley*, the trial court improperly sustained a *Batson* challenge despite the striking party's race-neutral explanation. 990 S.W.2d 1, 6-7 (Mo. Ct. App. 1998). The remedy in that case was a new trial without any showing that the outcome would have been different if the juror had been struck. *Id.* at 7; *see also State v. Hampton*, 163 S.W.3d 903, 904 (Mo. banc 2005). The remedy in this case is the same because the facts are the same. Appellant is entitled to a new trial.

¹ Counsel for Appellant did not have the juror slips when the peremptory strikes were made, so counsel did not know Juror Number 26 was black. Tr. 8:23-25.

- i. **Hy-Vee is entitled to a new trial under the Missouri standard for non-Batson peremptory challenge errors because Hy-Vee can show that it was prejudiced by the error.**

In *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172 (Mo. banc 1993), the Supreme Court of Missouri held that errors related to peremptory challenges require reversal if the complaining party can show prejudice. *Id.* at 177. Prejudice is shown when the juror to be struck actually sat on the jury. *Id.* at 178.

In *Carter*, the trial court allocated peremptory strikes among defendants without recognizing that one of the defendants' interests was aligned with the plaintiffs. This Court held that the allocation was error, but would not warrant reversal absent prejudice. 857 S.W.2d at 177:

In order to prove the existence of prejudice, the complaining party must show that it exhausted its peremptory challenges and that a prospective juror, who the challenging party would otherwise have stricken, served on the jury.

Id. at 178.

This Court held that Tom's Trucks failed to satisfy that burden because it did not identify which juror it would have struck with an additional challenge; there was no evidence that it would have challenged anyone other than the venire person stricken by the co-defendant; and there was no evidence that it was dissatisfied with any of the jurors. 857 S.W.2d at 178. In the alternative, the Court held that Tom's had failed to show that any juror was subject to removal for cause. *Id.*

Under the plain terms of the opinion, therefore, there are two ways for a party to show prejudice. First, the party can prove that a juror who otherwise would have been stricken served on the jury. Second, the party can prove that an unqualified juror sat. Hy-Vee has plainly satisfied the first requirement.

That is exactly how the Eastern District interpreted *Carter* in *Charlton v. Jeffries*, 911 S.W.2d 629 (Mo. App. 1995). There, the trial court allowed the defendant three challenges and the third-party defendant an additional three challenges. While this was a mirror image of the procedure in *Carter*, the “standard is the same.” 911 S.W.2d at 630:

All three of the “extra” venirepersons, 19 to 21, served on the jury. If the court had sustained plaintiff’s objection to their participation, none would have been eligible. Two of the three signed the 10-2 verdict. One of the two was necessary to reach the minimum of nine jurors required for a verdict. Thus, the error allowed a juror necessary to the verdict to serve although not eligible. The prejudice is obvious.

Id. at 630-31.

In our case, the *Batson* challenge error by the trial court resulted in Hy-Vee being precluded from exercising a peremptory challenge. Hy-Vee was prejudiced, according to the *Carter* standard, because the juror it attempted to strike actually sat on the jury and rendered a verdict against Hy-Vee. Unlike *Carter*, it is clear from the record that Hy-Vee attempted to strike Juror Number 26, the Court wrongfully denied that strike in a *Batson* challenge error, and Juror Number 26 sat on the jury and rendered a verdict against Hy-Vee. (Tr., 13:14-23). Because Hy-Vee was prejudiced when Juror Number 26 was

allowed to sit on the jury despite Hy-Vee's peremptory challenge, Hy-Vee is entitled to a new trial. *See Carter*, 857 S.W.2d at 178.

ii. Hy-Vee is entitled to a new trial under the standard for Batson challenge violations in the civil and criminal context.

The standard set by the *Carter* case is consistent with the standards in both civil and criminal *Batson* challenge cases.² In the criminal context in Missouri, the remedy for *Batson* challenge violations which result in a party being deprived of its right to exercise a peremptory challenge is automatic reversal without a showing of prejudice. *See State v. Stanley*, 990 S.W.2d 1, 6 (Mo. Ct. App. 1999) (having found that the trial court erred by sustaining the state's *Batson* challenge, the court held that the defendant was entitled to a new trial).

These Missouri cases granting reversal after a *Batson* challenge error are consistent with decisions of other jurisdictions addressing this issue, which have unanimously concluded that the remedy for *Batson* errors is reversal. *See Hitchman v. Nagy*, 889 A.2d 1066, 1074 (N.J. Super. Ct. App. Div. 2006) (finding that a *Batson* challenge violation "would have resulted in reversible error" if the juror had sat on the jury); *Clarke v. Kmart Corp.*, 559 N.W.2d 377, 385 (Mich. Ct. App. 1997) (holding that the remedy for a wrongfully upheld *Batson* challenge was reversal because the error

² The majority of *Batson* challenge cases are those in which the juror is wrongfully struck and does not sit on the jury. There are very few cases such as this one in which the *Batson* challenge was wrongfully upheld resulting in the juror sitting on the jury.

could not be considered harmless when the juror sat on the jury). Thus, in both the civil and criminal cases, the cure for *Batson* challenge violations is reversal when the juror sits on the jury.

In explaining why reversal is the correct remedy when a party is improperly precluded from exercising one of its peremptory challenges, the Ninth Circuit stated:

It would be virtually impossible to determine whether the denial of a peremptory challenge was harmless enough to warrant affirming the conviction. For several reasons, the denial of a defendant's right of peremptory challenge eludes a determination of whether a judgment was or was not "substantially swayed by the error...It would be difficult if not impossible for a reviewing court to determine the degree of harm resulting from erroneously allowing a juror to sit despite an attempted peremptory challenge...To subject the denial of a peremptory challenge to harmless-error analysis would require appellate courts to do the impossible: to reconstruct what went on in jury deliberations through nothing more than post-trial hearings and sheer speculation. In the context of an appeal based on denial of a peremptory challenge, there is inadequate evidence for an appellate court to determine the degree of harm resulting from the seating of a juror despite a defendant's attempted peremptory strike.

U.S. v. Annigoni, 96 F.3d 1132, 1144-1145 (9th Cir. 1996).

The standard announced in *Carter* is entirely consistent with this rationale. Applying the *Carter* standard in the context of a wrongfully upheld *Batson* challenge, the challenged juror always sits on the jury, resulting in per se prejudice. This concept is

inherent in the nature of peremptory challenges. The rationale behind a peremptory challenge is that venirepersons exist who an attorney believes will not be fair and impartial jurors, but who do not rise to the level of a strike for cause. For example, the spouse of the opposing attorney may represent that he will be a fair and impartial juror. However, the attorney may not believe him and will still likely exercise a peremptory strike to remove him from the jury. The purpose of peremptory challenges is to ensure a fair and impartial jury and to insulate a party from jurors whose bias is unprovable. To allow anything other than automatic reversal for an improper denial of a peremptory challenge would defeat the very purpose of peremptory challenges.

Furthermore, the standard must be automatic reversal if the juror sits on the jury because it is impossible to show the impact that a juror may have had on the verdict. *See Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1369 (7th Cir. 1990) (stating, in a civil case, “It is reversible error to deny a party to a jury trial the peremptory challenges to which the rules of procedure entitle him, although it will rarely if ever be possible to show that the trial would have come out differently with a different jury.”); *Peacher v. Cohn*, 786 So.2d 1282, 1284 (Fla. Ct. App. 2001) (“The harmless error analysis ... is impractical to apply; one can hardly determine whether a jury, minus the challenged juror and replaced by another, would have acted more in the plaintiff’s favor.”).

iii. An Evidentiary Hearing is Not an Adequate Remedy in this Case Because the Trial Court Already Held an Evidentiary Hearing on Respondent’s *Batson* Challenge.

Respondent’s proffered remedy for the improper grant of a *Batson* challenge – an evidentiary hearing on the challenge – is inadequate because the trial court has already conducted an evidentiary hearing on the *Batson* challenge. *Bowls*, 950 S.W.2d at 700. Thus, an evidentiary hearing would not provide an adequate remedy. The only appropriate remedy is a new trial.

In *Bowls*, the appellant sought to appeal the denial of a *Batson* challenge, claiming that the trial court failed to conduct the required evidentiary hearing on the challenge. *Id.* The appellant in *Bowls* brought a *Batson* challenge against one of the respondents’ peremptory strikes. The trial court required respondents to provide an explanation for their strike. *Id.* The respondents explained their reasons for striking the juror, at which time the appellant was given an opportunity to show that respondents’ reasons were merely pretextual and that the strike was racially motivated. *Id.* The trial court, after considering the arguments of the parties, found that the juror was indeed struck for non-discriminatory reasons and denied the *Batson* challenge.

The *Bowls* court found that the “trial court followed the procedure set out in *Parker* to the letter.” *Id.* Although the court ultimately held that the appellant had not preserved the issue for appeal, the court nevertheless discussed the trial court’s procedure for analyzing the *Batson* challenge and found that the “evidentiary hearing held by the

trial court met all the requirements of *Parker*” for considering and deciding a *Batson* challenge. *Id.*

As in *Bowls*, the trial court here already required Appellant to provide its race-neutral reasons for striking Juror Number 26. Appellant provided its reason – that Juror Number 26 was acquainted with Juror Number 31. Tr. 9:8-11, 11:11-15. Respondent was then afforded an opportunity to demonstrate that Appellant’s proffered reason was merely pretextual and that the real reason for the strike was race. Tr. 10:14-17. Respondent offered no argument that Appellant’s reason was pretextual – merely that Juror Number 26 had stated that his acquaintance with Juror Number 31 would not affect his ability to render a verdict. *Id.* The trial court then considered both arguments and, rather than finding that Appellant’s offered reason was pretextual, the trial court instead found that Appellant had not offered a **negative** race-neutral reason and granted the *Batson* challenge. Tr. 12:14-20.

The trial court already held an evidentiary hearing as mandated by *Parker*. *Bowls*, 950 S.W.2d at 700. Despite having held an evidentiary hearing, the trial court still applied the incorrect standard and rejected Appellant’s race-neutral reason, requiring it to offer a **negative** race-neutral reason for striking Juror Number 26. This clear error cannot be remedied by an evidentiary hearing. The only remedy for the trial court’s erroneous grant of the *Batson* challenge is a new trial.

II. CONCLUSION

Batson challenges in Missouri can only be sustained if the trial court determines that the challenger has met its burden to show that the striking party’s race-neutral

explanation is pretext for unlawful racial discrimination. In this case, the trial court ignored the argument for pretext and required the striking party to provide a race-neutral reason that negatively affected the juror's ability to serve. This was clear error that should leave this Court with the firm conviction that a mistake has been made. In light of that mistake, Appellant is entitled to a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE WITH COURT RULES

Pursuant to Missouri Supreme Court Rules 84.05 through 84.07 (“Court”), the undersigned hereby certifies that on the 28th day of August, 2008, the original and 7 copies of the Substitute Reply Brief and a floppy disk were filed at the Court and that on this same date two copies of the Substitute Reply Brief and a floppy disk were served on counsel for the Respondent by first-class U.S. Mail at the address shown below:

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The undersigned further certifies that:

- (1) Pursuant to Rule 84.06(c), the original and all copies of the Substitute Reply Brief include the information required by Rule 55.03, including the signature of an attorney of record for Appellant on the original Substitute Reply Brief; that the Substitute Reply Brief complies with the limitations contained in Rule 84.06(b); and that the Substitute Reply Brief contains 4,911 words as reflected in the word count of the Microsoft Word word-processing system used to prepare the Substitute Reply Brief; and
- (2) Pursuant to Rule 84.05(g), the undersigned further certifies that the floppy disks containing the Substitute Reply Brief filed with the Court and served on opposing counsel have been scanned for viruses and are virus-free.

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