

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

Missouri Court of Appeals, Eastern District

**SUBSTITUTE REPLY BRIEF OF
APPELLANT CAROLYNNE M. KIEFFER**

**Carolynne M. Kieffer
Appellant, pro se
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314-644-2400**

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II. THE JUDGE IN DIVISION 27 ERRED IN FAILING TO TRANSFER THE CASE TO DIVISION 29 BECAUSE LOCAL RULE 6.1.1.1 PROVIDES THAT ANY CASE PENDING IN DIVISION 27 IN WHICH A JURY TRIAL HAS BEEN REQUESTED SHALL BE HEARD IN DIVISION 29, IN THAT THE APPELLANT PROPERLY REQUESTED A JURY TRIAL ON FEBRUARY 8, 2008, AND JUDGE STELTZER'S ORDER OF FEBRUARY 13, 2008, ORDERED THAT THE CASE BE ASSIGNED TO JUDGE MULLEN IMMEDIATELY FOR HEARING, NOT FOR TRIAL.

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 WITH NO NOTICE TO APPELLANT BECAUSE LOCAL RULE 32.6(1) REQUIRES SPECIFICITY CONCERNING MATTERS ARISING IN THE COURSE OF DISCOVERY, 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 CALLING 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

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ABBREVIATIONS USED

Legal File, ED91742	LFA(page)
Legal File, ED95203	LFB(page)
Transcript of February 13, 2008, in ED91742	TRA(page)
Transcript of June 30, 2010, in ED95203	TRB(page)
Appendix in Appellant’s Brief, ED95203	A(page)
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STATEMENT OF FACTS

Respondents have not responded to Appellant's Statement of Facts contained in her Substitute Brief but instead chose to respond to the Statement of Facts contained in her brief in ED95203 before the Appellate Court. Respondents' Statement of Facts is biased and misleading and does not respond to the Statement of Facts presented to this Court. The appellant will respond to allegations put forth by the respondents in their Statement of Facts even though their Statement does not respond to appellant's Statement of Facts put before this Court.

It is apparent that the respondents, who did not respond to Appellant's Statement of Facts in her Substitute Brief, agreed with appellant's statements.

Respondents, responding to appellant's Statement of Facts in her Brief in ED95203, state on page 5 of their Respondents' Brief that appellant's "procedural history completely excluded the claims filed by Respondents against Appellant." (page 5, 2nd paragraph) Beginning in the first paragraph of page 9 of her Substitute Brief, concluding on page 10, appellant specifically addressed the claims filed by the respondents on July 10, 2008, along with their request for leave to file.

At the conclusion of their statement of facts, respondents added a "factual history" which was comprised of unsubstantiated allegations made at trial. Respondents alleged at trial that there was a witness but none appeared at court and no police or incident report was provided. Respondents failed to provide a copy of the express written

permission which would have been required for the respondents to have kept a pet in the premises pursuant to Article 23 of the Lease (LFA12), Respondents failed to provide a receipt for a pet deposit. (LFA101,102; TRA33, 17-20)

On February 13, 2008, the disqualified Judge Michael Steltzer assigned the case to Judge Mullen for "immediate hearing." (LFA92) Circuit Court Judge David L. Dowd also signed the Order. (LFA92) Respondents have not presented evidence that Circuit Court Judge Dowd was the presiding judge in 2008. (Respondents' Brief, passim) Appellant presented evidence that Judge Thomas Grady was the presiding judge in 2008. (Appellant's Brief in ED95203, A6 and following page)

Plaintiff's Motion for Jury Trial (LFA85,86) was faxed to defendants' lead attorney Kenneth McManaman on February 8, 2008. (TRA3, lines 5-7) No copy was sent to defendants' attorney Andrea Weiss. (TRA4, lines 8-13) The Judge denied plaintiff's motion for jury trial because plaintiff did not send a copy to attorney Weiss. (TRA4, lines 15-19)

Upon appeal in ED91742 the Eastern District in its Opinion in Footnote 4, in dicta, stated that "Rule 43.01 states that '(w)hen a party is represented by more than one attorney, service may be made upon any such attorney.' Therefore, Plaintiff was not required to serve her jury trial request on both of Defendants' attorneys.'" (SCA8) Upon remand Judge Mullen denied plaintiff's motion for jury trial, not for failing to notify attorney Andrea Weiss, but because it was not timely in its filing. (ASC11,12)

Jennifer Icaza lived in the condominium for only sixty-eight days and abandoned it on October 5, 2008. (TRA79, lines 3,9; TRA143, line 3; LFA11, article 15) The lease was for a term of two years and sixteen days. (LFA9, article 1)

Respondents state that attorney for Respondents Kenneth McManaman filed a Motion and Memorandum denying any ex parte contact with the judge. Specifically, their verified Motion and memorandum stated that he had no ex parte contact with the judge prior to the trial. (LFB113-118) The letter of Kenneth McManaman to plaintiff, dated July 23, 2008, stated that the ex parte communication took place in March 2008, after the trial and before the judgment was entered on May 29, 2008. (LFB110,111)

On August 22, 2011, appellant Kieffer filed a motion to recall the mandate in ED91742 on the basis that all actions taken in the case by Judge Mullen on February 13, 2008, and thereafter, were null and void, and without jurisdiction. (SCRA3-5) Her motion was denied. (SCRA-6)

Respondents did not refute the statements made in Appellant's Statement of Facts in her Substitute Brief, and hence they accepted all of Appellant's Statements.

ARGUMENT

I. JUDGE STELTZER, JUDGE IN THE ASSOCIATE CIRCUIT DIVISION, ACTED WITHOUT JURISDICTION IN ASSIGNING THE CASE TO JUDGE MULLEN, JUDGE IN THE ASSOCIATE CIRCUIT DIVISION, BECAUSE RULE 51.05(E) AND LOCAL RULE 6.5.3 GRANT JURISDICTION TO THE PRESIDING JUDGE TO ASSIGN A CASE TO A NEW JUDGE AFTER A JUDGE HAS BEEN DISQUALIFIED IN THAT THE DISQUALIFIED JUDGE STELTZER FAILED TO

NOTIFY PRESIDING JUDGE THOMAS GRADY, ASSIGNED THE CASE TO JUDGE MULLEN, AND REQUESTED CIRCUIT COURT JUDGE DAVID L. DOWD TO SIGN HIS ORDER ASSIGNING JUDGE MULLEN IN AN ATTEMPT TO VALIDATE HIS ORDER OF ASSIGNMENT AND AS A RESULT OF JUDGE STELTZER HAVING ACTED WITHOUT JURISDICTION HIS ASSIGNMENT TO JUDGE MULLEN WAS VOID AND ALL ACTIONS TAKEN BY JUDGE MULLEN ON FEBRUARY 13, 2008, AND THEREAFTER WERE NULL AND VOID.

Goodwin Creason, Administering Surviving Partner of the Partnership Firm of

Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d

1179 (Mo. 1939).

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

Respondents state that their response to appellant's Point I in her Substitute Brief is the same as was submitted to the appellate court. Referring to cases cited by appellant in her appellate brief, they state that the appellant cites no case that supports her argument. They ignore cases relied upon by the appellant in her Substitute Brief.

With respect to the issue of who assigned appellant's case to Judge Mullen, respondents obfuscate by first arguing that Judge Steltzer properly took the matter to Judge David Dowd **for assignment to Judge Mullen** (emphasis added), then arguing that **Judge Dowd was acting as the presiding judge** (emphasis added) on February 13, 2008, then argue that it is common practice in the Circuit Court of St. Louis City to **act** (emphasis added) as presiding judge, then concluding that **the presiding judge entered the order.** (emphasis added) They

state that **“no matter who wrote the order, the presiding judge entered the order, thereby endorsing the order and making it his own.”** (page 13, emphasis added)

Respondents have provided no evidence that Judge Dowd was the presiding judge, or even the acting presiding judge, on February 8, 2008. Appellant has provided evidence that Judge Grady was the presiding judge in 2008. (SC6 and following page)

There is no purpose served by figuring out which judge assigned the case to Judge Mullen--Judge Steltzer who completed the order of assignment, or Judge Dowd, who thereafter signed the order--because Judge Grady did not do the assignment, and the Supreme Court did not transfer a judge to handle the case.

Respondents ignore the fact that the notice given on December 31, 2007, stated that the case was assigned to Judge Michael Mullen, and that at some point in time the case was assigned to Judge Michael Steltzer. Her attorney—not the court—informed her on February 8, 2008, that Judge Mullen would not be the judge.

There is no provision under Rule 51.05(e) for the disqualified judge to assign a case to another judge. Paralleling that rule, local rule 6.5.3 also requires the disqualified judge to notify the presiding judge. Judge Steltzer, without jurisdiction, assigned appellant's case to Judge Mullen. His assignment was void, and all actions taken by Judge Mullen on February 13, 2008, and thereafter, including the judgment entered on March 3, 2010, were void.

Until her attorney informed her on February 8, 2008, that Judge Mullen would not be the judge far as the appellant was aware, the judge to which her case was assigned was Judge Michael Mullen.

The local rule cited by the respondents, Rule 36.8, requires--if it were to be applied—that Judge Dowd, in this instance, would be presiding in Division 1 on February 13, 2008. However, the respondents have offered no proof that Judge Dowd was sitting in Division 1 on February 13, 2008.

“Local Rule 36.8, Presiding Judge, Construction,” which appears in Local Rule 36 on the issue of “Setting Cases for Trial,” states in its entirety as follows:

“Whenever reference is made in Rule 36 to Presiding Judge, the same shall be construed to include any judge presiding in Division No. 1 by assignment or request of the Presiding Judge of the Circuit Court.”

Respondents err in relying on Local Rule 36.8. This rule, “Presiding Judge Construction” is intended to be applied only under Rule 36, in the normal setting of cases for trial. (SCR-A1)

Respondents have offered no proof that Presiding Judge Grady was not available. They have offered no proof that Judge Dowd was sitting as presiding judge under Local Rule 36.8.

Appellant cites the appropriate rule, Local Rule 6.5.3, which mimics Rule 51.05 and is applicable to situations in which a judge has been disqualified.

Respondents’ case, Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939) involved an appeal from a final judgment. Appellant’s appeal in ED95203 followed an appeal from a case that had no judgment. Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009) The law of the case does not apply.

Judge Steltzer erred in assigning appellant's case to Judge Mullen without jurisdiction. The issue of the lack of jurisdiction can be brought up at any time.

Respondents did not respond to the argument made in appellant's Substitute Brief. Appellant should prevail.

II. THE JUDGE IN DIVISION 27 ERRED IN FAILING TO TRANSFER THE CASE TO DIVISION 29 BECAUSE LOCAL RULE 6.1.1.1 PROVIDES THAT ANY CASE PENDING IN DIVISION 27 IN WHICH A JURY TRIAL HAS BEEN REQUESTED SHALL BE HEARD IN DIVISION 29, IN THAT THE APPELLANT PROPERLY REQUESTED A JURY TRIAL ON FEBRUARY 8, 2008, AND JUDGE STELTZER'S ORDER OF FEBRUARY 13, 2008, ORDERED THAT THE CASE BE ASSIGNED TO JUDGE MULLEN IMMEDIATELY FOR HEARING, NOT FOR TRIAL.

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

RSMo 517.091

The respondents admit that their response is the same as that in their brief before the Court of Appeals.

Respondents falsely state that the case was properly assigned to Division 28. They overlook the fact that on December 31, 2007, Presiding Judge Thomas Grady assigned the case to Judge Mullen in Division 27. (LFA5) The court did not at any time inform the appellant that her case was before Judge Steltzer in Division 28. (LFA5) Appellant filed a request for change of judge on January 31, 2008, to avoid the assigned judge,

Judge Mullen, for personal reasons irrelevant to the fact that she was filing her only request for peremptory change of judge. Appellant also filed a motion for jury trial on February 8, 2008, and withdrew her motion for change of judge on February 11, 2008.

Local rule 6.1.1.1 provides that a case in Division 27 in which a jury trial has been requested **shall** be heard in Division 29. (ASC25) Local rule 6.1.1.5 provides that a contested case, which would otherwise be heard in Division 28, shall be assigned to Division 29. (ASC27) Neither Judge Steltzer nor Judge Mullen transferred the case to Division 29 as required by these local rules.

RSMo 517.091.1 provides that for good cause shown, the judge may grant any party's request for jury trial." (SCR-7)

Judge Steltzer erred in assigning the case to Judge Mullen in violation of Local Rules 6.1.1.1.

Judge Steltzer's order of February 13, 2008, ordered the case assigned to Judge Mullen, Division 27, immediately for *hearing*. Judge Mullen held two pre-trial hearings and a *trial*. Even if were held that Judge Steltzer had the jurisdiction to assign the case to Judge Mullen, Judge Mullen would not have had jurisdiction to hold a trial, and, in compliance with Local Rule 6.1.1.1, would only have had jurisdiction to transfer the case to Division 29.

The respondents do not respond to cases cited in appellant's Point V in her Substitute Brief. They cite Keiffer (sic) v. Icaza, ED91742 at FN4 as establishing that "no proper request for jury trial was made by any party in this case." The Eastern District held that the purported judgment in the case was void (appellant's Point I), and that that

issue was dispositive: “(w)e therefore do not reach Plaintiff’s first point on appeal challenging the trial court’s denial of her motion for jury trial on the grounds that her motion was improperly filed and she failed to serve her request for a jury trial on both lawyers representing Defendants.” Kieffer v. Icaza, 296 S.W.3d 497 (MO.App. E.D. 2009. (ASC8)

The Eastern District in ED95203 (ASC18) held that the law of the case does not apply to appellant’s Point II regarding the denial of her request for jury trial.

Respondents did not cross-appeal.

Appellant was prejudiced by the court’s error in failing to transfer the case to Division 29 because her case was, hence, heard by Judge Mullen, the judge against whom she filed her peremptory application for change of judge. Presiding Judge Grady’s order assigning the case to Judge Mullen on December 31, 2007, placed her before a judge that she chose to avoid with a motion for change of judge. Judge Steltzer’s order of February 13, 2008, again placed her before Judge Mullen. Plaintiff was prejudiced when Judge Mullen did not transfer the case but instead held an immediate trial. Her petition was denied by Judge Mullen.

Respondents argue on page 31 of their brief, first full paragraph, in response to appellant’s Point VI of her Substitute Brief, that, to the extent that the issue of timeliness raised in Point VII was raised in the court of appeals, it is the basis of appellant’s Point II and is appropriately taken up as the same Point. If this argument were true, appellant argues herein that if the issue of timeliness is related to the issue of the court’s having failed to transfer the case to Division 29. Had the court transferred the case to Division

29, procedural due process would have required notice to the appellant as to the date of the jury trial. Appellant's demand for jury trial would hence have been deemed timely. Further, in his judgment entered on March 3, 2008, Judge Mullen changed the basis of his denial of appellant's demand for jury trial from appellant's failure to notify defendant's attorney Andrea Weiss in addition to notifying their lead attorney to lack of timeliness of the motion. This was after the Eastern District in dicta, in footnote 4 (Kieffer v. Icaza, 296 S.W.3d 497 (Mo.App. E.D. 2009) suggested that appellant's demand for jury trial was not timely. Timeliness was not raised on February 13, 2008.

The issue of jurisdiction put forth by appellant in this Point II is an issue that can be brought up at any time.

The actions of Judge Mullen taken on February 13, 2008, and thereafter, including his judgment entered on March 3, 2010, (ASC10-13) were void, *ab initio*.

The respondents did not respond to Point II in appellant's Substitute Brief, and their argument should be disregarded.

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 WITH NO NOTICE TO APPELLANT BECAUSE LOCAL RULE 32.6(1) REQUIRES SPECIFICITY CONCERNING MATTERS ARISING IN THE COURSE OF DISCOVERY, 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 CALLING 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 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.

Goodwin Creason, Administering Surviving Partner of the Partnership Firm of

Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d 1179 (Mo. 1939)

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).

Local Rules 32.4(1), 32.6 and 33.5

The respondents state that their response to appellant's Point III in her Substitute Brief is the same as their response made in their brief before the appellate court with the addition of some new argument regarding Rule 33.5. Rule 32.4 requires a Certification

of Attempt to Resolve pursuant to Rule 33.5 (ASC33) Respondents fail to respond to case law provided by the appellant in her Substitute Brief.

Respondents disregard Local Rules 32.4(1), 32.6 and 33.5. The court acted without jurisdiction in violation of these local rules. 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.”

Appellant preserved the arguments in this Point III throughout the trial (TRA, passim, throughout the trial) and in her motion for new trial. (LFB107)

The respondents misrepresented to the court that they had received no discovery from plaintiff. (LFA94-97; TRA24-29) On November 8, 2007, respondents 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. (TRA167, lines 3-8) The court in error relied on the false but verified statements of respondents’ attorneys to the effect that the appellant had not complied with discovery. (LFA94-96,97)

Respondents argue that appellant’s Point III is precluded from arguing the points made in her Point III, relying upon Goodwin Creason, Administering Surviving Partner of the Partnership Firm of Deatherage & Creason v. John T. Harding, et al., 126 S.W.2d

1179 (Mo. 1939). The first appeal in Goodwin Creason involved a final judgment; there was no judgment in the first appeal, as was established in Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009). The law of the case does not apply.

Appellant and her attorney responded to all discovery requests, as detailed in Point III in appellant's Substitute Brief. Even if the law of the case could conceivably be applied to Point III, and it should not, as argued in appellant's Point VI, an exception should apply in consideration of the mistaken facts and manifest injustice involved.

The respondents respond to an earlier appellant's brief, ignore case law provided by the appellant in the instant appeal, and argue against the weight of the evidence. The court erred in enforcing sanctions against the appellant as described in Point III in appellant's Substitute Brief, and the appellant should prevail in her arguments in Point III.

IV. THE DIVISION 28 JUDGE EXCEEDED HIS JURISDICTION IN SUSTAINING APPELLANT'S MOTION FOR CHANGE OF JUDGE WHICH HAD BEEN WITHDRAWN AND IN ASSIGNING THE CASE TO THE DIVISION 27 JUDGE BECAUSE THE MATTER OF CHANGE OF JUDGE WAS NOT BEFORE THE COURT ON FEBRUARY 13, 2008, IN THAT THE MOTION HAD BEEN WITHDRAWN ON FEBRUARY 11, 2008, AND HENCE THE JUDGE HAD NO JURISDICTION TO SUSTAIN THE APPLICATION FOR CHANGE OF JUDGE, THE ASSIGNMENT TO THE DIVISION 27 JUDGE WAS VOID, AND ALL ACTIONS TAKEN THEREAFTER BY JUDGE MULLEN IN DIVISION 27 WERE VOID.

The respondents did not respond to appellant's Point IV in her Substitute Brief. They admitted that their response to Appellant's Point IV is the same as submitted to the Appellate Court.

The respondents refer to the appellant's "own motion for change of judge." The courts **champion** a litigant's right to request a change of judge. By the same token, the litigant should have the right to withdraw a motion that he or she has filed for change of judge for his or her own reasons.

The record on Case.Net shows a docket entry on December 31, 2007, stating that the Presiding Judge has appointed Judge Michael Mullen in appellant's case in the Circuit Court of St. Louis County, effective January 1, 2008. The court's physical case file reflects that on January 31, 2008, the appellant filed a motion for change of judge, and that on February 11, 2008, the appellant withdrew that motion.

The court did not have jurisdiction to sustain a motion that did not exist. Judge **Steltzer further erred when he, as the disqualified judge, then assigned the case to another judge, the very judge that plaintiff's motion for change of judge was intended to avoid.**

The respondents state that the appellant has provide no case law or other authority to support her argument. They discuss a case cited by the appellant in her brief before the Court of Appeals. They let stand cases cited by appellant in her Substitute Brief, thereby agreeing with arguments made by appellant before this Court. If this Court should agree appellant's argument, she should prevail because the respondents have acquiesced in this point.

Appellant was prejudiced by the error against which appellant argued in Point IV.

Her case was assigned to the judge, and then tried by the judge who knew that she had filed a motion to avoid him. Further, she was placed before this judge immediately, that is, her case was tried by the judge she worked to avoid with as little as twenty minutes advance notice and she was left to try the case pro se without the attorney to whom she had paid \$1,000 for his representation.

Appellant argues that the issue here is one of jurisdiction, which can be brought up at any time. Goodwin Creason does not apply in that it represented an appeal from a final judgment.

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 ON 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, AND THE CONTRACT SHOULD BE ENFORCED.

The respondents failed to respond to appellant's arguments in Point V of her Substitute Brief before this Court. Respondents state that their "response to Appellant's Point V is the same as submitted to the Appellate Court, which, as the record will indicate, was submitted on June 11, 2011. (Respondents' Brief in ED95203)

Because the respondents did not respond to the statements made by the appellant in her Substitute Brief before this Court, they have agreed with her argument, and

appellant should prevail on this Point V. Further, they present no case law to support their response to Point V (with the exception of their arguments made in their attempts to dismiss appellant's Point V). Since the respondents did not respond to the argument presented before this Court, their response is not relevant and should be disregarded.

In its March 3, 2010, judgment the court stated that "the (c)ourt makes the following Findings of Fact, Conclusions of Law, and Judgment. . . ." (ASC10) None was provided.

In said Judgment the court denied plaintiff's petition and ruled in favor of plaintiff on defendants' counterclaim. With regard to the court's decision on breach of contract, it ignored the overwhelming and uncontroverted testimony and exhibits in the form of appellants' correspondence with respondents in which she requested and demanded compliance with the Lease.

Lessor and lessees admitted that lessees sent a letter to lessor in early October 1998, stating that they would vacate on or about October 5, 1998, and that they did vacate the premises on that date. The court (TRA84) acknowledged that the lease was for "24 months, or thereabouts, plus," and "she lived there two months and she left." (TRA84, lines 9,10,12,13)

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.

Respondents stated in their brief that plaintiff did not provide evidence or testimony with regard to her claims of damages. Plaintiff did provide testimony and a list

of damages, but, as discussed in appellant's Point III, due to the sanctions imposed upon the plaintiff by the court, appellant was barred from providing further corroborating evidence.

Respondents state in their brief, responding to an earlier appellant's brief, that the appellant did not provide a list of damages and a notice of inspection. Whether or not the appellant would have been required to provide such correspondence to lessees who abandoned the premises, the appellant testified that she had complied by providing a list of damages and notice of inspection to the respondents. (TRA61, line 22; 62, lines 11,12) An itemized list of damages was presented into evidence. The Court stated "I'll receive the itemization into evidence as Plaintiff's Exhibit No. 2." (TRA44, lines 18,19; LFA100)

Respondents made the same allegations in their counterclaim, upon which appellant prevailed. (ASC12)

It is clear that appellant produced both corroborating evidence supporting appellant's contention that the defendants had both breached the lease and damaged the premises, and evidence showing that there was no basis of their claim of constructive eviction. Not only did appellant provide testimony that contradicted defendants' testimony, but she provided corroborating evidence. (TRA, passim; discovery provided on November 8, 2007.)

The weight of the evidence is that the appellant provided testimony with corroborating evidence, and the defense only provided self-serving testimony with no corroborating evidence. At times Jennifer and Dianne provided contradicting

statements, e.g., Jennifer stated that “. . . my mom wrote you a check for a pet deposit.” (TRA101, lines 20-21) Dianne said “. . . I believe I paid—I don’t know, I could have paid a deposit for it, because I paid a large deposit. So I don’t know if some of it was for that. I just don’t remember.” (LFA110, lines 1-4) No cancelled check for a pet deposit was provided by respondents. On October 2, 1998, three days before the lessees abandoned the premises, lessor sent a certified letter to the lessees, demanding the signing of a rider addressing the matter of the pet which violated Article 23 of the Lease and the need for a pet deposit. (~~LFA~~)

Jennifer made contradictory statements and offered misleading and contradictory testimony. At first she does not remember getting many letters; she then says appellant sent her a letter **every single day** that she was there. She did not provide a single letter as evidence, and in testimony does not recall receiving any of the letters provided by lessor.

Lessor presented testimony and evidence that Jennifer had refused access for her to examine the clothes dryer, which Jennifer had alleged did not work. Lessor presented testimony and letters showing that on September 29, 1998, she had hand-carried a letter to Jennifer making demand for access to examine the clothes dryer, that Jennifer refused to make an appointment with her to examine and if necessary repair the dryer, that if the dryer were not properly functioning it was the responsibility of the lessees, and that she announced to Jennifer in two letters on September 29, 1998, that she and a repairman would be at the condominium at 9:00 a.m. on September 30, 1998, to examine and, if needed, repair the dryer. She testified that she and the repairman rang the doorbell at the front door of the building and received no answer, then knocked on the entry door to the

condominium and received no answer, then opened the door with a key and called out “landlord,” repeatedly, at the threshold at the entrance to the condominium when Jennifer, with another woman, came down the hallway screaming at her, and told the lessor that she would call the police if she did not leave, and the lessor and the repairman left the premises. Respondents misrepresent the facts of the case and overlook the fact that the Lease requires the Lessees to allow access to the Lessor for purposes of making repairs, inspecting, etc.

Appellant established that she made numerous trips to the condominium at Jennifer’s request, and that she did not volunteer to travel to the condominium to handle the responsibilities of the lessee.

The appellant established that late fees were owed and remain unpaid, and that the respondents abandoned the premises in violation of Article 15 of the Lease.

The appellant was denied the opportunity to present other evidence and to rely upon witnesses as argued in Appellant’s Point III. Further, her attorney, to whom she had paid \$1,000, was allowed to walk out prior to trial, and appellant was suddenly representing herself in an immediate trial after the denial of her request for jury trial, as argued in Appellant’s Points II and VII.

The trial court erred in failing to order the lessees to fulfill the contract by paying the unpaid balance, late fees owed, and the costs of abandonment under the abandonment clause, Article 15, of the Lease.

The law of the case was applied in error to appellant's Point V because ED95203 represented the first appeal after an appeal from a void judgment, i.e., from a case in which there was no judgment at all.

The appellant preserved this matter for appeal in her Motion for New Trial, argued before the Eastern District on June 30, 2010. (TRA2, throughout)

Because the respondents did not respond to appellant's arguments made in Point V of her Substitute Brief, appellant should prevail in her argument.

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 RSMo 512.020.5 PROVIDES THAT 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 IN THAT THE PURPORTED JUDGMENT ENTERED IN THE TRIAL COURT ON MAY 29, 2008, WAS A VOID JUDGMENT AND AS A RESULT THERE WAS NO JUDGMENT, AND THE LAW OF THE CASE DOES NOT PRECLUDE APPELLANT'S ARGUMENTS MADE IN HER SUBSEQUENT APPEAL OF A FINAL JUDGMENT.

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

Williams v. Kimes, 25 S.W.3d 150, 153-54 (Mo. Banc 2000)

Respondents relied in error in the case of Williams v. Kimes, 25 S.W.3d 150, 153-54 (Mo. Banc 2000), a case in which appellants appealed from a final judgment.

Respondents' statement that a litigant could repeatedly appeal from successive void judgments does not reflect an understanding of the situation in which a litigant finds herself when she is left with a void, and hence with no, judgment after costly litigation.

The Eastern District in its Opinion in ED91742, recorded in Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App.E.D. 2009) held that the appellant's argument that the purported judgment was entered out of time and was void, was dispositive, and no other issue was addressed.

Later, in ED95203, the Eastern District entered its Opinion applying the law of the case doctrine in violation of RSMo 512.020.5. Said statute, along with case law cited in Appellant's Substitute Brief, establish the need for a final judgment prior to an appeal. The law of the case was applied in error to Appellant's Points I, III, IV and V of Appellant's Brief.

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 RSMo 512.020.5 PROVIDES THAT 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 IN THAT THE PURPORTED JUDGMENT ENTERED IN THE TRIAL COURT ON MAY 29, 2008, WAS A

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A void judgment is no judgment at all.

Later, in ED95203, the Eastern District entered its Opinion applying the law of the case doctrine in violation of RSMo 512.020.5. Said statute, along with case law cited in Appellant's Substitute Brief, establish the need for a final judgment prior to an appeal. The law of the case was applied in error to Appellant's Points I, III, IV and V of Appellant's Brief.

VII. THE COURT OF APPEALS, EASTERN DISTRICT, ERRED WHEN IT DENIED APPELLANT'S POINT II FOR THE REASON OF TIMELINESS BECAUSE THE APPELLANT FILED A TIMELY DEMAND FOR JURY TRIAL IN COMPLIANCE WITH RSMO 517.091.1 AND PROVIDED SERVICE ON THE

RESPONDENTS IN COMPLIANCE WITH RULE 43.01(g) IN THAT THE ISSUE OF TIMELINESS WAS NOT RAISED BY THE COURT OR THE RESPONDENTS WHEN THE COURT DENIED APPELLANT'S MOTION FOR JURY TRIAL.

DePaul Health Center v. Mummert 870 SW2d 820, 823 Mo. Banc 1994

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

State ex rel Schnuck Markets v. Koehr, 859 SW2d 696 Mo. Supreme Court, 1993.

RSMo. 517.091.1

Rule 43.01(g)

Rule 44.01(a)

The respondents argue that the appellant has altered the basis of her claim as raised in the court of appeals. They, appropriately, do not argue that the law of the case should have been applied to Point VII, because on February 13, 2008, the judge did not deny appellant's demand for jury trial on the basis of timeliness, but on the basis that the appellant had not sent service on the motion to respondents' attorney Weiss but only to their lead attorney, Kenneth McManaman. (judgment) On March 3, 2010, the judge entered his judgment, denying, inter alia, appellant's demand for jury trial because it was not timely. ➔

The appellate court in dicta, footnote 4, in Kieffer v. Icaza, 296 S.W.3d 495 (Mo.App. E.D. 2009) at 497 (ASC8) stated, citing RSMo Section 517.091.1(2000) and Rule 44.01(a), that "(w)hile we do not reach this point, we note that the record

demonstrates that Plaintiff failed to file her motion within five days of the date set for trial.”)

RSMo 517.091.1 requires that demand for jury trial 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. (ASC39) Respondents agree that RSMo 517.091 does not make provision for the time of service of the demand for jury trial.

Respondents, however, misstate Rule 43.01(g); the rule 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.”

In Kieffer, page 496 (ASC7), the court stated that “(o)n February 8, 2008, the Friday before trial, Plaintiff *filed a motion for jury trial and sent copies of the motion via facsimile and mail to one of Defendants’ two attorneys of record.*”

RSMo 517.091.1 requires literally that written demand be filed not later than five days before the date set for trial. The appellant complied, having filed her demand five days prior to the date set for trial, i.e., on February 8, five days prior to February 13, 2008. The legislature’s intent was to specify a time limit for filing. It was not intended that the timeliness of service upon the opposing party was critical because the demand establishes the requesting party’s right to jury trial—not the timeliness of service upon the opposing party.

Appellant submits that Rule 43.01(g) applies in such a situation when the time of filing with the court is at issue, as is the situation in Section 517.091.1 RSMo, and that five days’ notice, not seven, were required.

Service or mailing is not the same as filing. See, e.g., DePaul Health Center v. Mummert 870 SW2d 820, 823 Mo. Banc 1994, at 823. “‘Service’ and ‘filing’ are two different and distinguished words contemplating two different and distinct acts. . . . We cannot construct one to mean the other.” State ex rel Schnuck Markets v. Koehr, 859 SW2d 696 Mo. Supreme Court, 1993.

If seven days’ notice were required, as stated in the Opinion of the Court of Appeals (ASC19), a party requesting a jury trial pursuant to 517.091.1 would be required to provide more notice to the opposing party than to the Court.

The respondents propose that appellant’s arguments in Point VII before this Court would properly be combined with her arguments made in Point II. If that were true, had the Division 27 court on February 13, 2008, transferred the case to Division 29 in response to appellant’s request for jury trial, a new trial date would have been established, pursuant to due process procedures, and appellant’s demand for jury trial would obviously have been timely. Timeliness was not raised by the respondents or the Court on February 8, 2008, in the denial of appellant’s demand for jury trial. Had the case been transferred to Division 29, the appellant’s demand for jury trial could not have been deemed untimely, albeit after the fact.

Service or mailing is not the same as filing. See, e.g., DePaul Health Center v. Mummert 870 SW2d 820, 823 Mo. Banc 1994, at 823. “‘Service’ and ‘filing’ are two different and distinguished words contemplating two different and distinct acts. . . . We cannot construct one to mean the other.” State ex rel Schnuck Markets v. Koehr, 859 SW2d 696 Mo. Supreme Court, 1993.

**VIII. RESPONDENTS VIOLATED RULE 84.04,
APPELLANT SIGNIFICANTLY AND SUBSTANTIALLY COMPLIED
WITH RULE 84.04, AND HER APPEAL SHOULD NOT BE DISMISSED.**

Rules 84.04 and 84.04(c)

Respondents requested this Court to dismiss her appeal because appellant failed to comply with Rule 84.04, yet their own Point VIII, requesting the dismissal of appellant's appeal, was admittedly the same as their Point VI in their Respondents' Brief in ED95203. The respondents also admitted that they, in their responses to Appellant's Substitute Brief, submitted the same responses to appellant's Statement of Facts, Point I, Point II, Point III (with the "addition of some new argument regarding Rule 33.5"), Point IV, and Point V, as they submitted in their Respondents Brief in ED95203.

Respondents complain about cases not mentioned in Appellant's Substitute Brief. They fail to respond to cases that the Appellant did cite in her Substitute Brief.

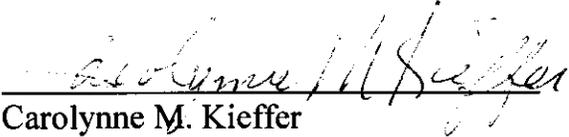
In this, their Substitute Respondents Brief, as in their Eastern District brief, they attempt to mislead this Court into believing that Judge David Dowd was the presiding judge on February 13, 2008. They cite rules that do not apply and overlook those that do. They attempt to mislead the Court into believing that they did not participate in ex parte communication with the judge by misstating the time frame. They make false and misleading statements throughout their brief, including the citing of respondents' unsubstantiated testimony at trial, to mislead the Court.

Respondents' Statement of Facts was unfair, biased, inaccurate and unsupported, and violated Rule 84(c).

The appellant's Substitute Brief significantly and substantially complies with Rule 84.04. Her appeal should not be dismissed, but rather should be reviewed by this Court for points of error by the trial court and the Court of Appeals, Eastern District, as argued in Appellant's Substitute Brief.

CONCLUSION

For all the foregoing reasons, Appellant Carolynne M. Kieffer requests this Court to set aside the Opinion of the Eastern District holding that plaintiff's Points I, III, IV and V were precluded by the law of the case, and 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, and amounts due from Lessee for their abandonment of the premises pursuant to Article 15 of the Lease, or, in the alternate, order a new trial.


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

CERTIFICATE OF SERVICE AND COMPLIANCE

WITH RULE 84.06(b), (c) and (g)

The undersigned certifies that on this 20th day of April, 2012, two true and correct copies of the foregoing brief in this matter and one disk containing the foregoing brief were mailed, first-class postage prepaid, to Brice Reed Sechrest, attorney for respondents, 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 6899 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 respondents 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

APPENDIX

TABLE OF CONTENTS

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RULE 36 SETTING CASES FOR TRIAL

(adopted May 27, 1997 - prior rule repealed; amended 9/27/04)

36.1 Request for Trial (Civil Jury)

No Local Rule.

36.2 Date of Calendar Call (Civil Jury)

No Local Rule

(Repealed 12/21/09)

36.3 Preparation of Calendar (Civil Jury)

The presiding judge shall have charge of the civil trial calendar and shall establish, from time to time, such procedures as the judge deems appropriate, which procedures shall be published on the court's website.

(amended 3/18/08; 12/21/09; 4/18/11)

36.4 Transfer of Cases

No local rule

(adopted 12/07/06; repealed 3/18/08)

36.5 Removal and Inactive Calendar (Civil Jury)

No Local Rule.

36.6 Revision of and Removal from Prepared Calendar (Civil Jury)

No local rule

(amended 12/07/06; repealed 3/18/08)

36.7 Special Assignments (Civil Jury)

No local rule

(amended 12/07/06; repealed 3/18/08)

36.8 Presiding Judge, Construction

Whenever reference is made in Rule 36 to Presiding Judge, the same shall be construed to include any judge presiding in Division No. 1 by assignment or request of the Presiding Judge of the Circuit Court.

36.9 Domestic Relations Calendar

36.9.1 Calendars

The Clerks of Divisions No. 14 and 15 shall provide and keep an appropriate record, either by card index or otherwise, which shall be denominated as the "General Domestic Relations Calendar," and shall cause to be entered thereon alphabetically all of the causes which shall by virtue of these Rules be assigned to Divisions No. 14 and 15 and said causes shall be numbered in the order in which they are filed with the Clerk. All preliminary motions shall be disposed of in Division No. 15.

36.9.2 Trial Calendars

The Clerks of Divisions No. 14 and 15 shall arrange settings on their respective trial calendars and enter thereon all causes in which trials shall be requested, or as ordered, by the Judge presiding therein, and cause shall be tried, so far as possible, in the order in which they appear in the trial calendar. An attorney requesting a trial setting in a domestic relations cause must give notice of such setting to opposing parties not in default within 5 days after setting the cause for trial unless a different period is fixed by the Court.

36.9.3 Default Calendar

The default calendar in Division No. 14 shall be set for hearing as directed by the Judge presiding therein.

36.10 Criminal

See Rule 67.10

FILED
AUG 22 2011

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

LAURA ROY
CLERK, MISSOURI COURT OF APPEALS
EASTERN DISTRICT
FILED AUG 22 2011

CAROLYNNE M. KIEFFER,)
)
 Appellant,)
)
 v.)
)
 JENNIFER ICAZA, et al.,)
)
 Respondents.)

~~ED95203~~ 91742
Division 3

APPELLANT'S MOTION TO MODIFY OR RECALL MANDATE ISSUED ON
DECEMBER 8, 2009

COMES NOW Carolynne M. Kieffer, appellant, pro se, and for Appellant's
Motion for this Court to Modify or Recall Mandate Issued on December 8, 2009, states as
follows:

1. This court in its Mandate dated December 8, 2009, remanded the case to Judge Michael Mullen.
2. In his February 13, 2008, order, Judge Michael Steltzer as the disqualified judge in violation of Rule 51.05(e), failed to allow the parties to stipulate to a new judge, assigned the case to Judge Michael Mullen, and failed to notify the presiding judge, Judge Thomas Grady. See copy of February 13, 2008, order, attached.
3. Rule 51.05(e) governs reassignment of a case from a disqualified judge. If the parties have not stipulated to a particular judge hearing the case, then "the disqualified judge shall notify the presiding judge: (1) If the presiding judge is not disqualified in the case, the presiding judge shall assign a judge of the circuit who is not disqualified or request [the Missouri Supreme Court] to transfer a judge." See this court's opinion in Mark Reynolds v. Robin Reynolds, 163 S.W.3d 567 (2005).

4. "Once 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." Carolyn Miller v. Mary Jo Mauzey et al., 917 S.W.2d at 635 (internal quotations omitted).

5. Based upon her reading of the above-cited cases, it appears to the appellant that Judge Steltzer was without jurisdiction to assign the case to Judge Mullen. It follows, as in Reynolds v. Reynolds, that, since the assignment was improper, Judge Mullen was without jurisdiction to enter any ruling or judgment in the case, including his purported judgment of May 29, 2008.

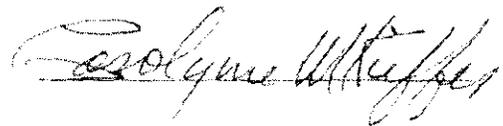
WHEREFORE, the appellant respectfully requests that this Court either recall its Mandate and enter a new opinion and mandate, or, in the alternate, modify its earlier Opinion and Mandate, remanding the case to the presiding judge of the Circuit Court of the City of St. Louis for assignment of a judge for trial.



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

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has on August 22, 2011, provided a true and correct copy of the foregoing by depositing it in the United States mail, postage prepaid, addressed to Brice Sechrest, attorney for respondents, 105 Science Street, P.O. Box 667, Park Hills, Missouri 63601.



MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT

(CITY OF ST. LOUIS)

Kiefer
VS

Carroll et al

CASE NO. 05-11687-1 DIVISION

25

2-13-05

ORDER/JUDGMENT/MEMORANDUM

Plaintiff's Motion for Change of
Judge granted. Case assigned
immediately to Judge William Davis
for hearing

SO ordered

Donald H. Davis
Judge

ST. LOUIS

W. H. H.

#406

SCR-A5



In the Missouri Court Of Appeals
Eastern District

ED91742

CAROLYNNE M. KIEFFER, APPELLANT

vs.

JENNIFER ICAZA, RAMIRO ICAZA AND DIANNE ICAZA, RESPONDENTS

ORDER

EMREC Motion for Recall of Mandate

_____ Sustained

_____ Granted

Denied

_____ Taken with Case _____

_____ Granted Until _____

_____ Other _____

By: *Kurt S Odenwald* 9-6-11
KURT S ODENWALD Date

SCR-A6

SEP 06 2011
COURT OF APPEALS
EASTERN DISTRICT