No. 88581

IN THE
SUPREME COURT OF MISSOURI

RANDOLPH AND KELLY AKERS,

Respondents/Plaintiffs

vs.

CITY OF OAK GROVE, MISSOURI

Appellant/Defendant

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit
Civil Action No. 02CV233809
Honorable W. Stephen Nixon

SUBSTITUTE BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal by Defendant City of Oak Grove, Missouri, from the Entry of Judgment on the Verdict entered against it in the Circuit Court of Jackson County at Independence on December 12, 2004. The trial court entered an order denying the Defendant's Motion for a New Trial and Defendant's Motion to Amend the Judgment on March 8, 2005. Defendant/Appellant's Notice of Appeal was timely filed on March 14, 2005, in the Western District Court of Appeals. The action in question arises out of a backup of the sanitary sewer system after heavy rains caused flooding in the area and, as a result of the flood waters entering the sewer system, it became overwhelmed and backed up, which caused damage to four individual apartments owned by the Respondent. The Respondent claimed monetary damages from the Appellant in inverse condemnation for the permanent diminution in value of the property and the taking or damaging of Respondents' property rights associated with the property.

This case was initially appealed to the Missouri Court of Appeals, Western District, pursuant to Article V, Section 3 of the Constitution of the State of Missouri, because the issues appealed did not involve items reserved for the exclusive jurisdiction of this Court. At issue was error by the trial court related to the common law standards and the interpretation of statutory language related to Respondent's claims of inverse condemnation, trial court's refusal of Defendant's requested converse jury instruction, and the award of prejudgment interest.

The case is now before this Court as a result of the Western District Court of Appeals ruling on April 17, 2007 adverse to Appellant. After the timely filing of its

Motion for Rehearing or Alternative Transfer to this Court in the Court of Appeals on April 26, 2007, and the Court of Appeals denial of Appellant's motion on May 29, 2007, Application for Transfer to this Court was timely filed by Appellant on June 12, 2007, pursuant to Civil Rule 83.04 and transfer was then granted on August 21, 2007.

STATEMENT OF FACTS

This appeal is limited to the Court's application of prejudgment interest to the verdict rendered by the jury. The remainder of the judgment on the verdict has been satisfied. See A 4-5.

Plaintiffs/Respondents Akers are residents of the City of Oak Grove, Missouri, and had a business of owning and leasing rental properties in eastern Jackson County, Missouri, including the property involved in this action, the Harding Street Apartments located at 1902 and 2002 Harding, Oak Grove, Missouri. tr. 462:1 – 463:16. The apartments consisted of two fourplexes. tr. 466:7-19. On May 8, 2002, the City of Oak Grove received an extensive amount of rain in a short period of time causing flooding to occur at Plaintiffs' two apartments, which flooding has been determined to have been caused at least in part as a result of the City of Oak Grove's deficient sewer system.

At the time of the flooding that gave rise to Respondent's inverse condemnation claim against Appellant on May 8, 2002[1], only six of the eight apartment units in the two buildings affected were actually occupied. tr. 484:18-24. Only four out of the eight units were physically damaged as a result of the flooding. tr, 528:20-24. But, Plaintiffs did not re-let the four undamaged units until January of 2003 allegedly because of mold issues. tr. 485:25 – 488:18. It took Plaintiff but two months to actually repair the damage to the rental units, once he decided to start work on them. tr. 481:2 – 482:5. Both buildings had

[1] The parties stipulated that May 8, 2002 was the date of the flooding that gave rise to the inverse condemnation claim. tr. 43:24 – 44:4.

been repaired and all units in them were ready for rental after February of 2003. tr. 481:5 – 483:12. The units were rented to the extent market conditions would allow one year after the flooding. tr. 489:1 – 490:8. Respondents claimed lost rent during this year in the amount of $37,350.00. tr. 490:9-16. Respondents' expert's estimate as to the expert's reasonable cost of the repair of the property was $106,213.27. tr. 295:8-17. Appellant's estimate was $78,164.00. tr. 602:1-19. (Plaintiff Randolph Akers did his own repairs and could not determine his actual costs. tr. 523:8-15) Respondents also claimed that because of the flooding, his units could not be rented even after repaired for the amounts for which they otherwise could have been rented, bringing his total loss to in excess of $300,000.00. tr. 491:22 – 496:16.

Before the start of trial, there was an exchange between the parties and the trial court:

Mr. Hunter:

Just one final matter, Your Honor, we might want to put on the record that I believe it's just a legal matter for Your Honor to decide rather than an issue that needs to be presented to the jury. I believe - - we understand defendant certainly contests that plaintiffs would be entitled to prejudgment interest, but I believe all parties are in agreement as a legal matter to be decided by the Court rather than an issue that needs to be submitted to the jury. I just wanted to put that on the record so we don't have to spend any time on that during trial or submit an instruction or anything such as that if we are in agreement.

The Court:

Mr. Majors, what is your position on that for the defendant?

Mr. Majors:

Obviously the city's position is that we don't believe they should be awarded prejudgment interest, but we do agree with the assertion that we believe it is a ruling for the Court and not a jury question. We would be glad to have you rule on that should a taking be found.

The Court:

The Court does acknowledge that there is case law that indicates that because this is a theory based upon constitutional law that the taking would occur as of the date of the events that caused damage and that the law requires that compensation be made at the time of the taking and that interest is something that case law has recognized can be recovered.

The Court will view it as a mathematical calculation for the Court to make in the event that interest becomes appropriate.

tr. 44:17 – 46:6. However, the verdict directing instruction then given the jury on damages after the trial of the case read as follows:

Instruction No. 8

You must award plaintiffs such sum as you believe is the difference between the fair market value of plaintiffs' whole property immediately before the taking or damaging on May 8, 2002 and the value of plaintiffs' remaining property immediately after such taking

> or damaging, which difference in value is the direct result of the taking or damaging and of the uses which defendant has the right to make of the property taken or damaged, plus such sum as you may find from the evidence will fairly and justly compensate plaintiffs for the loss of use thereof during the time reasonably necessary for the property to be repaired or replaced. If you find that plaintiffs failed to mitigate damages as submitted in Instruction Number 10, in determining plaintiffs' total damages you must not include those damages that would not have occurred without such failure. A-6.

The jury verdict was in favor of Respondents and against Appellant in the amount of $110,000.00. A-2. The judgment on the verdict was dated December 15, 2004. A-2. As part of its Judgment, the trial court assessed prejudgment interest on the $110,000.00 verdict at the rate of 9% per annum from May 8, 2002, resulting in the amount of $25,791.12 being awarded Plaintiff as prejudgment interest. A-2. Upon the trial court's unilateral entry of prejudgment interest as part of its judgment on the verdict, Defendant City timely filed its motion and suggestions to amend the judgment to exclude the prejudgment interest, LF 143-148 which motion was denied by the trial court, LF 194.

POINT RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADDING PREJUDGMENT INTEREST TO THE JURY'S AWARD OF DAMAGES IN THIS INVERSE CONDEMNATION CASE BECAUSE THE "TAKING" CONSTITUTING THE INVERSE CONDEMNATION WAS A "TEMPORARY PARTIAL TAKING" WITH REGARD TO WHICH (1) INTEREST COULD NOT BE MATHEMATICALLY COMPUTED BY THE COURT, AS WAS DONE BY THE COURT, AND (2) PREJUDGMENT INTEREST, IF ANY, THAT COULD HAVE BEEN ASSESSED WOULD HAVE BEEN A MATTER TO BE PROVED BY PLAINTIFF AND INCLUDED IN THE JURY'S DAMAGES AWARD AS PART OF ITS VERDICT, SUCH THAT THE AWARD OF PREJUDGMENT INTEREST TO PLAINTIFF BY THE COURT WAS NEITHER AUTHORIZED AS A MATTER OF LAW, SUPPORTED BY THE EVIDENCE, OR THE JURY'S VERDICT.

State ex rel State Highway Commission of Missouri v. Green, 305 S.W.2d 688, 693-694 (Mo. Div. 1, 1957)

Byrom v. Little Blue Valley Sewer District, et al, 16 S.W.3d 573, 577-578 (Mo. banc 2000)

Carmel Energy, Inc. v. Fritter, 827 S.W.2d 780 (Mo.App. W.D. 1992)

State ex rel Mo. Pac. R. Co. v. Moss, 531 S.W.2d 82, 84 (Mo.App. E.D. en banc 1975)

§ 510.270 RSMo

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN ADDING PREJUDGMENT INTEREST TO THE JURY'S AWARD OF DAMAGES IN THIS INVERSE CONDEMNATION CASE BECAUSE THE "TAKING" CONSTITUTING THE INVERSE CONDEMNATION WAS A "TEMPORARY PARTIAL TAKING" WITH REGARD TO WHICH (1) INTEREST COULD NOT BE MATHEMATICALLY COMPUTED BY THE COURT, AS WAS DONE BY THE COURT, AND (2) PREJUDGMENT INTEREST, IF ANY, THAT COULD HAVE BEEN ASSESSED WOULD HAVE BEEN A MATTER TO BE PROVED BY PLAINTIFF AND INCLUDED IN THE JURY'S DAMAGES AWARD AS PART OF ITS VERDICT, SUCH THAT THE AWARD OF PREJUDGMENT INTEREST TO PLAINTIFF BY THE COURT WAS NEITHER AUTHORIZED AS A MATTER OF LAW, SUPPORTED BY THE EVIDENCE, OR THE JURY'S VERDICT.

A. Standard of Review. The facts of the case and process followed by the trial court that is the subject matter of this appeal are not in dispute. Accordingly, this Court's review is "*de nova*" as to issues before it. *Schroeder v. Horack, et al*, 592 S.W.2d 742, 744 (Mo. en banc 1980). To the extent that the trial court's decision could be said to have resulted in the award of damages that went beyond those awarded by the jury, it is arguable that the trial court's decision to award prejudgment interest should be treated like a trial court's grant of a judgment notwithstanding the jury's verdict. Such a trial

court decision requires the appellate court to consider only that evidence supporting the verdict and reasonable inferences. *Smith v. R.B. Jones of St. Louis, Inc.*, 672 S.W.2d 185, 186 (Mo.App. E.D. 1984).

B. Factual Analysis. The parties and the trial court understood this case at outset to be an inverse condemnation "total taking" case and then, after trial, the trial court applied prejudgment interest to the judgment as though it was. In between, however, the evidence, the jury instructions, and the verdict revealed an "inverse condemnation temporary partial taking" case which was not amenable to the trial court's award of prejudgment interest on the verdict.

Unlike a total "direct taking" or a total "inverse taking" where the property taken can be measured at fair market value and its loss ministerially valued at an applied interest rate, such could not be done, but was done by the trial Court in this case. Here, there was evidence of both the loss in the value of the property itself and of income lost because of the unavailability of the property. Evidence of the loss of income in this case was the rent loss to Plaintiffs during the time period when a portion of Plaintiffs' rental units damaged by flooding were being repaired. The loss of income as a result of the taking was a substantive, not a procedural issue in this case. The evidence was presented to the jury and they were given an instruction directing them to compensate Plaintiffs for their loss of income during the time they were without the use of the property taken, in addition to the value of the property taken. Presumably, the jury awarded Respondents their damages for income loss which would have included prejudgment interest and any

additional amount awarded by this Court or the trial Court would be a windfall to Respondents and result in manifest injustice to Appellant.

Even if this Court was of a mindset that prejudgment interest should still be awarded, the amount awarded was far more than the evidence justifies. But, what the jury relied on to establish the verdict cannot be determined with any certainty. After consideration is given to the damages awarded Respondents for lost income, the best estimate that can be given to the jury's evaluation of the actual property loss is the $78,164.00 repair figure. Based on the evidence, the property was taken for as long as thirteen months or as little as two months, as opposed to the thirty-one months contemplated by the Court's prejudgment interest award. If thirteen months, and if interest is applied at the rate of nine percent (9%) per annum, the prejudgment interest figure would be $7,620.99. At two months, the figure would be $1,650.00. Although Respondents claimed lost rent of $37,350.00 during the thirteen months that some or all of the units of the two buildings were unoccupied, the evidence presented was not definitive as to what time periods various of the units were unoccupied or how many would have been unoccupied anyway during the thirteen months and what ongoing expense was charged against the $37,350.00 claimed. It is impossible to determine precisely what the jury included in its evaluation of the loss of income claimed and whether, or not, interest on lost income was included. Obviously, the Court had no ability to apply prejudgment interest to the portion of the verdict directed to loss of rental income, and can only speculate as to the jury's property loss finding.

The trial court's finding and the appellate court's affirmation of that finding that the trial Court was entitled to ministerially award prejudgment interest of $25,791.12 on the $110,000.00 judgment for the time period of May 8, 2002 to the time of the jury's verdict on December 15, 2004 assumed the existence of three factors that did not exist: 1) a total taking during the entire time period, 2) a jury instruction which did not allow for the recovery of lost income, and subsequently 3) a jury award that was limited to a total loss of Respondents' property from May 8, 2002 to December 15, 2004. It is clear from the record that the pretrial understanding assumed that these factors would prove true. If they had, it was understood that the Court would simply apply a mathematical interest calculation to the verdict. When the factors upon which the understanding was premised proved not to be true, the trial court should have disregarded its initial decision and chosen not to award prejudgment interest per Appellant's motion.

C. Legal Analysis.

1. Plaintiffs who have property taken from them by government because of inverse condemnation are not automatically, as a matter of law, entitled to receive prejudgment interest.

The trial court and Western District Court of Appeals concluded that all inverse condemnation takings were the same as direct condemnation takings. The trial court made this determination with its pretrial ruling, *supra* at pp. 4-5, and then later ministerially applied a mathematical calculation to the jury verdict. The Western District Court of Appeals later articulated the same position in its holding: "... this court finds that because actions in inverse condemnation fall

within the same constitutional context as direct condemnation actions, and prejudgment interest in direct condemnation actions is considered an element of just compensation required by the Missouri Constitution, landowners in inverse condemnation actions are entitled to prejudgment interest as well." Missouri Western District Court Slip Opinion, p. 9.

While there is constitutional directive and specific statutory and case law support for the universal application of prejudgment interest in all direct condemnation cases which is supported by sound legal logic, the same does not hold true for all inverse condemnation cases. See Art. I, Sec. 26, Missouri Constitution, § 523.045 RSMo, and *St. Louis Housing Authority v. Magafas*, 324 S.W.2d 697, 699 (Mo. 1959). In the *St. Louis Housing Authority* case, the commissioners had valued property condemned and taken at $26,500.00. A jury subsequently awarded $33,848.00. In determining that prejudgment interest should be awarded and the amount, this court rationalized its decision by saying:

> " ... in the interim between the taking and the circuit court trial, the defendants were denied the use of their property and also the use of the $7,348 which was the difference between the two amounts. In that situation it would seem that the just and equitable solution would be to allow defendants compensation, for the period from the taking until the entry of the judgment fixing the amount of damages, for the loss of the use of the amount whereby the sum fixed in the judgment exceeded the amount paid at the time of the taking. For

convenience, we think it not objectionable to refer to the allowance of damages for delayed payment as interest, and it would appear to be proper to make the allowance at the legal rate." p. 700

Unlike direct condemnation, which is always a purposeful taking by government of private property that is controlled by an established procedure, inverse condemnation is essentially a tort committed by government against a private property owner which indirectly results in his loss of property or its value. *State ex rel Mo. Pac. R. Co. v. Moss*, 531 S.W.2d 82, 84 (Mo.App. E.D. en banc 1975). The taking may be a complete one which occurs at an identifiable time and can be measured from that time, such as was envisioned by the trial court and Court of Appeals, here. If so, consistent with the logic in the *St. Louis Housing Authority* case, the application of prejudgment interest would be appropriate to compensate a plaintiff for loss of use of his property. See *Stewart v. City of Marshfield*, 431 S.W.2d 819, 833 (Mo.App. 1968).

However, where the taking is partial and temporary and both considerations are ill-defined, as is the case here, the propriety of prejudgment interest is dependent on the individual case and likely not appropriate. See *Byrom v. Little Blue Valley Sewer District, et al*, 16 S.W.3d 573, 577-578 (Mo. banc 2000).

If this inverse condemnation claim is considered as a tort action, plaintiff's entitlement to prejudgment interest is governed by § 408.040.2 RSMo. (1987) which allowed plaintiff to recover prejudgment interest from 60 days after a demand letter had been sent to defendant to which defendant was unresponsive.

But, plaintiff never sent such a letter. Otherwise, plaintiff's claim must have been liquidated for at least an amount readily ascertainable from some established perspective prior to trial. *Catron v. Columbia Mut. Ins. Co.*, 723 S.W.2d 5, 7-8 (Mo. 1987). And, although an equitable consideration can come into play, there must still be an established amount that can be shown to have been due from defendant to plaintiff at a determinable time, pretrial, which defendant in good conscience should have ascertained and should have paid. *id*. If not, a person who is liable to another is not required to pay an amount he does not know and subsequently interest on that amount. *Fohn v. Title Ins. Corp. of St. Louis*, 529 S.W.2d 1, 5 (Mo. banc 1975).

In the *Catron* case, plaintiffs, homeowner insureds, had windstorm damage for which they made claim on their insurer (defendant) for $13,376.99. Defendant insurer offered to pay but $5,425.06. The trial court awarded plaintiffs $11,718.79 and prejudgment interest. Defendant appealed and this court affirmed, finding that defendant had offered far less than plaintiffs' amount of loss and that plaintiffs had been without use of money they had expended to repair their residence for a considerable period of time. In *Fohn*, defendant title company had refused to defend plaintiff, its insured, over claim made by plaintiff's neighbor that plaintiff was occupying part of the neighbor's property pursuant to an inaccurate deed. Plaintiff lost his case with the neighbor and sued defendant for the value of property lost. With opinions at trial valuing the lost property at in the $50,000.00 range by plaintiff and at but $3,500.00 by defendant, the trial court awarded the

title insurance company policy limits of $20,000.00 plus prejudgment interest to plaintiff. On appeal, this court concluded interest should not have been awarded because plaintiff's claim was unliquidated.

Although the *Catron* case and the *Fohn* case represent the opposite extremes, in both instances there was an ascertainable amount of money shown to be due before the start of trial to which interest could be related. In the within action, there is still no establishable value to which interest can attach.

2. The jury's verdict precluded the trial court's post-trial award of prejudgment interest.

Although the Legislature has seen fit to provide for prejudgment interest in direct condemnation cases, § 523.045 RSMo, it has made no such provision for inverse condemnation cases. As such, *State ex rel State Highway Commission of Missouri v. Green*, 305 S.W.2d 688, 693-694 (Mo. Div. 1, 1957), which predated the statute and has not been overruled, would still be good law in all respects as relates to inverse condemnation cases and for that matter, to all civil cases. At. p. 694 of the opinion, the *Green* court made the following pronouncement:

> In actions for the recovery of money which are tried before a jury, the jury shall "assess the amount of the recovery." *Section*

> *510.270*.[2] In note cases it has been repeatedly held that when the verdict allowed no interest and contained no indication of an intention on the part of the jury to allow interest, the court, after discharge of the jury, was powerless to fix the amount of interest or amend the judgment by including same. "The verdict upon which a judgment is entered must be that returned by the jury and be the resultant amount of their deliberations and not that ascertained by a court's calculation. ... The right of a court to amend a verdict after the discharge of the jury is limited to matters of form or clerical errors clearly made manifest by the record, but never to matters of substance required to be passed on by the jury, which, in their nature, are essential to the determination of the case." [cases omitted]

Also see *City of St. Louis v. Vasquez*, 341 S.W.2d 839, 847-848 (Mo. Div. 1, 1960) which is to the same effect.

The only occasion on which the trial court is allowed to add prejudgment interest to a jury verdict is when that verdict clearly defines a principal amount of money that has been owing from a defined time and it is obvious that the jury did

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[2] § 510.270 RSMo requires that "when a verdict shall be found for the plaintiff in an action for the recovery of money only, the jury shall also assess the amount of recovery." A-7.

not include interest in its verdict. *Home Trust Co. v. Josephson*, 95 S.W.2d 1148, 1152 (Mo. banc 1936); *Campbell v. Kelley*, 719 S.W.2d 769, 771-772 (Mo. banc 1986); *Dierker Ass. v. Gillis*, 859 S.W.2d 737, 746 (Mo.App. 1993); *Holtmeier v. Davani*, 862 S.W.2d 391, 406 (Mo.App. 1993); II Mo. Damages, Section 20.71 (Mo. Bar 2d Ed. 2001, 2004). As succinctly put in the Mo. Damages CLE at p. 20-75, *id*.:

> Despite the confusion engendered by the prejudgment interest issue, the rule of *Home Trust*, 95 S.W.2d 1148, is relatively simple: When the damages amount is undisputed, the facts giving rise to the right of prejudgment interest are likewise undisputed, and mere mathematical calculation is needed to determine the verdict amount, such that the plaintiff would be entitled to a directed verdict with respect to the entitlement and amount of prejudgment interest, the trial court may simply assess the amount without input from the jury.

The author of the CLE section then goes on to say at p. 20-75, "Unless the *Home Trust* criteria are satisfied, the issue of prejudgment interest must be submitted to the jury in a jury-tried case."

The trial court mistakenly believed that the fact situation in this case fell within the exception. But, the appropriate amount against which interest was to be applied was unknown to the court, such that no mathematical calculation could be made. To the extent that an award of interest might even have been applicable as part of the measure of damages, the jury might already have awarded it. They

were given license by Instruction 8 to award plaintiffs "for the loss of use" of property that had been taken.[3] See A-6.

3. There was no substantial evidence of record to support the amount of the court's award of prejudgment interest.

The accepted law relevant to establishing damages is summarized in *Carmel Energy, Inc. v. Fritter*, 827 S.W.2d 780 (Mo.App. W.D. 1992) at pp. 782-783 of the opinion:

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[3] Consistent with the requirements of Civil Rule 84.05, Instruction No. 8 is hereafter restated:

Instruction No. 8

You must award plaintiffs such sum as you believe is the difference between the fair market value of plaintiffs' whole property immediately before the taking or damaging on May 8, 2002 and the value of plaintiffs' remaining property immediately after such taking or damaging, which difference in value is the direct result of the taking or damaging and of the uses which defendant has the right to make of the property taken or damaged, plus such sum as you may find from the evidence will fairly and justly compensate plaintiffs for the loss of use thereof during the time reasonably necessary for the property to be repaired or replaced. If you find that plaintiffs failed to mitigate damages as submitted in Instruction Number 10, in determining plaintiffs' total damages you must not include those damages that would not have occurred without such failure. A-6.

> Competent and substantial evidence is required to support an award of damages and the burden is on the party seeking to establish his claim to prove every essential element of that claim, including the amount of damages. *Massey v. Goforth*, 305 S.W.2d 894, 897 (Mo.App. 1957). The amount may not be based on nothing more tangible than "a gossamer web of shimmering speculation and finely-spun theory." *Id.* A verdict which is not supported by the evidence as to the amount of damages must be set aside as promptly as a verdict that is not supported by the evidence at all. *Mitchell v. Mosher*, 362 S.W.2d 532, 536 (Mo. 1962) and *Pinkston v. McClanahan*, 350 S.W.2d 724, 728-29 (Mo. 1961). To the same effect, where the court is the trier of fact, there must be substantial evidence to support the judgment, *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

The jury instruction on damages, Instruction 8, A-6, contemplated an award which included both an amount for property taken as a result of the flooding on May 8, 2002, and loss incurred as a result of the loss of use of that property. Only the value of the property taken as a result of the flooding was subject to an interest calculation and then only for the time period that the property was actually taken. As indicated, *supra* at pp. 9-11, there was varying evidence as to the value of property taken as relates to the value of the loss of use of that property. As shown, the court's calculation was not close to being accurate. As further shown, even a

"best guess" makes is clear that even if interest could, would or should be awarded, the amount awarded by the court was very excessive.

CONCLUSION

Since not only is there no law to support the award of prejudgment interest by the trial court, but no evidence to support such an award if there was law, this court should issue its mandate to the trial court to reverse its award of prejudgment interest and then show plaintiffs' judgment against defendant to be fully satisfied.

Respectfully submitted,
ENSZ AND JESTER, P.C.

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CERTIFICATE OF WORD PROCESSING PROGRAM

The undersigned hereby certifies that this Brief was prepared on a computer, using Microsoft Word. A diskette containing the full text of the Brief is provided herewith, and has been scanned for viruses and is believed to be virus-free.

_____

Attorney for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief herein is in compliance with Missouri Rule of Civil Procedure 84.06. According to the word count of the word processing system used to prepare the Brief, the Brief contains 4,940 words, 452 lines.

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Attorney for Appellant

CERTIFICATE OF SERVICE

Counsel for Appellant certifies that a copy of the foregoing SUBSTITUTE BRIEF OF APPELLANT was mailed, *via* U.S. Mail, postage prepaid, this 4th day of September, 2007 to:

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APPENDIX

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