

THE MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

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ELIZABETH MITCHELL, et al.

Appellants

vs.

ST. JOSEPH'S HOSPITAL, et al.

Respondents

**FILED**  
MAR 06 2009

LAURA ROY

CLERK, MISSOURI COURT OF APPEALS  
EASTERN DISTRICT

*Motion filed  
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No. ED 91103

**FILED**

OCT 15 2009

Appeal from the Circuit Court of St. Louis County  
The Honorable Steven H. Goldman, Circuit Judge

Thomas F. Simon

CLERK, SUPREME COURT

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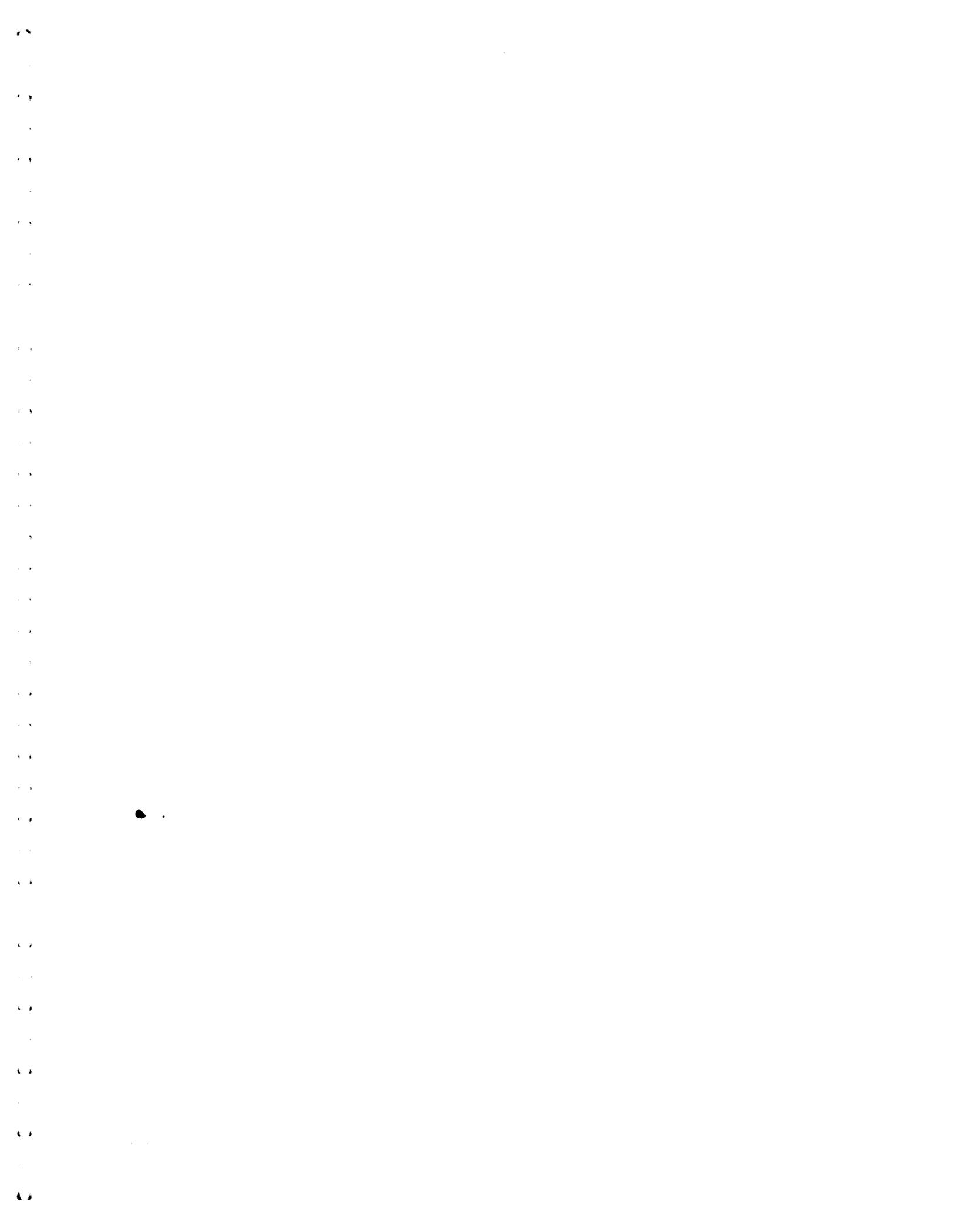
APPELLANT'S BRIEF

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**SCANNED**



## TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	1
Table of Authorities	2
Statement of Jurisdiction	3
Statement of Facts	4
Point Relied On	23
Argument	24
Conclusion	31
Certificate of Compliance and Service	32
Appendix	33
Judgment of the Circuit Court	

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Brown v. Hamid</i> , 856 S.W.2d 51 (Mo. 1993)	24, 27, 30
<i>Gurley v. Montgomery First National Bank</i> , 160 S.W.3d 863 (Mo.App.S.D. 2005)	28
<i>Jablonowski v. Modern Cap Manufacturing</i> , 279 S.W. 89 (Mo. 1925)	27
<i>Kroeger-Eberhart v. Eberhart</i> , 254 S.W.3d 38 (Mo.App.E.D. 2007)	26
<i>Miller v. SSM Health Care Corp.</i> , 193 S.W.3d 416 (Mo.App.E.D. 2006)	26-27, 30
<i>Roberts v. Emerson Electric Manufacturing Co.</i> , 362 S.W.2d 579 (Mo. 1962)	29
<i>State v. Engel</i> , 859 S.W.2d 822 (Mo.App.W.D. 1993)	30
<i>State v. Jones</i> , 835 S.W.2de 376 (Mo.App.E.D. 1992)	27
<i>Strong v. American Cyanamid Co.</i> , 261 S.W.3d 493, (Mo.App.E.D. 2007)	29
<i>Teets v. American Family Mutual Insurance Co.</i> , 272 S.W.3d 455 (Mo.App.E.D. 2008)	24-25, 30
<i>United States v. Shinderman</i> , 515 F.3d 5 (1st Cir. 2008)	27

## STATEMENT OF JURISDICTION

This is an appeal from the final judgment in a wrongful death case. The appeal has been brought to this Court from the Circuit Court of St. Louis County.

A jury returned a verdict in favor of defendant Milton Kardesch on February 12, 2008. Legal File at 52. The Circuit Court entered judgment on the verdict on February 13, 2008. Legal File at 53. The plaintiffs filed their motion for a new trial on March 11, 2008. Legal File at 54. The Circuit Court denied the motion in an order dated March 13, 2008. Legal File at 67. The plaintiff filed his notice of appeal to this Court on March 19, 2008. Legal File at 68.

This appeal does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state, or title to any state office, nor is it a case in which the punishment of death has been ordered. As provided in Article 5, Sections 3 and 15, of the Missouri Constitution, as amended, the Missouri Court of Appeals for the Eastern District, has jurisdiction of this appeal.

## STATEMENT OF FACTS

### A. Testimony of Fact Witnesses

Vicky Lakowski, a registered medical assistant who worked for defendant Milton Kardesch, M.D., for 11 years, was the first witness called on behalf of plaintiff Elizabeth Mitchell. Tr. at 117-18, 122. Ms Lakowski testified that she had answered a telephone call from Mrs. Mitchell on October 11, 2001, and taken a message for Dr. Kardesch. Id. at 118-21, 125; Ex. 2. The text of the message read: “October 11, 2001, Ruben Mitchell, diet; eats anything, night; sleep, nightmare, grabs chest, sleeps after work, never used to nap.” Tr. at 126.

Ms Lakowski acknowledged having indicated on the message slip that “the nightmares were about death.” Id. She made note of Mr. Mitchell’s telephone number. Id. And she drew a line on the message slip, which she explained in her trial testimony: “That line means that I went back to talk to Dr. Kardesch about this phone call.” Id.

Ms Lakowski testified that Dr. Kardesch had told her that his diagnosis for Mr. Mitchell was “arteriosclerotic heart disease “ and “rule out angina.” Id. at 128-29. She said that she invariably would write down the diagnosis after relaying a patient’s call to Dr. Kardesch. Tr. at 141. Dr. Kardesch also advised her: “That the heart medicine could have caused some of these symptoms . . . That . . . it might be one

of the heart medicines.” Id. at 127. She had no recollection of Dr. Kardesch having gotten on the telephone to talk with Mrs. Mitchell. Id. at 131-32, 135.

Ms Lakowski also testified that she had been very careful in noting everything that Dr. Kardesch told her in response to Mrs. Mitchell’s call. Id. at 133-34. She described her protocol for processing telephone messages from patients: “I would speak to the patient, get a phone number, go back and talk to Dr. Kardesch, and I would write down whatever Dr. Kardesch would tell me the patient should do.” Id. at 140.

Ms Lakowski’s notes regarding Mrs. Mitchell’s call on October 11, 2001, did reflect Dr. Kardesch’s instruction that Ms Lakowski schedule a thallium stress test for Mr. Mitchell. Id. at 133-34. Ms Lakowski testified that she arranged for Mr. Mitchell to have the stress test on October 22, 2001. Id. at 133. She said that the “[n]ormal procedure” would have been to “schedule it for the next day.” Id. at 134, 143-44. Ms Lakowski explained that she had attempted to arrange for the test to be conducted sooner but accepted October 22 as the earliest available date. Id. at 134.

The notes made no mention of Dr. Kardesch having stated that Mrs. Mitchell should take her husband to an emergency room. Id. at

133-34. Ms Lakowski testified that she had no recollection of having instructed Mrs. Mitchell to take her husband to an emergency room. *Id.* at 147. When she was questioned by defense counsel, Ms Lakowski stated: “It was automatic that if a patient was having chest pain, they needed to go to the emergency room, and it was never written. It was just a verbal.” *Id.* at 137. She allowed that she also had not made note of Mrs. Mitchell’s report that her husband was experiencing chest pain. *Id.* at 138-39. Ms Lakowski explained that she normally would not include reference in her notes to the complaint of chest pain but would invariably tell the patient to go to the emergency room. *Id.*

Dr. Kardesch testified initially as a plaintiff’s witness. *Id.* at 151. He described Mr. Mitchell as “a young man . . . with such horrible heart disease.” *Id.* at 162. He had been Mr. Mitchell’s physician during July, 2000, when Mr. Mitchell complained of “some dull chest pain and some indigestion.” *Id.* at 172-73. At that time Mr. Mitchell had been evaluated in an emergency room, found to have suffered a heart attack, and admitted to the hospital for treatment. *Id.* Dr. Kardesch acknowledged that the documentation of that episode had been in his professional records. *Id.* at 172.

Dr. Kardesch acknowledged that Mrs. Mitchell had reported her husband’s chest pains and grabbing of his chest and nightmares when

she called his office on October 11, 2001. Id. at 167-68, 253. He confirmed that his diagnoses had been arteriosclerosis and rule out angina. Id. at 168-69. Dr. Kardesch agreed that “angina . . . is chest pain due to cardiac origin.” Id. at 168. He agreed that he had known at the time of Mrs. Mitchell’s telephone call that Mr. Mitchell was at risk for another myocardial infarction: “You can, with a history like that, you can say he’s probably going to have more heart attacks, but you cannot say when.” Id. at 179-80, 182.<sup>1</sup>

Dr. Kardesch explained the difference between myocardial ischemia versus myocardial infarction:

Myocardial ischemia just means lack of blood flow through a vessel. It is not completely blocked, but it’s less, and you’ll get symptoms sometimes similar to a regular heart attack. A myocardial infarction is a total blockage of the whole artery where blood cannot get through, and the tissue starts to die off.

Id. at 180.

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<sup>1</sup> Dr. Kardesch subsequently explained that “myocardial infarction” is “another term for a heart attack.” Tr. at 231.

Dr. Kardesch testified that he recalled Mrs. Mitchell's telephone call about her husband, despite the passage of several years, because it involved a medical emergency and because "the idea of grabbing the chest at night with nightmares sticks out." *Id.* at 164-65, 170, 252, 289. He recalled specifically that Mr. Mitchell's nightmare had been "about death." *Id.* at 216-17. Dr. Kardesch acknowledged having been concerned that Mr. Mitchell might be suffering from "unstable angina" when Ms Lakowski advised him of Mrs. Mitchell's call. *Id.* at 166.

Dr. Kardesch agreed that Mr. Mitchell's complaint of chest pain and history of heart disease necessitated "find[ing] out whether this man's chest pain was due to cardiac origin," and that a failure to obtain that determination would have been a deviation from the applicable standard of care. *Id.* at 163, 175-76, 186-88. He agreed that "the way to do that is to . . . send him to the emergency room and get an EKG and enzymes." *Id.* at 293, 296. Dr. Kardesch allowed that he actually had believed "from all the symptoms" related by Mrs. Mitchell that Mr. Mitchell merely had experienced "a bad nightmare." *Id.* at 179-80.

Dr. Kardesch confirmed that he had not talked with Mrs. Mitchell himself on October 11, 2001, but rather had relied upon Ms Lakowski to convey his medical advice to her. *Id.* at 176-77, 185-86. He testified that he instructed Ms Lakowski to advise Mrs. Mitchell "to

get Mr. Mitchell over to the emergency room.” Id. at 186-87, 253. Dr. Kardesch explained: “It is very important, and I didn’t want to waste time. I wanted him to go to the emergency room . . . With his past history, everything counted on him to go to the emergency room.” Id. at 190.

Dr. Kardesch acknowledged that Ms Lakowski’s note regarding her conversations with Mrs. Mitchell on October 11, 2001, did not reflect any such advice. Id. at 188-89. He confirmed that there was no documentation of the content of communications between Mrs. Mitchell and Ms Lakowski anywhere in his records apart from Ms Lakowski’s telephone message slip. Id. at 191. Dr. Kardesch recalled Ms Lakowski’s report of her follow-up telephone conversation with Mrs. Mitchell. Id. at 254. He said Ms Lakowski told him that Mr. Mitchell had gone to work, and that he was “feeling fine [and] had no further chest problems and no chest pain.” Id. Dr. Kardesch testified:

[T]his lessened my suspicion from this being coronary artery disease. Since he was at work feeling just fine, I really thought this was just a bad nightmare, but I felt we should check it out a hundred per cent. So I asked [Ms Lakowski] to schedule a stress test, which I thought would just be done the next day, and to tell Mrs. Mitchell that if

any of these symptoms recurred to go directly to the emergency room immediately . . . or to come in.

Id. at 254. He stated that it was “easy” for him to schedule cardiac stress tests within one day and that the reason for the delayed scheduling of Mr. Mitchell’s test was the Mitchells’ own scheduling needs. Id. at 259-60, 284-85.

Dr. Kardesch testified that Mr. Mitchell had the cardiac stress test on October 22, 2001. Id. at 192, 262. The cardiologist who conducted the test recorded Mr. Mitchell’s medical history and noted that he did not have “specific cardiac symptoms.” Id. at 264; Ex. L. He reported that Mr. Mitchell’s “ability to perform on the treadmill” was above average, that he had not complained of chest pain during the stress test, and that the results of the test were “negative . . . by EKG criteria.” Tr. at 266-67; Ex. L. The test had to be stopped because Mr. Mitchell became short of breath. Tr. at 193; Ex. L. The cardiologist recorded his opinion that Mr. Mitchell had a “mildly depressed” ejection fraction. Tr. at 269; Ex. L

Dr. Kardesch explained the term “ejection fraction” in the context of a cardiac stress test:

When the left heart fills up, and is beating to get the blood out, it never really empties completely. The normal

amount for emptying is 50 to 60 per cent. That's called an ejection fraction. Some blood remains in that blood flow chamber. And the normal range is between 50 and 60 per cent. If heart muscle is weak, it will be a smaller number. It can be above 60. But as a rule, it's between 50 and 60.

Id. at 199. He testified that an ejection fraction below 40 represented cause for concern. Id. at 199, 220, 297.

Dr. Kardesch acknowledged having testified in a deposition during 2004 that the ejection fraction shown by Mr. Mitchell's foreshortened thallium stress test had been close to the 50 per cent result that was recorded during Mr. Mitchell's stress test in July, 2000. Id. at 193-94. He also acknowledged that the result in October, 2001, actually had been 38.7 per cent and that his deposition testimony had been mistaken: "[T]hat was a wrong thing to say. It wasn't close." Id. at 194. Dr. Kardesch stated that the ejection fraction in 2001 had been significantly smaller than that in 2000 and explained his error as a "[s]lip of words." Id.

Dr. Kardesch also testified that the rejection fraction in a thallium stress test "is always much lower than the echocardiogram." Id. at 195, 205. He also said that he had felt that the ejection fraction recorded during the 2001 stress test "was wrong" and that he "just did

not trust that ejection fraction.” Id. at 195, 199, 205. He explained that Mr. Mitchell’s stress test had been performed on “a completely new machine” and that “the results were – the results were coming off a little funny.” Id. at 273. He added:

Yes. This was an entirely new method using a new radioactive isotope. And it’s always been a problem being sure that when you do the thallium part, that you’re going to get a perfect answer. It is nowhere as accurate as the cardiac catheter.

Id. at 274.

Dr. Kardesch stated his belief that the overall results of the stress test did not comport with the ejection fraction that the cardiologist had reported: “Everything sounded good and looked good. And the low ejection fraction just didn’t go along with these results.” Id. at 271-72. He testified: “I really didn’t believe that it was truly that low, and I was going to get an echocardiogram . . . . And I figured, well, I was going to be seeing him right away..” Id. at 198-99. Dr. Kardesch said that he had mistakenly believed that Mr. Mitchell had a routine appointment to be seen in his office imminently. Id. at 198-99, 207, 299-300. He testified: “[A]nd I thought, well, he did so well on the stress test, that waiting several days more isn’t going to hurt him. He

went back to work. He felt fine.” Id. at 198-99. Dr. Kardesch said: “If an echocardiogram would have been low also, I would have had him see a cardiologist.” Id. at 208.

Dr. Kardesch testified that he called Mrs. Mitchell on October 23, 2001, the day after the thallium stress test, and advised her that “everything was fine” and that “there was nothing to worry about.” Id. at 195, 198. He did not say anything to her about the decreased ejection fraction that had been recorded during the test. Id. at 205-07. Dr. Kardesch agreed that he had told Mrs. Mitchell that there was “no change” in Mr. Mitchell’s test results and that she should not worry about her husband. Id. at 212. He testified that the thallium stress test results were “reassuring” and that there was nothing in the stress test results “that indicated a problem going on or one about to happen or some cardiac event happening recently.” Id. at 280-81.

Dr. Kardesch never obtained the follow-up echocardiogram. Id. at 220. He testified that Mr. Mitchell suffered a myocardial infarction on October 25, 2001, three days after the thallium stress test. Id. at 182, 202. A cardiac catheterization performed while Mr. Mitchell was having that heart attack showed an ejection fraction of 30. Id. at 202. Dr. Kardesch acknowledged that he had signed Mr. Mitchell’s death

certificate and that the cause of death reported on the certificate was acute myocardial infarction and arteriosclerosis. *Id.* at 170; Ex. 4.

Mrs. Mitchell testified that she and Mr. Mitchell had met during 1988 and were married a couple of years later. *Id.* at 467. Their two children were seven and 10 years old at the time of Mr. Mitchell's death. *Id.* Mrs. Mitchell did her undergraduate work at Fontbonne University and Harris-Stowe State University. *Id.* at 464-65. She received a master's degree in education from Maryville University. *Id.* at 465. Mrs. Mitchell taught in the St. Louis and University City school systems and was certified to work as a school principal. *Id.*

Mrs. Mitchell recalled the night preceding her telephone call to Dr. Kardesch's office on October 11, 2001: "My husband woke me up, and he was grabbing his chest, and he was crying, and he was telling me he had had a nightmare about dying." *Id.* at 478. She recalled that he had a "very startled" look on his face, she "just sort of wrapped [her] arms around him and held him," that he continued to hold his chest and cry, and that after "maybe 10 to 15 minutes" he settled down. *Id.* at 478-79, 527-28.

Mrs. Mitchell testified that her husband awoke in the morning and went to work. She said that she assumed he was feeling better but that she "was still worked about – still worried about him." *Id.* at 480.

Mrs. Mitchell testified that Dr. Kardesch had been her husband's primary care physician for a number of years and that they depended on Dr. Kardesch to take care of Mr. Mitchell's health problems. *Id.* at 482. Mrs. Mitchell called Dr. Kardesch's office later that morning: "Because that's usually what I would do . . . [H]e wasn't a complainer, and I, if I thought he wasn't feeling well, if it seemed like he was a little sore, I would call Dr. Kardesch." *Id.* at 481. She said that she called Dr. Kardesch because she was worried about her husband: "That was my sole reason. I was worried about him." *Id.* at 489, 520-21.

Mrs. Mitchell confirmed that Ms Lakowski's telephone message slip recorded the symptoms that she had described during their initial conversation. *Id.* at 483. She testified that Mr. Mitchell's naps after work were a recent development and that he had been increasingly tired "[f]or a short while." *Id.* at 484. Mrs. Mitchell said that she asked Ms Lakowski whether she could speak with Dr. Kardesch: "She . . . told me to hold, and when she came back, she said that Dr. Kardesch was going to order a stress test and that she would get back with me with the appointment." *Id.* at 485-86. Mrs. Mitchell testified that Ms Lakowski advised her that Dr. Kardesch was "not available" to talk with her. *Id.* at 486.

Mrs. Mitchell denied that Ms Lakowski had instructed her to take Mr. Mitchell to an emergency room: “That did not happen. If they would have told me to take him anywhere, I would have taken him immediately.” Id. at 487. She explained that her husband had been a journeyman plumber with 28 years of seniority and that his work rules allowed him to leave a job for medical purposes at any time. Id. at 488, 493. Mrs. Mitchell added: “He would have left immediately, and I would have taken him . . . I would [have] taken him wherever they told me to take him immediately.” Id. at 488-89.

Mrs. Mitchell also denied having specified a date for or requested any delay of the thallium stress test. Id. at 489-90. She testified that she would have taken Mr. Mitchell to the test “[w]henever they wanted me to.” Id. at 490. Mrs. Mitchell stated that Mr. Mitchell’s convenience “was never an issue” in the scheduling of his stress test. Id. at 493.

Mrs. Mitchell said that Ms Lakowski did not call her back with the date and time of the stress test ordered by Dr. Kardesch until approximately one week after their initial telephone conversation. Id. She explained her reaction to Dr. Kardesch’s response to that call: “I felt that Dr. Kardesch must have thought it wasn’t too urgent for him not to get on the phone with either him or me and get him an appointment sooner.” Id. at 491-92. Mrs. Mitchell stated that she had

been reassured by the delayed scheduling of the test, and by the fact that Dr. Kardesch had not considered any more urgent action necessary. *Id.* at 492.

Mrs. Mitchell confirmed that she had received a telephone call from Dr. Kardesch on October 23, 2001, the day after her husband's thallium stress test. *Id.* at 472-73. She recalled: "He said that he was really pleased with the results. That it wasn't broke, so he wasn't going to fix it . . . . [H]e didn't say anything other than it went fine, and it wasn't broke, he wasn't going to fix it." *Id.* at 473. Mrs. Mitchell testified that she was "positive" that Dr. Kardesch did not mention anything to her about Ruben coming to his office for another appointment, or about an echocardiogram or any other additional test. *Id.* at 473-75.

### **B. Summary of Expert Testimony**

Donald Singer, M.D., testified as one of the plaintiffs' expert witnesses. *Id.* at 302.<sup>2</sup> Dr. Singer is a cardiologist and professor of

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<sup>2</sup> The plaintiffs and Dr. Kardesch each adduced the testimony of several expert witnesses. The expert testimony is presented selectively and in summary form in this brief in order to apprise the Court that experts were called and differed with one another and to suggest the nature of

medicine at the University of Illinois in Chicago. Id. at 303, 307. At his university's hospital he runs a geriatric heart failure program that is one of two programs of its kind in the United States. Id. Dr. Singer testified that he is a fellow of the American Heart Association and the American College of Cardiology. Id. at 312-14. Two of his areas of specialization are cardiac testing and sudden death. Id. at 315-16, 322.

Dr. Singer testified that he had reviewed the deposition testimony of Dr. Kardesch and other witnesses, as well as the medical records of Mr. Mitchell's history, treatment, and death. Id. at 325-26. He agreed that the definition of standard of care is "that degree of skill and care which is ordinarily used under the same or similar circumstances by members of [the medical] profession." Id. at 326.

Dr. Singer testified that it was his opinion, held to a reasonable degree of medical certainty, that Dr. Kardesch deviated from the standard of care in his management of Mr. Mitchell's medical problems. Id. at 327. He identified the "principal deviation" as Dr. Kardesch's failure to make a prompt determination of whether Mr. Mitchell's symptoms were "a manifestation of coronary heart disease or angina"

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the medical issues that the experts addressed and about which they opined.

in view of his history of heart disease and heart attacks. Id. at 327-28. Dr. Singer explained that because of Mr. Mitchell's history Dr. Kardesch "needed to get a number of really simple tests" to determine "whether . . . the patient's symptoms were related to the progression of coronary artery disease and the development of ischemic changes." Id. at 328. He said that Dr. Kardesch could have "shipped the patient off to the emergency room," which might have been the best choice, or referred him to a cardiology group, or that the two simplest tests could have been performed in Dr. Kardesch's own office: "This was an EKG and a blood test for compounds called enzymes . . . that are released from the heart muscle that's been injured." Id. at 328-29. Dr. Singer testified that it also was his opinion, held to a reasonable degree of medical certainty, that the EKG and enzyme tests would have shown signs of ischemia on October 11, 2001. Id. at 330-32.

Dr. Singer stated his belief that Mr. Mitchell's symptoms were "manifestations of myocardial ischemia." Id. at 335. He added that myocardial ischemia is not disproved by the fact that the patient has gone to work: "Well, I mean, people do work with myocardial ischemia. I went to work with myocardial ischemia." Id. at 335-36. Dr. Singer testified that "the degree of ischemia varies from moment to moment," and that Mr. Mitchell could have had a normal treadmill test on

October 22, 2001, despite having experienced myocardial ischemia 11 days earlier. *Id.* at 336-37. He acknowledged that the goal in treating patients such as Mr. Mitchell is to treat them while they still have ischemia and before they develop a heart attack. *Id.* at 337.

Dr. Singer stated his opinion, held with a reasonable degree of medical certainty, that Dr. Kardesch's deviation from the standard of care was a direct cause of Mr. Mitchell's death. *Id.* at 338-39. He explained:

[H]ad his problems been taken care of earlier, he would not have developed a heart attack, and he would not have this need to have had an emergency catheterization, and he would not have had the [complications] that particularly resulted in the . . . infarct that killed him.

*Id.* at 339.

Patricia Cole, M.D., testified as one of Dr. Kardesch's expert witnesses. *Id.* at 538. Dr. Cole is an interventional cardiologist in private practice in St. Louis County. *Id.* at 539. She is a fellow of the American College of Cardiology and the Society for Cardiac Angiology and Intervention. *Id.* at 542-43. Before entering private practice on a full-time basis, Dr. Cole had served as an associate professor of

medicine at Washington University and later as the director of the cardiac catheterization laboratory at Jewish Hospital in St. Louis. *Id.*

Dr. Cole stated that she had conducted an extensive review of the depositions and medical records pertinent to Mr. Mitchell's medical history and death. *Id.* at 553-56. She testified at length regarding various opinions that she had formed and held with a reasonable degree of medical certainty, and offered explanations of her opinions. *Id.* at 556-639. Dr. Cole's opinions generally opposed or contradicted those of the plaintiffs' experts.

### **C. Exclusion of Evidence Regarding**

#### **Dr. Kardesch's Untruthfulness**

An interrogatory submitted by the plaintiffs to Dr. Kardesch prior to trial asked whether his license to practice medicine ever had been suspended. *Ex.* 19. Dr. Kardesch's response was that it had not. *Id.* In a subsequent deposition Dr. Kardesch admitted that his licenses to practice medicine in Missouri and in New York had been suspended after he was found guilty of a crime. *Ex.* 22.

Dr. Kardesch sought a pre-trial order excluding evidence of the untruthful interrogatory answer. *Tr.* at 28-37. His attorney argued that "the issue of suspension of one's license . . . is a collateral issue [that is] remote in time [and] had nothing to do with patient care." *Id.*

at 23. Counsel for the plaintiffs responded that Dr. Kardesch's credibility was a determinative issue in the case and that the plaintiffs should be allowed to show the jury that he had been untruthful in a testimonial response in the case. *Id.* at 25. The Circuit Court concluded that the evidence was of a collateral matter and granted the defendant's request for exclusion. *Id.* at 27-30, 37.

The plaintiffs made an offer of proof during trial consisting of the interrogatory answer and the subsequent videotaped deposition. *Id.* at 440-41. The court allowed the offer of proof in that form and again sustained Dr. Kardesch's objection to the evidence. *Id.* at 442.

#### **D. Verdict and Judgment**

The jury returned a verdict in favor of Dr. Kardesch. Legal File at 52. The court entered judgment on the verdict. *Id.* at 53. The plaintiffs requested a new trial on the basis of the court's exclusion of evidence regarding Dr. Kardesch's untruthful interrogatory answer. *Id.* at 54-66. The court denied that motion. *Id.* at 67.

## POINT RELIED ON

The Circuit Court abused its discretion in excluding evidence of Dr. Kardesch's untruthful answer to an interrogatory and his admission of that misrepresentation in a subsequent deposition because the evidence was logically and legally admissible and its exclusion deprived the plaintiffs of a fair trial, in that (1) the plaintiffs' evidence and Dr. Kardesch's evidence regarding Dr. Kardesch's response to Mr. Mitchell's symptoms differed materially, (2) the adequacy of that response was the ultimate issue in the case, (3) the jury's assessments of the credibility of Mrs. Mitchell and Dr. Kardesch was likely to be determinative of that issue, and (4) the actual prejudice resulting to Mrs. Mitchell from the exclusion of the evidence was greater than any prospective prejudice that might have resulted to Dr. Kardesch if the evidence was allowed.

*Roberts v. Emerson Electric Manufacturing Co.*, 362 S.W.2d 579

(Mo. 1962)

*Miller v. SSM Health Care Corp.*, 193 S.W.3d 416

(Mo.App.E.D. 2006)

*Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38 (Mo.App.E.D. 2007)

*State v. Engel*, 859 S.W.2d 822 (Mo.App.W.D. 1993)

## ARGUMENT

The Circuit Court abused its discretion in excluding evidence of Dr. Kardesch's untruthful answer to an interrogatory and his admission of that misrepresentation in a subsequent deposition because the evidence was logically and legally admissible and its exclusion deprived the plaintiffs of a fair trial, in that (1) the plaintiffs' evidence and Dr. Kardesch's evidence regarding Dr. Kardesch's response to Mr. Mitchell's symptoms differed materially, (2) the adequacy of that response was the ultimate issue in the case, (3) the jury's assessments of the credibility of Mrs. Mitchell and Dr. Kardesch was likely to be determinative of that issue, and (4) the actual prejudice resulting to Mrs. Mitchell from the exclusion of the evidence was greater than any prospective prejudice that might have resulted to Dr. Kardesch if the evidence was allowed.

*Standard of Review:* "The trial court's ruling on admissibility of evidence is accorded substantial deference and will not be disturbed absent an abuse of discretion."

*Brown v. Hamid*, 856 S.W.2d 51, 56 (Mo. 1993). "An abuse of discretion occurs when the trial court's ruling is clearly against the logic of the circumstances then before it and is

so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration.” *Teets v. American Family Mutual Insurance Co.*, 272 S.W.3d 455, 468 (Mo.App.E.D. 2008).

Dr. Kardesch and Ms Lakowski testified that Mrs. Mitchell was instructed immediately to take her husband to an emergency room on account of the symptoms that she had reported. Tr. at 137-39, 186-87, 190, 253. Mrs. Mitchell testified that she received no such instruction and that she would have taken her husband to an emergency room at once if that had been Dr. Kardesch’s advice. Id. at 487-89, 493. Dr. Kardesch and Ms Lakowski testified that Mr. Mitchell’s thallium stress test was scheduled immediately and that the delay in scheduling this test with a cardiologist was necessitated by the patient’s schedule. Id. at 259-60, 284-85. Mrs. Mitchell demurred again: neither her schedule nor her husband’s ever was an issue and she would have taken Mr. Mitchell to the test “[w]henver they wanted me to,” and she did not hear from Dr. Kardesch regarding the test date until a week after her initial call to report Mr. Mitchell’s symptoms. Id. at 490-93.

The jury’s choice of which version of events it would believe was likely to determine the outcome of this trial. Dr. Kardesch’s description offered support for a finding that he had not deviated from the

standard of care. Mrs. Mitchell's very different version was a picture of professional neglect and ultimate tragedy. The trial court's decision to keep unequivocal evidence of Dr. Kardesch's willingness to be untruthful under oath in this very case skewed the credibility analysis in an arbitrary and unreasonable way. By precluding fair resolution of the central factual issues in the case, that ruling surely is shocking and unconscionable. This Court should reverse the judgment that ensued.

Relevance is the primary factor in the admission or exclusion of evidence, and a court must find evidence both logically and legally relevant in order to admit it. *Kroeger-Eberhart v. Eberhart*, 254 S.W.3d 38, 43 (Mo.App.E.D. 2007). Evidence is logically relevant if it tends to make the existence of any material fact more or less probable than it would be without the evidence. *Id.* To determine legal relevance, a court must weigh the probative value of the evidence against its potential for causing unfair prejudice or otherwise impeding the trial process: "[t]he trial court must measure the usefulness of the evidence against its cost, and if the cost outweighs the usefulness, then the evidence is not relevant and the court should exclude it." *Id.*

It is axiomatic that credibility of witnesses is a potential issue in any trial. *See, e.g., Miller v. SSM Health Care Corp.*, 193 S.W.3d 416, 421 (Mo.App.E.D. 2006) (recognizing that "[t]he jury is entitled to know

information that might affect the credibility of the witness, and the weight to be given his testimony”). Dr. Kardesch’s proven willingness to give a flatly untruthful answer in his sworn response to interrogatories submitted during the very case on trial surely tended to make his want of credibility more probable and apparent. Whether he was to be believed or not just as surely was a central issue in the case. The evidence of his untruthfulness thus was logically relevant. *See United States v. Shinderman*, 515 F.3d 5, 17 (1st Cir. 2008) (observing that “[a]fter all, a witness’s willingness to lie . . . in an application . . . is highly probative of his character for truthfulness”).

The evidence of Dr. Kardesch’s false and self-serving interrogatory answer also was legally relevant. “Relevant and material evidence may not be excluded solely because it tends to prejudice the jury against a party.” *Brown v. Hamid, supra*, 856 S.W.2d at 56 (citing *Jablonowski v. Modern Cap Manufacturing*, 279 S.W. 89, 97 (Mo. 1925)). The determinative considerations are whether the disadvantage that might result from admission of the evidence is “unfair” and whether the evidence would introduce into the case “matters which cause prejudice wholly disproportionate to [its] value and usefulness.” *State v. Jones*, 835 S.W.2de 376, 380 (Mo.App.E.D. 1992).

The concept of “unfair” prejudice was considered in *Gurley v. Montgomery First National Bank*, 160 S.W.3d 863 (Mo.App.S.D. 2005), As in the present case, the central issue was the relative credibility of each side’s fact witnesses. *Id.* at 871. Bank employees testified that a key letter had been sent to the plaintiff and her decedent prior to the death of the latter. The plaintiff suggested that bank personnel had fabricated the letter after the death in order to cover up the bank’s negligence. She introduced evidence tending to show that bank employees changed the bank’s operating manual after the death, also to cover up the bank’s negligence.

The particular testimony at issue was from a plaintiff’s witness who described practices engaged in by the bank in its dealings with the plaintiff and her decedent that deviated from standard banking practices. The Court of Appeals resolved the question of logical relevance by noting that the evidence would “aid the jury in its credibility determinations” and also would be helpful in the jury’s assessment of the bank’s willingness to “bend the rules” in its transactions with the plaintiff and her decedent. *Id.*

The court had no greater difficulty resolving the issue of legal relevance: “The prejudicial nature of the evidence did not outweigh its probative effect . . . [T]he prejudice to the Bank that resulted was in no

way ‘unfair.’” *Id.* It is no more “unfair” for the jury in this case to be made aware of Dr. Kardesch’s willingness to make a false statement under oath as the parties prepared for trial. The plaintiffs did not trick him into lying, nor did he object to the interrogatory question in lieu of providing an answer that served his own interests. With due regard for whatever theoretical risk of prejudice might attend informing jurors of past professional discipline, it is part of the bedrock of our jurisprudence that juries know how to weigh the evidence presented to them. *See Strong v. American Cyanamid Co.*, 261 S.W.3d 493, 506 (Mo.App.E.D. 2007).

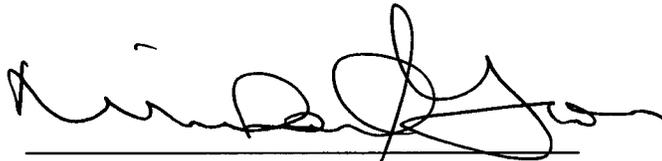
Counsel for Dr. Kardesch contended and the trial court concluded that evidence of Dr. Kardesch’s untruthful interrogatory answer was collateral to the issues in the case. Tr. 30, 37, 442. But evidence that has “a legitimate tendency to throw light on the accuracy, truthfulness, and sincerity of a witness” is proper proof for assessing the credit that ought to be assigned to the testimony of that individual. *Roberts v. Emerson Electric Manufacturing Co.*, 362 S.W.2d 579, 584 (Mo. 1962). The issue properly identified was Dr. Kardesch’s credibility, which was hardly collateral to the other matters before the jury. And the jury was entitled to know that Dr. Kardesch had been untruthful under oath in this case as an aid to determining his credibility and the weight to be

given his testimony. See *Miller v. SSM Health Care Corp.*, *supra*, 193 S.W.3d at 421; see also *State v. Engel*, 859 S.W.2d 822, 829 (Mo.App.W.D. 1993) (recognizing that “the admission of . . . any impeaching evidence is premised on the proposition that a trial of a lawsuit is a search for truth” and that “[t]he impeachment process provides a jury with valuable information in assessing the [witness’s] credibility”).

The trial court’s decision to exclude evidence of Dr. Kardesch’s willingness to be untruthful under oath in this case precluded the jury from fairly determining the credibility of the fact witnesses. With full recognition of the “substantial deference” due a trial court’s rulings with respect to the admission or exclusion of evidence, *Brown v. Hamid*, *supra*, 856 S.W.2d at 56, the ruling at issue here hobbled the search for truth and meets every incantation of the test for an abuse of trial court discretion: it defies the logic of the circumstance, is sufficiently unreasonable to shock one’s conscience, and is wrong enough to demonstrate a lack of careful consideration. See *Teets v. American Family Mutual Insurance Co*, *supra*, 272 S.W.3d at 468.

## CONCLUSION

This Court should reverse the judgment of the Circuit Court and remand the case with instructions to grant the plaintiffs a new trial and to permit them to introduce evidence of Dr. Kardesch's untruthful answer to a discovery interrogatory.



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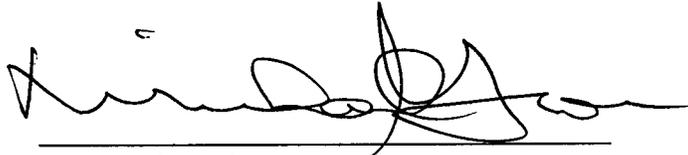
Attorney for the Appellants

## CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Mo.R.Civ.P. 84.06 and Local Rule 360 of this Court. The brief contains 6,489 words as determined by the software application Microsoft Word for Macintosh 2008. The computer disk filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

Two copies of this brief and one compact disk bearing an electronic copy of the brief were sent by first class mail on March 5, 2009, to:

David Paul Ellington  
1010 Market Street, 20th Floor  
St. Louis, Missouri 63101

A handwritten signature in black ink, appearing to read "Michael A. Gross", written over a horizontal line.

Michael A. Gross

## APPENDIX

Judgment of the Circuit Court	A-1
Order Ruling on Plaintiffs' Motion for a New Trial	A-2



IN THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI  
21st JUDICIAL CIRCUIT

**FILED**

FEB 13 2008

JOAN M. GILMER  
CLERK, ST. LOUIS COUNTY

Elizabeth A. Mitchell, et al	)	
Plaintiff(s),	)	February 13, 2008
	)	
VS.	)	Cause No. 2107CC-00327
	)	
	)	
St. Joseph's Hospital, et al.,	)	Division 12
Defendant(s).	)	

**JUDGMENT**

This action came on for trial before the Court and a jury, the parties having appeared by their respective attorneys, the issues having been duly tried, and the jury having duly rendered its verdict for the defendant as follows:

On the claim of plaintiffs, Elizabeth Mitchell, Rachel Mitchell and Justin Mitchell, for the wrongful death against Milton Kardesch, M.D., we, the undersigned jurors, find in favor of Defendant, Milton Kardesch, M.D.

It is therefore Ordered and Adjudged that the plaintiffs Elizabeth Mitchell, Rachel Mitchell and Justin Mitchell take nothing by reason of this cause of action, that the defendant Milton Kardesch, M.D. be discharged and go hence as to said cause of action, that the costs of this proceeding be paid by plaintiff, and that execution issue therefor.

**SO ORDERED:**

  
 \_\_\_\_\_  
 Steven H. Goldman  
 Circuit Judge, Division 12

DONE this 13 day of February, 2008.



