SC101121

IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF THE CUSTODY OF S.H.P. and A.L.P., Minors:

ALICIA SMITH,

Respondent,

vs.

LORA MARTINEZ,

Appellant.

On Appeal from the Circuit Court of Jackson County
Honorable Kenneth R. Garrett III, Circuit Judge
Case No. 2116-FC08728
Honorable Sherrill L. Rosen, Family Court Commissioner
Case No. 2116-FC08728-01

SUBSTITUTE REPLY BRIEF OF THE APPELLANT

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A. Summary of Mother's opening brief

Lora Martinez ("Mother") appeals from a judgment – labeled a "consent judgment" – granting Alicia Smith third-party visitation of the two children ("the Children") that Mother previously adopted (D24), as well as a judgment granting Ms. Smith's family access motion to enforce that judgment (WD87522 D4).

In her opening brief, Mother explained that Ms. Smith, the Children's former guardian, lacked standing to seek third-party visitation after Mother adopted the Children, so the judgment failed for this reason, regardless of consent (Substitute Brief of the Appellant ["Aplt.Br."] 29-52). Alternatively, she explained that she did not consent to the judgment, so the trial court could not enter it, and the trial court's finding otherwise was either a misapplication of law (Aplt.Br. 53-61) or lacked substantial evidence in its support (Aplt.Br. 62-72). Either way, because the judgment was invalid, the family access judgment failed, too (Aplt.Br. 73-78).

B. Ms. Smith failed to file a substitute brief, making her Court of Appeals brief of little utility in this Court.

In this Court, Mother filed a substitute brief of the appellant, as Rule 83.08(b) allows. But Ms. Smith did not file a substitute brief in response, making her brief filed in the Court of Appeals her brief in this Court. (Mother notes that Ms. Smith also failed to file suggestions in opposition to her application for transfer as this Court had requested of Ms. Smith.)

While Mother's substitute brief does "not alter the basis of any claim that was raised in the court of appeals brief," as Rule 83.08(b) requires, it is

still not precisely the same as the brief she filed in the Court of Appeals. Her statement of facts and argument section are lengthier and more detailed than they were in the Court of Appeals. And her arguments are fleshed out for this Court's role of reexamining and clarifying the law and answering questions of statewide importance, as opposed to the Court of Appeals' role of ensuring the law's application.

Because of this, Ms. Smith's Court of Appeals response brief, which Mother will explain suffers from its own deficiencies, is of essentially no utility in responding to Mother's substitute brief in this Court. Its page citations and specific quotations and responses are to a brief that under Rule 83.08(b) does not exist anymore. But Mother will offer this short reply nonetheless.

C. Reply as to facts

Ms. Smith initially objects to Mother's statement of facts as not being a "fair and concise statement of the facts relevant to the questions presented" under Rule 84.04(c), arguing it "obscures, rather than affords 'an immediate, accurate, complete and unbiased understanding of the facts of the case'" (Brief of the Respondent ["Resp.Br."] 6) (citation omitted). This is not so.

1. Mother's statement of facts does not make any argumentative or conclusory statements.

As an example, Ms. Smith says Mother "falsely indicates that the court entered the visitation judgment as a consent judgment without the consent and agreement of both parties" (Resp.Br. 7) (citing Mother's "overview" section, now on Aplt.Br. 12).

The paragraph Ms. Smith cites contains no such assertion. Mother provided a non-argumentative summary for the Court (Aplt.Br. 12), on which she then expanded in the remainder of the statement of facts (Aplt.Br. 12-23). At no point in Mother's statement of facts did she argue that either of the trial court's judgments were incorrect or unsupported by evidence. *That* would have been argumentative and demonstrate a failure to comply with Rule 84.04(c). *Jones v. Buck*, 400 S.W.3d 911, 915 (Mo. App. 2013).

Instead, Mother merely recounted that Ms. Smith's counsel had e-mailed the trial court a Microsoft Word version of a proposed judgment (Aplt.Br. 17). The court requested confirmation from all parties that this proposed judgment was the "final product" for it to sign (Aplt.Br. 17). And Mother replied to the email stating there were several problems with the joint stipulation, she had requested changes to address those problems but had not heard back from either Ms. Smith or the guardian ad litem, and that she would like to seek to have the joint stipulation set aside (Aplt.Br. 17-18). The trial court then arranged for a teleconference to discuss the settlement, after which Ms. Smith's counsel e-mailed the court requesting the proposed judgment be entered while acknowledging that "[Mother] is copied on this email as well, and she does not approve the judgment." (Aplt.Br. 18).

This is a fair and concise statement of the relevant facts concerning the questions Mother presented in her brief. The mere fact that Ms. Smith drew a logical conclusion based on those facts – indeed, *the* logical conclusion that Mother did not consent to the judgment – does not make Mother's recollection argumentative.

2. Mother's statement of facts does not omit any relevant evidence.

Additionally, Ms. Smith accuses Mother of:

> omit[ting] key procedural events leading to the court's April 9, 2024 entry of the Judgment and Order of Visitation; inadequately describ[ing] the language and substance of the visitation judgment itself; provid[ing] no information regarding the terms of either the Joint Stipulation for Visitation or the Affidavit of the Petitioner and Respondent Requesting Entry of Judgment of Third Party Visitation … ; and misrepresent[ing] [Mother]'s efforts to retract her own voluntary execution of a joint stipulation to which she is bound.

(Resp.Br. 6).

Ms. Smith is in error. A fair and concise statement of the facts must "afford an immediate, accurate, complete and unbiased understanding of the facts of the case." *Tavacoli v. Div. of Emp't Sec.*, 261 S.W.3d 708, 710 (Mo. App. 2008). Mother did exactly that. Ms. Smith does not identify a single piece of relevant evidence in her favor that Mother omitted (Resp.Br. 5-10). This is because Mother did not "emphasiz[e] facts favorable to [her] and omi[t] facts *essential* to [Ms. Smith]" in her statement of facts. *Watson v. Moore*, 8 S.W.3d 909, 911-12 (Mo. App. 2000) (emphasis added).

The only omissions Ms. Smith asserts were Mother not including the specific terms of the joint stipulation and joint affidavit (Resp.Br. 7-8) or an alleged e-mail exchange between Mother and the guardian ad litem (Resp.7-8). But Ms. Smith is wrong, because Mother included both of these in her statement of facts.

a. Mother properly presented the joint stipulation and joint affidavit.

Mother challenges whether Ms. Smith had standing to bring a third-party visitation claim and, if she did, whether the trial court correctly held that Mother consented to the proposed judgment at the time it was presented to the court (Aplt.Br. 29-72).

In her statement of facts, Mother fully discussed the joint stipulation and joint affidavit (Aplt.Br. 15-16). She also included them in the record and in her appendix (D20; D23; App. A16-27) and cited them repeatedly. She certainly never concealed them from review, as Ms. Smith suggests. To the contrary, they are front and center.

b. The purported e-mail exchange Ms. Smith attached to her unverified opposition to Mother's post-judgment motion is not evidence and supports Mother's position in any case.

Mother also did not omit the e-mail exchange Ms. Smith cites (D30; D31; D32) from her statement of facts, which is irrelevant in any case.

First, the e-mail exchange at issue merely purported to be Mother agreeing to the joint stipulation and affidavit, which Mother discussed in her statement of facts (Aplt.Br. 22). Mother conceded in her opening brief that she did agree to and sign the joint stipulation and affidavit (Aplt.Br. 15-16). She did not omit anything material.

Second, in any case, the e-mails are unverified materials Ms. Smith simply attached to her opposition to Mother's post-judgment motion below, without any verification or affidavit, making them not evidence under the law of Missouri.

"Allegations contained in a motion … that include factual matters outside of the record are not self-proving," even when made by an attorney. *Holmes v. Union Pac. R.R. Co.*, 617 S.W.3d 853, 861 (Mo. banc 2021) (attorney's failure to include affidavit meant allegations in motion were unsubstantiated). Similarly, "[e]xhibits attached to motions filed with the trial court are not evidence and are not self-proving." *Ryan v. Raytown Dodge Co.*, 296 S.W.3d 471, 473 (Mo. App. 2009).

To the contrary, attorneys must present sworn evidence like everyone else, and an attorney's arguments are not evidence. *Est. of Bell*, 292 S.W.3d 920, 926 (Mo. App. 2009) (reversing trial court's decision predicated on unsworn argument by lawyer). Therefore, Mother did not omit any "key procedural events leading to the court's" judgment by failing to detail the e-mails' text, which appears to be Ms. Smith's gripe (Resp.Br. 6), because the e-mails Ms. Smith cites are not legally evidence. Conversely, Mother's post-judgment motion that contained her allegations about non-consent was verified under oath, and the e-mails she cited in her statement of facts were attached to that verified motion and similarly verified (D25 p. 14; D27).

Second, as Mother indicated in her statement of facts (Aplt.Br. 22), the e-mail exchange, even if true, does not show Mother somehow *did* consent to the judgment, but if anything supports Mother's argument (D30; D31; D32).

The first one shows Mother agreed to sign the joint stipulation (D30). Mother conceded she did so (Aplt.Br. 15) (citing D20 pp. 4-6). The second one just contains a copy of the joint stipulation (D31), which Mother already produced and included in her appendix (D20 pp. 4-6). The final one shows

Mother *not* agreeing to the proposed judgment (D32). That supports Mother, not Ms. Smith, as Mother explained in her brief – citing a verified e-mail from Ms. Smith's counsel – that in the e-mail in which Ms. Smith's counsel sent the proposed judgment to the court, she acknowledged Mother "does not approve the judgment" (Aplt.Br. 17) (citing D27 p. 2)).

Mother's statement of facts fully, fairly, and concisely presented the facts relevant to the entire story of this case and the entry of the trial court's judgment. In a matter-of-fact, non-argumentative, and non-conclusory form, Mother included *all* the evidence, while stating whose evidence it was, what form it took, and how the trial court resolved that evidence. Her statement is immediate, accurate, complete, unbiased, and without argument. It is entirely proper.

D. Mother is aggrieved and has standing to appeal to challenge whether she agreed to the alleged "consent judgment" below and also whether Ms. Smith had standing to sue, which she challenged at all times below and which cannot be procured by agreement.

In her opening brief, Mother presented two general species of argument challenging the trial court's "consent judgment" awarding Ms. Smith third-party visitation.

First, she explained that the trial court misapplied the law in concluding that from the facts it found, Ms. Smith had standing to seek third-party visitation after Mother adopted the Children (Aplt.Br. 29-52). As part of this, she explained that even if she somehow had consented to the judgment, this would not preclude her from appealing it and challenging Ms. Smith's standing to bring her third-party visitation claim to begin with

(Aplt.Br. 49-52). This is because standing cannot be waived and may be raised at any time, nor could Ms. Smith obtain standing through judicial estoppel or waiver, because a court cannot obtain jurisdiction over a claim that lacked standing in the first place (Aplt.Br. 49-52).

Second, and alternatively, Mother challenged the trial court's conclusion that she *had* consented to the supposed "consent judgment" in the first place (Aplt.Br. 53-72). She argued this both misapplied the law (Aplt.Br. 53-61) and lacked substantial evidence in its support (Aplt.Br. 62-72).

Mother explained this was because the only evidence before the trial court was that she never actually consented to the judgment, as its terms remained in dispute at the time Ms. Smith's counsel presented the judgment to the court (Aplt.Br. 53-72). She cited decisions holding that a settlement agreement cannot be enforced if the terms remain in dispute at the time the agreement is presented to the trial court. *See Reynolds v. Reynolds*, 109 S.W.3d 258 (Mo. App. 2003); *O'Neal v. O'Neal*, 673 S.W.2d 126 (Mo. App. 1984); and *Wakili v. Wakili*, 918 S.W.2d 332 (Mo. App. 1996) (Aplt.Br. 55-57). Here, all parties, including the trial court itself, were aware that Mother did not consent to the proposed judgment before the court signed and entered it as a "consent judgment" (Aplt.Br. 57-61, 66-72). Therefore, if this Court disagrees with her standing argument, Mother asked the Court to reverse the judgment and remand the case for trial (Aplt.Br. 61, 72).

In response, Ms. Smith initially argues Mother was not aggrieved by the trial court's judgment under § 512.020, R.S.Mo., and therefore lacks

standing or authority to appeal, *because* the trial court's judgment was a "consent judgment" (Resp.Br. 10-13). This is in error.

A party is aggrieved "when the judgment operates prejudicially and directly on [her] personal or property rights or interests." *Riegel v. Jungerman*, 626 S.W.3d 300, 308 (Mo. App. 2021) (citation omitted). And a "party who has not been aggrieved by a judgment has no standing to appeal." *Id*.

Ms. Smith argues Mother is not aggrieved because the parties entered into a joint stipulation for visitation and executed a joint affidavit requesting a judgment for third-party visitation (Resp.Br. 12).

At the outset, it bears note that Mother's entire second and third points in her opening brief explain why she *did not* consent to the judgment, despite the joint stipulation and joint affidavit (Aplt.Br. 53-72).

Mother cited similar decisions including *Wakili*, in which the appellate court held a separation agreement between husband and wife was never enforceable because the parties were not in agreement when the proposed settlement was presented to the trial court. 918 S.W.2d at 339. The wife had written a letter to the court stating she wished to rescind the agreement before it was presented to the court. *Id*. And because there was no question that the parties did not "jointly, while in agreement, come before the court and present their proposed settlement for the court's approval," the agreement was deemed unenforceable. *Id*.

Here, Mother also communicated to the trial court through written correspondence that she wished to rescind the joint stipulation because they

were no longer in agreement (D27 p. 4). She did this before the judgment the parties' affidavit mentioned was formally presented to the court because she voiced her dispute when the proposed judgment was not yet the "final product" (D27 p. 4). And all parties were aware that Mother disputed the terms before the judgment could be signed and entered (D27 p. 2). And the judgment is replete with items not in either the joint stipulation or affidavit (Aplt.Br. 58-60).

Despite arguing that Mother is not aggrieved because she *did* consent to the judgment, Ms. Smith never addresses *Wakili* or any of the other authorities Mother cited in her second and third points. Indeed, she does not respond to Mother's second or third points at all. Instead, she only acknowledges them in one abrupt sentence at the conclusion of her brief, stating that "[Mother's] remaining arguments misstate the law in Missouri and warrant no consideration by this Court" (Resp.Br. 14). She offers no explanation on *how* Mother misstates the law in her second or third points or what the law of Missouri actually is.[1] Instead, she makes a bald assertion with no substance behind it.

The few authorities Ms. Smith cites for her argument that Mother is not aggrieved are entirely inapposite.

Ms. Smith first cites *Stucker v. Stucker*, 558 S.W.3d 119, 121 (Mo. App. 2018) (Resp.Br. 10, 12), in which a father attempted to appeal a consent

[1] Ms. Smith's brief in the Court of Appeals was a slapdash document filed at 1:00 a.m. the day after it was due, ultimately with leave to file out of time despite having no further extensions. While it is only 15 pages long, its table of authorities (Resp.Br. 3) appears to be from a different brief, citing decisions the brief does not cite and on pages upward of 21 that do not exist.

judgment in a dissolution case. In *Stucker*, the trial court held a bench trial on the parties' cross-petitions for dissolution of marriage and then entered a judgment. *Id*. The mother then moved to reopen the trial for additional evidence regarding certain tax consequences relating to the judgment, which the court granted. *Id*. Before the second day of trial, the parties entered into and filed a stipulation for the entry of a second amended judgment they had filed by interlineation. *Id*. The trial court then "cancelled the scheduled bench trial and entered the stipulated Second Amended Judgment." *Id*. After this, the "[f]ather's only subsequent filing was his notice of appeal, by which he [then attempted] to dispute the validity of the Second Amended Judgment's custody and child support determinations to which he stipulated." *Id*.

Unlike Mother here, at no point in *Stucker* did the father attempt to dispute the terms of the stipulation *before* the court entered the judgment or file a post-judgment motion doing so. *Id*. at 121-22. To the contrary, the Court of Appeals concluded the record demonstrated the only time the father disputed the validity of the judgment was after he filed his notice of appeal. *Id*.

Here, unlike the father in in *Stucker*, while Mother may have signed a joint stipulation and joint affidavit requesting a judgment, her point is that she signed them *before* the proposed judgment had been drafted and presented to the court (D27 p. 6). And then when the proposed judgment was circulated, Mother stated she did not agree to its terms (D27 p. 4). The record plainly indicates that all parties, including the trial court, were aware

that Mother refused to agree to the proposed judgment before the court signed it (D27 p. 2). Further, when the trial court did issue the judgment the other parties put before it, Mother filed a post-judgment motion explaining both why Ms. Smith lacked standing, requesting dismissal, and why she did not consent to the judgment, requesting a new trial (D25). *Stucker* is entirely inapposite.

Ms. Smith also relies on *Chatman v. Chatman*, 673 S.W.3d 528 (Mo. App. 2023) (Resp.Br. 12). There, a husband and wife submitted the trial court a property settlement and agreed judgment on the same day. *Id*. at 529. The wife then appealed, but she admitted the judgment was entered by the parties' consent. *Id*. at 530. The Court of Appeals held that wife waived her right to appeal the judgment because it was entered on her request. *Id.* at 531.

Here, unlike in *Chatman*, the stipulation and judgment were not submitted all at once. The guardian ad litem originally notified the court that the parties came to a settlement on February 6, 2024 (D27 p. 6). But a proposed judgment had not yet been reviewed by all the parties or submitted to the court (D27 p. 6). Ms. Smith's counsel e-mailed the court a proposed judgment the next day (D27 p. 5) but when the court requested confirmation that the proposed judgment was the "final product" for it to sign (D27 p. 4), Mother disputed this (D27 p. 4). The parties then had a teleconference and Ms. Smith's counsel e-mailed the court following the call and requested the court enter the proposed judgment while acknowledging that Mother did not

agree to it (D27 p. 2). And again, the judgment is replete with items not in either the joint stipulation or affidavit (Aplt.Br. 58-60).

Plainly, unlike in *Stucker* or *Chatman*, but as in *Wakili* and the other authorities Mother cited in her second and third points, Mother is aggrieved because she timely and properly challenged the entry of the judgment below as a "consent judgment" before its entry, did so again in a post-judgment motion, and now does so on appeal. Ms. Smith's only response to her argument is to play "nothing to see here" and offer one line at the end of her brief.

Moreover, even if this Court were to disagree with Mother's second and third points – themselves alternatives – and hold there was a valid agreement between the parties at the time the proposed judgment was presented to the trial court, Ms. Smith offers no argument showing how that would make Mother not aggrieved as to Ms. Smith's standing to sue in the first place. As Mother explained in her opening brief, her standing challenge is still proper (Aplt.Br. 35-38), because "[s]tanding cannot be waived, may be raised at any time by the parties, and may even be addressed *sua sponte* by the trial court or an appellate court." *Charles v. Oak Park Neighborhood Ass'n*, 685 S.W.3d 519, 529 (Mo. App. 2023) (citation omitted) (holding party's agreement to entry of judgment did not preclude later challenge to standing).

The law of Missouri is that despite the trial court calling the judgment a "consent judgment," Mother is aggrieved as to her challenges to whether Ms. Smith had standing to sue in the first place, and as to whether she actually agreed to the judgment that the trial court entered.

E. Ms. Smith lacked standing to seek third-party visitation under § 452.375.5, R.S.Mo., after Mother adopted the Children, Ms. Smith's request for adoption was denied, and Ms. Smith's guardianship was terminated.

In her first point in her opening brief, the only point to which Ms. Smith actually responds, Mother explained that the trial court misapplied the law in concluding Ms. Smith had standing to seek third-party visitation after Mother adopted the Children (Aplt.Br. 29-52).

This is because under § 452.375.5, R.S.Mo., third parties only have a right to petition for custody or visitation with a child "*prior to*" issuance of a final custody determination (Aplt.Br. 31-32) (emphasis added).

Before 2012, Missouri law was uniform that this meant the statute did not provide an independent action for third-party custody, but instead required either being named as a party in an ongoing custody proceeding or intervening in it (Aplt.Br. 32-34). Then, in 2012, in *In re T.Q.L.*, 386 S.W.3d 135 (Mo. banc 2012), this Court suggested that in some circumstances there could be an independent action for third-party custody or visitation under § 425.375.5 (Aplt.Br. 34-35).

But all post-*T.Q.L.* decisions concerning that supposed independent action have involved only either (a) open questions of parentage with no previous litigation of parentage or custody or (b) ongoing custody proceedings (Aplt.Br. 38-39). And in the years since *T.Q.L.*, in *Hanson v. Carroll*, 527 S.W.3d 849 (Mo. banc 2017), and a series of decisions involving adoptions, particularly *In re J.D.S.*, 482 S.W.3d 431, 438 (Mo. App. 2016), this Court and the Court of Appeals, respectively, held that *after* a custody determination, including an adoption (which per § 453.090.3, R.S.Mo., awards custody to the

adoptive parent), there is no standing under § 452.375.5 to seek third-party custody (Aplt.Br. 39-45).

Mother asked this Court to clarify this law by holding either (1) overruling *T.Q.L.* and holding that by its plain language, § 452.375.5(5) does not provide an independent third-party custody action; or (2) that the independent action is limited to cases in which there has been no prior parentage or custody determination, including by dissolution, paternity, guardianship, or adoption (Aplt.Br. 45-47).

Either way, however, § 452.375.5 did not give Ms. Smith a right to seek custody or visitation after she lost the adoption case (Aplt.Br. 47-49). Notably, *J.D.S.* is directly on point (Aplt.Br. 47-48). Just like the third parties there who also were unsuccessful in an adoption – and like other parties who sought to bring claims under § 452.375.5 *in* adoption cases in *In re Adoption of R.S.*, 231 S.W.3d 826, 829 (Mo. App. 2007), *In re Adoption of C.T.P.*, 452 S.W.3d 705, 713 (Mo. App. 2014), *In re Adoption of E.N.C.*, 458 S.W.3d 387, 402 (Mo. App. 2014), which the Court of Appeals in *J.D.S.* followed – Ms. Smith equally lacked standing to bring a third-party visitation claim after Mother had adopted the Children (Aplt.Br. 47-49).

In her response, which spans about a page and does not actually discuss any of the decisions Mother cited, Ms. Smith argues "[n]one of the cases cited in [Mother's] brief are factually analogous to the circumstances of the instant appeal; nor do they stand for the proposition that following an adoption action, a third party lacks standing to bring an independent action for visitation or third-party custody" (Resp.Br. 13-14). (Of course, Mother's

Court of Appeals brief to which Ms. Smith was responding was not the same as Mother's substitute brief in this Court.)

Ms. Smith must not actually have read the decisions Mother cited. The Court of Appeals' decision in *J.D.S.*, which fits neatly with this Court's decision in *Hanson* and the pre-*T.Q.L.* uniform law, was in exactly the same posture: an independent action citing § 452.375.5 brought in a *separate* case by the unsuccessful party to an adoption *after* the adoption was over. 482 S.W.3d at 434. But the Court of Appeals held this was a distinction without a difference because the petitioners still lacked standing, and it reversed an order of third-party visitation entered by default and ordered dismissal of the claim. 482 S.W.3d at 443-44. The underlying action was an adoption case, and relying on *R.S.* and *E.N.C.*, the Court of Appeals held a petition under § 452.375.5 was not "intended to be used to grant a party right to visitation in an adoption case." *Id.* at 439 (quoting *R.S.*, 231 S.W.3d at 830).

J.D.S. has not been abrogated by this Court or the Court of Appeals. Under it, Ms. Smith equally lacks standing to bring a § 452.375.5 independent action after an adoption decision.

The only distinction Ms. Smith seeks to draw with *J.D.S.* and Mother's other authorities is that they "all involved grandparents of parents whose rights were abrogated in an adoption proceeding," and "[b]ecause the statutory abrogation extended to these grandparents when their children's rights were taken away, they lacked standing to seek visitation as interested third parties" (Resp.Br. 14).

But that was not the holding of any of these decisions. Instead, it could have been any third party who was held not to have standing. The point is that *no one* has standing to seek third-party custody or visitation of a child in an independent action after an adoption case, just as no one has standing to seek third-party custody or visitation after a guardianship has been issued, as this Court held in *Hanson*. A grandparent whose rights were abrogated is a third party, no different than Ms. Smith who used to be the Children's guardian but no longer is by virtue of their adoption by Mother.

Indeed, in recounting "all" the decisions Mother cited, Ms. Smith conspicuously omits *C.T.P.*, 452 S.W.3d at 705, which Mother discussed in her opening brief (Aplt.Br. 36-38, 41-44). There, the third party *was not* a former grandparent, but instead was the mother's former same-sex partner. *Id.* at 707. Citing many of the decisions Mother cited in her first point, the Court of Appeals still held § 452.375.5 did not "create[e] a legal interest [she] is entitled to assert." *Id.* at 714. Ms. Smith equally lacks that same legal interest. Indeed, the party who was held not to have an independent cause of action under § 452.375.5 in *White v. White*, 293 S.W.3d 1, 18-21 (Mo. App. 2009), which Mother also discussed in her opening brief, was also the mother's former same-sex paramour, and so was just a third party like any other, too (Aplt.Br. 32-34).

Ms. Smith also cites a footnote in the opinion affirming Mother's adoption of the Children, *In re S.H.P.*, in which the Court of Appeals stated, "Once the adoption is complete, a person may seek to obtain third-party child custody and visitation determinations *authorized by law*." 638 S.W.3d 524,

532 n.8 (Mo. App. 2021) (emphasis added). (Ms. Smith does not disclose that this was in a footnote (Resp.Br. 13).)

Ms. Smith incorrectly appears to believe this was tacit consent for her to her third-party visitation claim to succeed. The statement that a person may only seek third-party visitation if the determination as "authorized by law" cited *C.T.P.* *Id.* (citing 452 S.W.3d at 717). But in that part of *C.T.P.*, the Court explained at length that post-adoption, "any future court will remain free to make third-party child custody and visitation determinations involving the Child *in a proceeding where such determinations are authorized by law*." 452 S.W.3d at 717 (emphasis added).

The problem here is that, as in *Hanson* and *J.D.S.*, the proceeding below – a supposed independent action by a third party who was the unsuccessful party in an adoption – was *not* authorized by law to determine third-party custody or visitation. What the Court of Appeals held in *S.H.P.* and *C.T.P.* is a tautology: a court may award third-party custody or visitation when the law authorizes it to do so. It is not a holding that *Ms. Smith* has standing to bring such an action *now*, *independently*. And in *Hanson* and *J.D.S.*, this Court and the Court of Appeals, respectively, directly held to the contrary. Ms. Smith has no answer to that.

Just as in *J.D.S.*, Ms. Smith lacked standing to request third-party visitation after the parties' adoption case. As a matter of law, the trial court had to dismiss Ms. Smith's petition. It erred in refusing to do so. As in *Hanson* and *J.D.S.*, this Court should reverse the judgment and remand the case with instructions to dismiss Ms. Smith's petition for lack of standing.

F. Ms. Smith fails to respond to Mother's Points II, III, or IV.

As Mother mentioned above at p. 14, Ms. Smith's only response to her second, third, and fourth points is a single line at the end of her brief: that Mother's "remaining arguments misstate the law in Missouri and warrant no consideration by this Court" (Resp.Br. 14).

That is no response at all. Certainly, a respondent on appeal is well within her rights not to file a brief and to rely on the presumption of a correct judgment below. *State ex rel. Neal v. Karl*, 627 S.W.2d 913, 914 (Mo. App. 1982). But that is not what Ms. Smith does. Instead, she makes a blanket assertion that Mother misstates the law without identifying how or why or providing any clarification as to what she believes the actual law is (Resp.Br. 14).

Ms. Smith's one-line proposition is an "analytically insufficient" "conclusory statement." *LaBranche v. Cir. Ct. of Jackson Cnty.*, 703 S.W.3d 226, 238 (Mo. App. 2024) (citation omitted). It does a disservice to the parties and the Court.

Conclusion

The Court should reverse the trial court's judgment granting Ms. Smith third-party visitation and remand this case with instructions to dismiss the action. Alternatively, the Court should reverse the third-party visitation judgment and remand this case for trial. And either way, the Court should reverse the trial court's family access judgment.

Respectfully submitted,

Jonathan Sternberg, Attorney, P.C.

by /s/Jonathan Sternberg

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Certificate of Compliance

I certify that I prepared this brief using Microsoft Word for Office 365 in 13-point, Century Schoolbook font, which is not smaller than 13-point, Times New Roman font. I further certify that this brief complies with the word limitations of Rule 84.06(b), as this brief contains 5,623 words.

/s/Jonathan Sternberg
Attorney

Certificate of Service

I certify that I signed the original of this brief, which is being maintained by Jonathan Sternberg, Attorney, P.C. per Rule 55.03(a), and that on August 12, 2025, I filed a true and accurate Adobe PDF copy of this substitute reply brief of the appellant via the Court's electronic filing system, which notified the following of that filing:

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