



APPLICATION OF: Robin (Rob) J. Aiken
FOR CIRCUIT OR ASSOCIATE CIRCUIT JUDGE
31st CIRCUIT JUDICIAL COMMISSION
GREENE COUNTY, MISSOURI (as adopted June 8, 2009)

RESPONSES TO THESE QUESTIONS WILL BE MADE PUBLIC IF THE APPLICANT IS NOMINATED.

NOTE – Please submit seven (7) paper copies with attachments.

- 1. Present principal occupation and title: Solo Practitioner**
- 2. What is your age? 58**
- 3. (a) How many years have you been a citizen of the United States? 58 years.**
(b) How long have you been a Greene County resident? 58 years.
(c) How many consecutive years immediately preceding your application have you been a qualified voter of Missouri? 40 years.
- 4. State the date you were admitted to The Missouri Bar and whether your license is in good standing. If not, explain in detail. September 19, 1980. Good standing.**
- 5. List any other states, courts, or agencies in which you are licensed as an attorney.**

Missouri Bar admission: 9-19-80 to present.
Federal Bar: 9-81 to present
Eighth Cir. Ct. Appeals 1983 to present.
Missouri Supreme Court 1983 to present

- 6. (a) State the name and address of all colleges and universities attended, other than law school, together with the dates and degrees received.**

Wooster College, Wooster, Ohio	1972	No degree
University of Missouri	1973	
Drury College, Springfield, MO	1974-1977	B.A.

- (b) List/describe any college or university activities, scholastic achievements and other awards or honors you think are relevant to the commission's decision. Drury College: Graduated magna cum laude; departmental honors, Business Administration; top speaker, National Invitational Round Robin; third place, Delta Sigma Rho Tau Kappa Alpha National Debate Tournament; outstanding Senior Debater Award.**

- (c) Attach a certified copy of college, university and law school transcripts Here, or have the institutions send transcripts direct to the contact person.**

See attached.

7. (a) State the name and address of all law schools attended together with the dates and degrees received.

University of Missouri, Kansas City, MO 1977-80 Juris Doctorate

- (b) List/describe any law school activities, scholastic achievements and other Awards or honors you think are relevant to the commission's decision.

Dean's Honor list; ranked number one in class in Trial Advocacy;
Phi Alpha Delta Legal Fraternity.

8. State, in chronological order (starting with the earliest employment) (a) significant non-law-related employment prior to law school and (b) all employment from the beginning of law school to the present. To the extent reasonably available to you, include the name and address of each employer and the dates of employment, and for legal employment, describe the positions you have held, e.g., associate, partner, law clerk, general counsel.

Kenworth Truck Co., Kansas City, MO 1977-1979
Woolsey, Fisher, Whitaker & Wilson, Springfield, MO 1978, Law Clerk
Greene Co. Prosecuting Attorney's Office, Springfield, MO, 1980-1983
Assistant Prosecutor
United States Atty.'s Office for the Western Dist. of Mo., 1983-1989
Assistant U.S. Attorney
Bacon, Lewis and Aiken, partner 1989-1995
Solo Practitioner 1995-present.

9. If you were a student at any school from which you were suspended, placed on probation, or expelled by school authorities, for any reason, describe the circumstances.

None

10. Describe the nature of your experience in trial and appellate courts and explain how they demonstrate the quality of your legal work. (*You either may take as much space as you need here or attach your response on separate sheets*). *Include in your response:*

a) Appellate Experience: Please include a representative list of cases you have briefed and/or argued (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court and, if published, the citation; identify the client(s) you represented and opposing counsel; give a one-paragraph description of the case and your role.

See attached.

b) Trial-Level Experience: Please include a representative list of cases and/or administrative hearings you have handled (if you are a judge, include representative cases from your practice prior to your judicial appointment) including, to the extent reasonably available to you, the style, date, and court; identify who you represented and opposing counsel; state whether the case was disposed of following a jury trial, bench trial or at what other state; give a one-paragraph description of the case and your role.

See attached.

a) **Judicial Experience:** If you are a judge, commissioner, or are serving or have served in other judicial capacity, please describe the nature and extent of your judicial responsibilities, including the dates you have served as a judge at each level, the types of dockets you have handled, and any special expertise you have developed that you believe is relevant to your qualifications for the position for which you are applying. N/A

11. (a) Describe any additional legal experience that you believe may be relevant to the Commission's decision, including clients by category that you have represented.

(b) Describe any non-legal experience that you believe may be relevant to the commission's decision.

I have been active in the Boy Scouts of America, both as an Assistant Scout Master and committee member of Ozarks Trail Council. I coached youth soccer for a number of years and served on the Board for Lake County Soccer.

My involvement in community activities has largely been driven by my involvement with my three sons. My three sons have been actively engaged in Troop 1 of the Ozark Trails Council of Boy Scouts of America and Troop 24 of the Boys Scouts of America. My oldest son, Taylor, and my youngest son, Ben, both achieved rank of Eagle Scout.

I have spent a number of years providing service as an assistant Scout Master and have organized many successful backpacking and floating events. I have been the adult advisor for an eighty-mile trek at Philmont and also a fifty-mile trek at Philmont with two of my sons and other scouts. Additionally, I served as an adult advisor on two trips of sailing adventures for Scouts in the Bahamas.

In addition to Scouting, my three sons have always been actively engaged in all sports, including soccer, basketball, and baseball. For many years I coached teams in which my sons participated and coached the middle school soccer program at Greenwood Junior High for approximately ten years. At one point, when all three sons were actively engaged in sports, I coached or attended approximately 245 games in one year.

I served on the Ozark Trails Council Boy Scouts of America on the Executive Board of Directors. I have also served on the Lake Country Soccer Board of Directors and am a member of First and Calvary Presbyterian Church.

12. List all bar associations and other professional societies of which you are a member, with any offices held and dates.

Missouri Bar Association, 9-19-80 to present;
Federal Bar: 9-81 to present;
Eighth Circuit Court of Appeals – 1983 to present;
Missouri Supreme Court – 1983 to present.

13. (a) List any professional articles or books authored by you that have been published or any special recognition or award of a professional nature you have received.

(b) List any other articles, reports, letters to the editor, editorial pieces, or other material authored by you that have been published within the last five (5) years.

14. List all professional, business, fraternal, scholarly, civic, charitable, or other organizations in which you have significantly participated. Provide dates of membership or participation, and indicate any office you held. Include clubs, working groups, advisory or editorial boards, panels, committees, conferences, or publications.
15. Do you now hold or have you ever held an elective or an appointive public office or position? If yes, provide details.

No.
16. Please list any client(s) or organizations(s) for which you performed lobbying activities and describe the lobbying activities you performed on behalf of such client(s) or organization(s).

N/A.
17. Provide the branches and dates of (a) military service or (b) other public Service not otherwise disclosed in this application. If discharged from the military, state whether the discharge was other than honorable. N/A.
18. State whether you are able, with or without a reasonable accommodation, to perform the essential functions of being a trial judge.

Yes.
19. Were you ever refused admission to the bar of Missouri or the bar of another state or the federal courts? If yes, provide details.

No.
20. Have you ever been disciplined, admonished or cited for breach of ethics or professional conduct by the Supreme Court of Missouri or by any court or Bar association or committee thereof? If yes, provide details.

No.
21. If you are or were a member of the judiciary of the State of Missouri, please state:
 - a) Whether an order of discipline ever has been entered against you by the Supreme Court of Missouri for breach of the Code of Judicial Conduct or the Canons of Judicial Conduct. If yes, provide details. N/A

- b) Whether a reprimand or admonition ever has been entered against you by the Commission on Retirement, Removal and Discipline for any of the causes specified in Supreme Court Rule 12.07. If yes, provide details.

N/A

22. Have you ever been held in contempt of court? If yes, provide details.

No.

22. Have you ever been sued by a client or been a party to any other litigation, other than as guardian ad litem, plaintiff ad litem, or defendant ad litem? If your answer is yes, state the style of the case, where it was filed, and explain in detail. If you are a judge and you have been sued in your judicial capacity, list only those cases where you are or were other than a nominal party.

No.

23. Have you ever been convicted or received a suspended imposition of sentence for a felony or misdemeanor in state, federal or military court? *(Note that this question does not require that traffic offenses or other infractions be listed.)*

If your answer is yes, state the style of the case, where it was filed, and Explain in detail.

No.

24. Are you delinquent in the payment of any federal, state, county or city taxes? If yes, provide details.

No.

25. You must attach to this application one writing sample of your choice. The only rule, limitation or instruction is that you must indicate whether it was edited by anyone else, and if so, to what degree.

Attached. Not edited.

26. List/describe any additional honors or awards you have received, activities you have performed, or any other information not set out above that demonstrates the quality of your work as an attorney or that you otherwise believe is relevant to the commission's decision.

I received the David Woodruff Community Justice Award for outstanding work in the criminal justice system.

Please list the names of **five** persons whom you will ask to provide letters of reference for you with respect to your judicial qualifications. Do **not** list a reference a judge of the court involved. As to each of the (5) references, **please provide name, title, mailing address, telephone and e-mail address. Please note that it is your responsibility to contact your references** and to see that they send the requested letters in a timely manner and in accordance with the Guidelines for References.

1. Tom Millington
2. Tom Carver
3. Dee Wampler
4. Bob Hammerschmidt
5. Russ Cook

See attached.

APPELLATE EXPERIENCE

1. *United States v. Carter*, 804 F.2d 487 (C.A. 8 (Mo.), 1986). In this case Loren Honecker represented the Appellant (Carter) who was appealing his conviction for murdering a fellow inmate in the weight room with a barbell at the Medical Center for Federal Prisons in Springfield. I represented the United States and as sole counsel tried the case to a jury and handled the appeal. The conviction was affirmed on appeal.

2. *United States v. Schriver*, 838 F.2d 980 (C.A. 8(Mo.), 1988). Appellant appealed his convictions for arson and bombing involving buildings used in interstate commerce. In particular, one count involved the fire bombing of a competitor's bar known as the "Back Forty." The appellant was represented by Robert M. Sweere and I represented the United States as sole counsel in both the jury trial and the appeal.

3. *United States v. Tate*, 821 F.2d 1328 (C.A. 8(Iowa), 1987). Appellant Tate appealed his conviction after receiving life sentences on fourteen counts of federal weapons violations. The weapons violations stemmed from the discovery in his van of machine guns, plastic explosives, hand grenades and other dangerous devices. Mr. Tate was a violent member of the "order" and was also convicted in the murder of a Missouri Highway Patrolman named Jimmie Linegar. Mr. Tate was represented by R. Steven Brown of the federal public defender's office and I represented the United States as sole counsel in both the jury trial and the appeal.

4. *United States v. Mays*, 822 F.2d 793 (C.A. 8(Mo.), 1987). Appellant Mays was represented by Attorney Phillip Moomaw and appealed his conviction for armed bank robbery. I represented the United States as sole counsel, both for the trial and the appeal. Mr. Mays was on the FBI's ten most-wanted list.

In addition to these cases, I have handled both civil and criminal appeals in front of the Eighth Circuit and the Southern District of Missouri.

B. (Trial-level Experience)

As an assistant prosecuting attorney, Greene County, Springfield, Missouri, I was sole counsel in thirty-five felony cases which were tried to juries for offenses including murder, kidnapping, rape, assault, and robbery, receiving guilty verdicts in thirty-four of those jury trials, all of which were affirmed on appeal.

1. *State v. Lafayette Thomas*, 664 S.W. 2d 56, (C.A. (S.D.), 1984). I represented the State; the defendant was represented by Attorney Ty Gaither. This case was tried to a jury and the defendant was found guilty. The State's case was based in part on the dying declaration of the victim. Mr. Thomas poured gasoline on her and ignited it. Mr. Thomas' defense was based on insanity. The examining psychiatrist for the State was called by the defense and gave an opinion that the defendant was insane at the time of the murder.

2. *State v. Timothy Hays*. This was a case involving the murder of a foreign exchange student at Southwest Missouri State University. The victim in that case was lured into a motel room by a female accomplice of Mr. Hays where he was then beaten to death and robbed. I was sole counsel for the State in the jury trial and the defendant was represented by Attorney Richard Bender. The Defendant was found guilty.

3. *State v. James White*, 329 S.W.3d 710. I was sole counsel for Mr. White who was accused of murdering his wife. The shooting involved the discharge of a short-barreled shotgun into Mrs. White's face. The case was prosecuted by Christian County Prosecutor Ron Cleek. Following a jury trial in which I was the sole counsel, Mr. White was convicted of voluntary manslaughter.

As a trial attorney, I have handled over 70 jury trials involving both criminal and civil matters. I have also handled family law and juvenile cases.

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DIVISION

APPEAL NO. SD31766

ROBERT WHYZMUZIS and SARA WHYZMUZIS,
Appellants

v.

PLAZA SHOE STORE, INC., ROBERT O. LEE, BARBARA LEE,
CATHY BELK, AND TIM LEE,

Respondents

RESPONDENTS' BRIEF

Respectively submitted,

Rob J. Aiken

Rob J. Aiken, MBE#29049
3249 East Ridgeview Street
Springfield, Missouri 65804
ATTORNEY FOR RESPONDENTS

Plaza Shoe Store, Inc., Robert O. Lee,
Barbara Lee, Cathy Belk.

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STATEMENT OF FACTS

1. The Parties

Appellant Sara Whyzmuzis owns real property located at 1848 South Glenstone, Springfield, Greene County, Missouri, which is part of a commercial retail area commonly known as the Plaza Shopping Center ("the Property"). LF 303.

Respondent Plaza Shoe Store, Inc. ("Plaza Shoe") is a Missouri corporation in good standing with its principal place of business in Springfield, Greene County, Missouri. LF 303.

Default judgment was taken against Robert Whyzmuzis on November 23, 2009. Robert Whyzmuzis did not appear at trial in person or by attorney. LF 98. Tr. 2:15-25

2. The Lease

In October 2004, Plaza Shoe entered into a commercial lease with Robert and Sara Whyzmuzis. Ex. P-4.

The lease provided in paragraph 3:

Care and Maintenance of Premises. Lessee acknowledges that the premises are in good order and repair, unless otherwise indicated herein. Lessee shall, at his own expense and at all times, maintain the premises in good and safe condition, including plate glass, electrical wiring, plumbing and heating installations and any other system or equipment upon the premises and shall surrender the same, at termination hereof, in as good condition as received, normal wear and tear excepted. Lessee shall be responsible for all repairs required, including the roof, exterior walls, structural foundations and all other items. This is a triple net lease: Lessee is responsible for all repairs and maintenance. Lessee shall also maintain in good condition such portions adjacent to the premises, such as sidewalks, driveways, lawns and shrubbery, which would otherwise be required to be maintained by Lessor.

The lease provided in paragraph 13:

Destruction of Premises. In the event of a partial destruction of the premises during the term hereof, from any cause, Lessee shall forthwith repair the same, provided that such repairs can be made within sixty (60) days under existing governmental laws and regulations, but such partial destruction shall not terminate this lease, except that Lessee shall be entitled to a proportionate reduction of rent while such repairs are being made, based upon the extent to which the making of such repairs shall interfere with the business of Lessee on the premises. If such repairs cannot be made within said sixty (60) days, Lessor, at his option, may make the same within a reasonable time,

this lease continuing in effect with the rent proportionately abated as aforesaid, and in the event that Lessor will not elect to make such repairs which cannot be made within sixty (60) days, this lease may be terminated at the option of either party. In the event that the building in which the demised premises may be situated is destroyed to an extent to not less than one-third of the replacement costs thereof, Lessor may elect to terminate this lease whether the demised premises be injured or not. A total destruction of the building in which the premises may be situated shall terminate this lease.

The term of the lease was for a period of five years commencing October 2004 and terminated September 2009. Ex. P-4.

3. The Constructive Eviction

Plaza Shoe experienced roof leaks in the roof from 2004, at the lease inception, until it vacated the premises. During the initial period of the lease, the leaks were more or less manageable. According to the testimony of manager Cathy Belk, the leaks became much worse following an ice storm which occurred in January 2007. Tr. 327:21-25; Tr. 328: 1-4; Tr. 380: 6-13.

Throughout the lease term, Plaza Shoe made repeated and substantial attempts to maintain and repair the roof but was unable to prevent the roof from leaking because the roof had exceeded its useful life and therefore, could not be repaired and maintained and required total replacement. Ex. D-33, 34, 35, 48; Tr.

242: 6-25; Tr. 288: 4-12; Ex.D-1 Plaza Shoe's expert testified that the roof could not be maintained. Tr. 242:6-25; Tr. 243:1-2; Tr. 246:10-25; Tr. 247:1-13; Tr. 247:14-25.

As a result of the leaks, Plaza Shoe could no longer carry on its business without an unreasonable risk of danger to the health and safety of its customers. Many of Plaza Shoes' customers were elderly or used walkers and the leaks caused the tiled and carpeted areas used by the customers to become slippery. The leaks dripped on customers and caused the ceiling to become moldy. Tr. 296: 21-25; Tr. 297:1-25; Tr. 298: 1-7; Tr. 300: 19-25; Tr. 301: 1-11; Tr. 306: 1-7.

Photographic and video evidence depicted water leaking into the sales floor of Plaza Shoes. Leaks damaged merchandise in Plaza Shoes' storeroom. Ex. D-8, 9.

On February 1, 2007, the heating system of the premises failed and could not be repaired. Weather service records showed that the temperature was below freezing. The uncontroverted evidence was that Plaza Shoes' customers left the store because of how cold it was in the store. The heating and air-conditioning system could no longer be repaired and maintained due to the age of the equipment

and lack of spare parts. Tr. 309: 1-11; Tr. 310: 21-25; Tr. 311:1-3; Ex. D-49; Ex. D-52.

On February 16, 2007, manager Cathy Belk advised by letter, which was received by Sara Whyzmuzis, that the heating and air-conditioning units were not working and needed to be replaced and that the roof needed to be replaced. She further advised Sara Whyzmuzis that Plaza Shoe had maintained the building according to the lease, but maintenance was no longer sufficient to allow them to function as a business. Plaza Shoe received no response. Ex. D-36, Tr. 330:15-16.

On March 1, 2007, manager Cathy Belk again gave notice to Sara and Robert Whyzmuzis by letter that the major heating units could no longer be maintained and that temperatures had been in the teens and employees had to work with their coats on, and further advised that the roof needed to be replaced. She advised that "each time it rains the roof leaks in several places despite our continued efforts to repair the roof at great cost." Ex. D-37.

By letter dated March 2, 2007, Sara Whyzmuzis advised Plaza Shoe that their demand for money regarding the replacement of one heating unit would not be met. Sara Whyzmuzis further demanded that Plaza Shoe repair the roof and replace the heating units expeditiously. Sara Whyzmuzis advised that if they did

not commence repairs within ten (10) days or March 12, 2007, that she would start the eviction process and that Plaza Shoes would have fifty (50) days to vacate the premises. Sara Whyzmuzis advised she would be sending a structural engineer to assess the damage. A structural engineer was not sent to the premises in that time frame. Tr. 335: 14-19, Tr. 80:2-5; Ex. D-38.

Prior to vacating the premises, Plaza Shoe obtained certain estimates for potential replacement of the roof. Plaza Shoes' expert suggested that the cost of properly replacing the roof would be at least \$119,250.00, not including any carpentry work, mechanical HVAC plumbing and electrical work or metal work. Further, that should it be necessary to replace the decking, a condition not knowable until the roof was removed, it would be an additional price at the rate of \$3.25 per square foot for the wood, \$4.35 per square foot for metal, or \$7.00 per square foot for decking, whichever applies. The expert estimated that it could cost as much as \$60,000.00 more for decking repairs. The annual rent for the premises was \$66,000.00 per year. The cost of replacement of the roof alone was estimated at many multiples of the annual rent. Tr. 250: 8-13; Tr. 337:15-19; Tr. 24: 18-22; Ex. D-33.

By letter dated August 23, 2007, Defendants' attorney advised Sara and Robert Whyzmuzis that the roof had been inspected by a roofing contractor and could no longer be repaired or maintained. They were further advised that "the roof was currently leaking such that it is becoming impossible for my clients to conduct business at that location. Attached for your information are photos which show the ceiling and the result of the leaks." Ex. P-28.

By letter dated October 1, 2007, Sara Whyzmuzis demanded that Plaza Shoe withdraw from the premises and return it to a "white-box" condition, that the Plaza Shoe continue to pay rent while returning the building to a "white-box" condition "or expect litigation." Ex. D-40.

After Plaza Shoe vacated the premises, Sara Whyzmuzis had the premises inspected by a HVAC contractor in November 2007. The contractor found: "The current equipment is in great disrepair. Much of it is inoperable and has been out of service for several years. The rest of it is twenty years old or older and in extremely poor condition. Only some or parts of the equipment are operating and there are parts missing on most of the equipment. The duct work is in bad condition and its location is keeping you from gaining valuable floor space. We propose to replace all existing equipment with three new systems with all new

duct work, supplies and returns.” The estimated cost of replacement was \$49,500.00. Ex. D-52.

On October 9, 2007, Sara Whymuzis signed a listing agreement with a realtor to lease the property. As part of the listing agreement, Sara Whyzmuzis agreed that the roof would be replaced and that the space would be put in “white-box” condition. Ex. P-8.

Sara Whyzmuzis admitted that in November 2007 the building could not be rented because no business could be reasonably expected to carry on business without heating and air conditioning and with a leaky roof. Tr. 100:25; Tr. 101:1-19.

On or about October 31, 2007, Plaza Shoe vacated Plaintiffs’ property due to the condition of the premises, specifically its roof and heating and air-conditioning system, and the actions and inactions of the Whyzmuzises. Tr. 352: 2-4; Tr. 353: 5,5; Tr. 314: 7-11.

Appellant presented evidence that she entered into an agreement with a contractor to return the building to a “white-box” condition. The contractor testified that he removed the sheetrock and the ceiling. He charged \$9,000.00 for the demolition of the premises. According to the proposal, the contractor was to be

paid in phases upon completion of the work. Payments in excess of \$57,000 were paid by Sara Whyzmuzis to the contractor at various times through March 10, 2008. Ex. P-17.

Sara Whyzmuzis admitted there was no heating or air conditioning in the vacated space until 2010 because she was in no particular hurry and did not want the warranty to run on any new equipment. Tr. 104: 24-25; Tr. 105: 1,2; Tr. 105:3-14. An additional \$120,000 was spent in 2010 on the reconstruction. As part of the reconstruction, the old partitions were removed and steel beams were put in. Tr. 115: 16-25; Tr. 16-25; Tr. 116:1-22. D-51.

The construction commenced by Sara Whyzmuzis exceeded the sixty (60) day provision in the lease, exceeded the six-month estimate by Sara Whyzmuzis for a suitable time period for the repairs and were not completed until 2010.

Appellant's work in returning the building to a usable and then a "white-box" condition rendered the premises unusable during the remaining term of the lease, and constituted a partial destruction of the premises during the term of the lease from "any cause." The lease provided that Plaza Shoe was entitled to an abatement of the rent since the building was not in a usable condition due to the

demolition, construction, and lack of heating and air conditioning during the remaining term of the lease. Ex. P-4.

It is undisputed that the property was in substantially the same condition as when the lease term began in 2004, subject only to the continued degradation of the roof and HVAC system. Tr. 97: 9-21; Tr. 314:12-18.

POINTS RELIED ON

1.

The trial court did not err in holding that plaza shoe store was constructively evicted from the property.

Ridley v. Newsom, 754 S.W.2d 912 (Mo. App. 1988)

Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo.App. 2001)

I.M. Freedman, Freedman on Leases, Section 10.601, page 723 (4th Ed. 1997)

R & J. Rhodes, LLC v. Finney, 231 S.W.3rd 183 (Mo.App.2007).

11. The trial court did not err in holding that plaza shoe store did not waive its claim of constructive eviction.

R & J. Rhodes, LLC v. Finney, 231 S.W.3rd 183 (Mo.App.2007).

Argument

I. The trial court did not err in holding that Plaza Shoe Store was constructively evicted from the property.

Ridley v. Newsom, 754 S.W.2d 912 (Mo. App. 1988)

Miller v. Gammon & Sons, Inc., 67 S.W.3d 613 (Mo.App. 200)

I.M. Freedman, Freedman on Leases, Section 10.601, page 723 (4th Ed. 1997)

R & J. Rhodes, LLC v. Finney, 231 S.W.3rd 183 (Mo.App.2007).

A. Standard of Review

In reviewing the judgment from a bench-trying case, this Court should sustain the judgment of the trial court unless there is not substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *DCW Enters., Inc. V. Terre du Lac Ass'n*, 953 S.W.2d, 130 (Mo.App. 1997). “An appellate court reviews the evidence and all reasonable inferences in the light most favorable to the judgment and disregards all contrary evidence and inferences.” *Surrey Condo. Assn. , Inc. v. Webb*, 163 S.W.3d 531, 536 (Mo.App. 2005).

B. Plaza Shoe Store was constructively evicted from the property.

Under Missouri law, absent a specific agreement to the contrary, a repair and maintenance clause is to be interpreted in conjunction with the surrender clause. Therefore, Plaza Shoe Store's duty was only to repair and maintain and retain it in "as good of condition as received, normal wear and tear excepted." *Miller v. Gammon and Sons, Inc.*, 67 D.W.3rd, 613 (Mo.App. 2001). "A tenant's covenant to maintain or repair generally does not require him to replace something worn out." *I.M. Freedman*, Section 10.601, page 723 (4th Ed. 1997).

Plaza Shoe Store gave Appellants adequate notice of the problems with regards to the roof and the heating and air-conditioning system, and gave Appellants reasonable time in which to remedy same. However, Appellants refused. The nature of extent of the leaks rendered the building unfit for business purposes. Therefore, Appellants constructively evicted Plaza Shoe Store from the property as of October 31, 2007, by failing to replace the roof and to provide a workable heating and air-conditioning system so as to provide Plaza Shoe Store with a reasonably safe and suitable place to conduct business. Appellants

substantially interfered with Plaza Shoe Store's beneficial use and enjoyment of the demised premises. *Ridley v. Newsom*, 754 S.W.2d 912 (Mo.App. 1988).

C. Plaza Shoe Store did not breach the lease.

Having been constructively evicted, Plaza Shoe Store did not breach the lease by failing to pay rent or taxes during the remainder of the lease term.

Appellants' work in returning the building to a "white-box" condition rendered the premises unusable during the remaining term of the lease and constituted a partial destruction of the premises during the term of the lease from "any cause." Under the terms of the lease, Plaza Shoe Store was entitled to a full abatement of the rent since the building was unusable due to the demolition, construction, and a lack of heating and air conditioning.

Appellants' conduct of demolition of the building, and returning it to a "white-box" condition, rendered the premises unusable and constituted a constructive eviction.

Ridley v. Newsom, 754 S.W.2d, 912 (Mo.App.1988);

R & J Rhodes, LLC v. Finney, 231 S.W. 183 (Mo.App. 2007).

II. The trial court did not err in holding that Plaza Shoe Store did not waive its claim of constructive eviction.

R.J. Rhodes, LLC v. Finney, 231 S.W.3d 183 (Mo.App. W.D. 2007).

Plaza Shoe Store abandoned the property after giving Appellant a reasonable time to remedy the condition.

Plaza Shoe Store did not waive its claim for constructive eviction by its conduct in accepting the property at the inception of the lease with a leaky roof, and continuing the tenancy for many months with the condition. Plaza Shoe Stores' efforts to repair and maintain the roof, and the HVAC system, and ultimately being unable to do so, did not constitute the relinquishment of a known right to abandon the property. *R & J Rhodes, LLC v. Finney*, 231 S.W.3d 183 (Mo.App. W.D. 2007).

CONCLUSION

The Appellant admitted that no business could reasonably be expected to carry on business at the Plaza Shoe property in October 2007. The appellant's failure to replace the roof and HVAC and subsequent reconstruction of over \$250,000.00 to return the building to "white-box" condition constructively evicted Plaza Shoe. Plaza Shoe did not waive its claim of constructive eviction by repairing and maintaining the roof or HVAC, and giving Appellant a reasonable time to replace the roof and HVAC system. Therefore, the Trial Court's decision should be Affirmed.

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

ROBERT WHYZMUZIS AND)
SARA WHYZMUZIS)
)
Appellants,)
) Case No. 31766
v.)
)
PLAZA SHOE STORE, INC., ROBERT O. LEE,)
BARBARA LEE, CATHY BELK, and TIM LEE)
)
Respondents.)

**CERTIFICATE OF COMPLIANCE WITH
RULE 84.06 AND CERTIFICATE OF SERVICE**

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(x), counsel for Respondents Plaza Shoe Store, Inc., Robert O. Lee, Barbara Lee and Cathy Belk certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 3207 words in this brief. Counsel for Respondents relied on the word count on the word processing system in making this certification.

Further, counsel for Respondents state that Respondents Brief in the within cause were served via electronic and U.S. Postal delivery addressed to the following named persons at the addresses shown, all on this 12th day of June, 2012:

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Barbara Lee, Cathy Belk

Subscribed and sworn to before me this 12th day of June, 2012.

Alma Larson

Notary Public

My Commission Expires: Aug. 16, 2013

Greene Co. Mo.

Commission No. 09489737

AIKEN ROBIN JAMES

(NAME OF STUDENT)

(PARENT OR GUARDIAN)

65804

(PERMANENT ADDRESS)

(ADDRESS)

DATE OF BIRTH **9-28-54** PLACE OF BIRTH **SPRINGFIELD MISSOURI**

ENTRANCE CREDITS

CREDITS FROM GRADUATION DATE

ADMITTED TO **ADM & PUB AFF** DATE **8-74**

ADMITTED TO **ARTS & SCIENCE** DATE **F-73**

ADMITTED ON SCHOLASTIC PROBATION FROM HIGH SCHOOL

ADMITTED TO DATE

ADMITTED TO DATE

DEGREE

DATE

DEGREES AND CERTIFICATES

ADMITTED TO DATE

DEGREE

DATE

UNIVERSITY CREDITS

GRADING SYSTEM CODE

A-B-C-D-E-L-D-E-LAYED, D-EXCUSED
G-SATISFACTORY U-UNSATISFACTORY

P. E.

STUDENT NUMBER	COURSE	DEPT.	COURSE NUMBER	TERM	NORMAL CREDIT HOURS	GRADE	GRADE CODE	CREDIT HOURS GRANTED	REMARKS
<u>The College of Wooster</u>									
1	1973	Freshman Colloquium	101		3.5		S		
		American Governmt	101		3.5		C		
		The New Testament	152		3.5		B		
		Debate Foren Wkshop	240		1.75		A		
		Personl Development	150				S		
2	1973	Non Maj Animal Behav	113		3.5		B		
		Basic Composition	101				W		
		Beginning Spanish							
3	1973	Hitler Nazi State	111		3.5		B		
		Interpersonl Commun	245		3.5		C		
		Rhetorical Criticism	348		3.5		B		
		Tennis	132				S		
201124	REGIONS NAT WORLD 1	40	1	F73	3		B	3	
	INTRO SPEECH COMMUN	9J	75	F73	3		B	3	
	GENERAL SOCIOLOGY	9D	1	F73	3		B	3	
	GEN FXPER PSYCHOLOGY	8M	2	F73	5		C	5	
	ELE GERMAN 1	4W	1	F73	3		C	3	
	TERM HRS.- 17.0	TERM GR. PTS.-	43.0	TERM GPA-	2.5294				
	CUM. HRS.- 17.0	CUM. GR. PTS.-	43.0	CUM. GPA-	2.5294				
201124	GENERAL ANTHROPOLOGY IV	ID	W74	3			C	3	6-6-19-74
	GENERAL BIOL LECT	2H	1	W74	3		S	3	
	CONTEMP AMER SPEAKER	9J	283	W74	3		D	3	
	ETHICS	7P	10	W74	3		B	3	
	TERM HRS.- 6.0	TERM GR. PTS.-	12.0	TERM GPA-	2.0000				
	CUM. HRS.- 23.0	CUM. GR. PTS.-	55.0	CUM. GPA-	2.3913				
		(over)							



Handwritten signature

Official Transcript

Student ID: 0151790
 Date of Birth: 09/28/XXXX
 Soc. Sec. Number: XXX-XX-9748

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
FALL 1978	Univ of MO-KC	Law	Law-Jd			
Law	541	Property I	C+	4.0		
Law	607	Business Organization I	B+	3.0		
Law	671	Estates and Trusts I	B+	4.0		
Law	724	Commercial Trans I	B	2.0		
Law	731	Prof Responsibility	B+	2.0		
GPA Hrs Att Hrs Em Qual Pt GPA						
LAW Term:		15.0	15.0	42.50		2.833
LAW CUM:		43.0	44.0	117.80		2.740

This transcript has been produced for:

FAX: 417-887-4177
 Rob Aiker

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
FALL 1978	Univ of MO-KC	Law	Law-Jd			
Law	542	Property II	C	3.0		
Law	602	Business Organization II	C	3.0		
Law	635	Criminal Procedure I	C+	3.0		
Law	722	Commercial Trans II	C	2.0		
Law	736	Debtor-Creditor Rights	C	3.0		
GPA Hrs Att Hrs Em Qual Pt GPA						
LAW Term:		14.0	14.0	34.00		2.429
LAW CUM:		57.0	58.0	151.80		2.663

Course Number Course Title Grade Hours Remarks

Degree Awarded: University of Missouri - Kansas City
 Law JD 05-08-1980

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
FALL 1977	Univ of MO-KC	Law	Law-Jd			
Law	541	Property I	C	3.0		
Law	542	Property II	C	3.0		
Law	521	Civil Procedure I	B	3.0		
Law	531	Legal Ethics	C-	1.0		
Law	636	Criminal Law	D	3.0		

ADMITTED FIRST PROX WR LAW

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
LAW Term:		14.0	14.0	34.30		2.450
LAW CUM:		14.0	14.0	34.30		2.450

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
WINT 1978	Univ of MO-KC	Law	Law-Jd			
Law	502	Contracts II	A	2.0		
Law	511	Torts I	B+	3.0		
Law	522	Civil Procedure II	B	2.0		
Law	532	Appellate Advocacy	C+	1.0		
Law	552	Federal Taxation	B+	3.0		
Law	631	Constitutional Law I	C-	4.0		

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
LAW Term:		14.0	15.0	41.60		2.929
LAW CUM:		28.0	29.0	75.90		2.689

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
FALL 1979	Univ of MO-KC	Law	Law-Jd			
Law	703	Trial Advocacy II	A	2.0		
Law	746	Legal Research	B+	2.0		
Law	754	International Bus Trans	A	3.0		
Law	764	Administrative Law	B	3.0		
Law	824	Juvenile Law & Procedure	B	2.0		
Law	855	Photographic Evidence	A-	2.0		
GPA Hrs Att Hrs Em Qual Pt GPA						
LAW Term:		16.0	16.0	52.00		3.250
LAW CUM:		73.0	74.0	203.80		2.792

Term	Univ	Course	Grade	Hours	Qual Pt	GPA
WINT 1980	Univ of MO-KC	Law	Law-Jd			
Law	521	Evidence	B	3.0		
Law	702	Conflict of Laws	C	3.0		
Law	753	International Law	C	3.0		
Law	837	Bus Organizations III	B	3.0		
Law	853	Social Question Research	B	2.0		
GPA Hrs Att Hrs Em Qual Pt GPA						
LAW Term:		14.0	14.0	39.70		2.550
LAW CUM:		87.0	88.0	239.50		2.753

Official transcripts are printed on blue safety paper and bear the university seal and the signature of the registrar. See reverse side for explanation of grades.

In accordance with the Family Educational Rights and Privacy Act of 1974, information on this transcript may not be released to a third party without written consent of the student. If you are unable to comply fully with this requirement, please return this record immediately.

RAISED SEAL NOT REQUIRED

[Signature]
 Registrar

