

IN THE SUPREME COURT OF MISSOURI

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DENNIS BUEMI, et al.,

Respondents,

vs.

ARTHUR KERCKHOFF, JR., et al.,

Appellants

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**No. SC91132**

Appeal from the Circuit Court of St. Louis County  
The Honorable Barbara Wallace, Circuit Judge

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**SUBSTITUTE JOINT BRIEF OF RESPONDENTS PLAINTIFFS  
DENNIS P. BUEMI, et al., and DEFENDANT PF DEVELOPMENT**

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## STATEMENT OF FACTS

The underlying action in this case involves a suit, brought by several individual residents of the Pevely Farms Subdivision (“**Pevely Farms**” or the “**Subdivision**”), derivatively on behalf of the Pevely Farms Homeowners’ Association (the “**Association**”) and on their own behalf against the developers of the Subdivision, the current and former board members of the Association, and certain homebuilders. Supp. L. F. 1 - 56. In the underlying action, Plaintiffs bring a variety of claims against the various defendants alleging the inadequacy of the water system that was developed for the Subdivision. Supp. L. F. 1 - 56. Specifically, Plaintiffs allege that the water system that was developed for the Subdivision is not adequate to supply both potable and irrigation water to the entire development, despite the fact that it was marketed and represented to have that capability. Supp. L. F. 1 - 56. Among the defendants are Appellants Arthur Kerckhoff, Jr., Arthur Kerckhoff III, Arthur Kerckhoff IV, and the Arthur Kerckhoff Trust (“**Kerckhoff Defendants**”), Respondent PF Development, LLC (“**PF Development**”) and Respondent Fischer & Frichtel, Inc. (“**Fisher & Frichtel**”). Supp. L. F. 1 - 56.

The underlying action is and has always been pending before the Honorable Barbara W. Wallace of the Circuit Court of the County of St. Louis, Missouri. L.F. 1 - 43. After the action had been pending for over two and a half years, on or about July 22, 2009, the trial court issued an Order of Referral to Alternative Dispute Resolution (the “**Referral Order**”). L.F. 44. The Referral Order required all parties or to attend the confidential mediation. L.F. 45.

A representative group of the Plaintiffs, Kerckhoff Defendants (except Arthur Kerckhoff IV), PF Development, Fischer & Frichtel, and other defendants and third party defendants met to mediate the case on December 18, 2008 before the Honorable Judge William M. Corrigan ( the “**Mediator**”). Tr. Vol. I, 28.<sup>1</sup> Before the mediation began, all parties entered into an Agreement to Mediate (the “**Mediation Agreement**”). L.F. 125 - 127. The Mediation Agreement stated that, “no admission, representation, statement or other confidential communication made in the process of setting up or conducting this mediation shall be admissible as evidence or subject to discovery.” L.F. 126. The Mediation Agreement also provided that “all parties agree to negotiate in good faith.” L.F. 127.

The parties mediated the case for approximately twelve hours on December 18, 2008. Tr. Vol. I, 28; Tr. Vol. III, 6. During the mediation the parties met individually, with their attorneys, with the Mediator and with each other to try to reach a global solution and settlement of the case. Tr. Vol. I, 29 - 30. At one point several hours into the mediation, three of the Plaintiffs met with Defendant Arthur F. Kerckhoff III without the lawyers, which meeting lasted between 30 minutes to an hour. Tr. Vol. I, 36. Following that meeting, Jason Rugo, counsel for Plaintiffs Buemi, et al., prepared the first of three settlement term sheets

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<sup>1</sup> Three Volumes of the Transcript Exist. The first volume involves testimony taken on May 11, 2009 and will be referred to as Tr. Vol. I. The second volume involves testimony taken on May 20, 2009 and will be referred to as Tr. Vol. II. The third volume involves testimony taken on August 10, 2009 and will be referred to as Tr. Vol. III.

based on the parties' discussion. Tr. Vol. I, 36 - 38. Thereafter, attorneys for Plaintiffs and Kerckhoff Defendants met, and based on the discussions of that meeting, a second settlement term sheet was created. Tr. Vol. I, 39 - 40; L.F. 129 - 130. This term sheet was provided to counsel for Kerckhoff Defendants and the Mediator. Tr. Vol. I, 40. Finally, late in the day of the mediation, a third settlement term sheet was generated by Mr. Rugo. Tr. Vol. I, 40-42; L.F. 131 - 132. Mr. Rugo testified that this third and final term sheet was provided to the Mediator and to counsel for Kerckhoff Defendants. Tr. Vol. I, 63. In addition to the items on the term sheets, other defendants, including PF Development and Fischer & Frichtel, had agreed to pay sums to Plaintiffs in support of a global settlement agreement. Tr. Vol. I, 75; Vol. II, 110 - 111, 126.

At the close of the mediation, the parties executed a document entitled "Mediated Settlement Agreement" (the "MSA"). L.F. 128; Tr. Vol. I, 32 - 34. The MSA stated in pertinent part,

By signing this [MSA] the parties acknowledge that prior to the execution of the MSA, the mediation was terminated, that all parties read and understood the MSA . . . and that any party may seek enforcement of this MSA. . . Further, that any party to this MSA and/or [the mediator] may introduce this document into evidence without objection by any party notwithstanding the provisions of Missouri Supreme Court Rule 17, Section 435.014 R.S.Mo., and/or any other applicable state or federal statute or regulation. The parties have been

advised that by signing a MSA they may adversely affect their legal rights in court, in that by signing this agreed MSA they are waiving any and all trials and appeals, except for judicial enforcement of this MSA.

L.F. 128 (Emphasis in original). In addition, the MSA contained a handwritten note stating, “Case settled in principal - proposed settlement to be reduced to writing by 12-31-08. Plaintiffs to recommend settlement to property owners.” L.F. 128. This handwritten material was inserted by the Mediator. Tr. Vol. III, 10. The Mediator recalled that after the termination of the mediation, counsel for Kerckhoff Defendants stated that they would be preparing the final settlement documents. Tr. Vol. III, 37. None of the term sheets were attached to the MSA. Tr. Vol. III, 50.

In the days and weeks following the mediation, counsel for Plaintiffs and counsel for Kerckhoff Defendants exchanged several e-mails regarding the mediation and the settlement. Tr. Vol. I, 64 - 65. The day following the mediation, December 19, 2008, Mr. Rugo sent an e-mail to counsel for Kerckhoff Defendants stating, “I think we all did as good a job for our clients as circumstances permitted, and my guess is no one is ecstatic over the deal which probably means it is a very good job of negotiation and compromise.” L.F. 133; Tr. Vol. I, 65 - 66. Counsel for Kerckhoff Defendants responded: “[W]e are reviewing the points outlined with our clients as well. In that regard, we are utilizing the earlier outline you prepared rather than the last which we thought was going to be a statement of general principles with less detail . . . As indicated yesterday, we will develop a proposed first draft and get it to you. . . . John is looking into bond and alternative security arrangements.” L.F.

134; Tr. Vol. I, 66 - 67. On December 31, 2008, counsel for Kerckhoff Defendants again wrote to counsel for Plaintiffs: “Jason - although we are having a very busy year end . . . we have commenced drafting language for a proposed agreement with respect to the more critical provisions. . . Should have it to you hopefully by the end of next week.” L.F. 138; Tr. Vol. I, 69 - 70. Arthur Kerckhoff, Jr. e-mailed one of the Plaintiffs asking them to reconsider one of the terms of the settlement. L.F. 135, Tr. Vol. II, 10 - 13. In addition, counsel for Kerckhoff Defendants called Plaintiffs’ counsel in the weeks following the mediation to indicate that they were working hard on the settlement documents and would have a draft to Plaintiffs as soon as possible. Tr. Vol. I, 71.

After several weeks, counsel for Kerckhoff Defendants requested a meeting with counsel for Plaintiffs, which meeting took place on or about February 15, 2009. Tr. Vol. I, 71. At that meeting, counsel for Kerckhoff Defendants presented counsel for Plaintiffs with a settlement proposal that differed in several material respects from the term sheets prepared during the mediation and which was not acceptable to Plaintiffs. Tr. Vol I, 71 - 72; Vol. II, 69. At the time the Mediation was conducted, the underlying action was set for trial on April 27, 2009. L.F. 33.

In the spring of 2009, PF Development and Plaintiffs filed motions to enforce settlement (collectively, the “**Motions to Enforce Settlement**”). L.F. 46 - 83. The trial court then scheduled an evidentiary hearing on the Motions to Enforce Settlement. L.F. 84. The evidentiary hearing was conducted over three days in the summer of 2009. *See* generally, Tr. Vol I, Vol. II, and Vol. III. While the Motions to Enforce Settlement were

pending and the evidentiary hearings were conducted, the trial had to be removed from the April 27, 2009 trial docket. L.F. 38 - 39.

Prior to the evidentiary hearings, counsel for Kerckhoff Defendants objected to the introduction of any and all evidence related to the mediation session based on their claim that such testimony was improper due to the confidentiality provisions of Supreme Court Rule 17.<sup>2</sup> As stated by counsel for Kerckhoff Defendants before the evidentiary hearing, with regard to his clients' objection, "Rule 17 [ ] says that no communications at all regarding settlement negotiations, regarding any type of evidence whatsoever can be admitted in a court of law to determine anything. We understand that the mediator cannot be subpoenaed, nor could they [sic] come into this courtroom. . . There is Rule 17, there's a local Rule 38 . . . all of them state unequivocally without a shadow of a doubt that you cannot obtain any information whatsoever." Tr. Vol. I, 7. L.F. 85 - 95. The court overruled this objection. Tr. Vol. I, 16, 19. Additionally, throughout the evidentiary hearing, counsel for Kerckhoff Defendants repeatedly objected to testimony based on their claims that it violated Supreme Court Rule 17. Those objections were routinely denied. *See generally*, Tr. Vol I, Vol. II, and Vol. III.

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<sup>2</sup> As admitted by counsel for Kerckhoff Defendants, these arguments had been raised before the Missouri Court of Appeals for the Eastern District and this Court upon application for extraordinary writs. Tr. Vol. I, 8 - 9. As conceded by counsel for Kerckhoff Defendants, each of those writs was denied. Tr. Vol. I, 9.

During the evidentiary hearings, the trial court considered evidence related generally to the procedure of the mediation, to the creation of the term sheets, to the execution of the MSA, and to the events following the termination of the mediation. *See* generally, Tr. Vol. I, Vol. II, and Vol. III. Counsel for Kerckhoff Defendants called the Mediator to testify regarding certain aspects of the mediation, including the creation and execution of the MSA. Tr. Vol. III, 5 - 60.

During the evidentiary hearing, Arthur Kerckhoff, Jr. and Arthur Kerckhoff III testified that they signed the MSA believing it to mean nothing and with the belief and intent that it would not be binding on them. Tr. Vol. I, 135, 149; Tr. Vol. III, 99-102. Both Arthur Kerckhoff, Jr. and Arthur Kerckhoff, III testified that they signed the MSA so that they could leave the mediation. Tr. Vol. I, 134 - 135; Tr. Vol. III, 84. They also testified that no settlement could have been reached on the day of mediation because Arthur Kerckhoff, IV who was not present at the mediation, would be required for a settlement to be reached. Tr. Vol. I, 118. Kerckhoff Defendants acknowledge that this fact was not disclosed during the mediation. Tr. Vol. III, 75 -76. Additionally, though Arthur Kerckhoff III had done most of the negotiating on behalf of Kerckhoff Defendants, he testified that he had no authority to settle anything. Tr. Vol. I, 125.

At the close of the mediation, motions for sanctions and memoranda in support were filed against Kerckhoff Defendants by Plaintiffs, PF Development, and Fischer & Frichtel. L.F. 101 - 175. In these motions, the parties argued that Kerckhoff Defendants failed to mediate in good faith in that they agreed to certain settlement terms, but executed the MSA

with the intent and belief that it was not binding on them and that they were not actually going to agree to the settlement terms outlined during the mediation. L.F. 117 - 120. Plaintiffs also argued that Kerckhoff Defendants continued to mislead the parties following the mediation because they represented that they were drafting the settlement documents. L.F. 119. Kerckhoff Defendants also filed a motion for sanctions against counsel for Plaintiffs and PF Development pursuant to Rule 55.03 for filing their Motions to Enforce Settlement, which Kerckhoff Defendants claim were frivolous pleadings. L.F. 176 - 181.

On October 2, 2009, the trial court issued its Order and Judgment related to the Motions to Enforce Settlement and the motions for sanctions (“**Judgment**”). L.F. 194 - 198. The court denied the Motions to Enforce Settlement. L.F. 195. The Judgment provides,

The Court further finds that at the conclusion of the mediation, the parties, including Kerckhoff Defendants, executed [the MSA] stating that the case was settled in principle, that the terms were to be reduced in a complete writing by December 31, 2008, that counsel for Plaintiffs was to recommend settlement to the Plaintiff property owners, that the parties could seek enforcement of the MSA, and that the parties waived any and all trials and appeals except for enforcement of the MSA. The Court finds and believes that settlement in principle was reached at this mediation, and that Defendants knew and agreed to those principles as developed on the term sheets presented at the hearing. *However, the term sheets . . . were omitted from being attached to the MSA . . . which*

*prevents this Court from granting the Motions to Enforce Settlement,  
and therefore, denies same.*

L.F. 195 (Emphasis added).

Though the court denied the Motions to Enforce Settlement, it granted the motions for sanctions filed by Plaintiffs, PF Development and Fischer & Frichtel against Kerckhoff Defendants. The court bases its ruling on these motions on the following findings:

The Court finds that Kerckhoff Defendants executed the MSA with the intent that it was not binding on them, with the intent and belief that they had not agreed to a single term of settlement discussed . . . that they executed the MSA with the intent only to exit the mediation, and with the belief and knowledge that one of the parties necessary to a complete agreement to settle, Arthur Kerckhoff IV, was not present at the mediation . . . The Court further finds that Kerckhoff Defendants failed to inform any other parties at the close of the mediation or in the weeks immediately after mediation that they did not intend nor believe there was a valid settlement . . . and they actively concealed such intent by indicating that they were diligently working on documents consistent with the agreed upon terms . . .

L.F. 195 - 196. The court indicated that the aforementioned actions of Kerckhoff Defendants “constitute[d] a complete lack and absence of good faith at mediation and thereafter and were

intentionally done to the other parties detriment.” L.F. 196. (emphasis added). As a result of these findings, the trial court entered sanctions against Kerckhoff Defendants totaling approximately \$122,000.00. L.F. 197. The court denied Kerckhoff Defendants’ motion for sanctions. L.F. 197.

Following the court’s certification of the Judgment as final and appealable, Kerckhoff Defendants filed their notice of appeal to the Missouri Court of Appeals for the Eastern District on or about November 12, 2009. L.F. 206, 212 - 217. The Court of Appeals dismissed the appeal for lack of a final judgment on or about June 21, 2010. Kerckhoff Defendants filed a motion for transfer in the Missouri Court of Appeals for the Eastern District, which was denied on or about August 10, 2010. Kerckhoff Defendants then filed a motion for transfer to this Court on or about August 25, 2010 which was granted on or about September 21, 2010.

## **POINTS RELIED ON**

**I. THE TRIAL COURT CORRECTLY OVERRULED THE OBJECTIONS OF KERCKHOFF DEFENDANTS TO TESTIMONY AND OTHER EVIDENCE REGARDING THE COURT-ORDERED MEDIATION, BECAUSE THOSE RULINGS WERE CONSISTENT WITH AND DID NOT VIOLATE MISSOURI COMMON LAW, SUPREME COURT RULE 17, OR PUBLIC POLICY AND DID NOT PREJUDICE KERCKHOFF DEFENDANTS, IN THAT (A) THE EVIDENCE ADMITTED AT THE EVIDENTIARY HEARING WAS ADMITTED FOR THE**

**PURPOSE OF RULING ON THE MOTIONS TO ENFORCE SETTLEMENT, NOT DURING A TRIAL ON THE MERITS OF THE ACTION; (B) WHILE SUPREME COURT RULE 17 PROVIDES FOR LIMITED MEDIATION CONFIDENTIALITY, THE EVIDENCE ADMITTED DID NOT VIOLATE THE RULE IN THAT NO EVIDENCE OF ADMISSIONS, REPRESENTATIONS OR OTHER CONFIDENTIAL MATTERS WERE ADMITTED, AND (C) EVEN IF SOME OF THE TRIAL COURT’S RULINGS AS TO THE EVIDENCE DID VIOLATE SUPREME COURT RULE 17, SUCH RULINGS WERE NOT AN ABUSE OF DISCRETION AND KERCKHOFF DEFENDANTS WERE NOT PREJUDICED, BECAUSE THE TRIAL COURT DENIED THE MOTIONS TO ENFORCE SETTLEMENT AND NONE OF THE EVIDENCE RELIED UPON IN SUSTAINING RESPONDENTS’ MOTIONS FOR SANCTIONS VIOLATED SUPREME COURT RULE 17.**

*Miller v. Neill*, 867 S.W.2d 523, 528 (Mo.App. E.D. 1993)

*Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo banc. 2007)

*Williams v. Kansas City Title Loan Co., Inc.*, 314 S.W.3d 868 (Mo.App. W.D. 2010)

S. Ct. Rule 17.06

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SANCTIONS AGAINST KERCKHOFF DEFENDANTS, BECAUSE THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND PROPERLY DECLARES AND APPLIES THE LAW, IN THAT THE TRIAL COURT HAS THE**

**POWER TO SANCTION BAD FAITH CONDUCT PURSUANT TO ITS INHERENT AUTHORITY AND THERE IS SUBSTANTIAL EVIDENCE THAT KERCKHOFF DEFENDANTS FAILED TO PARTICIPATE IN THE COURT-ORDERED MEDIATION IN GOOD FAITH, IN THAT THE RECORD ESTABLISHES THAT KERCKHOFF DEFENDANTS INTENTIONALLY DECEIVED RESPONDENTS BY INDICATING AND ACTING AS THOUGH THEY HAD AGREED ON A SETTLEMENT AT THE CONCLUSION OF THE MEDIATION AND IN THE WEEKS THEREAFTER WHILE HARBORING AN INTENT AND BELIEF THAT THEY HAD AGREED TO NOTHING, ALL IN VIOLATION OF THE TRIAL COURT'S ORDERS AND TO THE DETRIMENT OF RESPONDENTS.**

*Rea v. Moore*, 74 S.W.3d 795 (Mo. App. S.D. 2002)

*Nick v. Morgan's Foods, Inc.*, 99 F. Supp. 2d 1056 (E.D. Mo. 2000)

*Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8<sup>th</sup> Cir. 2001)

**III. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SANCTIONS AGAINST RESPONDENTS' ATTORNEYS AND LAW FIRMS, BECAUSE, (A) THE TRIAL COURT LACKED AUTHORITY TO GRANT THE MOTION PURSUANT TO SUPREME COURT RULE 55.03(d), (B) THE TRIAL COURT'S INHERENT AUTHORITY TO ISSUE SANCTIONS WAS NOT PROPERLY AT ISSUE, AND (C) RESPONDENTS' ATTORNEYS COMPLIED WITH SUPREME COURT RULE 55.03(c) IN FILING THE RESPECTIVE**

**MOTIONS TO ENFORCE SETTLEMENT IN THAT, (A) APPELLANTS DID NOT SERVE THEIR MOTION FOR SANCTIONS ON RESPONDENTS' ATTORNEYS THIRTY DAYS PRIOR TO FILING WITH THE COURT, (B) APPELLANTS DID NOT PETITION THE TRIAL COURT FOR RELIEF UNDER ITS INHERENT AUTHORITY, (C) THE TRIAL COURT'S INHERENT AUTHORITY TO ISSUE SANCTIONS FOR ALLEGED VIOLATIONS OF MO. R. CIV. P. 55.03(c) IS LIMITED BY MO. R. CIV. P. 55.03(d), AND (D) RESPONDENTS' MOTIONS TO ENFORCE SETTLEMENT WERE FOR A PROPER PURPOSE, WERE NOT FRIVOLOUS AND HAD EVIDENTIARY SUPPORT.**

S. Ct. Rule 55.03(d)(1)(A)

*Williams v. Frymire*, 186 S.W.3d 912 (Mo.App. S.D. 2006)

*Bothe v. Bothe*, 266 S.W.3d 321 (Mo.App. E.D. 2008)

*Noland v. State Farm Mut. Auto. Ins. Co.*, 853 S.W.2d 327 (Mo.App. W.D. 1993)

**IV. WHETHER THE COURT OF APPEALS FOR THE EASTERN DISTRICT OF MISSOURI ERRED IN DISMISSING APPELLANTS' APPEAL FOR WANT OF A FINAL JUDGMENT IS NOT AT ISSUE IN THIS MATTER AS THE CASE WAS PROPERLY TRANSFERRED TO THE SUPREME COURT OF MISSOURI FOR FINAL DETERMINATION.**

*Kunkel v. Hertzog*, 176 S.W.3d 171, 173 (Mo. App. W.D. 2005)

## **ARGUMENT**

### **[Response to Appellants' Point Relied on II]**

**I. THE TRIAL COURT CORRECTLY OVERRULED THE OBJECTIONS OF KERCKHOFF DEFENDANTS TO TESTIMONY AND OTHER EVIDENCE REGARDING THE COURT-ORDERED MEDIATION, BECAUSE THOSE RULINGS WERE CONSISTENT WITH AND DID NOT VIOLATE MISSOURI COMMON LAW, SUPREME COURT RULE 17, OR PUBLIC POLICY AND DID NOT PREJUDICE KERCKHOFF DEFENDANTS, IN THAT (A) THE EVIDENCE ADMITTED AT THE EVIDENTIARY HEARING WAS ADMITTED FOR THE PURPOSE OF RULING ON THE MOTIONS TO ENFORCE SETTLEMENT, NOT DURING A TRIAL ON THE MERITS OF THE ACTION; (B) WHILE SUPREME COURT RULE 17 PROVIDES FOR LIMITED MEDIATION CONFIDENTIALITY,**

**THE EVIDENCE ADMITTED DID NOT VIOLATE THE RULE IN THAT NO EVIDENCE OF ADMISSIONS, REPRESENTATIONS OR OTHER CONFIDENTIAL MATTERS WERE ADMITTED, AND (C) EVEN IF SOME OF THE TRIAL COURT'S RULINGS AS TO THE EVIDENCE DID VIOLATE SUPREME COURT RULE 17, SUCH RULINGS WERE NOT AN ABUSE OF DISCRETION AND KERCKHOFF DEFENDANTS WERE NOT PREJUDICED, BECAUSE THE TRIAL COURT DENIED THE MOTIONS TO ENFORCE SETTLEMENT AND NONE OF THE EVIDENCE RELIED UPON IN SUSTAINING RESPONDENTS' MOTIONS FOR SANCTIONS VIOLATED SUPREME COURT RULE 17.**

**A. Standard of Review**

The standard of review for a claim of error in the admissibility of evidence is an abuse of discretion resulting in substantial and obvious injustice. *Miller v. Neill*, 867 S.W.2d 523, 528 (Mo. App. E.D. 1993). A trial court's decision to impose sanctions pursuant to its inherent powers is reviewed for an abuse of discretion. *Rea v. Moore*, 74 S.W.3d 795, 799 (Mo. App. S.D. 2002).

**B. Argument**

The trial court did not err in holding the evidentiary hearing or admitting certain evidence related to the mediation and counsel for Kerckhoff Defendants know it. All of the evidence that was admitted during the evidentiary hearing was related to *settlement* not the merits of the case. As Kerckhoff Defendants themselves admit:

The facts at issue in the [Motions to Enforce Settlement and motions for sanctions] proceedings - again: who had done and who had said exactly what that might amount to an enforceable settlement agreement, and then how well or how badly had various parties behaved in those proceedings - were distinct in virtually every material regard from the facts that will be at issue in the trial of Plaintiffs' claims in the underlying lawsuit. The law governing the enforceability of a mediated settlement agreement and that pertaining to the susceptibility of conduct in mediation to punishment also bears no relationship to the law that will govern adjudication of the Plaintiffs' underlying equitable, tort and contract claims. The attenuation of those underlying claims from the proceedings that resulted in sanctions could hardly be more complete.

Appellants' Brief, 31-32 (Emphasis added).

In arguing that their appeal to the Missouri Court of Appeals for the Eastern District should not have been dismissed, Kerckhoff Defendants acknowledge and admit that the evidentiary hearing and the testimony admitted during the hearing, which is at issue in this appeal, bears no relationship to Plaintiffs' claims in the underlying action. But it is for this very reason that Point II lacks merit. The evidence admitted by the trial court was not

admitted in a hearing on the merits of this matter, and thus, is not confidential and privileged testimony under the long-standing common law rule of the State of Missouri.

Nor does the application of Missouri Supreme Court Rule 17 bar the trial court's receipt of evidence during the hearing on the Motions to Enforce Settlement. Rule 17 does provide for mediation confidentiality, but it is a limited scope of confidentiality and, contrary to the claims of Appellants, does not bar a court from receiving any evidence whatsoever with regard to the mediation process and the statements and actions of counsel in the days and weeks following the mediation. If Kerckhoff Defendants' sweeping claims of confidentiality were to apply to court-ordered mediation in this State, the important purposes of Rule 17 - to encourage and facilitate the use of alternative dispute resolution - would be defeated. If Kerckhoff Defendants are correct, no court or litigant would ever utilize the processes outlined in Rule 17 due to fear of exactly what happened in this case. A party could mediate in bad faith, "agree" to a settlement, and then back out with assurances that the court could do absolutely nothing about it. Rule 17 cannot be interpreted to allow such a result.

Finally, Kerckhoff Defendants fail to analyze the standard of review applicable to their claims and fail to set forth how the court erred in admitting any particular evidence. They also gloss over the fact that the Motions to Enforce Settlement were denied. The evidence upon which the court relied in making its award of sanctions against Kerckhoff Defendants was not admitted in violation of Supreme Court Rule 17 and Kerckhoff Defendants completely fail to argue otherwise. The Judgment must be affirmed.

**1. The trial court did not err in holding the evidentiary hearings in order to rule on the Motions to Enforce Settlement; such a course of action is recognized and preferred by Missouri Courts.**

In Missouri, the general rule is that an offer of settlement or compromise is inadmissible at trial. *Hancock v. Shook*, 100 S.W.3d 786, 799 (Mo banc. 2003). Because settlements are to be encouraged, such evidence is excluded to avoid penalizing a party by revealing an offer to the jury if settlement negotiations fail. *Id.* “Allowing evidence of settlement and negotiation to come before the jury creates a possibility of bias that has no place in our system of justice. The jury could perceive the offering party as admitting guilt . . . and the jury could perceive the receiving party as stubborn, greedy or mean-spirited.” *Id.* Allowing this evidence in a trial on the merits would have a chilling effect on settlement negotiations because no one would make such offers if there exists a risk of the offer ending up before the jury. *J.A. Tobin Construction Company v. State Highway Commission of Missouri*, 697 S.W.2d 183, 186 (Mo. App. W.D. 1985).

While evidence of settlement negotiations are rightfully excluded from a trial on the merits, this does not and has never required the exclusion of such evidence on a motion to enforce settlement. While Missouri does not have a specific process for enforcing settlements, the issue may be raised by a motion to enforce. *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo banc. 2007). The moving party must prove the existence of the settlement by clear, convincing and satisfactory evidence. *Id.* While the trial court may decide a motion to enforce on the pleadings, pursuant to Rule 55.27 or treat the motion as

akin to one for summary judgment, “the most desirable approach would be to hold an evidentiary hearing where the moving party proves the agreement and the non-moving party can then present evidence as to any defenses.” *Id.* Necessarily, the determination of whether a settlement has occurred when the parties dispute its existence requires proof of factual issues. *Precision Investments, L.L.C. v. Cornerstone Propane, L.P.*, 220 S.W.3d 301 (Mo. banc 2007).

The evidence of which Kerckhoff Defendants complain in this appeal was not admitted at a trial on the merits and has not, and cannot, be presented to a jury in this case. The evidence was admitted upon Plaintiffs’ and PF Development’s Motions to Enforce Settlement. Such evidence is routinely admitted by trial courts in determining whether an enforceable settlement was, in fact, reached between or among the parties. This Court has expressed its preference that a trial court decide these issues the exact way that the court did in this case - via an evidentiary hearing. *Eaton*, 224 S.W.3d at 599. Such a hearing necessarily required proof of factual matters surrounding the parties’ execution of the MSA (after termination of the mediation) and subsequent events. Under long standing and well-settled Missouri common law rules, as set forth above, the court did not err in admitting evidence related to the parties’ mediation proceedings in the evidentiary hearing on the Motions to Enforce Settlement, and the Judgment must be affirmed.

- 2. The trial court did not violate Supreme Court Rule 17 by holding the evidentiary hearing, because such hearings are contemplated by the Rule**

**and none of the evidence admitted at the hearing was confidential under the language of Rule 17.**

Kerckhoff Defendants argue that the rules stated above are altered due to the existence and application of Missouri Supreme Court Rule 17. This Rule, adopted by order of the Supreme Court of Missouri dated October 22, 1996, became effective July 1, 1997 and governs court-sponsored alternative dispute resolution programs. *See generally*, S. Ct. Rule 17. Rule 17 allows a trial court to order any civil action to alternative dispute resolution, which can include mediation. S. Ct. Rule 17.01(b)(3); 17.03(a).

Rule 17 has provisions concerning the confidential nature of court-ordered mediation.

It provides:

- (a) An alternative dispute resolution process undertaken pursuant to this Rule 17 shall be regarded as settlement negotiations. Any communication relating to the subject matter of such dispute made during the alternative dispute resolution process by a participant or any other person present at the process shall be a confidential communication. No admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery . . .
- (b) No individual or organization providing alternative dispute resolution services pursuant to this Rule 17 . . . shall be subpoenaed or

otherwise compelled to disclose any matter disclosed in the process of setting up or conducting the alternative dispute resolution process.

(c) Settlement shall be by a written document setting out the essential terms of the agreement executed after the termination of the alternative dispute resolution process.

(d) An individual or organization providing alternative dispute resolution services pursuant to this Rule 17 . . . may be called in an action to enforce the written settlement agreement reached following the conclusion of the alternative dispute resolution process for the limited purpose of describing events following the conclusion of the alternative dispute resolution process.

S. Ct. Rule 17.06.

The Rule delineates what is confidential in regard to court-ordered mediation. It provides that “admissions, representations, statements or other confidential communications made in setting up or conducting” the process are confidential and shall not be admissible as evidence. S. Ct. Rule 17.06(a). Confidential communications are specifically defined as “any communications *relating to the subject matter of the dispute made during the alternative dispute resolution process.*” (emphasis added). *Id.* Additionally, it provides that the individual or organization providing the alternative dispute resolution services may not be compelled to disclose “any matter disclosed in the process of setting up or conducting the alternative dispute resolution process.” S. Ct. Rule 17.06(b).

But Rule 17, by its very terms, does not confer blanket confidentiality upon the process of court-ordered mediation. It only applies to admissions, representations, statements, and confidential communications *related to the subject matter of the dispute*. S. Ct. Rule 17.06(a). It also requires that these admissions, representations, statements or communications be made in setting up or during the mediation process; it does not apply to such communications made after the mediation session has ended. Rule 17's confidentiality provisions do not apply to the written settlement agreement, and the Rule specifically contemplates actions to enforce the terms of such settlement agreements. S. Ct. Rule 17.06(d). It does not bar a mediator from appearing and testifying in an action to enforce the terms of a written settlement agreement for the purposes of describing events following the conclusion of the mediation, which includes the execution of the written settlement agreement. S. Ct. Rule 17.06(c); 17.06(d). Finally, Rule 17 does not apply to impressions, thoughts, or conduct involved in a court-ordered mediation.

Respondents' research discloses only one reported Missouri case discussing the confidentiality provisions of Rule 17. In *Williams v. Kansas City Title Loan Co., Inc.*, the Missouri Court of Appeals for the Western District was called upon to determine whether parties had reached an oral settlement agreement during a court-ordered mediation. 314 S.W.3d 868 (Mo. App. W.D. 2010). The Court of Appeals held that no enforceable settlement was reached because one of the parties failed to sign a written settlement agreement. *Id.* The *Williams* Court was not asked to rule with regard to the admissibility of any claimed confidential information, and thus, the Western District's statements regarding the

confidentiality provisions of Rule 17.06 are *dicta*. As such, and because it is the lone Missouri case discussing the issue, *Williams* can hardly be said to be the “controlling law” on the matter of how courts are to interpret and apply Rule 17.06.

Despite its lack of “controlling” status, *Williams* does support the idea that, while some things are confidential pursuant to Rule 17, not all evidence surrounding a court-sponsored mediation is confidential. “Once the parties have reached an agreement on the settlement . . . the mediation process concludes, and a written agreement is executed by the parties. That agreement is admissible as evidence and enforceable, and the parties may present testimony and evidence - including testimony from the mediator - *concerning the execution of the agreement, the parties’ performance thereunder, and other subsequent events.*” *Id.* *Williams* does not support the notion that evidentiary hearings are improper pursuant to Rule 17, and does not support an argument that under no circumstances can a Court take evidence regarding a court-ordered mediation.

It is important to note that while Kerckhoff Defendants appeal the trial court’s denial of their objections to evidence during the evidentiary hearing, **nowhere** within their Brief do they specifically identify which objections to which testimony they assert are reversible error. Kerckhoff Defendants vaguely object to “the trial court’s reception of extensive testimony regarding the substance of mediation discussions.” Appellants’ Brief, p. 41. This is insufficient to preserve any claim of error. It is not the job of Respondents or this Court to scour the transcript to locate and / or speculate with regard to which specific objections Kerckhoff Defendants appeal. *See State ex. rel. State Highway Commission v. Harrison*, 311

S.W.2d 104, 108 (Mo. App. 1958) (noting a point on appeal was defective for failing to specify definitively what actions of the trial court were complained of).

It may be that Kerckhoff Defendants seek to challenge the trial court's authority to even hold an evidentiary hearing. *See* L.F. 85 - 95. As stated by counsel for Kerckhoff Defendants before the evidentiary hearing, with regard to his clients' objection, "Rule 17 [ ] says that no communications at all regarding settlement negotiations, regarding any type of evidence whatsoever can be admitted in a court of law to determine anything. We understand that the mediator cannot be subpoenaed, nor could they [sic] come into this courtroom<sup>3</sup>. . . There is Rule 17, there's a local Rule 38<sup>4</sup>. . . all of them state unequivocally without a shadow of a doubt that you cannot obtain any information whatsoever." Tr. Vol. I, 7.

This blanket objection was properly overruled by the court. As addressed above, under the common law, it is the preference of this Court to hold such hearings in order to determine the issues related to a motion to enforce settlement. *Eaton*, 224 S.W.3d at 599. Moreover, despite counsel for Kerckhoff Defendants' bald assertions to the contrary, Rule

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<sup>3</sup> It bears noting here that the Mediator testified at the evidentiary hearing because he was subpoenaed by Kerckhoff Defendants. Tr. Vol. III, 4 - 59.

<sup>4</sup> Local Rule 38 is the local rule of the Twenty-First Judicial Circuit adopting an Alternative Dispute Resolution program. Rule 38.6 governs confidentiality and provides, "The proceedings shall be private, confidential, and regarded as settlement negotiations as provided in Supreme Court Rule 17.05 and 17.06."

17 specifically contemplates actions to enforce the terms of settlements reached in court-ordered alternative dispute resolution and does not bar “any type of evidence whatsoever . . . to determine anything.” S. Ct. Rule 17.06(d). Finally, and importantly, the MSA itself stated, “any party to this MSA . . . may introduce this document into evidence without objection by any party notwithstanding the provisions of Missouri Supreme Court Rule 17.” L.F. 51. If Kerckhoff Defendants’ claim of error is that the court held an evidentiary hearing, their appeal must fail, and the Judgment must be affirmed.

The evidence presented at the evidentiary hearing was largely evidence regarding the circumstances surrounding the execution of the MSA and the term sheets, which is admissible under Rule 17.06(d); evidence regarding statements and actions of counsel in the hours, days, and weeks following termination of the mediation, which is not confidential under Rule 17; evidence regarding party and counsel attendance at mediation, which is not confidential under Rule 17; and other non-substantive matters. *See generally*, Tr. Vol I., Vol. II, and Vol. III. While the Mediator did testify, because he was subpoenaed by the Kerckhoff Defendants, he explained that he would not (and he did not) testify with regard to anything that would be confidential under Rule 17. Tr. Vol. III, 4 -5, 10, 25. The evidence presented at the evidentiary hearing did not encompass admissions, representations, statements or other confidential communications as those terms are used in and contemplated by Rule 17. It did not delve into or encompass the deliberative process of mediation, *e.g.* the risks and benefits of any term of settlement. No witness was asked why they took a particular action, and none was asked to address the strengths and weaknesses of the underlying dispute. The evidence

was limited to that necessary to determine *whether* settlement was reached, was proper under Rule 17, and the Judgment must be affirmed.

**3. Public policy requires that this Court reject Kerckhoff Defendants' asserted application of Supreme Court Rule 17 because it would defeat the stated purpose of the Rule, which is to encourage and support alternative dispute resolution in the State of Missouri.**

Kerckhoff Defendants argue that public policy requires that this Court find that the court erred in admitting testimony regarding the mediation process. *See Appellants' Brief*, 40 - 42 (“the present Judgment poses a profound threat” to confidentiality in mediation. “The interests of litigants and of the courts in viable court - sanctioned alternative dispute resolution proceedings are under attack”). But if Kerckhoff Defendants are correct, and “no evidence whatsoever” with regard to the court-ordered mediation would be admissible in an action to enforce settlement, the interests of litigants and of the courts in court-ordered mediation would crumble. If Kerckhoff Defendants are correct, then parties could participate in the dispute resolution process, come to an agreement, then back out of that agreement with no consequences whatsoever, because no evidence of their actions would be admissible in an action seeking enforcement of the settlement. Similarly, participants could engage in a whole host of other “bad faith” behavior during mediation, without any sort of oversight by the very court that ordered them there.

Complete mediation confidentiality would effectively preclude judicial inquiry into participant conduct during the mediation process and would interfere with a court's power to

regulate and sanction the conduct of parties and attorneys, which is an established and important principle in the American legal system. If this were the law, courts and litigants would have absolutely no reason to use or participate in alternative dispute resolution and the purpose of Rule 17, to “provide an alternative mechanism for the resolution of civil disputes . . . before trial of certain civil cases with resultant savings in time and expenses to the litigants and to the court” would be completely defeated. *See* S. Ct. Rule 17.01(a).

A balance must be struck between protecting the disclosure of substantive materials going to the merits of an action and allowing the disclosure of relevant evidence necessary for the determination of a motion to enforce settlement. Respondents urge this Court to confirm that the state of both the common law and the provisions of Rule 17 have already struck that balance in disallowing statements, admissions and representations regarding the subject matter of a dispute to be submitted as evidence in an action on the merits of the underlying matter, and in allowing the introduction of evidence necessary to prove the existence of a settlement in an action to enforce that settlement. The trial court carefully and correctly navigated these competing interests and properly allowed evidence surrounding the execution of an alleged written settlement agreement and subsequent events to guide it in ruling on properly raised Motions to Enforce Settlement. The Judgment must be affirmed.

- 4. Even if the trial court did admit some evidence that violated Rule 17, the Judgment must still be affirmed, because Kerckhoff Defendants fail to establish an abuse of discretion, in that the Motions to Enforce Settlement**

**were denied and none of the evidence upon which the court relied in granting the motions for sanctions violated Rule 17.**

Finally, even if this Court is inclined to look past the fact that Kerckhoff Defendants fail to direct it to the specific objections which it claims constitute reversible error, and determines that some of the evidence admitted over Kerckhoff Defendants' objections in the evidentiary hearing did violate the provisions of Rule 17, the admission of such evidence was not an abuse of discretion and has not resulted in substantial or obvious injustice to Kerckhoff Defendants. *Miller*, 867 S.W.2d at 528. Appellants correctly note that the standard of review is an abuse of discretion; however, they provide no discussion regarding how the standard applies in this case to require this Court to reverse the Judgment. Perhaps, that is because it does not. It must be remembered, the trial court denied the Motions to Enforce Settlement. L.F. 195. The introduction of evidence related to the mediation session did not harm Kerckhoff Defendants by enforcement of any settlement agreement.

Kerckhoff Defendants argue injustice in the granting of the motions for sanctions against them. The court granted Plaintiffs', PF Development's, and Fischer & Frichtel's motions for sanctions due to Kerckhoff Defendants' bad faith behavior related to the mediation, after its termination, and events following the mediation. L.F. 195 - 197. "Courts, as arms of the judicial branch, have certain inherent powers, which includes the power, right and duty to take whatever action is necessary to protect the integrity of the judicial process." *Rea v. Moore*, 74 S.W.3d 795, 799-800 (Mo. App. S.D. 2002); *see also Chambers v. NASCO Inc.*, 501 U.S. 32 (1991) ("courts have the discretion to fashion an appropriate sanction for

conduct which abuses the judicial process”). Missouri courts have endorsed the use of their inherent power to sanction bad faith conduct, including the power to sanction a litigant for failing to participate in mediation in good faith. *Id*; see also *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001). A trial court’s decision to impose sanctions pursuant to its inherent powers is reviewed for an abuse of discretion. *Rea*, 74 S.W.3d at 799.

Kerckhoff Defendants claim that the findings supporting the sanctions awards “depended exclusively upon evidence of the existence, nature, and content of the term sheets, and the conduct and communications of parties and neutral [sic] at the mediation proceeding.” Appellants’ Brief, 39. According to Kerckhoff Defendants, “as soon as that singularly illegal evidentiary foundation is removed, the finding of bad faith and the imposition of sanctions collapses under its own weight.” *Id*. A review of the findings supporting the award for sanctions within the Judgment establishes that Kerckhoff Defendants are wrong.

In the Judgment, the court found that at the conclusion of the mediation, the parties, including Kerckhoff Defendants, executed the MSA which stated that the case was settled in principle, that the settlement terms were to be reduced to writing by December 31, 2008, that counsel for Plaintiffs was to recommend settlement, that the parties could seek enforcement of the MSA and the parties waived any and all trials and appeals, except for enforcement of the MSA. L.F. 195. The evidence of the contents of and execution of the MSA is not confidential as stated within the MSA itself and as addressed in Rule 17.06. Based on the language of the MSA, which stated, “case settled in principle,” and upon the fact that the

MSA was signed by Kerckhoff Defendants, the trial court found that “settlement in principle *was reached* at the mediation” and Kerckhoff Defendants knew and agreed to those principles.

Additionally, in making its award for sanctions, the court found:

Kerckhoff Defendants executed the MSA with the intent that it was not binding on them, with the intent and belief that they had not agreed to a single term of settlement discussed and reduced to writing that day, that they executed the settlement with the intent only to exit the mediation, and with the belief and knowledge that one of the parties necessary to a complete agreement to settle, Arthur Kerckhoff IV, was not present at the mediation. They further executed the MSA knowing that they would not reduce the terms discussed that day in mediation to a final settlement agreement, and that, in their minds, there was no settlement.

L.F. 195-196.

These findings are not based upon any “admission, representation, statement or other confidential communication” relating to the subject matter of the dispute. *See* S. Ct. Rule 17.06(a). These findings are based on the testimony of Kerckhoff Defendants regarding the execution of the MSA and their thoughts and beliefs related to the execution of the MSA. Tr. Vol. I, 106 - 107, 125. Incredibly, both Arthur Kerckhoff, III and Arthur Kerckhoff, Jr. testified that they executed the MSA so that they could leave the mediation. Tr. Vol. I, 134 - 135 (Arthur Kerckhoff, III: “As you can tell by my father, he is of ill health right now. And

at the end of the day, you know, someone said we'll never get through these things . . .we were led to believe the only way we were going to get out of there that night was to sign [the MSA] . . . I signed [the MSA] so I could leave, my father could leave.”); Tr. Vol. III, (Arthur Kerckhoff, Jr.: “I was so exhausted I would have signed any damn thing to get out of there”).

Additionally, Kerckhoff Defendants testified at length regarding the fact that no settlement could have been reached because they had not determined who had settlement authority on their behalf. Arthur Kerckhoff, IV, who was not even present at the mediation, was required in order for settlement to be reached, but that fact was not disclosed to the parties at the mediation. Tr. Vol. I, 118; Vol. III, 75 - 76. This is a direct violation of the court's Referral Order. L.F. 45. The party who had done most of the negotiating the day of the mediation on behalf of Appellants, Arthur Kerckhoff III, testified that he had no authority to settle the case; a fact which was confirmed by Arthur Kerckhoff, Jr. Tr. Vol. I, 125; Tr. Vol. III, 103 - 104. Additionally, Arthur Kerckhoff, Jr. testified that though he signed the MSA which stated, “settled in principle,” it was his belief and intent that he had not agreed to anything. Tr. Vol. III, 99 - 102. These matters are not confidential under Rule 17, were properly admitted as evidence by the court, and support its award for sanctions against Kerckhoff Defendants.<sup>5</sup>

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<sup>5</sup> Other states with rules related to confidentiality in mediation which are similar to Rule 17 have held that conduct related to the mediation, such as failure of a party to attend or information regarding the limits of a party's authority to settle a case, are not

The court's award of sanctions against Kerckhoff Defendants was also based on evidence related to the statements, actions and inactions of Kerckhoff Defendants in the days and weeks following mediation. No argument can seriously be made that these matters are confidential under Rule 17. Specifically, the trial court found that Kerckhoff Defendants failed to inform any one at the close of mediation or in the weeks immediately after mediation that they did not intend or believe there was a settlement and they actively concealed such intent and belief by indicating that they were diligently working on settlement documents consistent with the agreed upon terms. L.F. 196. These findings are based upon testimony and e-mails regarding what happened following termination of the mediation. See Tr. Vol. I, 65 - 71; Vol. II, 141 - 42. The court determined that Kerckhoff Defendants misled Plaintiffs and other parties into believing that they had agreed to a settlement and were working diligently to memorialize that settlement into a final writing, when Kerckhoff Defendants knew that was not the case. These factual issues are based on matters that did not occur during the mediation and are not confidential under Rule 17. Under the court's abuse of discretion standard, these actions fully support the granting of the motions for sanctions against Kerckhoff Defendants.

Despite their cursory attempts to argue to the contrary, Kerckhoff Defendants were simply not prejudiced by the introduction of any evidence which could arguably be in

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confidential under their rules. See *In re Daley*, 29 S.W.3d 915 (Tex. App. 2000); *Doe v. State of Nebraska*, 971 F. Supp. 1305 (D. Neb. 1997).

violation of Rule 17. The trial court ultimately denied the Motions to Enforce Settlement. While the trial court did grant Respondents' motions for sanctions against Kerckhoff Defendants, those motions were based upon evidence that does not violate the letter or the spirit of Rule 17, and which was properly admitted. Kerckhoff Defendants' have woefully failed to establish an abuse of discretion in the admission of evidence by the trial court which resulted in prejudice to them, and for this reason and the reasons addressed above, the Judgment must be affirmed.

**[Response to Appellants' Point Relied on III]**

**II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN IMPOSING SANCTIONS AGAINST KERCKHOFF DEFENDANTS, BECAUSE THE JUDGMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND PROPERLY DECLARES AND APPLIES THE LAW, IN THAT THE TRIAL COURT HAS THE POWER TO SANCTION BAD FAITH CONDUCT PURSUANT TO ITS INHERENT AUTHORITY AND THERE IS SUBSTANTIAL EVIDENCE THAT KERCKHOFF DEFENDANTS FAILED TO PARTICIPATE IN THE COURT-ORDERED MEDIATION IN GOOD FAITH, IN THAT THE RECORD ESTABLISHES THAT KERCKHOFF DEFENDANTS INTENTIONALLY DECEIVED RESPONDENTS BY INDICATING AND ACTING AS THOUGH THEY HAD AGREED ON A SETTLEMENT AT THE CONCLUSION OF THE MEDIATION AND IN THE WEEKS THEREAFTER WHILE HARBORING AN INTENT AND BELIEF THAT THEY HAD AGREED TO NOTHING, ALL IN VIOLATION OF THE TRIAL COURT'S ORDERS AND TO THE DETRIMENT OF RESPONDENTS.**

**A. Standard of Review**

The trial court's order imposing sanctions pursuant to its inherent power must be affirmed unless this Court finds that the trial court abused its discretion. *Rea v. Moore*, 74 S.W.3d 795, 798-99 (Mo.App. S.D. 2002). Only if the award of sanctions "is clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration" can it be reversed. *Id.* at 799.

While the trial court was obliged to base its award of sanctions upon evidence that was clear and convincing, *Rea*, 74 S.W.3d at 801, this Court must sustain the Judgment “unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). This Court’s power to set aside the Judgment “on the ground that it is ‘against the weight of the evidence’ [must be exercised] with caution and [only if it has] . . . a firm belief that the judgment is wrong. . . .” *Id.*

Where evidence is conflicting and consists, in part, of the testimony of witnesses, this Court must defer to the credibility determinations of the trial court. *White v. Director of Revenue*, 312 S.W.3d 298, 308 (Mo. banc 2010). Because the trial court can better assess the witnesses’ credibility, sincerity, character, and other intangibles than can an appellate court from the cold record, the appellate court must refrain from completely reevaluating the evidence. *Id.* at 308-09. Instead, recognizing that the trial court was “free to disbelieve any, all, or none of [the] evidence,” this Court must confine itself to determining the questions posed by *Murphy v. Carron* - substantial evidence, weight of evidence, and errors of law, as described above. *Id.*

## **B. Argument**

- 1. Appellants’ Point III violates Supreme Court Rule 84.04(d)(1) and should be disregarded.**

Appellants' Point III puts Respondents at a great disadvantage in preparing their brief, because it fails to comply with applicable briefing requirements. Rule 84.04 requires that Appellants identify the trial court ruling or action that is challenged on appeal. S. Ct. R. 84.04(d)(1). Point III of Appellants' Brief claims error in certain "findings of fact" reached by the trial court, but it leaves Respondents (and this Court) uncertain as to exactly what ruling of the trial court Appellants claim is erroneous and on what bases they so claim. Respondents and this Court have to guess at what they might mean, which is exactly what Rule 84.04 seeks to avoid.

Instead of identifying any one "ruling or action" that they challenge, as required by Rule 84.04(d)(1)(A), Appellants' Point III complains of two different findings of fact: first, that the trial court erred in finding that the parties had reached a settlement agreement and; second, that the trial court erred in finding the Kerckhoff Defendants acted "in bad faith with respect to the Mediated Form." Kerckhoff Defendants then give several particulars in which they claim the trial court erred in its factual findings. By grouping together contentions not related to a single issue, this point violates Rule 84.04 and preserves nothing for appellate review. *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). Further, though Point III identifies two findings that Appellants contest, in the argument that follows, Appellants criticize five separate findings, only two or three of which correlate with those described in the point. Appellant's Brief, 45 - 57. Arguments made in the argument section of an Appellant's Brief which do not relate to a point relied on should be disregarded. *Hutson v. Blazin' Saddle Entertainment, Inc.*, 930 S.W.2d 70, 71 (Mo. App. E.D. 1996).

Not only is this Point confusing and erroneous by focusing on the court's findings, rather than on its ruling, it hopelessly confuses the ultimate question, which one can only assume that Kerckhoff Defendants intend to challenge: Did the trial court properly impose sanctions? This is not clearly stated in the Point Relied On and for this reason, and the reasons stated above, Point III should be disregarded and/or stricken from the Appellants' Brief.

**2. Whether the trial court's factual findings are correct is not the correct question on appeal.**

Assuming, *arguendo*, that Point III preserves anything for appeal, we must attempt to divine its import. The unstated premise of Appellants' Point III is that two of the court's findings of fact are not supported by the evidence and are the product of a misapplication of the law, and therefore, the trial court's imposition of sanctions was improper. This argument implies that the Judgment must stand or fall on whether there is sufficient proof of just these two factual findings. Such an argument reflects a misunderstanding of the proper scope of appellate review. The question in whether to uphold the Judgment is not whether each of the trial court's individual factual findings are correct, but rather whether there is substantial evidence of these or other facts to support the Judgment. *Murphy v. Carron*, 536 S.W.2d at 32. As will be addressed throughout the remainder of this Point Relied On, there was sufficient and substantial evidence to support the trial court's imposition of sanctions against Kerckhoff Defendants, and the Judgment should be affirmed.

**3. The Judgment imposing sanctions upon Kerckhoff Defendants is supported by sufficient and substantial evidence and it appropriately declares and applies the law.**

- a. Whether the trial court found that a settlement in principle was reached at the mediation is not the issue on appeal, but even if it is relevant, there was substantial evidence in the record to support the finding.

As an initial matter, Kerckhoff Defendants' first challenged finding of fact in their point relied on is their claim that the trial court "erred in finding [] that the parties had reached an agreement regarding the terms of settlement at the . . . mediation proceeding." Appellants' Brief, 43. The basis for this claim of error, as set forth in their point relied on is that the term sheets contained an unresolved essential term, most of the plaintiffs had not agreed to any settlement, and none of the parties had a reasonable basis for determining that a settlement had been reached. Appellants' Brief, 43, 45 - 49. But the issue regarding whether an enforceable settlement was reached is irrelevant to this appeal. As addressed in Respondents' Point II, it must be remembered that, though the trial court did make this finding of fact, it did not enforce the terms of any settlement agreement. L.F. 195.

Appellants insinuate that the trial court's conclusion that the case was settled "in principle" cannot be sustained unless there is proof that rises to the level necessary to make

the settlement enforceable under Rule 17.06(c) or under the law of contracts.<sup>6</sup> Appellants' Brief, 45 - 49. Had the trial court entered a judgment enforcing the settlement and had Appellants then appealed, such an analysis would have been apropos. But that is not what happened and this analysis is totally out of place in this appeal. The portion of the Judgment imposing sanctions, which is what is at issue on this appeal, encompasses the manner in which Appellants conducted themselves during the mediation and afterwards, not a determination that the case had been settled and on what terms.

Even if this finding is properly at issue, there is substantial evidence in the record to support it. The evidence that Kerckhoff Defendants and other parties signed the MSA, which stated, “case settled in principle” is uncontroverted. L.F. 128; Tr. Vol. I., 32-34; Tr. Vol. III, 60, 76-78, 99. The MSA further provides, “The parties have been advised that by signing a MSA they may adversely affect their legal rights in court, in that by this agreed MSA they are waiving any and all trials and appeals, except for judicial enforcement of this MSA.” L.F. 128, Tr. Vol. I, 32 - 34. (emphasis in original). Moreover, though the final “term sheet” was not attached to the MSA, as the trial court found was required under Rule 17.06(c) in order to enforce the settlement, L.F. 195, the court received testimony regarding the existence and preparation of the term sheets and believed that they outlined the essential “principles” upon

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<sup>6</sup> It is not inconsistent that the trial court may have found that, while the parties did agree to a settlement in principle, the agreed upon settlement could not be enforced.

which the case was settled. Tr. Vol. I, 35 - 62, L.F. 195 (“the term sheets, *which contained those principles*, were omitted from being attached to the MSA”).

In addition, the evidence regarding the actions of Kerckhoff Defendants in the days and weeks following mediation establish that a settlement in principle was reached. Counsel for Kerckhoff Defendants sent several e-mails to, and had conversations with, counsel for Plaintiffs in which they indicated they were diligently working on preparing the settlement documents. Tr. Vol I, 64 - 71. At no time, at least until February of 2009, did Kerckhoff Defendants state to Plaintiffs that no deal had been reached. Tr. Vol. I, 71 - 72. If Kerckhoff Defendants really believed that no settlement had been reached, their counsel surely would not have been working to prepare settlement documents. In fact, it was not until Kerckhoff Defendants testified at the evidentiary hearings that Respondents and the Court learned that Kerckhoff Defendants took the position that “nothing” had been agreed to.

In addition, all parties (or counsel for parties) that attended and participated in the mediation, except for Kerckhoff Defendants, testified that a settlement had been reached. Tr. Vol. I, 63 - 64, 95, Vol. II, 68, 101, 108, 110 -111, 122. Eight out of ten attorneys testified that a settlement agreement had been reached. *Id.* Though Kerckhoff Defendants (and their counsel) testified to the contrary, Tr. Vol. I, 106, 124 125, Tr. Vol. III, 107, it is clear that the trial court found such testimony “as lacking any credibility whatsoever.” L.F. 196. Because the trial court has the benefit of receiving the evidence “live,” as opposed to a review of a cold transcript, where testimonial evidence is conflicting, this Court must defer to the credibility determinations of the trial court. *White*, 312 S.W.3d at 308.

There is substantial evidence in the record to support the trial court's finding that a settlement in principle had, in fact, been reached at the mediation, even though the trial court found that it could not enforce its terms. Appellants' arguments in their brief regarding the enforceability of such a settlement, Appellants' Brief, 45 - 50, miss the mark because the settlement was not enforced. The fact that the trial court found that the settlement in principle could not be enforced has no bearing on whether the trial court correctly or incorrectly imposed sanctions upon Kerckhoff Defendants for their actions related to the mediation.

- b. Substantial evidence supports the trial court's imposition of sanctions against Kerckhoff Defendants and the trial court properly declared and applied the law.

Presumably, as it is not clear from their brief, Appellants seek to challenge the ruling of the trial court in imposing sanctions against them for their bad faith in mediation. The record before the trial court is replete with evidence that Kerckhoff Defendants mediated and otherwise conducted themselves in bad faith in contempt of the trial court's Referral Order and in violation of their agreement to mediate in good faith. L.F. 44, 127. As set forth below, the record fully and substantially supports the trial court's finding that Kerckhoff Defendants actively concealed their true intentions and beliefs that no settlement was reached solely for the purpose of delay and resulting in harm to Respondents in the expenditure of significant funds and the loss of a trial setting. The trial court correctly sanctioned this abuse and misconduct in order to compensate Respondents for their harm, to punish and deter

Kerckhoff Defendants from such conduct, and to preserve and protect the integrity of the judicial process, including the integrity of court-ordered alternative dispute resolution. L.F. 196 - 97. The Judgment should be affirmed.

Missouri courts are vested with inherent power to address particular issues before them, including the imposition of sanctions. *Foster v. Kohm*, 661 S.W.2d 628, 631 (Mo. App. E.D. 1983) (“a trial judge has the inherent power to enforce compliance with [its] reasonable orders . . . A trial court, therefore, may at its discretion, impose sanctions when they are justified, considering the conduct of the parties and counsel.”); *Rea*, 74 S.W.3d at 799; *see also, Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

Federal decisions provide clear and concise guidance regarding a court’s ability to impose sanctions for a party’s failure to mediate in good faith. In *Nick v. Morgan’s Foods, Inc.*, the United States District Court for the Eastern District of Missouri imposed sanctions on a defendant for failure to mediate in good faith by failing to submit a mediation memorandum and failing to send a corporate representative with authority to settle. 99 F. Supp. 2d 1056, 1061 (E.D. Mo. 2000) (“ . . . the rules and orders governing [alternative dispute resolution] are designed to prevent abuse of the opponent, which can and does occur when one side does not participate in good faith.”). The Eighth Circuit affirmed the decision of the District Court. *Nick v. Morgan’s Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001). In both decisions, the courts cited to their inherent power for authority to sanction a party for failure to mediate in good faith. 99 F. Supp. 2d at 1060-61; 270 F.3d at 595, n. 2.

The trial court found, based upon the evidence, that Kerckhoff Defendants had mediated and thereafter acted in “bad faith,” or without good faith. L.F. 196. While the exact definition of “good faith” may vary depending on the context in which it is used, “in common usage it has a well-defined and generally understood meaning.” *State of Missouri v. Russell*, 45 S.W.3d 487, 497 (Mo. Ct. App. W.D. 2001). “That meaning is the state of mind denoting honesty of purpose, freedom from intention to defraud, and, generally speaking, means being faithful to one’s duty or obligation.” *Id.* Similarly, BLACK’S LAW DICTIONARY defines “good faith,” in part, as “honesty in belief or purpose,” “faithfulness to one’s duty or obligation” and “absence of intent to defraud or seek unconscionable advantage.” BLACK’S LAW DICTIONARY (9th ed. 2009).

Generally, in the context of addressing good faith conduct in the course of litigation, courts focus on actions which do not demonstrate good faith and what they instead deem as “bad faith.” Examples of bad faith conduct during the course of litigation include: a party’s filing of false pleadings or affidavits; a party’s concealment of assets; a party’s failure to comply with a scheduling order issued by the court; and a party’s failure to follow terms included in an order of the court. *See Engeman v. Engeman*, 123 S.W.3d 227, 240-241 (Mo. App. W.D. 2003); *see also Rea*, 74 S.W.3d at 799-800; *Nick*, 270 F.3d 590; 99 F. Supp.2d 1056. As set forth below, the record before the trial court upon Respondents’ motions for sanctions contained substantial evidence that Kerckhoff Defendants failed to mediate in

“good faith” (and thus, acted in “bad faith”) and the trial court properly imposed sanctions against them under its inherent authority.<sup>7</sup>

The evidence established that Kerckhoff Defendants executed the MSA with the intent and belief that it was not binding on them, and yet, they failed to inform any of the other parties that they believed no settlement had been reached and that they had agreed to “nothing.” Tr. Vol. I, 106-107, Tr. Vol. III, 99 - 102. Arthur Kerckhoff, Jr. admitted to reading and signing the MSA, which stated “case settled in principle.” Tr. Vol. III, 99. At the evidentiary hearing, when he was asked whether he agreed with the statement that the case was settled in principle, incredibly he responded, “No. I agreed in principle that there was a shortage of irrigation water downstream. That’s the only principle I agreed to . . . and it was non-binding.” Tr. Vol. III, 100. When confronted with the term sheet containing the discussed settlement terms, he indicated he might be willing to consider one of the terms. Tr. Vol. III, 97 -99. The record discloses, and the trial court directly determined, that Kerckhoff Defendants misled Respondents by signing a document setting forth that the case was settled in principle, when they felt they had agreed to nothing.

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<sup>7</sup> Kerckhoff Defendants did not file a request to opt out of mediation pursuant to Missouri Supreme Court Rule 17.03. Implicitly, a party who does not invoke its right to opt out represents to the court and to the other parties that it will mediate in good faith. *Nick*, 99 F. Supp. 2d at 1061. Additionally, the Agreement to Mediate contained a provision that each signing party agreed to mediate in good faith. L.F. 127.

In addition, though they executed a document stating that the case was “settled in principle,” Kerckhoff Defendants’ testimony at the evidentiary hearing established that, under no circumstances in their mind, could settlement have been reached that day. Arthur Kerckhoff, IV was not present at mediation and, according to Kerckhoff Defendants’ testimony during the evidentiary hearing, no settlement could have been reached without him. Tr. Vol. I, 118 (Q: “Was settling that day contingent upon the approval of any of the Kerckhoff family who was not present?” A: “Yeah, [Arthur Kerckhoff, IV] was not there. He would have had to sign any document.”). The fact that the attending Kerckhoff Defendants did not have authority to settle on the day of mediation was not disclosed to Plaintiffs. Tr. Vol. III, 75 -76. This is a direct violation of the trial court’s Referral Order, L.F. 45 and is nearly the situation that Judge Sippel predicted when he cautioned that “. . . occasionally parties may use the absence of a decision-maker as a weapon. Such parties ‘feign a good faith settlement posture by those in attendance at the conference, relying on the absent decision maker to refuse to agree,’ thereby taking advantage of their opponent. *Nick*, 99 F. Supp. 2d at 1062.

In addition, the testimony established that Arthur Kerckhoff, III had done most of the negotiating for Kerckhoff Defendants on the day of mediation. Tr. Vol. II, 9. But at the evidentiary hearing, both Arthur Kerckhoff, III and Arthur Kerckhoff, Jr. testified that Arthur Kerckhoff, III had no authority to settle anything. Tr. Vol. I, 125.; Tr. Vol. III, 103 -104. Arthur Kerckhoff, Jr. testified that he was a party who had to agree to settle the case but he did not make any settlement proposals nor did he participate in any of the settlement

negotiations. Tr. Vol. III, 102 - 104 (Q: “Did you participate in the private meeting which occurred that day between the litigants without the lawyers in the room?” A: “I did not.” Q: “Why did you not participate in that?” A: “No reason for me to.”). While Arthur Kerckhoff, Jr. was *physically* present for the mediation, the testimony reveals that he made no efforts to reach any settlement agreement throughout the course of the day. Tr. Vol. III, 82 - 83, 96 - 105. Failure to have the party with the ability to meaningfully negotiate attend and participate is a tactic which allows the offending party to gain information about its opponent’s case, strategy and settlement posture without sharing any of its own information. *See Nick*, 99 F. Supp. 2d at 1062. When the decision-maker fails to participate in the mediation, “the Court’s referral to mediation has been callously misused . . . the opposing side has spent money and time preparing for a good-faith, candid discussion toward settlement. If the other party does not reciprocate, most if not all of that money and time has been wasted.” *Id.* at 1063.

Counsel for Kerckhoff Defendants also testified that they allowed their clients to sign a document stating the case was settled in principle, when they believed nothing had been settled. Tr. Vol. 106 (Q: “Your client also signed [the MSA], is that right?” A: “Yes . . . I think both of them did, yeah.” Q: “When you signed this document what did you think it meant?” A: “Didn’t mean anything. That’s what it meant. Did not mean anything. . . All there was here, counselor, is the fact that there were some recognition of broad principles of a downstream possible water issue and some possibility of how this water issue would be resolved . . .”). As officers of the Court, counsel for Kerckhoff Defendants should know

better. The proper action to have been taken would be for counsel to have stated that while the mediation had been long and some progress may have been made, as it stood there was not yet a deal. This didn't happen and instead they allowed their clients to sign a document indicating the case was settled in principle. The reason for this is clear in hindsight. By taking this action, Kerckhoff Defendants were able to avoid the looming trial date (and deposition settings) and delay this litigation for more than a year.

The evidence also established that Kerckhoff Defendants signed the MSA, stating the case was settled in principle, so they could leave the mediation. Tr. Vol. I, 134 - 135 (Arthur Kerckhoff, III: "As you can tell by my father, he is of ill health right now. And at the end of the day, you know, someone said we'll never get through these things . . .we were led to believe the only way we were going to get out of there that night was to sign [the MSA] . . . I signed [the MSA] so I could leave, my father could leave."); Tr. Vol. III, (Arthur Kerckhoff, Jr.: "I was so exhausted I would have signed any damn thing to get out of there"). Kerckhoff Defendants correctly note in their brief that they were free to leave the mediation without signing the MSA. Appellants' Brief, 51. Appellants' testimony regarding the fact that they signed it in order "to get out of there," must mean either that they did believe the case was settled or that they wanted to "get out of there," while leading Plaintiffs and the other parties to believe that the case had been settled, when they harbored the belief and intent that it had not been settled.

The actions of the Kerckhoff Defendants and their counsel following mediation further establish that Kerckhoff Defendants wanted to lull Plaintiffs into believing that the

case was settled. In the days and weeks following the mediation, counsel for Plaintiffs and counsel for Kerckhoff Defendants exchanged several e-mails regarding the mediation and the settlement. Tr. Vol. I, 64 - 65. The day following the mediation, December 19, 2008, counsel for Plaintiffs sent an e-mail to counsel for Kerckhoff Defendants stating, “I think we all did as good a job for our clients as circumstances permitted, and my guess is no one is ecstatic over the deal which probably means it is a very good job of negotiation and compromise.” L.F. 133; Tr. Vol. I, 65 - 66. Counsel for Kerckhoff Defendants responded:

[W]e are reviewing the points outlined with our clients as well. In that regard, we are utilizing the earlier outline you prepared rather than the last which we thought was going to be a statement of general principles with less detail . . . As indicated yesterday, we will develop a proposed first draft and get it to you. . . . John is looking into bond and alternative security arrangements.

L.F. 134 (emphasis added); Tr. Vol. I, 66 - 67. On December 31, 2008, counsel for Kerckhoff Defendants again wrote to counsel for Plaintiffs: “Jason - although we are having a very busy year end . . we have commenced drafting language for a proposed agreement with respect to the more critical provisions. . . Should have it to you hopefully by the end of next week.” L.F. 138 (emphasis added); Tr. Vol. I, 69 - 70. Arthur Kerckhoff, Jr. e-mailed one of the Plaintiffs asking them to reconsider one of the terms of the settlement. L.F. 135, Tr. Vol. II, 10 - 13. In addition, counsel for Kerckhoff Defendants called Plaintiffs’ counsel

in the weeks following the mediation to indicate that they were working hard on the settlement documents and would have a draft to Plaintiffs as soon as possible. Tr. Vol. I, 71.

Based on the evidence set forth above, the trial court found that Kerckhoff Defendants intentionally misled Respondents with regard to the issue of whether the case was settled and with regard to their efforts to memorialize such settlement to the detriment of Respondents in preparing for the mediation, attending the mediation, paying for the mediation, moving to enforce settlement, and prosecuting the Motions to Enforce Settlement. Additionally, and importantly, the trial court determined that Kerckhoff Defendants' actions were taken, in part, to extend the litigation and to avoid an impending trial date. L.F. 196. At the time the mediation was conducted on December 18, 2008, the underlying action was set for trial on April 27, 2009. L.F. 33. Kerckhoff Defendants' actions, in continuing to act as though the case was settled for several weeks following the mediation, necessitated that the looming trial date be continued. L.F. 38 - 39. In addition, during this time, Plaintiffs relied upon Kerckhoff Defendants' representations regarding settlement and, as a result, postponed prosecuting the lawsuit. When this evidence was introduced at the evidentiary hearing, it was clear to all parties, including the trial court, that an outright fraud had been committed by Kerckhoff Defendants, which caused the trial court to invite parties to file their respective motions for sanctions. Tr. Vol. III, 156.

The Judgment of the trial court imposing sanctions upon Kerckhoff Defendants appropriately declares and applies the law. As set forth above, Missouri courts have recognized a trial court's ability to sanction party or counsel for bad faith behavior in the

course of litigation, which includes the ability to sanction bad faith behavior related to the alternative dispute resolution process. In addition, the Judgment is supported by sufficient and substantial evidence of Kerckhoff Defendants' bad faith conduct. As determined by the trial court, the record establishes that Kerckhoff Defendants represented, through execution of the MSA and through their conduct in the days and weeks following mediation, that they had agreed to a settlement of the lawsuit. The record further discloses that Kerckhoff Defendants' actions and representations regarding settlement were intentionally done to mislead, in that they never agreed to anything, nor believed that the case was settled. These misrepresentations with regard to settlement were in contempt of the trial court's Referral Order, were in violation of the Agreement to Mediate, caused significant harm to Respondents in the form of the expenditure of attorneys fees and time, and the loss of a trial date, and constitute an impairment to the judicial integrity of the court-ordered mediation process. The Judgment should be affirmed.

[Response to Appellants' Point Relied on IV.]

**III. THE TRIAL COURT DID NOT ERR IN DENYING APPELLANTS' MOTION FOR SANCTIONS AGAINST RESPONDENTS' ATTORNEYS AND LAW FIRMS BECAUSE, (A) THE TRIAL COURT LACKED AUTHORITY TO GRANT THE MOTION PURSUANT TO SUPREME COURT RULE 55.03(d), (B) THE TRIAL COURT'S INHERENT AUTHORITY TO ISSUE SANCTIONS WAS NOT PROPERLY AT ISSUE, AND (C) RESPONDENTS' ATTORNEYS COMPLIED WITH SUPREME COURT RULE 55.03(c) IN FILING THE RESPECTIVE MOTIONS TO ENFORCE SETTLEMENT IN THAT, (A) APPELLANTS DID NOT SERVE THEIR MOTION FOR SANCTIONS ON RESPONDENTS' ATTORNEYS THIRTY DAYS PRIOR TO FILING WITH THE COURT, (B) APPELLANTS DID NOT PETITION THE TRIAL COURT FOR RELIEF UNDER ITS INHERENT AUTHORITY, (C) THE TRIAL COURT'S INHERENT AUTHORITY TO ISSUE SANCTIONS FOR ALLEGED VIOLATIONS OF MO. R. CIV. P. 55.03(c) IS LIMITED BY MO. R. CIV. P. 55.03(d), AND (D) RESPONDENTS' MOTIONS TO ENFORCE SETTLEMENT WERE FOR A PROPER PURPOSE, WERE NOT FRIVOLOUS AND HAD EVIDENTIARY SUPPORT.**

**A. Standard of Review**

An appellate court is required to affirm the denial of a motion for sanctions unless there is no substantial evidence to support it, it is against the weight of the evidence, or unless it erroneously declares or applies the law. *Williams v. Frymire*, 186 S.W.3d 912, 916

(Mo.App. S.D. 2006) (internal citations and quotations omitted); *Kopp v. Franks*, 792 S.W.2d 413, 425 (Mo.App. S.D. 1990). A trial court’s judgment is presumed valid and the burden is on the appellant to demonstrate its incorrectness. *Id.* (internal citations omitted). The appellate court defers to the trial court’s determination of credibility, viewing the evidence and permissible inferences therefrom in the light most favorable to the judgment and disregarding all contrary evidence and inferences. *Id.* (internal citations omitted).

### **B.Argument**

**1. The court lacked authority to grant Appellants’ motion for sanctions because Appellants failed to comply with the requirements of Rule 55.03(d)(1)(A).**

Although the court did not err in denying Appellants’ motion for sanctions against Respondents<sup>8</sup> on substantive grounds, argued below, the Court need not reach that argument because Appellants failed to comply with the explicit procedural requirements of Rule 55.03, denying the court any authority to impose sanctions.

In the context of this case, Rule 55.03(c) advises that by presenting and maintaining a claim, request, demand, contention or argument in a motion submitted to the court, an

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<sup>8</sup>Appellants’ motion for sanctions was directed only to the law firms and counsel for Respondent (Plaintiffs) Homeowners and Respondent (Defendant) PF Development, LLC. Reference to ‘Respondents’ in this portion of Respondents’ Joint Brief refers only to those attorneys and law firms that Appellants sought against whom Appellants sought sanctions.

attorney or party is certifying to the best of the person's knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, that the claim is not made for any improper purpose, that the claim is not frivolous and that the allegations have or are likely to have evidentiary support. S. Ct. Rule 55.03(c).

The court may impose sanctions upon lawyers, law firms or parties it finds to have violated Rule 55.03(c) after notice and an opportunity be heard. S. Ct. Rule 55.03(d). However, the court's ability to impose sanctions is subject to the conditions of Rule 55.03(d)(1)-(2). In relevant part, Rule 55.03(d)(1)(A) states, "[t]he motion **shall not** be filed with or presented to the court unless within thirty days after service of the motion the challenged claim . . . request, demand . . . contention, or argument is not withdrawn or appropriately corrected." (emphasis added).

Missouri appellate courts have consistently enforced compliance with these conditions prior to a court's imposition of sanctions. In *Bothe v. Bothe*, 266 S.W.3d 321 (Mo.App. E.D. 2008), the appellant mother argued that the court erred in imposing sanctions pursuant to Rule 55.03(c) (now 55.03(d)) and Mo. Rev. Stat. § 514.205 because respondent father filed his motion for sanctions prior to thirty days after service. Citing to the requirements of the rule, the appellate court reversed the court, explaining that the thirty day time limit "is designed to conserve judicial resources by allowing the non-moving party to take corrective action on the alleged violation prior to the court's ruling on the motion." *Id.* at 327 (internal citations omitted). Further, the court held that filing a motion for sanctions with the court prior to the expiration of the thirty day period leaves the court without authority to rule on

the motion. *Id.* (citing *Weidner v. Amc. Family Mut. Ins. Co.*, 928 S.W.2d 401, 404 (Mo.App. E.D. 1996) for dismissal of motion for sanctions for lack of jurisdiction because movant filed the motion with the court the day after serving the motion on the opposing party); *see also Peachtree Apartments v. Pallo*, 317 S.W.3d 189, 192-193 (Mo.App. E.D. 2010) (noting in footnote 3 that even if the trial court otherwise had jurisdiction to enter a valid judgment, it erred as a matter of law in imposing sanctions under Rule 55.03 because, in part, movant filed its motion for sanctions with the court prior to thirty days from service); *Williams*, 186 S.W.3d at 923 (“[t]he violation of the explicit procedural requirements of this rule denies the trial court of any authority to impose sanctions.”).

In this case, Appellants’ motion for sanctions was filed with the court on or about the same day it was served on Respondents, some six months after Respondents filed their motions to enforce settlement, and only after the underlying motions to enforce sanctions were fully briefed and the evidentiary hearing concluded. L.F. 39; 180; 37; 56 – 57.

Importantly, Appellants’ motion for sanctions is distinguishable from the four motions for sanctions filed by Respondents because Appellants’ motion relies solely on Rule 55.03 and complains only of violations of 55.03(c), while Respondents’ motions rely on the court’s inherent authority to sanction for bad faith mediation.

Thus, Appellants were required, but failed, to serve their motion on Respondents thirty days prior to presenting it to the court, in contravention of the requirements of Rule 55.03(d)(1)(A), and depriving Respondents the opportunity to correct the alleged sanctionable conduct. As such, the court did not have authority to impose sanctions and did

not err in summarily denying Appellants' motion.

**2. The court's inherent authority to sanction Respondents for violation of Rule 55.03(c) was not properly at issue.**

Appellants' motion only alleged violations of Rule 55.03(c) and only requested sanctions pursuant to 55.03. Brief of Appellants, p. 11. The only mention by Appellants of the court's inherent authority to impose sanctions *sua sponte* is found in their Motion to Strike Respondents PF Development and Plaintiff Homeowners Memorandums in Opposition to their Motion for Sanctions<sup>9</sup> and in their Point Relied On IV. L.F. 190; Brief of Appellants, p. 58.

Because Appellants offer no argument in their brief regarding the court's inherent authority to impose sanctions for alleged 55.03(c) violations and, likewise, confine their request for relief from this Court, as stated in the Conclusion to Appellants' brief, to the imposition of sanctions pursuant to 55.03(d), Respondents assume that Appellants have abandoned that portion of their Point Relied On. If, however, the Court does not find that Appellants abandoned the argument, it may still find that the court did not err in denying Appellants' "request" for sanctions under its inherent authority because that issue was never properly before the court.

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<sup>9</sup> Appellants' motion to strike did not request sanctions in its prayer for relief (L.F. 191) and, as best can be discerned from Appellants' brief, they have not appealed the court's denial of their motion to strike.

The trial court has the inherent authority to impose sanctions for violations of Rule 55.03(c) on its own initiative as set forth in 55.03(d)(1)(B). However, this authority is limited by the rule's requirements that a court must first issue an order describing the alleged misconduct, order the offender to show cause why no violations exist and afford a reasonable opportunity to respond in contemplation of basic due process. *Noland v. State Farm Mut. Auto. Ins. Co.*, 853 S.W.2d 327, 331 (Mo.App. W.D. 1993) (internal citations omitted).

In *Town and Country Appraisals, LLC. v. Hart*, the Eastern District of the Missouri Court of Appeals reversed the court's imposition of sanctions on the appellant, noting that the trial court neglected to issue a show cause order before imposing sanctions. Citing *Williams, supra*, the court stated that "[t]he violation of the explicit procedural requirements of this rule denies the trial court of any authority to impose sanctions." *Town and Country Appraisals, LLC. v. Hart*, 244 S.W.3d 187 (Mo.App. E.D. 2007).

Here, the court did not issue a show cause order at any time. To invoke its inherent authority and impose sanctions on Respondents without notice and an opportunity to be heard would deny Respondents of basic due process. *See Noland*, 853 S.W.2d 327 at 331. As a result, the court's inherent authority to impose sanctions against Respondents was not properly at issue before it.

- 3. Even if this Court should find that the trial court had authority to impose sanctions on Respondents, the trial court did not err in denying Appellants' Motion for Sanctions because substantial evidence supports the court's decision.**

If this Court concludes that Appellants complied with the procedural requirements of Rule 55.03(d), the trial court's denial of Appellants' motion for sanctions must be affirmed due to the substantial evidence supporting the decision. Furthermore, the broad and conclusory statements in Appellants' brief fail to identify any specific error by the court in denying Appellants' motion.

In evaluating whether sanctions are appropriate, “[i]t should first be noticed that Rule 55.03 speaks as of the time the pleading is signed . . . [t]he court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.” *Noland*, 853 S.W.2d at 331 (citing to Fed.R.Civ.P. 11 advisory committee notes). Moreover, “Rule 55.03 is not to be applied in such a way as to make parties and attorneys overcautious in pleading . . . [t]he rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories.” *Id.*

Respondents' motions to enforce settlement were each supported by affidavits from their respective clients swearing to their belief that a settlement had been reached at mediation. Supp. L.F. 18 - 19; L.F. 70 – 83. Moreover, each motion was buttressed by a Memorandum of Law replete with analysis applying existing Missouri case law regarding enforcement of settlements to the facts of this case (*see e.g. Bishop v. Heartland Chevrolet, Inc.*, 152 S.W.3d 893, 896 (Mo.App. E.D. 2005)). Supp. L.F. 1 - 9; L.F. 55. Finally, the MSA, executed by Appellants and their counsel, expressly authorized its enforcement. L.F. 51. These factors alone demonstrate that Respondents' motions were not brought for an

improper purpose, were not frivolous and had evidentiary support. Appellants' brief offers no analysis to the contrary.

Instead, Appellants' brief cites to only two cases, each of which is readily distinguishable or not on point. Appellants cite no cases discussing a court's denial of a motion for sanctions. Appellants cite *Capital One Bank v. Hardin*, 178 S.W.3d 565, 576 (Mo.App. 2005) for the definition of a frivolous pleading. Brief of Appellants, p. 59. Appellants' reliance on *Capital One* for the offered definition is misplaced because the case is distinguishable and not on point in that it is a frivolous appeal case under Rule 84.19, not a case under Rule 55.03. Further, the appellant was pro se whereas Respondents' counsel have considerable collective experience practicing law in Missouri courts.

Appellants next cite to *Dillard Department Stores, Inc. v. Muegler*, 775 S.W.2d 179, 186 (Mo.App.E.D. 1989) to explain the purposes of Rules 55.03(d) and 84.19. Brief of Appellants, p. 60. Appellants conclusively state that this case warrants the same treatment that the appellant received in *Dillard*, i.e. imposition of sanctions, but leave it to this Court to find and connect the dots of why that is so. *Dillard* is distinguishable from this case, not only because it is an appeal of the imposition of sanctions rather than a denial, but also because its facts are not remotely similar to the facts of this case. In *Dillard*, the appellant was sanctioned under now Rule 55.03(c)(1) (improper purpose) for refileing two causes of action that had previously been denied by the court.

Based on the foregoing, this Court should affirm and find that either the trial court lacked authority to impose sanctions or that it did not err in denying Appellants' Motion for Sanctions.

**[Response to Appellants' Point Relied on I]**

**IV. WHETHER THE COURT OF APPEALS FOR THE EASTERN DISTRICT OF MISSOURI ERRED IN DISMISSING APPELLANTS' APPEAL FOR WANT OF A FINAL JUDGMENT IS NOT AT ISSUE IN THIS MATTER AS THE CASE WAS PROPERLY TRANSFERRED TO THE SUPREME COURT OF MISSOURI FOR FINAL DETERMINATION.**

**A. Standard of Review**

An appellate court is charged with considering the issue of its jurisdiction *sua sponte*. *Kunkel v. Hertzog*, 176 S.W.3d 171, 173 (Mo. App. W.D. 2005).

**B. Argument**

Respondents do not believe that whether the Court of Appeals for the Eastern District of Missouri properly or improperly dismissed Appellants' appeal to that Court is at issue in this matter following transfer by this Court. Respondents believe that this case is properly before this Court on transfer, that this Court has jurisdiction, and the issues are now before this Court for determination.

## CONCLUSION

For the reasons set forth in Respondents' Points Relied On I - IV, Respondents respectfully request that this Honorable Court affirm the Judgment of the trial court.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 84.06(c)**

The undersigned counsel hereby certifies that the foregoing brief (1) includes the information required by Rule 55.03, (2) complies with the limitations in Rule 84.06(b), (3) was prepared in proportional typeface of 13 points, (4) that the word processing system used to prepare the brief is WordPerfect X4 in Times New Roman, and (5) that the brief contains 15,539 words as determined by the WordPerfect X4 word counting system. The undersigned counsel further certifies that the accompanying disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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## CERTIFICATE OF SERVICE

A true copy of the foregoing Brief of Respondents Plaintiff Dennis P. Buemi, et al., and Defendant PF Development and a CD-ROM containing the brief were sent by first class United States mail, postage prepaid, this \_\_\_\_\_ day of January, 2011, to:

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