

IN THE SUPREME COURT OF MISSOURI

DENNIS BUEMI, et al.

Respondents

vs.

ARTHUR KERCKHOFF, JR., et al.

Appellants

No. SC 91132

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

APPELLANTS' BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	1
Table of Authorities	2
Statement of Jurisdiction	6
Statement of Facts	8
Points Relied On	26
Argument	30
Conclusion	62
Certificate of Compliance and Service	64
Appendix	
Judgment of the Circuit Court	
Mo. R. Civ. P. 17.05	
Mo. R. Civ. P. 17.06	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Bannister v. Pulaski Financial Corporation</i> , 255 S.W.3d 538 (Mo.App.E.D. 2008)	34-35
<i>Brown v. Kirkham</i> , 23 S.W.3d 880 (Mo.App.W.D. 2000)	58
<i>Burger v. City of Springfield</i> , 323 S.W.2d 777 (Mo. 1959)	46
<i>Capital One Bank v. Hardin</i> , 178 S.W.3d 565 (Mo.App. 2005)	59-60
<i>Chailland v. MFA Mutual Insurance Co.</i> , 375 S.W.2d 78 (Mo. 1964)	49-50
<i>Columbia Mutual Insurance Co. v. Epstein</i> , 200 S.W.3d 547 (Mo.App.E.D. 2006)	33
<i>Committee for Educational Equality v. State of Missouri</i> , 878 S.W.2d 446 (Mo. 1994)	33-34
<i>Delta Air Lines, Inc. v. Director of Revenue</i> , 908 S.W.2d 353 (Mo. 1995)	38
<i>Dillard Department Stores, Inc. v. Muegler</i> , 775 S.W.2d 179 (Mo.App.E.D. 1989)	60
<i>Dreppard v. Dreppard</i> , 211 S.W.3d 620 (Mo.App.E.D. 2007)	34
<i>Emerick v. Mutual Benefit Life Insurance Co.</i> , 756 S.W.2d 513 (Mo. 1988).	45-46
<i>Erslon v. Cusumano</i> , 691 S.W.2d 310 (Mo.App.E.D. 1985)	32

TABLE OF AUTHORITIES (Cont'd)

<u>Cases (cont'd)</u>	<u>Page</u>
<i>Foxgate Homeowners' Association, Inc. v. Braalea California, Inc.</i> , 40 25 P.3d 1117 (Cal. 2001)	
<i>Gibson v. Brewer</i> , 952 S.W.2d 239 (Mo. 1997)	32, 36
<i>Hancock v. Shook</i> , 100 S.W.3d 786 (Mo. 2003)	57-58
<i>Heindselman v. Home Insurance Co.</i> , 282 S.W.2d 191 (Mo. 1955)	52
<i>Higgins v. Director of Revenue</i> , 778 S.W.2d 24 (Mo.App.S.D. 1989)	44, 56
<i>Karsch v. Carr</i> , 807 S.W.2d 96 (Mo.App.E.D. 1990)	50
<i>Land Clearance for Redevelopment Authority v. Zitko</i> , 386 S.W.2d 69 (Mo. 1964)	52
<i>McPherson v. U.S. Physicians Mutual Risk Retention Group</i> , 99 S.W.3d 462 (Mo.App.W.D. 2003)	56
<i>Missouri Soybean Association v. Missouri Clean Water Commission</i> , 102 S.W.3d 10 (Mo. 2003)	31
<i>Murphy v. Carron</i> , 536 S.W.2d 30 (Mo. 1976)	44
<i>Nelson v. Waxman</i> , 9 S.W.3d 601 (Mo. 2000)	38
<i>P. R. T. Investment Corporation v. Ranft</i> , 252 S.W.2d 315 (Mo. 1952)	46
<i>Poe v. Illinois Central Railroad Co.</i> , 99 S.W.2d at 82 (Mo. 1936)	50

TABLE OF AUTHORITIES (Cont'd)

<u>Cases (cont'd)</u>	<u>Page</u>
<i>Quiktrip Corp. v. City of St. Louis</i> , 801 S.W.2d 706 (Mo.App.E.D. 1990)	30-31
<i>Rea v. Moore</i> , 74 S.W.3d 795 (Mo.App.S.D. 2002)	44, 56
<i>St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.</i> , 301 S.W.3d 549 (Mo.App.E.D. 2009)	45-46
<i>Sawyer v. Bi-State Development Agency</i> , 237 S.W.3d 617 (Mo.App.E.D. 2007)	34-35
<i>State ex rel Selleck v. Reynolds</i> , 158 S.W. 671 (Mo. 1913)	56
<i>Shirrell v. Missouri Edison Co.</i> , 535 S.W.2d 446 (Mo. 1976)	44
<i>State of Missouri v. Hicks</i> , 535 S.W.2d 308 (Mo.App.S.D. 1976)	50
<i>Team, Inc. v. Schlette</i> , 814 S.W.2d 12 (Mo.App.E.D. 1991)	30
<i>Williams v. Kansas City Title Loan</i> , 314 S.W.3d 868 (Mo.App.W.D. 2010)	40-41
 <u>Constitution, Statutes and Rules</u>	
Mo. Const., art. V, § 3	6-7
Mo. Const. art. V, § 10	6-7
Mo. Const., art. V, § 15	6-7
§ 512.160, Mo. Rev. Stat.	60-61
Mo. R. Civ. P. 17.05	<i>passim</i>

TABLE OF AUTHORITIES (Cont'd)

<u>Constitution, Statutes and Rules (Cont'd)</u>	<u>Page</u>
Mo. R. Civ. P. 17.06	<i>passim</i>
Mo. R. Civ. P. 55.03	<i>passim</i>
Mo. R. Civ. P. 74.01	30-36
Mo. R. Civ. P. 83.04	7
Mo. R. Civ. P. 84.14	60-61
Mo. R. Civ. P. 84.19	57-58
Unif. Mediation Act, 7A U.L.A.	38

Other Authorities

Michael A. Perino, Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act, 26 Seton Hall L. Rev. 1, 5-8 (1995)	40
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STATEMENT OF JURISDICTION

This is an appeal from an Order and Judgment of the St. Louis County Circuit Court dated October 2, 2009 (“Judgment”) requiring the Appellants, who were defendants in a multi-defendant civil action, to pay as sanctions attorney fees incurred by other parties during and after court-ordered mediation proceedings. Legal File at 194-98. After ordering the sanctions, on motion of the Appellants the trial court made a finding that there was no just reason for delaying appellate review of the matter, and on November 12, 2009, entered an order pursuant to Mo. R. Civ. P. 74.01(b) entering the Judgment and rendering it final for purposes of appeal. *Id.* at 206.

The Appellants filed their Notice of Appeal to the Missouri Court of Appeals, Eastern District, on November 12, 2009. *Id.* at 212-17. The Court of Appeals dismissed the appeal for lack of a final judgment in an order entered on June 21, 2010. The Appellants filed their Application for Transfer in the Court of Appeals on July 6, 2010, and the Court denied that application on August 10, 2010. The Appellants filed their Application for Transfer in this Court on August 25, 2010. On September 21, 2010, this Court entered its order transferring the appeal.

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

the Missouri Court of Appeals for the Eastern District, enjoyed original jurisdiction of this appeal. By virtue of Article 5, § 10, of the Missouri Constitution, as amended, and Mo. R. Civ. P. 83.04, this Court is vested with jurisdiction to transfer and finally determine appeals pending in a Court of Appeals because of the importance of a question involved in the case, or for the purpose of re-examining existing law, or to address conflict between the disposition of the case by the Court of Appeals and previous decisions of an appellate court of this state.

STATEMENT OF FACTS

A. Procedural History

Several owners of homes in Pevely Farms, a St. Louis County subdivision (“Plaintiffs”), unhappy with the alleged inadequacy of the existing water system and with plans for the construction of additional homes, sued a panoply of defendants for declaratory and injunctive relief and damages. Supp. Legal File at 1-55. Among the defendants in that action are Arthur Kerckhoff, Jr., Arthur Kerckhoff III, Arthur Kerckhoff IV and the Arthur Kerckhoff Trust, Arthur Kerckhoff, Jr., Trustee (collectively “Appellants” or “Kerckhoff Defendants”) *Id.* at 1, 6-7. Arthur Kerckhoff, Jr., Arthur Kerckhoff, III and Arthur Kerckhoff, IV at various times were officers and/or directors of the subdivision homeowners association. *Id.* The Arthur Kerckhoff Trust was the owner of the lots, before selling them to a developer, upon which the homes were built. The Trust continues to own lots in the subdivision. *Id.* at 7.

The Circuit Court ordered the parties to participate in a mediation pursuant to Supreme Court Rule 17. Legal File at 44-45. The order specified: “*All parties or their representatives with authority to resolve the case . . . shall attend the Alternative Dispute Resolution meetings set by the neutral.*” *Id.* at 45 (emphasis in original). The order also provided:

The proceeding shall be private, confidential and regarded as settlement negotiations as provided in Supreme Court Rules 17.05

and 17.06. No stenographic, electronic or other record of the Alternative Dispute Resolution process shall be made.

Id.

Retired Circuit Court Judge William Corrigan served as mediator and conducted a single mediation proceeding on December 18, 2008. Tr. III. at 5-6.¹ The Plaintiffs and one defendant, PF Development, LLC (“PF Development”), later filed motions (joined in by plaintiff Giovanna Boato) seeking the enforcement of what they characterized as a mediated settlement agreement. *Id.* at 46-83, 99; Tr. II at 130. The purported settlement agreement was a one-page form document titled “Mediated Settlement Agreement” provided by USA&M and the mediator (“Mediation Form”). It contained no terms of settlement and was not executed by all the parties. *Id.* at 51, 58. No “term sheets” were incorporated in or attached to the document. *Id.* Judge Corrigan had written the following by hand near the top of the document: “Case settled in principle—proposed settlement to be reduced to writing by 12-31-08. Plaintiffs to recommend settlement to property owners.” Tr. III at 10-11; Legal File at 51, 58.

¹ The record includes three volumes of transcript from proceedings conducted by the trial court. The Appellants’ brief refers to the transcript of proceedings of May 11, 2009, as Tr. I and a page citation; the transcript of proceedings on May 20, 2009, as Tr. II and a page citation; and the transcript of proceedings on August 10, 2009, as Tr. III and a page citation.

The Circuit Court scheduled an evidentiary hearing on the motions seeking enforcement of the purported settlement agreement. Legal File at 84. The present Appellants, who are among the defendants in the trial court, filed a motion to vacate that scheduling order. *Id.* at 85-91. They based their objection to the hearing on the confidentiality provisions of Rule 17.06(a) and Cir. Ct. R. 38.06 and on the requirement of Rule 17.06(c) and Cir. Ct. R. 38.3(4) that a mediated settlement agreement be written, contain the essential terms of the agreement and be executed after the termination of the alternative dispute resolution process. Legal File at 86-88. The Circuit Court denied that motion. *Id.* at 85. The present Appellants filed a separate motion to exclude any testimony or other evidence of the substance of the mediation process. *Id.* at 92-95. The court denied that motion but noted the possibility of exclusionary rulings with respect to particular evidence at the hearing. *Id.* at 92.

The trial court conducted its evidentiary hearing on May 11 and 20 and August 10, 2009. Tr. I-III. At the conclusion of testimony on the latter date, the court asked counsel: “Is this motion to enforce in the alternative a motion for sanctions?” Tr. III at 156. None of the pending motions had made any mention of sanctions. Legal File at 101-61. The court announced it would “entertain motions for sanctions about this as well” and requested evidence regarding “attorneys fees that you’ve incurred during the mediation, for the things that occurred after the mediation . . . including the writs and the motions and the time you spent in court.” Tr. III at 156.

The Plaintiffs, plaintiff Giovanna Boato separately, the Kerckhoff Defendants, and two other defendants, PF Development and Fischer & Frichtel, Inc. (“Fischer & Frichtel”), filed motions for sanctions seeking awards of attorney fees pursuant to the trial court’s invitation. Legal File at 101-88. The Kerckhoffs’ motion was filed pursuant to Mo. R. Civ. P. 55.03 and alleged that the several motions seeking enforcement of a mediated settlement agreement had been frivolous because no agreement had been reached. *Id.* at 176-79. The other motions invoked the inherent power of the court to sanction misconduct during litigation, alleged variously that the case had been settled in the mediation proceeding, and concluded that the Kerckhoffs had acted in bad faith by executing the Mediation Form and not advising the plaintiffs and other defendants that they did not consider themselves legally bound to a mediated settlement agreement. *Id.* at 101-175.

The Circuit Court entered its Judgment on October 2, 2009, without having conducted further proceedings on the invited motions for sanctions. *Id.* at 194-98. It found that the parties had reached a “settlement in principle” but that the absence of written terms precluded enforcement of the agreement.” *Id.* at 195. The court also found that the present Appellants had “executed the [mediated settlement agreement form] with the intent that it was not binding on them,” that they had “failed to inform any other party at mediation that no agreement could be reached in the absence of Arthur Kerckhoff IV,” that they had “actively concealed such intent by indicating that they were diligently working on documents

consistent with the agreed upon terms,” and that ultimately they had “submitted a settlement proposal varying in major respects to the ‘principle’ agreed to at the mediation.” *Id.* at 195-96. The court concluded that the present Appellants had acted in “bad faith . . . intentionally . . . to the other parties’ detriment.” *Id.* at 196. The court ordered the present Appellants to pay attorney fees totaling \$122,425.00 to those parties as a sanction for that conduct. *Id.* at 197.

At the Kerckhoff Defendants’ request, the Circuit Court found that there was no just reason for delay with respect to its award of sanctions and entered the Judgment pursuant to Rule 74.01(b), and ordered that it was final for purposes of appeal. The Kerckhoffs then appealed to the Court of Appeals. *Id.* at 212-16. That Court dismissed the appeal for want of a final judgment. The order of dismissal stated: “The 74.01(b) certification is not proper because it does not dispose of any single claim for relief requested in the petition. There is no final appealable judgment.” This Court then transferred the appeal.

B. Evidentiary Hearing

Judge Corrigan testified that he had mediated approximately 700 cases in the seven and one-half years since his retirement from the bench. Tr. III. at 5, 13. He stated that when a case is settled in mediation he “never let[s] the people leave until they set all the essential elements [in writing] and all the parties sign it.” *Id.* at 13. When he was asked whether that had happened in this case, Judge Corrigan answered: “No.” *Id.*

Judge Corrigan testified that he conducted a single mediation session in this case on December 18, 2008. *Id.* at 6. The meeting lasted almost 12 hours. *Id.* at 6, 16, 19, 24, 54-55. Judge Corrigan described the mediation of this case as “very contentious” and stated that he had worked through that session continuously without a meal break. *Id.* at 7, 10. He recalled that he had placed parties and attorneys in “four or five rooms,” that “people were milling around all day long,” and that he had “shuttl[ed] back and forth between rooms all day.” *Id.* at 17-18. Judge Corrigan testified that the parties had not settled the case or entered into a settlement agreement by the end of the proceeding. *Id.* at 7-8, 48.

Judge Corrigan completed the Mediation Form before concluding the mediation session. *Id.* at 8-10, 20. He testified that he thought the parties who were present had come close to settling the case and explained that his purpose in preparing the Mediation Form had been to assist the attorneys “in keeping pressure on the people” to reach a final resolution. *Id.* at 12. During cross-examination by counsel for the plaintiff property owners, Judge Corrigan testified:

I wrote this to encourage you and your clients to continue to negotiate and hopefully bring about a settlement and save some resources so they’re not spending a lot of unnecessary time and effort and money on either additional mediation or the trial.

Id. at 31. He also testified: “I told everybody I would make myself available if they wanted to continue [the mediation], but I hadn’t heard anything from anybody after this.” *Id.* at 11.

Judge Corrigan stated that the mediation session was attended by three representatives of the 29-member group of plaintiff-homeowners. *Id.* at 7, 30. He testified: “[T]hree of them were there who I had thought were decision makers, but it turned out that wasn’t the case . . . [T]hey said they had to recommend it to the other people.” *Id.* at 11-12, 43. Judge Corrigan recalled that after he had prepared the Mediation Form “[f]or the first time I found out that [the three representative plaintiffs] had to report back to . . . other property owners.” *Id.* at 21-22. He testified that the three representative property owners declined to sign the Mediation Form. *Id.* at 22, 24, 33, 40, 44. Judge Corrigan recalled having been confident that the case was going to be settled “because there was only a few minor additions that had to be made.” *Id.* at 55. He said he was given that information by counsel for the home-owners. *Id.* at 56. Judge Corrigan testified: “I was unaware of the fact that there . . . were three pages of unsettled issues. That was not what I was led to believe or I’d never [have] written this.” *Id.* at 21-22, 24, 59.

In response to questioning about the Mediation Form by counsel for the plaintiff property owners, Judge Corrigan stated: “I was trying to be helpful . . . and obviously it was a mistake on my part. I should never have tried to be helpful.” *Id.* at 22. He explained:

I suppose if I hadn’t written this we wouldn’t be here today, we would have been spending our time in more profitable ways by

either continu[ing] to mediate or having a trial. But I realize that this piece of paper has caused a great deal of difficulty.

Id. at 26. During cross-examination by counsel for the plaintiffs, Judge Corrigan said that he had advised at least one group of litigants that signing the form would not bind them to a particular settlement:

I do recall the only thing that was said to me is “Is this binding?”

And my recollection was under the circumstances it’s not binding.

It’s an effort on my part to try to resolve the matter finally . . . I

don’t know whether it was your side or the other side . . . I know that

I put in there . . . that you are to recommend settlement because

nobody would sign it. Your side wouldn’t sign it, their side

wouldn’t sign it.

Tr. III at 40.

Jason Rugo testified at the settlement enforcement hearing. Tr. I at 26-90; Tr. II at 126-44. Mr. Rugo’s law firm represented the Plaintiffs in the Circuit Court and in the mediation proceedings (Plaintiff Giovanna Boato had separate counsel, C. Timothy Rice). Tr. I at 26-28. He stated that the three representative property owners who attended the mediation hearing on December 18, 2008, were authorized to “negotiate” on behalf of all of the plaintiffs. *Id.* at 30. Mr. Rugo explained the limit of that authority: “[O]ur negotiating would be similar to a union negotiation. We had authorized representatives who were authorized to enter into a binding deal subject to ratification by the group.” *Id.* at 31.

Mr. Rugo testified that he prepared three successive term sheets during the course of the mediation proceeding. *Id.* at 35-36; Ex. 2-4. He recalled having typed the first term sheet “several hours into the mediation” after a meeting between Arthur Kerckhoff III and the three representative property owners. Tr. I at 36-38, 41-42. Mr. Rugo testified that he prepared a second term sheet one to two hours later. *Id.* at 39-41; Ex. 3. He explained that he prepared the revised terms after additional discussion between several attorneys. Tr. I at 40. Mr. Rugo next identified a third term sheet that he had prepared “late in the day.” *Id.* at 40-41; Ex. 4. He explained the latter document:

[It] was prepared by me late in the day while Judge Corrigan was otherwise occupied, and I basically had time and I went in to start flushing out things like you would start to flush out a settlement agreement.

Tr. I at 42. Mr. Rugo acknowledged that he had “made some changes” in the third term sheet and explained that his purpose had been to accommodate the interest of the Kerckhoff defendants in “maximum flexibility . . . so that the ultimate buyer of the 104 lots would have maximum choice.” Tr. II at 135.

When Mr. Rugo was asked whether he had provided all three successive versions of the term sheets to Judge Corrigan before the Mediation Form was signed, he responded: “I believe so. Certainly iterations one and two. The third

may have been right at the same time.” *Id.* at 63.² Mr. Rugo subsequently allowed that he had not provided the third term sheet to the Kerckhoff defendants and their counsel until after the mediation proceeding had ended. Tr. II at 132, 135-36. He agreed that counsel had not had any opportunity to review the third term sheet with the Kerckhoffs during the mediation proceeding. *Id.* at 135-36. Mr. Rugo testified that none of the term sheets bore the signature of any party or attorney. Tr. I at 63.

Mr. Rugo testified at length regarding details he recalled of the parties’ point-by-point negotiations throughout the day. *Id.* at 45-63. Counsel for the Kerckhoff defendants objected repeatedly on the basis of the confidentiality requirement of Rule 17.06(a) during Mr. Rugo’s testimony. *Id.* at 45-47, 49-51, 53-54, 62. The court overruled those objections. Prior to commencement of the hearing, counsel for the Kerckhoff Defendants had sought without success to exclude such evidence. *Id.* at 5-18. In denying that motion the court stated: “I think that’s an interesting point, and you may be right on that . . . But then I got something that’s a nullity, that means nothing.” *Id.* at 18. And: “Well I’m saying

² The motion eventually filed by the property owner plaintiffs for judicial enforcement of a mediated settlement agreement acknowledged that the third term sheet “was handed to counsel for the Kerckhoff Defendants as the mediation concluded, after the [mediated settlement agreement] was executed.” Legal File at 53.

that I'm going to deny your motion. And I understand . . . that I could be wrong on this." *Id.* at 19.

The final term sheet issue addressed by Mr. Rugo was the Plaintiffs' insistence upon "some sort of security" from the Kerckhoff Defendants to insure the eventual installation of a "global watering system." *Id.* at 61-62. He testified that the first iteration of the issue "was basically a matter of we need security." *Id.* at 61. In the second term sheet it became more specific:

Final issue: we need security to guarantee performance of obligation for global irrigation system. John Kilo is investigating a bond.

Some security for performance will be negotiated and reasonably agreed to by the parties for a deal to be binding.

Ex. 3 at 2. Mr. Rugo testified:

[T]he second [iteration] was after result of discussion between counsel[.] Mr. Kilo indicated he was going to investigate a bond, and so that's why that language found itself into the second and then third iterations.

Id. at 61. Mr. Rugo testified that "after . . . discussion between counsel Mr. Kilo indicated he was going to investigate a bond, and so that's why that language found itself into the second and then third iterations." *Id.*

The Plaintiffs' motion for sanctions was filed with copies of several email messages as exhibits. Legal File at 133-38. Mr. Rugo testified about that correspondence at the hearing on the motions to enforcement a settlement

agreement. Tr. I at 64-70; Ex. 6. The first e-mail was sent by Mr. Rugo to Clay Billingsley, co-counsel for the Kerckhoff Defendants, on December 19, 2008:

“We are in the process of submitting the agreement in principle to our people for approval . . . The only thing we are waiting to hear on from your side is the final word on bond or other security.” Ex. 6; Legal File. at 133. Mr. Billingsley responded the same day:

[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 and instead it expanded on certain issues and introduced concepts not in the earlier outline . . . [A]s I am sure you are aware, the language in all final documents is going to be critical to all parties. As indicated yesterday, we will develop a proposed first draft and get it to you . . . John is looking into bond and alternative security arrangements.

Ex. 6; Legal File at 134.

When Mr. Rugo was asked to explain “the issue with bond and alternative security arrangements” at the evidentiary hearing, he answered:

Well as we saw in the various iterations, the discussion on security evolved from we need security to the question of whether that security would take the form of a deed of trust or a bond as Mr. Kilo volunteered to look into. This was confirmation from Mr.

Billingsley that John was in fact looking into a bond or alternative security arrangements.

Tr. I at 67.

Mr. Rugo responded to Mr. Billingsley's e-mail of December 19 on December 23. He advised that "it was the last prepare[d] document that is distributed to our people for approval and for which, so far, there is tepid support." Ex. 6; Legal File at 137. At the evidentiary hearing Mr. Rugo identified that statement as his notice to the Kerckhoff Defendants that the property owner plaintiffs had approved the purported settlement agreement. Tr. I at 75-76. In his message of December 23, Mr. Rugo also wrote:

It seems to me that a synthesis of the concepts would work to provide maximum flexibility which my people are willing to provide to accommodate the obvious desire of the Kerckhoffs to minimize current expenditures, and give the ultimate buyer some choices and flexibility, in return for controls and guarantees that ensure the parties will not end up in a dispute again and/or in court. Hopefully each side will give full consideration to the psychology and wishes of the other to reach the common goal.

Ex. 6; Legal File at 137.

Mr. Rugo testified that Mr. Billingsley sent an email message on December 31, 2008, reporting that his firm was drafting a proposed agreement "with respect to the more critical provisions." Tr. I at 68-69; Ex. 6; Legal File at 138. He

testified that a series of telephone conversations ensued during January and February, 2009. Tr. I at 71. Mr. Rugo recalled: “Mr. Kilo would call me to indicate they were working hard, meeting with people, discussing things, and they’d have it to us as quickly as possible.” *Id.* He later added:

I had . . . several conversations, one conversation where they told me it wouldn’t be ready by [December] 31, several conversations thereafter where they indicated they were meeting with people, their water engineers, at one point they were waiting for data from their engineers, they were talking about the beneficiaries of the trust who had somehow become involved and had complicated things on their end.

Tr. II at 142.

At Mr. Kilo’s request, counsel for the Plaintiffs and the Kerckhoff Defendants met in Mr. Rugo’s office in mid-February. Tr. I at 71-72; Legal File at 54. Mr. Rugo testified that Mr. Kilo and Mr. Billingsley proposed an “ultimate solution” that “could include individual wells for each of the 104 remaining lots” rather than the installation of the “global watering system” contemplated in mediation. Tr. I at 71-72.³ Mr. Rugo stated: “Our response was, I would say

³ During the mediation session on December 18, 2008, the Plaintiffs had expressed a need for security to assure the future installation of the global watering system.

Tr. I at 61-62; Ex. 2-4. The second term sheet prepared by Mr. Rugo identified

kindly, extremely aggravated . . . It was in derogation of the mediated terms we thought.” *Id.* at 72. He testified that he had reported the proposal to his clients and they “absolutely” rejected the use of wells in lieu of a global irrigation system. *Id.* Mr. Rugo said that he continued to encourage the parties to seek solutions “to the obvious problem [the Kerckhoff defendants] were having in consummating what I thought we had agreed to.” Tr. II at 131.

On March 24, 2009, co-defendant PF Development filed a motion claiming that a global settlement had been reached during the mediation session with Judge Corrigan and requesting judicial enforcement of that settlement. Legal File at 46-51. The property owner Plaintiffs filed their motion to enforce a mediated settlement agreement on April 6, 2009. Legal File at 52-83; Tr. II at 130. They claimed that an enforceable mediated settlement agreement had been reached on the basis of the one-page, termless Mediation Form, signed by some of the parties, and the “existence” during the mediation proceeding of “two sets of negotiated terms.” *Id.* at 52. The property owners’ motion acknowledged that the third term

that requirement as the “[f]inal issue” between the parties, stated that Mr. Kilo was “investigating a bond” and concluded that security for performance would be necessary “for a deal to be binding.” Ex. 3 at 2. The third term sheet reiterated the requirement for a bond or other security and Mr. Kilo’s agreement to “investigate” the possibility of securing a bond. Tr. I at 61; Ex. 4.

sheet “was handed to counsel for the Kerckhoff Defendants . . . after the [mediated settlement agreement] was executed.” *Id.* at 53.⁴

Rick Hollenberg also testified for the property owner plaintiffs. Tr. I at 157. Mr. Hollenberg identified himself as one of the plaintiffs who had been present for the mediation proceeding on December 18, 2008. *Id.* at 157-58. He stated that “one issue . . . remained open” at the conclusion of the proceeding and identified the issue as “how we securitized the installment of the gray water or the global solution.” *Id.* at 161. Mr. Hollenberg recalled that the three representative property owners continued to discuss that unresolved issue with Judge Corrigan and several attorneys after the Mediation Form had been signed. *Id.* at 161-62.

The property owner plaintiffs called defendant Arthur Kerckhoff, III as a witness. Tr. I at 120-21. Counsel for the Kerckhoffs objected to questioning about communications and conduct during the mediation session on the basis of

⁴ The property owners’ motion alleged that the third term sheet “is not materially different from the first two.” Legal File at 53. When Mr. Billingsley brought differences in the “last” term sheet received by the Kerckhoff Defendants to Mr. Rugo’s attention in his email message of December 19, 2008—pointing out that the final term sheet “expanded on certain issues and introduced concepts not in the earlier outline,” Ex. 6; Legal File at 134—Mr. Rugo wrote back: “[I]t was the last prepare[d] document that is distributed to our people for approval and for which, so far, there is tepid support.” Ex. 6; Legal File at 137.

the confidentiality requirement of Rule 17.06(a). *Id.* at 121-22. Counsel also objected to questions about conversations between Mr. Kerckhoff and his attorneys. *Id.* The trial court overruled both objections. *Id.* at 122.

Mr. Kerckhoff acknowledged that he had seen two of the three term sheets the day of the mediation. *Id.* at 123. When the plaintiffs' counsel asked him whether "any agreement with the plaintiffs home owners [had been] contingent upon anything," Mr. Kerckhoff answered: "There never was an agreement." *Id.* at 125. He acknowledged having signed the Mediation Form. *Id.* at 134-35. Mr. Kerckhoff testified that he had been motivated to sign the document in part by the duration of the proceeding and concern for his father's health:

As you can tell by my father, he's of ill health right now. And at the end of the day, you know, someone said we'll never get through these things; you know, we're not going to get through these things before Christmas We had been there for 11 hours and my father was ill and we couldn't stay there any longer.

Id. at 134. Mr. Kerckhoff testified that conversation with counsel and with the mediator had led him to believe that there would not be a binding agreement until a final settlement was written "at a later date." *Id.* at 135.

Mr. Kerckhoff acknowledged having met with two of the three representative plaintiffs at some time after the mediation proceeding. *Id.* at 130-32. Mr. Kerckhoff testified that his purpose had been "to see if we can get this

thing resolved,” and said that he was shocked to learn that the plaintiffs believed that they already had a settlement. *Id.* at 131.

POINTS RELIED ON

I.

The Court of Appeals erred in dismissing this appeal for want of a final judgment because the Judgment for sanctions was a “distinct judicial unit” and the entry of the Judgment and ordering it final for purposes of appeal was proper under Rule 74.01(b), in that (A) the proceedings on the motions for sanctions were premised upon and limited to a claim of legal right that was distinct from any claim asserted in the underlying litigation, (B) the claim of each party seeking sanctions required proof of different facts from those required to prove any claim in the underlying litigation, (C) the claims for sanctions required the application of law different from that applicable to any claim in the underlying litigation, (D) the Order and Judgment of the Circuit Court requires immediate payment of attorney fees incurred by adverse parties in the amount of \$122,425.00, and (E) the Circuit Court thus acted within its authority under Rule 74.01(b) in finding that there was no just reason for delaying appellate review of its Order and Judgment and in entering Judgment and ruling that it was final for purposes of appeal.

Mo. R. Civ. P. 74.01

Gibson v. Brewer, 952 S.W.2d 244 (Mo. 1997)

Committee for Educational Equality v. State of Missouri, 878 S.W.2d 446
(Mo. 1994)

Bannister v. Pulaski Financial Corp., 255 S.W.3d 538 (Mo.App.E.D. 2008)

II.

The Circuit Court erred in overruling the objections of the Kerckhoff Defendants to testimony regarding and other evidence reflecting the participants' communications and negotiations with each other and with Judge Corrigan in their court-ordered mediation because those rulings violated Mo. R. Civ. P. 17.06 and public policy and resulted in prejudice to the Kerckhoff Defendants, in that (A) Rule 17.06(a) provides that communications made during court-ordered alternative dispute resolution proceedings shall be confidential and shall not be admissible as evidence, (B) the confidentiality requirement of Rule 17.06(a) is an important matter of the public policy underlying court-ordered alternative dispute resolution proceedings, and (C) proof of the Plaintiffs' claims for sanctions was impossible without the challenged evidence.

Mo. R. Civ. P. 17.06

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

III.

The Circuit Court erred in finding (A) that the parties had reached an agreement regarding terms of settlement at the December 18, 2008, mediation proceeding, and (B) that the Kerckhoff Defendants acted in bad faith with respect to the Mediation Form executed by some of the parties, because those findings were not supported by substantial evidence, were against the weight of the evidence, and reflected improper applications of governing law, in that (1) each of the term sheets prepared by Mr. Rugo prior to execution of the Mediation Form stipulated that a term essential for settlement was not resolved, (2) most of the plaintiffs had not agreed to any terms of settlement, (3) neither the Plaintiffs nor any other party or attorney had a reasonable basis for believing that a binding and enforceable agreement had been reached at the mediation proceeding, (4) there was no bad faith on the part of the Kerckhoff Defendants in believing that there was not yet a binding settlement because as a matter of fact and law there was none, and (5) there was no evidence that the Kerckhoffs and their counsel had failed to make reasonable efforts in good faith to secure a bond or alternative form of guarantee for the installation of a global irrigation system by a future purchaser of subdivision property.

Mo. R. Civ. P. 17.06

Emerick v. Mutual Benefit Life Insurance Co., 756 S.W.2d 513 (Mo. 1988)

Burger v. City of Springfield, 323 S.W.2d 777 (Mo. 1959);

IV.

The Circuit Court abused its discretion in denying the Kerckhoff Defendants' motion for an award of sanctions against attorneys and law firms pursuant to Mo. R. Civ. P. 55.03(d), or pursuant to the court's inherent authority, because the several motions to enforce a purported settlement agreement were frivolous, unjustifiable, and caused damage to the Kerckhoff defendants, and because the motions constituted bad faith conduct in the course of court-ordered mediation, and the ruling thus was an abuse of the court's discretion, in that (1) all counsel moving for enforcement knew that the written settlement agreement requirement of Rules 17.05(a) and 17.06(c) had not been met and that no settlement agreement enforceable under contract law generally had been made, (2) the sole purposes of counsel's conduct was to gain undue advantage in the litigation and cause unjust prejudice to the Kerckhoff Defendants, and (3) that conduct was an abuse of the trial court's process and resources.

Mo. R. Civ. P. 55.03

Mo. R. Civ. P. 84.14

Dillard Department Stores, Inc. v. Muegler, 775 S.W.2d 179

(Mo.App.E.D. 1989)

Capital One Bank v. Hardin, 178 S.W.3d 565 (Mo.App. 2005)

ARGUMENT

I.

The Court of Appeals erred in dismissing this appeal for want of a final judgment because the Judgment for sanctions was a “distinct judicial unit” and the entry of the Judgment and ordering it final for purposes of appeal was proper under Rule 74.01(b), in that (A) the proceedings on the motions for sanctions were premised upon and limited to a claim of legal right that was distinct from any claim asserted in the underlying litigation, (B) the claim of each party seeking sanctions required proof of different facts from those required to prove any claim in the underlying litigation, (C) the claims for sanctions required the application of law different from that applicable to any claim in the underlying litigation, (D) the Order and Judgment of the Circuit Court requires immediate payment of attorney fees incurred by adverse parties in the amount of \$122,425.00, and (E) the Circuit Court thus acted within its authority under Rule 74.01(b) in finding that there was no just reason for delaying appellate review of its Order and Judgment and in entering Judgment and ruling that it was final for purposes of appeal.

Standard of review: A trial court’s determination that its ruling disposes of a distinct judicial unit suitable for certification pursuant to Rule 74.01(b) is matter of law determinative of appellate court jurisdiction. *Team, Inc. v. Schlette*, 814 S.W.2d 12, 13 (Mo.App.E.D. 1991); *see also Quiktrip Corp. v. City of St. Louis*,

801 S.W.2d 706, 710 (Mo.App.E.D. 1990) (noting that “the finality of a judgment is a prerequisite to [appellate] jurisdiction”). When there is no dispute regarding pertinent facts, the jurisdiction of a court is a question of law to be accorded de novo review. *Missouri Soybean Association v. Missouri Clean Water Commission*, 102 S.W.3d 10, 22 (Mo. 2003).

Several owners of homes in Pevely Farms, a St. Louis County subdivision, unhappy with the existing water system and with plans for the construction of additional homes, sued a panoply of defendants for declaratory and injunctive relief and damages. Supp. Legal File at 1-55. After the trial court ordered the parties to participate in Rule 17 mediation, the Plaintiffs and one defendant, PF Development, filed motions (joined in by plaintiff Giovanna Boato) seeking the enforcement of what they alleged to be an actionable mediated settlement agreement. *Id.* at 44-83. The trial court conducted an extensive hearing rife with testimony and evidence about who had said and done what during the supposedly confidential Rule 17 proceeding—all of which was destined to establish that no agreement in fact had been reached, *Id.* at 194-95--and, at the conclusion of that hearing, invited motions requesting sanctions on account of conduct and statements during the mediation process. Tr. III at 155-56.

The facts at issue in the motion proceedings—again: who had done and who had said exactly what that might amount to an enforceable mediated settlement agreement, and then how well or 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 the 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. For that reason, the Judgment certified by the trial court pursuant to Rule 74.01(b) and challenged in this appeal is a “distinct judicial unit” and the appeal should be allowed to proceed.

A trial court’s certification of a judgment as appealable pursuant to Mo. R. Civ. P. 74.01(b) certainly is not conclusive: “It is the content, substance, and effect of the order that determines finality and appealability.” *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. 1997) (citing *Erslon v. Cusumano*, 691 S.W.2d 310, 312 (Mo.App.E.D. 1985)). In *Gibson* this Court stated that a trial court’s designation of finality for purposes of appeal “is effective only when the order disposes of a distinct ‘judicial unit.’” 952 S.W.2d at 244. The Court explained:

It is “differing,” “separate,” “distinct” transactions or occurrences that permit a separately appealable judgment, not differing legal theories or issues presented for recovery on the same claim.

Id. The Judgment challenged in this appeal meets that test.

In *Committee for Educational Equality v. State of Missouri*, 878 S.W.2d 446 (Mo. 1994), this Court noted that Rule 74.01(b) authorizes a trial court to designate a judgment resolving “one or more claims but fewer than all claims” in an action as final for purposes of appeal. The Court explained: “Thus, the minimum unit of disposition is at least one claim.” 878 S.W.2d at 450. The Judgment challenged in the present appeal resolves all claims to enforce the supposed mediated settlement agreement and the purported misconduct in mediation proceedings—claims that were not asserted in the plaintiffs’ petition, did not exist when the petition was filed, and are categorically different from the plaintiffs’ original claims—and thus is an appealable unit under that construct.

The *Committee for Educational Equality* opinion goes on to recognize: “A judgment which resolves fewer than all legal issues as to any single ‘claim for relief’ is not final notwithstanding the trial judge’s designation as such.” *Id.*; see also *Columbia Mutual Insurance Co. v. Epstein*, 200 S.W.3d 547, 550 (Mo.App.E.D. 2006) (cited in the present show cause order). The Appellants acknowledge that proposition, as they must. But the present Judgment decided every legal issue as to the claims for enforcement of a mediated settlement agreement and for punitive sanctions. There are no remaining claims for settlement enforcement or for sanctions.

Finally, the *Committee for Educational Equality* opinion states: “Similarly, a judgment that disposes of only one of several remedies and leaves other remedies relating to the same legal rights open for future adjudication is not a final

judgment under Rule 74.01(b).” *Id.* at 450-451; *see also Dreppard v. Dreppard*, 211 S.W.3d 620, 622 (Mo.App.E.D. 2007) (defining “distinct judicial unit” as “the final judgment on a claim, and not a ruling on some of several issues arising out of the same transaction or occurrence [nor a] judgment that resolves fewer than all legal issues as to any single claim for relief”). The present Judgment is a final resolution of the plaintiffs’ and any co-defendants’ purported legal rights with respect to the enforcement of the claimed settlement agreement and to recover attorney fees or other damage as a sanction for the alleged conduct of the Kerckhoffs during mediation proceedings. The Judgment did not “leave[] other remedies relating to the same legal rights open for future adjudication,” and the trial court’s designation of that Judgment as final pursuant to Rule 74.01(b) was proper.

The Court of Appeals that dismissed the present appeal has held that a “distinct judicial unit” for Rule 74.01(b) purposes must consist of “at least one claim for relief.” *Sawyer v. Bi-State Development Agency*, 237 S.W.3d 617, 620 (Mo.App.E.D. 2007). That is consistent with the rule’s provision that the trial court may certify its judgment on any “claim for relief” in an action as final for purposes of appeal, provided that the court makes “an express determination that there is no just reason for delay.” In *Bannister v. Pulaski Financial Corporation*, 255 S.W.3d 538 (Mo.App.E.D. 2008), the Court of Appeals recognized that “[t]he ‘one claim’ required for Rule 74.01(b) certification means one legal right,

regardless of whether multiple remedies are sought.” *Id.* at 541. The *Bannister* opinion explains:

In other words, claims are separate if they require proof of different facts and application of distinguishable law, subject to the limitation that severing the claims does not violate the prohibition on splitting a cause of action.

Id.

The claims for sanctions and resulting Judgment at issue in this appeal constitute a “distinct judicial unit” when that term is defined as “at least one claim for relief,” as the Court of Appeals defined the term in *Sawyer*. Because the present Judgment was not directed to and has no discernible effect upon the claims asserted in the Plaintiffs’ petition, the claims and judgment for sanctions just as clearly satisfy the definition of “a distinct judicial unit” in *Bannister*. The Court of Appeals’ conclusion that a claim must have been asserted in an original pleading in order for judgment on that claim to qualify as a “distinct judicial unit” misinterprets the latter term and is materially erroneous.

The Circuit Court specified in its Judgment that all of the sanction awards were “immediately due and payable.” Legal File at 197. That feature of the Judgment for sanctions crystallizes the appropriateness of the trial court’s Rule 74.01(b) certification. Given the scope and complexity of the array of underlying legal and equitable claims arising from the development of a subdivision and the purported losses and entitlements alleged by numerous plaintiffs against numerous

defendants, refusing to allow this appeal from the present Judgment until all of those other matters have been concluded would subject the present Appellants to immediate execution of a significant punitive judgment without any reasonable likelihood of timely appellate review. That result would not serve any logical or otherwise discernable purpose of the final judgment requirement of Rule 74.01.

“It is the content, substance, and effect of the order that determines finality and appealability.” *Gibson*, 952 S.W.2d 244. The “content, substance, and effect” of the Judgment for the present Appellants’ purported misconduct in court-ordered mediation, and the jurisdictional issues raised by the court-ordered evidentiary hearing on the motions to enforce settlement in light of the confidentiality provisions of Rule 17, are altogether different from the “content, substance, and effect” of any judgment that ultimately may dispose of the plaintiffs’ claims for damages and injunctive relief in the underlying action.

Nothing in the record suggests that the ruling from which the present appeal has been taken could have any logical or legal effect on the adjudication of those underlying claims. The Circuit Court thus was acting within its authority—and well within the scope of its discretion—in designating the Judgment awarding sanctions as final and appealable pursuant to Mo. R. Civ. P. 74.01(b). The rationale and ruling of the Court of Appeals represent a significant departure from the letter and intent of that rule and from prior decisions of Missouri appellate courts. The issues raised hereafter are important to the future of court-ordered

alternative dispute resolution in Missouri. This Court should allow the appeal to be adjudicated on its merits.

II.

The Circuit Court erred in overruling the objections of the Kerckhoff Defendants to testimony regarding and other evidence reflecting the participants' communications and negotiations with each other and with Judge Corrigan in their court-ordered mediation because those rulings violated Mo. R. Civ. P. 17.06 and public policy and resulted in prejudice to the Kerckhoff Defendants, in that (A) Rule 17.06(a) provides that communications made during court-ordered alternative dispute resolution proceedings shall be confidential and shall not be admissible as evidence, (B) the confidentiality requirement of Rule 17.06(a) is an important matter of the public policy underlying court-ordered alternative dispute resolution proceedings, and (C) proof of the Plaintiffs' claims for sanctions was impossible without the challenged evidence.

Standard of review: Rulings on the admissibility of evidence generally are reviewed for abuse of discretion. *Nelson v. Waxman*, 9 S.W.3d 601, 603-04 (Mo. 2000). The interpretation and application of a court rule is a matter of law to be reviewed de novo. *See Delta Air Lines, Inc. v. Director of Revenue*, 908 S.W.2d 353, 355 (Mo. 1995) (holding that the construction of a statute is a question of law).

Rule 17.06(a) provides without ambiguity that “[n]o admission, representation, statement or other confidential communication made in . . . [an

alternative dispute resolution] process shall be admissible as evidence.” The trial court based its Judgment for sanctions in this case upon precisely such evidence, which it admitted over the repeated objections of the Kerckhoff Defendants.

Those evidentiary rulings did not merely oppress and prejudice the parties whom the court punished: by undermining the confidence of litigants, their attorneys, and neutrals in the confidentiality of their actions and communications in Rule 17 proceedings, the rulings constitute a significant threat to the vitality of the rule and its salutary purpose. This Court should reverse the Judgment for those reasons.

The court premised its ruling upon findings that “a settlement in principle was reached at [the] mediation,” that the Kerckhoff Defendants “knew and agreed to those principles as developed on the term sheets presented at the hearing,” and that those defendants signed the Mediation Form—which did not include any of the series of term sheets purportedly produced during the session—with no belief that it was binding upon them and no intention of “reduc[ing] the terms discussed that day in mediation to a final settlement agreement.” Legal File at 195-96.

Those findings depended exclusively upon evidence of the existence, nature, and content of the term sheets, and the conduct and communications of parties and neutral at the mediation proceeding, that was developed in contravention of the very court rules that authorized court-ordered mediation in the first instance. 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. And rightly so.

There are compelling reasons for the promise and the mandate of confidentiality provided by Rule 17.06(a). The purpose of confidentiality in alternative dispute resolution proceedings is the promotion of “a candid and informal exchange [that] is achieved only if the participants know that what is said in the mediation will not be used to their detriment through later court proceedings and adjudicatory processes.” Unif. Mediation Act, 7A U.L.A. pt II, 127, 119, prefatory n.1 (Supp. 2006), *quoted in Foxgate Homeowners’ Association, Inc. v. Braalea California, Inc.*, 25 P.3d 1117, 1126 (Cal. 2001); *see also, e.g.*, Michael A. Perino, Drafting Mediation Privileges: Lessons From the Civil Justice Reform Act, 26 Seton Hall L. Rev. 1, 5-8 (1995) (arguing that confidentiality is required in mediation because it encourages parties to be candid without fear that facts and statements will be used against them in litigation). The present Judgment poses a profound threat to that objective.

The Court of Appeals for the Western District recently took note of the promise of confidentiality prescribed by Rule 17.06(a). *Williams v. Kansas City Title Loan*, 314 S.W.3d 868, 870-71 (Mo.App.W.D. 2010). That Court quoted the rule and stated: “Thus . . . the back-and-forth of the parties’ settlement discussions during a court-ordered mediation session are inadmissible as evidence.” *Id.* at 871. *Williams* recognized:

A motion to enforce an oral agreement purportedly reached during a mediation session will virtually always require, however, that the parties disclose the content of such discussions, and argue as to

whether those discussions resulted in a binding agreement. That is exactly what occurred here . . . *Those disclosures would appear to be in violation of the clear directive of Rule 17.06(a).*

Id. (emphasis added).

In *Williams* the Court of Appeals concluded that “[t]he various provisions of Rule 17 . . . are of a piece” and explained:

They contemplate that discussions during a court-ordered mediation process, which culminate in the parties’ agreement to the essential terms of a settlement, are confidential and non-binding. Neither the parties nor the mediator may disclose the substance of those discussions.

Id. at 872. In this case, the trial court’s reception of extensive testimony regarding the substance of mediation discussions and communications was anathema to the purpose and the future of court-ordered mediation under Rule 17. No rational person who read a transcript of the evidentiary hearing in this case could expect his or her statements or conduct during a mediation proceeding ordered under the rule to be protected from disclosure.

The guarantee of confidentiality with respect to communications and actions during court-ordered mediation—and the explicit mandate that evidence of those matters is inadmissible in court proceedings—exists to facilitate mandatory alternative dispute resolution proceedings. That guarantee becomes meaningless if it is enforced only intermittently and brushed aside whenever it stops suiting a

particular judge. The interests of litigants and of the courts in viable court-sanctioned alternative dispute resolution proceedings are under attack in this case. The judgment of the Circuit Court should be reversed in order to preserve those interests.

III.

The Circuit Court erred in finding (A) that the parties had reached an agreement regarding terms of settlement at the December 18, 2008, mediation proceeding, and (B) that the Kerckhoff Defendants acted in bad faith with respect to the Mediation Form executed by some of the parties, because those findings were not supported by substantial evidence, were against the weight of the evidence, and reflected improper applications of governing law, in that (1) each of the term sheets prepared by Mr. Rugo prior to execution of the Mediation Form stipulated that a term essential for settlement was not resolved, (2) most of the plaintiffs had not agreed to any terms of settlement, (3) neither the Plaintiffs nor any other party or attorney had a reasonable basis for believing that a binding and enforceable agreement had been reached at the mediation proceeding, (4) there was no bad faith on the part of the Kerckhoff Defendants in believing that there was not yet a binding settlement because as a matter of fact and law there was none, and (5) there was no evidence that the Kerckhoffs and their counsel had failed to make reasonable efforts in good faith to secure a bond or alternative form of guarantee for the installation of a global irrigation system by a future purchaser of subdivision property.

Standard of Review: The judgment of a trial court sitting without a jury should be reversed if it is based upon a factual finding that is not supported by substantial evidence or is against the weight of the

evidence, or if the court has erroneously declared or applied governing law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). A trial court's decision to impose sanctions pursuant to its inherent powers is reviewed for abuse of discretion. *Rea v. Moore*, 74 S.W.3d 795, 799 (Mo.App.S.D. 2002) An abuse of discretion occurs "when a trial court's ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Shirrell v. Missouri Edison Co.*, 535 S.W.2d 446, 448 (Mo. 1976). A court's inherent powers, including the power to impose sanctions on account of conduct in litigation, should be exercised "sparingly, wisely, temperately, and with judicial self-restraint." *Rea v. Moore*, 74 S.W.3d 795, 800 (Mo.App.S.D. 2002) (quoting *Higgins v. Director of Revenue*, 778 S.W.2d 24, 26 (Mo.App.S.D. 1989)).

The trial court made a series of findings regarding a settlement purportedly reached by all parties at the mediation proceeding on December 18, 2008, and about the purported mediation and subsequent conduct of the Kerckhoff Defendants. Legal File at 195-97. Based on those findings the Court ordered the Kerckhoffs Defendants to pay \$122,425.00 of attorney fees incurred by other parties in the case as a sanction for "unconscionable" behavior. *Id.* at 197. Those findings and that ruling are utterly inconsonant with the evidence, the clear and

unequivocal mandates of Rule 17, and with fundamental principles of contract law. This Court should reverse the judgment of the trial court because of those errors.

The order imposing sanctions upon the Kerckhoff Defendants is rife with unsustainable findings:

- *Finding that the parties reached an agreement regarding identifiable terms of settlement.* The court found that all of the parties had reached settlement in principle based on the term sheets “presented at the hearing,” and noted that the purported settlement would have been enforceable but for “the omission of the attachment of those sheets” to the Mediation Form. Legal File at 195. That finding cannot be squared with the law.

Rule 17.06(c) provides that “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.” That clear and unequivocal language of the Rule was not satisfied or complied with in this case. The Mediation Form contained no agreement terms, much less the essential terms of an agreement, and it was not executed by all the parties. On the face of it, there was no settlement agreement “in principle” or otherwise.

Apart from the particularized settlement formation requirements of Rule 17, “[c]ontract law governs the question of whether the parties entered into an enforceable settlement agreement.” *St. Louis Union Station Holdings, Inc. v. Discovery Channel Store, Inc.*, 301 S.W.3d 549, 551 (Mo.App.E.D. 2009) (citing

Emerick v. Mutual Benefit Life Insurance Co., 756 S.W.2d 513, 518 (Mo. 1988)).

In *Emerick* this Court explained: “An enforceable contract requires a meeting of the minds on the subject matter of the contract . . . Unless both parties manifest assent to the contract terms, no contract is formed.” 756 S.W.2d at 518. Further, the formation of a contract requires that the parties have reached agreement regarding terms that are definite and certain:

The essential terms of the contract must be certain, or capable of being rendered certain through application of ordinary canons of construction or by reference to something certain; that is, terms of agreement must be sufficiently definite to enable the court to give it an exact meaning.

Burger v. City of Springfield, 323 S.W.2d 777, 783 (Mo. 1959); *see also P. R. T. Investment Corporation v. Ranft*, 252 S.W.2d 315, 316 (Mo. 1952) (holding that to be enforceable a contract “must be a concluded contract” and that “there must have been a clear mutual understanding and a positive assent on both sides as to the material terms, and the contract must be sufficiently definite and certain to enable the court to decree its specific performance”).

The property owner plaintiffs, the Kerckhoff Defendants—as well as presumably all other defendants—and Judge Corrigan all went home on the night of December 18, 2008, *knowing* that at least two conditions still had to be met before an enforceable settlement agreement could come into existence. First, the three plaintiffs who had attended the mediation proceeding had to obtain the

approval of the much larger majority of owners who had not participated in the mediation. Second, the Kerckhoff Defendants had to obtain a bond or other means of assuring the installation of a global irrigation system by a future developer. There was no basis for certainty that either of those conditions could or would be satisfied. It is anything but certain that the first condition ever was satisfied, and it is clear that the second was not. It is also clear that at the time of termination of the mediation, neither condition was satisfied.

The only evidence that the plaintiff property owners who did not take part in mediation ever approved the purported terms of settlement before an enforcement motion was filed was the email message that Mr. Rugo sent to Mr. Billingsley five days after the mediation session. Tr. I at 75-76; Ex. 6. Counsel for the Plaintiffs told counsel for the Kerckhoff Defendants that he had given the remaining property owners only “the last prepare[d] document”—*i.e.*, the third term sheet, in which Mr. Rugo concededly changed some terms and which he did not provide to Mr. Kilo and Mr. Billingsley until *after* the term-free Mediation Form had been signed and the mediation concluded—and that the response to that document “so far . . . is tepid support.” *Id.*; Legal File at 137. In the same email message Mr. Rugo made clear his understanding that the terms of settlement still were in flux and further negotiation remained to be done:

It seems to me that a synthesis of the concepts would work to provide maximum flexibility which my people are willing to provide to accommodate the obvious desire of the Kerckhoffs to minimize

current expenditures, and give the ultimate buyer some choices and flexibility, in return for controls and guarantees that ensure the parties will not end up in a dispute again and/or in court. Hopefully each side will give full consideration to the psychology and wishes of the other to reach the common goal.

Ex. 6; Legal File at 137. A finding that all of the plaintiffs had agreed to terms of settlement embodied in the term sheets prepared by Mr. Rugo at the mediation proceeding thus was not supported by the record.

Nor was the recital of the Plaintiffs' non-negotiable demand for a bond or other security that a subdivision-wide irrigation system would be installed by a presently unknown future developer, coupled with the recital that Mr. Kilo was to *investigate* such a bond after the mediation proceeding, a definite enforceable term. That condition was not foisted on the Plaintiffs by the Kerckhoff Defendants; it was written by Mr. Rugo into all three term sheets, including the sheet that was not distributed until after the mediation session had ended. Tr. at 61-62; Ex. 2-4. The record is devoid of evidence suggesting that the parties knew whether a bond or any other form of security existed, or what it might cost, or exactly what amount or other measure of security the plaintiffs eventually would require. In short, the one certain feature of this term is that it was an unmet condition with investigation and definition remaining to be accomplished.

There is no evidence at all that the Kerckhoff Defendants or their counsel ever were able to obtain a bond to secure the future installation of the irrigation

system demanded by the Plaintiffs, or that that condition was ever satisfied.

Nothing in the record could have begun to support a finding that they were less than diligent in seeking a way to meet the Plaintiffs' demand or that obtaining a bond was possible.

• *Findings that the Kerckhoffs believed that the purported mediated settlement agreement form was not binding on them and wrongly failed to inform the Plaintiffs or other parties of that belief.* The Kerckhoff Defendants were *correct* in believing that the Mediation Form they signed did not bind them—or any other signatory—to enforceable terms. It is not sensible to conclude that they were obliged to announce their belief to other litigants and their attorneys or that they were trying to fool adverse counsel by failing to announce that belief.⁵

Again, Rule 17 mandates that a settlement must be by a written document containing the essential terms of the agreement executed by the parties after termination of the alternative dispute resolution process. As the Circuit Court correctly determined, that did not happen in this case. Further, under common law, it is essential to the existence of a contract that there be mutuality of agreement or assent to all of the essential terms of the contract. *Chailland v. MFA*

⁵ The unreasonableness of such a conclusion is all the more apparent in light of Judge Corrigan's testimony that he told whomever asked him that execution of the Mediation Form *sans* terms would not bind anyone to particular terms. Tr. III at 40.

Mutual Insurance Co., 375 S.W.2d 78, 81 (Mo. 1964); *see also Karsch v. Carr*, 807 S.W.2d 96, 99 (Mo.App.E.D. 1990) (holding that “[i]t is axiomatic that, in order for a contract to be formed, there must be ‘meeting of the minds’ and the essential terms must be certain”). The Mediation Form signed by the parties to this case memorialized the fact that *not all of the plaintiffs had assented* to the purported terms of settlement. Ex. 1. Of at least equal significance, the terms sheets generated by Mr. Rugo provided that the Plaintiffs simply would not agree to an enforceable settlement agreement *unless the Kerckhoff Defendants were able to provide a bond or other security*—and that the matter of a bond or alternative form of security for the future performance of a critical act by an as-yet-unknown unidentified developer *was to be looked into* by Mr. Kilo. Ex. 3-4.

It would have defied common sense for the Kerckhoff Defendants or their counsel to believe that they had snookered every adverse litigant *and his or her lawyer* into thinking that the term-free Mediation Form was an enforceable contract and that only they knew otherwise. “Everyone is presumed to know the law . . . *A fortiori*, all attorneys . . . are presumed to know the law.” *State of Missouri v. Hicks*, 535 S.W.2d 308, 312 (Mo.App.S.D. 1976) (citing *Poe v. Illinois Central Railroad Co.*, 99 S.W.2d at 82, 89 (Mo. 1936)). This Court should reject the trial court’s finding that the Kerckhoff Defendants concealed their opinion about the enforceability of that form with the intention or the expectation of tricking the Plaintiffs.

• *Finding that the Kerckhoff Defendants executed the Mediation Form “with the intent only to exit the mediation.”* This finding is similarly unfounded. The Kerckhoff Defendants were free to leave the mediation proceeding on the night of December 18, 2008, without signing the Mediation Form: Rule 17.03 unquestionably authorizes trial courts to order mediation; those courts are vested with inherent authority to punish bad faith conduct by litigants and their counsel, *Rea*, 74 S.W.3d at 800; but no authority compelled the Kerckhoff Defendants to remain at the mediation proceeding for a particular length of time—much less for the nearly 12 hours that they and certain other participants did remain in attendance—and no evidence provided rational support for a finding that they signed the termless Mediation Form before departing in order to fool adverse litigants and attorneys. Tr. III at 6, 16, 19, 24, 54-55.

The only reasonable finding consistent with the evidence was that the Kerckhoff Defendants and their counsel stayed as long as they did—and signed the Mediation Form—because they wanted to continue pursuing the settlement process. And that is what happened. Judge Corrigan testified that the mediation session lasted nearly 12 hours and was “very contentious.” *Id.* at 7, 10. He stated that his purpose in filling out and presenting the Mediation Form to the litigants and attorneys was to encourage the parties to continue to negotiate and hopefully to settle the case without the need for a trial. Tr. III at 11-12.

The communications between counsel after December 18, 2008, make it clear that Judge Corrigan succeeded in that purpose. Mr. Billingsley reminded

Mr. Rugo the following day that “the language in all final documents is going to be critical to all parties.” Ex. 7; Legal File at 134. Mr. Rugo responded four days later by suggesting “a synthesis of concepts” and assuring Mr. Billingsley that the plaintiffs “are willing to accommodate” the needs and desires of the Kerckhoff defendants in exchange for “controls and guarantees.” Ex. 6; Legal File at 137. Mr. Rugo testified that Mr. Kilo telephoned him repeatedly during the next several weeks to report on the efforts of the Kerckhoff Defendants to resolve those matters. Tr. I at 71; Tr. II at 142.

Appellate courts routinely defer to the credibility findings of a trial court. *Land Clearance for Redevelopment Authority v. Zitko*, 386 S.W.2d 69, 80 (Mo. 1964). But particular credibility determinations are not conclusive when a reviewing court is called upon to decide whether a general finding is against the weight of the evidence. *See Heindselman v. Home Insurance Co.*, 282 S.W.2d 191, 193 (Mo. 1955) (holding that deference to trial court credibility determinations must co-exist with the appellate court’s responsibility to weigh the evidence). Despite the trial court’s blanket dismissal of the credibility of any testimony offered by the Kerckhoff Defendants that was “contrary to [the court’s] findings,” this Court should consider the testimony of Arthur Kerckhoff III regarding the interest of the Kerckhoff Defendants in departure from the mediation proceeding as it weighs the evidence regarding the Kerckhoff Defendants’ good or bad faith in signing the Mediation Form.

Mr. Kerckhoff, III testified that he had been motivated to sign the form in part by the duration of the proceeding and concern for his father's health:

As you can tell by my father, he's of ill health right now. And at the end of the day, you know, someone said we'll never get through these things; you know, we're not going to get through these things before Christmas We had been there for 11 hours and my father was ill and we couldn't stay there any longer.

Tr. I at 134. He testified about having met with home owners after the mediation proceeding "to see if we can get this thing resolved," *Id.* at 121-22. Properly weighed, the evidence on this issue did not support the trial court's finding of bad faith and improper motive.

• *Finding that the Kerckhoff Defendants concealed a belief that no settlement could be reached in the absence of Defendant Arthur Kerckhoff IV.* The Plaintiffs named Arthur Kerckhoff IV as a defendant and alleged specifically why he and each of the other Kerckhoff Defendants were targets of their complaints and demands. Supp. Legal File at 1, 6-7, 11-55. *The mediation session lasted nearly 12 hours.* Tr. III at 6, 16, 19, 24, 54-55. It would have been preposterous for any party or attorney who attended that proceeding to allege that he or she failed to notice that only two of the three defendants named Kerckhoff were present. The trial court's finding is unsustainable to the extent that it suggests that the Kerckhoff Defendants hid the fact that Arthur Kerckhoff IV was absent.

The exercise of a court’s inherent power to impose a punitive sanction can only be exercised “when the sanctioned party acted in bad faith.” *McPherson*, 99 S.W.3d at 481-82. Arthur Kerckhoff III was candid about his belief that a party to litigation would have to assent to specific settlement terms in order to be bound by a settlement agreement. Counsel for the Plaintiffs cross-examined repetitiously about his belief that his son’s assent would have been required for a binding settlement of the case. Tr. III at 69, 74-75. In each instance Mr. Kerckhoff responded with his understanding that a defendant in the case was not bound by terms unless he had given his assent by signing a written agreement. *Id.* That understanding may have reflected an oversimplification of the pertinent contract principles—even an erroneous understanding of the law—but the record is devoid of evidence that could justify a finding that he held that belief *in bad faith*.

Nor could the trial court reasonably have concluded that the Kerckhoff Defendants ought to be held accountable for the attorney fees of numerous other parties, including the Plaintiffs, because Arthur Kerckhoff IV was not in the mediation party and might have been necessary for the formation of a binding settlement. First, as the present argument has demonstrated, the parties did not reach agreement on terms that could have settled the case. More to the point, only three of the 32 Plaintiffs attended the meeting, and both Mr. Rugo and Judge Corrigan testified that *those representatives were not authorized to settle the case*. Tr. I at 31; Tr. III at 11-12, 43. The trial court had ordered: “All parties or their representatives with authority to resolve the case . . . shall attend the Alternative

Dispute Resolution meetings set by the neutral.” Legal File at 45. It was singularly unreasonable for that court to base its imposition of sanctions on the Kerckhoff Defendants’ failure to attend en masse, on their belief that there was no binding settlement when they signed the term-free Mediation Form at Judge Corrigan’s request, or on their failure to advise the other litigants and attorneys of that legal opinion.

• *Finding that the Kerckhoff Defendants misrepresented their efforts to effectuate settlement of the litigation.* The trial court effectively found that the representations of the Kerckhoff Defendants’ of ongoing work on a written proposal that could actually settle the case was false. Legal File at 196. No evidence supports such a finding, and the finding is against the weight of all of the evidence.

Mr. Rugo testified that he engaged in an exchange of email messages with Mr. Billingsley for approximately two weeks following the December 18, 2008, mediation proceeding. Tr. I at 64-70; Ex. 6; Legal File at 133-37. Those messages reflect ongoing negotiation between the parties with respect to the terms upon which the case was to be settled. Ex. 6; Legal File at 134-37. Mr. Rugo also testified about a series of telephone conversations that Mr. Kilo initiated and through which Mr. Kilo kept him apprised regarding counsel’s meetings with a water engineer and other individuals, the necessity of obtaining data from engineers, issues raised by beneficiaries of the Kerckhoff family trust that “had complicated things on their end.” Tr. I at 71; Tr. II at 142.

No evidence was adduced that belied Mr. Billingsley's and Mr. Kilo's representations about the efforts of the Kerckhoff Defendants to move forward with the settlement process. The trial court's determination that the Kerckhoff Defendants all along were deceiving the plaintiffs and their counsel lacks both an evidentiary foundation and any mention of a comprehensible purpose for such dissembling. The notion that the record on this issue could justify invocation of a court's rather dangerous inherent power to punish misconduct in litigation is untenable.

The Kerckhoff Defendants do not question the inherent power of a trial court to impose sanctions for litigation misconduct of sufficient gravity. *See Rea*, 74 S.W.3d at 800 (observing that "Missouri case law does provide support for the use of a court's inherent powers to address particular issues before it"). But in *Rea* the Court of Appeals also stated: "Missouri courts are cautioned to exercise their inherent powers 'sparingly, wisely, temperately, and with judicial self-restraint.'" *Id.* (quoting *Higgins v. Director of Revenue*, 778 S.W.2d 24, 26 (Mo.App.S.D. 1989)). And in *McPherson v. U.S. Physicians Mutual Risk Retention Group*, 99 S.W.3d 462 (Mo.App.W.D. 2003), the Court of Appeals for the Western District recognized: "[B]ecause 'it is only one short step from the assertion of inherent power to the assumption of absolute power . . . , rarely should a court invoke its inherent powers.'" *Id.* at 477 (quoting *State ex rel Selleck v. Reynolds*, 158 S.W. 671, 681 (Mo. 1913) (Brown, J., concurring)).

In this case the Circuit Court concluded “that the Kerckhoff Defendants’ actions constitute a complete lack and absence of good faith at mediation and thereafter, constitute bad faith, and were intentionally done to the other parties’ detriment.” Legal File at 196. Rather than providing substantial support for that conclusion, the record tells the story of a difficult mediation that did not end in agreement to a set of terms for settlement, of the Kerckhoff Defendants’ presence and participation with other litigants and attorneys in attendance throughout more than 11 hours of negotiation, and of their continuation of settlement efforts throughout the ensuing weeks. Whatever conclusion one might draw with reason from that record, there is no justification for the invocation of an undefined punitive power that courts are warned to exercise “rarely,” “temperately,” and with “judicial self-restraint.”

The critical findings and conclusions of the Circuit Court lack evidentiary support and misapply the governing principles of Rule 17 and of contract law. The Judgment imposing sanctions against the Kerckhoff Defendants was a manifest abuse of that court’s discretion. This Court should reverse the Judgment for those reasons.

IV.

The Circuit Court abused its discretion in denying the Kerckhoff Defendants' motion for an award of sanctions against attorneys and law firms pursuant to Mo. R. Civ. P. 55.03(d), or pursuant to the court's inherent authority, because the several motions to enforce a purported settlement agreement were frivolous, unjustifiable, and caused damage to the Kerckhoff defendants, and because the motions constituted bad faith conduct in the course of court-ordered mediation, and the ruling thus was an abuse of the court's discretion, in that (1) all counsel moving for enforcement knew that the written settlement agreement requirement of Rules 17.05(a) and 17.06(c) had not been met and that no settlement agreement enforceable under contract law generally had been made, (2) the sole purposes of counsel's conduct was to gain undue advantage in the litigation and cause unjust prejudice to the Kerckhoff Defendants, and (3) that conduct was an abuse of the trial court's process and resources.

Standard of Review: A trial court's decision regarding the imposition of sanctions under Rule 55.03(d) is reviewed for abuse of discretion. *Brown v. Kirkham*, 23 S.W.3d 880, 882 (Mo.App.W.D. 2000). An abuse of discretion occurs when the court's order 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. *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. 2003).

Rule 55.03(d) authorizes the imposition of sanctions against lawyers, law firms, or parties for filing frivolous or unfounded or otherwise improper pleadings. The mediation proceeding of December 18, 2008, did not result in a mediated settlement agreement subject to enforcement under Rule 17.06(c) because that rule requires a written and signed agreement reciting “the essential terms of the settlement” for enforceability. Neither did the proceeding result in a settlement agreement that could have been enforced under common law contract principles: the assent of most plaintiffs had yet to be given and the bond requirement for a binding settlement—stipulated in writing at the mediation proceeding by the representative plaintiffs and their counsel—had not begun to be met and was memorialized in term sheets in language that might generously be described as iffy and indefinite.

That the conduct of the attorneys who moved for judicial enforcement of the termless Mediation Form was doomed is obvious, and its fate was officially sealed by the trial court’s inevitable refusal to grant the relief initially requested. Thus the pleadings were frivolous: a pleading should be considered frivolous when “it is so readily recognizable as devoid of merit on the face of the record that there is little prospect of success,” or when the issues presented by the pleading are not “fairly debatable.” *See Capital One Bank v. Hardin*, 178 S.W.3d 565, 576 (Mo.App. 2005) (considering the characteristics of a frivolous appeal within the

contemplation of Mo. R. Civ. P. 84.19). That the motivation of counsel was nothing more creditable than an ambition to disadvantage the Kerckhoff Defendants, and to make persisting in the defense of this litigation unreasonably expensive for their family, is evident from the invocation of the trial court's inherent power to impose sanctions for bad faith conduct in litigation despite indisputable knowledge—shared by all of the lawyers and Judge Corrigan since the end of the day on December 18, 2008—that the mediation process simply had failed to produce a settlement.

Judge Simeone, sitting with the Court of Appeals, stated the salutary purposes of rules such as Rule 55.03(d) and Rule 84.19:

The purpose of all these recent developments is manifold: (1) to prevent the congestion of court dockets with unmeritorious causes, pleadings, motions or other papers, (2) to prevent the filing of frivolous pleadings, motions or other papers, and (3) to compensate others for the delay, expense and harassment of responding to a matter, cause, motion, pleading or appeal which is frivolous or meritless.

Dillard Department Stores, Inc. v. Muegler, 775 S.W.2d 179, 186 (Mo.App.E.D. 1989). That is an apt a description of what is called for in this case as one could hope to find.

This Court is authorized by Mo. R. Civ. P. 84.14 to enter the judgment that the trial court ought to have entered. In fact that Rule commands: “Unless justice

otherwise requires, the court shall dispose finally of the case.” *Id.*; *see also* § 512.160.3, Mo. Rev. Stat. It can hardly be gainsaid that the Circuit Court’s summary denial of the Kerckhoff Defendants’ motion for sanctions must be reversed. This Court should grant the Kerckhoffs leave to submit detailed and itemized evidence of the attorney fees and other costs that they have incurred on account of the bogus motions to enforce a non-existent mediated settlement agreement, and proceed to apportion that expense as the Court sees fit among the attorneys and law firms responsible for those expenses.⁶

⁶ If this Court concludes that the procedural requirements of Rule 55.03(d) have not been met yet and cannot be satisfied through the appellate process, then the case should be remanded to the trial court with instructions to make an award of all attorney fees incurred by the Kerckhoff Defendants on account of the frivolous conduct of opposing counsel and to conduct such proceedings as may be required to determine the amount of that award.

CONCLUSION

For the reasons set forth in this brief, the Court should (1) recognize that the Circuit Court's entry of Judgment upon its Order imposing sanctions disposed of a distinct judicial unit and proceed to decide this appeal on its merits, (2) affirm the Circuit Court's denial in that Judgment of the several motions for enforcement of a purported mediated settlement agreement, (3) reverse the imposition of sanctions against the Kerckhoff Defendants and vacate that award, and (4) reverse the denial of the Kerckhoff Defendants' motion for the imposition of sanctions against attorneys and law firms pursuant to Rule 55.03(d) and either (a) determine the amount of attorney fees to be awarded as a sanction and the assignment of liability for the payment of that award among the offending attorneys and law firms or (b) remand the case to the Circuit Court with instructions to make an award of attorney fees after conducting a hearing, in conformity with Rule 55.03(d) and consistent with the findings and conclusions of this Court's opinion in this case, and determine the amount of attorney fees to be awarded and the assignment of liability for the payment of that award among the offending attorneys and law firms.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the requirements of Mo.R.Civ.P. 84.06. The brief contains 13645 words as determined by the software application Microsoft Word for Macintosh 2008. The computer disk filed with this brief bears a copy of the brief and has been scanned for viruses and is virus-free.

Two copies of this brief and one compact disk bearing an electronic copy of the brief were sent by first class mail on December 13, 2010, to:

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APPENDIX

Judgment of the Circuit Court	A-1
Order Entering Judgment	A-6
Mo. R. Civ. P. 17.05	A-7
Mo. R. Civ. P. 17.06	A-8
Mo. R. Civ. P. 55.03	A-9