

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

SUBSTITUTE REPLY BRIEF

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ARGUMENT

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.¹

¹ The respondents contend that the standard of review for this issue is abuse of discretion. Resp.'s Br. at 16. That is true for review of a trial court's evidentiary ruling generally and may have pertinence to the Court in its consideration of this point. *Nelson v. Waxman*, 9 S.W.3d 610, 603-604 (Mo. 2000). But the point frames an issue based principally upon the construction and application of Mo. R. Civ. P. 17.06. 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

Rule 17.06(a) states that “[n]o admission, representation, statement or other confidential communication made in . . . [an alternative dispute resolution] process shall be admissible as evidence.” No exception to that prohibition is stated in the rule, nor does the rule purport to limit its application to trials on the merits of cases that could not be resolved through alternative proceedings. To the extent that the respondents’ various attempts to lead the Court around that requirement of confidentiality succeed, the plain intent of Rule 17 will be contravened and the likelihood of its success in promoting alternative dispute resolution and in helping to manage crowded court dockets will be substantially diminished.

The respondents argue: “[Rule 17.06(a)] requires that these [confidential] 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.” Resp.’s Br. at 23. They cite no authority for that proposition, nor does any exist. The argument purports to swap the respondents’ term “mediation session” for the rule’s term “mediation process.” Rule 17 nowhere limits the notion of “mediation process” to a single mediation session.

S.W.2d 353, 355 (Mo. 1995) (holding that the construction of a statute is a question of law).

This Court was not subtle in articulating the parameters of the Rule 17.06(a) prohibition against disclosure. Rule 17.06(a) itself states:

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* 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 . . .

Mo. R. Civ. P. 17.06(a) (emphasis added). Rule 17.06(b) precludes compulsory disclosure by any ADR service provider of “any matter disclosed in the process of setting up or conducting the alternative dispute resolution *process*.” Mo. R. Civ. P. 17.06(b) (emphasis added.)

The respondents’ argument that the court-sanctioned alternative dispute resolution process established in Rule 17 consists only of time spent with the neutral, and in a mediation process terminates at the conclusion of the first session with the mediator, cannot be reconciled with the purpose or the express language of the rule. Nothing in the rule suggests that court-ordered mediation is limited to one session with the mediator. In this case Judge Corrigan advised all of the parties at the end of the day on December 18, 2008, that he would continue to be available for further mediation, and in fact the parties continued to work on settling the case for several weeks thereafter. Tr. III at 11.² During that time no

² Judge Corrigan testified that his purpose in preparing a termless mediation form in this case was to assist all counsel “in keeping pressure on” their clients so that

party ever notified the Circuit Court that the alternative dispute resolution process had ended, as required by Rule 17.05. Mo. R. Civ. P. 17.05(b).

Under the construct proposed by the respondents, any “admission, representation, statement or other . . . communication” made by a party or his attorney or the neutral in between or after any mediated session would not be confidential under Rule 17.06(a) and would be subject to disclosure. That interpretation would grossly undermine the purpose of Rule 17 and would be an unreasonable interpretation of the rule’s terminology. For example, if some progress toward settlement was made during a first mediated session but further work was required and additional time with the mediator was indicated, the respondents’ construction of Rule 17.06(c) would preclude confidentiality with respect to any communications by any mediation participants during the time between mediated sessions. That inevitably would diminish the prospect for getting the case settled. And of course that is not what the rule’s confidentiality provision—stating that admissions, representations, statements, and other communications made during an alternative dispute resolution *process* may be admitted into evidence—actually says.

the case could continue to move toward settlement Tr. III at 12. When he was asked whether the case had been settled at the session, he answered that it had not. Id. at 13.

The drafters of Rule 17 recognized the need for an identifiable ending to court-ordered alternative dispute resolution proceedings. They adopted a plain provision to meet that need: “The parties shall advise the court within ten days of the termination of the alternative dispute resolution process only that the parties were successful in resolving their dispute or that issues remain open and unresolved.” Mo. R. Civ. P. 17.05(b). Nobody issued such notification during the weeks following the mediated session on December 18, 2008. That is because the mediation process was ongoing.

In *Williams v. Kansas City Title Loan*, 314 S.W.3d 868 (Mo.App.W.D. 2010), the Court of Appeals for the Western District stated that “the back-and-forth of the parties settlement discussions during a court-ordered mediation session are inadmissible as evidence.” *Id.* at 871. But the mediation process and the evidence in that case ended at the conclusion of a single session with the mediator. *Id.* at 869. The present case was different: Mr. Rugo testified that the parties continued their settlement communications for more than two months after their session with Judge Corrigan, Tr. I at 64-72, and Judge Corrigan testified that the case was not settled at the end of one session and that he had informed everyone that he would remain available for further meetings. Tr. III at 7-8, 11, 13, 48. More to the point, in *Williams* the Court of Appeals also stated that settlement communications “during a court-ordered mediation process . . . are confidential and non-binding.” 314 S.W.3d at 872. This Court should reject the respondents’ inapt characterization of all communications and conduct pertaining to this dispute

that occurred after December 18, 2008, as matters occurring after the termination of the mediation process.

The respondents dismiss the statements regarding Rule 17.06(c) confidentiality in *Williams* as *dictum*. Resp.’s Br. at 24. The Missouri Supreme Court has recognized that dicta is persuasive authority when it is supported by logic.” *State ex rel. Dunlap v. Higbee*, 43 S.W.2d 825, 831 (Mo. 1931); *see also County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring and dissenting) (noting the precedential value “not only [of] the holdings of our prior cases, but also to their explications of the governing rules of law”). The consideration of and conclusions drawn about confidentiality under Rule 17.06(c) was an integral part of the Court of Appeals’ analysis and holding in *Williams*. 314 S.W.3d at 870-872. The analysis is cogent and logical, grounded as it is in the unequivocal terms of Rule 17: in fact the respondents do not criticize the analysis in any regard. Resp.’s Br. at 23-24.

On the other hand, the respondents do suggest that *Williams* lacks weight because “it is the lone Missouri case discussing the issue.” *Id.* at 24. They cite no authority for the implicit proposition that a case of first impression lacks weight because no other court reached the issue sooner. *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). The respondents have not found a basis for criticizing that recognition, case of first impression or not. And *Williams* 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. Contrary to the respondents’ insinuation, the Kerckhoffs have not suggested that the decision of a sister court in *Williams* is binding on this Court. Resp.’s Br. at 24 (stating that “*Williams* can hardly be said to be the ‘controlling law’ on the matter of how courts are to interpret and apply Rule 17.06 and noting *Williams*’ “lack of ‘controlling’ status”). It is just an eminently well reasoned decision, and one that the respondents have found no basis for criticizing.

The respondents contend that the Kerckhoffs have failed to preserve their point for review because “*nowhere* in their brief do they specifically identify *which objections* to *which testimony* they assert are reversible error.” Resp.’s Br. at 24-25 (emphases in original). That argument ignores the facts that the lower court took the initiative in informing counsel for the Kerckhoffs during a pre-hearing argument that he would have a running objection to testimony regarding

communications or conduct in the mediation process, and reiterated its approval of a continuing objection during the same proceeding. Tr. I at 20-21.³ The respondents' argument also ignores the fact that the Kerckhoffs' attorney restated his Rule 17.06(c) objection promptly after testimony began, and the Circuit Court again took the initiative in approving a continuing objection. Id. at 26. The issue thus was preserved for review.

“Repeated objections to the same or similar evidence are not necessary to preserve the issue for [appellate] review.” *Bell v. United Parcel Services*, 724 S.W.2d 682, 685 (Mo.App.E.D. 1987). More pertinently, in *State v. Baker*, 103 S.W.3d 711 (Mo. 2003), this Court recognized the sufficiency of a “continuing objection” requested of and authorized by the trial court to preserve an evidentiary

³ Counsel for the Kerckhoffs objected at the commencement of the evidentiary hearing that allowing evidence of communications in the mediation process other than a signed mediated settlement agreement would violate the confidentiality provision of Rule 17.06(a). Tr. I at 5-20. The Circuit Court overruled that objection: “I’m overruling you. You could be right. But let’s move on . . . It can be a continuing objection.” Id. at 20. After further colloquy counsel for the Kerckhoffs stated: “Your honor, I’m going to have a continuing line of objections . . . to any and all testimony.” Id. at 21. The court responded: “You may . . . That’s fine.” Id.

challenge for appellate review. *Id.* at 716; *see also State v. Pike*, 162 S.W.3d 464, 472 (Mo. 2005) (noting that defense counsel had requested and received a continuing objection to all evidence relating to events after the stop of the defendant’s vehicle, and holding that “[t]his objection was sufficient to preserve the issue for appeal”). In *State v. Allen*, 845 S.W.2d 671 (Mo.App.E.D. 1993), the Court of Appeals held that the conversion of a motion *in limine* to a continuing objection approved by the trial court is sufficient to preserve the challenge to evidentiary rulings for appellate review. *Id.* at 673.

Hundreds of questions asked at the evidentiary hearing concerned nothing other than communications and conduct during the mediation process. The evidentiary challenge, obviously understood by the trial court, was to testimony regarding the participants’ communications and negotiations with each other and with Judge Corrigan in their court-ordered mediation. The Circuit Court’s global rejection of that challenge is *precisely* the point relied upon by the Kerckhoffs. There has been no failure to specify the challenged action of the trial court or to preserve this issue for appellate review.

The respondents’ argument that “[i]t is not the job of Respondents or this Court to scour the transcript” for particular testimony that the appellants claim should not have been allowed is correct as a general principle. Resp.’s Br. at 24-25. But the deployment of that argument in this case misses—or seeks to obscure—the point. In the trial court and in this Court, the issue always has been the propriety of allowing testimony regarding communications and conduct in the

course of mediation proceedings. The respondents' claims for enforcement of the non-existent settlement agreement and for the imposition of sanctions depended on that evidence, as did the judgment from which this appeal has been taken. The Kerckhoffs have claimed throughout this case that such testimony is prohibited by the confidentiality provision of Rule 17.06(a).

The ultimate flaw in the respondents' argument is their conflation of the general rule regarding the admissibility of evidence regarding settlement negotiations with the particular protections that Rule 17 affords to admissions, representations, statements and other communications made in the process of court-ordered mediation. To be sure, the law favors the settlement of disputes and conventional rules of evidence limit the admissibility of evidence regarding private settlement efforts in order to facilitate that value. *See, e.g., Mills v. American Mutual Ass'n*, 151 S.W.2d 459, 462 (Mo.App.W.D. 1941). But court-ordered mediation—settlement-specific proceedings institutionalized by the judicial system to achieve those benefits in a system constructed by the courts—is a fundamentally different process. And a reliable promise of confidentiality is essential to that process.

The purposes served by court-ordered mediation are manifold and salutary.

The Supreme Court of Indiana has observed:

The best interests of Indiana citizens and sound judicial administration are well-served when trial courts fully utilize and promote the use of mediation, which can be an enormously effective tool to facilitate the amicable resolution of disputes, to enable parties to meaningfully participate in crafting solutions that best serve their

respective interests, to reduce points of contention that would otherwise require a court hearing, to minimize the destructive polarization that can accompany contested adversarial proceedings, to resolve disputes often more expeditiously and less expensively than by protracted litigation and trial proceedings, to equip parties with dispute resolution skills, and to relieve crowded trial dockets thus enabling courts to provide necessary trials more promptly.

Fuchs v. Martin, 845 N.E.2d 1038, 1041 (Ind. 2006). The purpose of protecting the communications and actions of parties in court-ordered mediation from disclosure are equally clear.

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); Alan Kirtley, “The Mediation Privilege’s Transition from Theory to Implementation, Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,” 1995 J. Dispute Resolution, 1, 9-10 (suggesting that “[a] principal purpose of the mediation privilege is to provide

mediation parties protection against [the] downside risks of a failed mediation”).

A federal appellate court explained more than 30 years ago:

If participants cannot rely on the confidential treatment of everything that transpires during [mediation] sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, noncommittal manner more suitable to poker players in a high-stakes game than adversaries attempting to arrive at a just solution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.

Lake Utopia Paper Ltd. v. Connelly Containers, Inc., 608 F.2d 928, 930 (2nd Cir.

1979); *see also Clark v. Stapleton Corp.*, 957 F.2d 745, 746 (10th Cir. 1992)

(admonishing counsel for breach of confidentiality and holding confidentiality essential to proper functioning of appellate settlement conference program); *Willis v. McGraw*, 177 F.R.D. 632, 633 (S.D.W.Va. 1998) (following *Lake Utopia* and denying motion to enforce settlement).

The respondents contend that “allowing the disclosure of relevant evidence necessary for the determination of a motion to enforce settlement” can trump the mandates of Rule 17.06(a) that “[a]ny communication relating to the subject matter of [a] dispute made during the alternative dispute resolution process by a participant or any other person present at the process shall be a confidential communication,” and that “[n]o admission, representation, statement or other confidential communication made in setting up or conducting such process shall be admissible as evidence or subject to discovery.” The drafters of that rule surely

knew how to write exceptions into it, but they did not do so. The respondents' attempt to rewrite the rule should find no purchase in this Court.

The respondents argue that “none of the evidence upon which the [trial] court relied in granting the motions for sanctions violated Rule 17.” Resp.’s Br. at 29. That is preposterous. The Circuit Court made clear at the outset of its order that it was relying upon “the evidence adduced at three days of hearing in connection with the Motion[s] to Enforce Settlement.” Legal File at 194. The following findings, which were integral to the order, can only have been based on testimony that violated the confidentiality guarantee of Rule 17.06(a):

- The court found “that a settlement in principle was reached at this mediation.” Legal File at 195. That finding necessarily was based on testimony regarding communications between the parties and the mediator throughout the mediation session on December 18, 2008. Mr. Rugo testified at length about the parties’ point-by-point negotiations throughout the day. Tr. I at 45-63.

- The court found “that Defendants knew and agreed to those principles as developed on the term sheets presented at the hearing.” Legal File at 195. Mr. Rugo testified that he had prepared the various term sheets throughout the day and that the successive sheets were based on discussions between the several attorneys. Tr. I at 35-41. He testified that he had “made some changes” in the third term sheet—presumably the sheet upon which the Circuit Court relied in finding that the parties had reached a “settlement in principle,” Legal File at 195—and that the

changes were designed to address particular matters discussed by counsel for the Kerckhoffs during the day. Tr. I at 135.

- The court made findings regarding the intentions and understandings of the parties with respect to the the continuation of the process after December 18, 2008. Legal File at 195-196. Particularly in view of the court’s recitation that it had taken all of the testimony over three days of hearing into account, that finding necessarily was based in part on Mr. Rugo’s testimony that “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.” Tr. I at 61, 67. Mr. Rugo also testified at length about the parties’ ongoing settlement process after December 18, 2008. Id. at 64-76, 140-42.

The respondents seek to avoid the patent wrong in this case by arguing that the trial court premised its imposition of sanctions on conduct that occurred “at the conclusion of the mediation.” Resp.’s Br. at 30-31. That simply is not so. They also seek to avoid the well-deserved consequences of their own frivolous motions to enforce a mediated settlement agreement that they all knew contained no settlement terms and could not be enforced, Mo. R. Civ. P. 17.05(a), 17.06(c), by bootstrapping the parties’ execution of the mediation form with no terms of settlement—that Judge Corrigan testified was merely a device to keep the litigants working on settling an unsettled case, Tr. III at 11-12, 31—into proof that the mediation process had been concluded and thus that this Court should brush aside the rule regarding confidentiality and admissibility of mediation conduct.

None of the respondents' arguments can overcome the clear and mandatory confidentiality promise of Rule 17.06(a). This Court should reverse the judgment of the Circuit Court.

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.

This was a bench-tried case. The judgment in such a case is to be reversed if it is dependent upon factual findings that are not supported by substantial evidence or are against the weight of the evidence. *Murphy v. Carron*, 536

S.W.2d 30, 32 (Mo. 1976). The Circuit Court premised its imposition of sanctions on a finding that “the Kerckhoff Defendants actions constitute a complete lack and absence of good faith at mediation and thereafter [and] constitute bad faith.”

Legal File at 196-197. That finding necessarily was derived from the court’s finding that the parties had reached a “settlement in principle” during the mediated session on December 18, 2008. Legal File at 195. Those findings are not supported by substantial evidence and are against the weight of the evidence, and thus the judgment that depends upon them must be reversed.

The respondents contend that the Kerckhoffs’ point relied on is deficient and does not preserve their challenge to the trial court’s findings and judgment for appellate review. Resp.’s Br. at 37-39. They posit that findings of fact that fail to pass muster under the *Murphy v. Carron* standard cannot be the subject of a proper point under Mo. R. Civ. P. 84.04(d) and complain of being called upon to “divine [the] import” of the appellants’ point. Id. at 38. That is incorrect. Rule 84.04(d) requires that the appellant identify the “ruling or action” of the trial court that is being challenged. The action challenged by the Kerckhoffs is the making of erroneous findings upon which the judgment was based. Appellant’s Br. at 43. The point relied on proceeded to state the *Murphy v. Carron* requirements for a sustainable factual finding in its “because” clause. Id. And it concluded with a summary recital of why in the context of this case the erroneous factual findings require reversal. Id.

The appellants recognize the importance of properly framed points in an appellate brief:

Deficient points relied on force the appellate court to search the argument portion of the brief or the record itself to determine and clarify the appellant's assertions, thereby wasting judicial resources, and, worse yet, creating the danger that the appellate court will interpret the appellant's contention differently than the appellant intended or his opponent understood.

Hall v. Missouri Board of Probation & Parole, 10 S.W.3d 5404-545

(Mo.App.W.D. 1999). The present point provides notice of the Kerckhoffs' challenge to the trial court's action in making two pivotal findings of fact despite inadequate evidentiary support for those findings. As required by Rule 84.04(d)(1)(B), the point specifies the legal reason that the findings are wrong—*i.e.*, because they fail to meet the standard established by this Court for sustaining a judgment when the factual findings upon which it is based are wrong.

The respondents argue that “whether an enforceable settlement was reached is irrelevant to this appeal.” Resp.'s Br. at 39-49. In fact the Circuit Court based its ultimate finding of bad faith and its several underlying findings of impropriety at the mediated session squarely on its finding that the parties had reached a “settlement in principle” at the mediated session on December 18, 2008. Legal File at 195-197.

The respondents contend that the Kerckhoffs' argument regarding the non-existence of an enforceable agreement “is totally out of place in this appeal.” Resp.'s Br. at 40. They seek to isolate the trial court's finding of bad faith on the

part of the Kerckhoffs from its finding that all of the parties had essentially settled the case. *Id.* But the essence of the Circuit Court’s order imposing sanctions upon the Kerckhoffs was that they had withheld their belief that there was no valid settlement agreement and “misled [the respondents] to their detriment” in that a trial setting was vacated. Legal File at 196. The Kerckhoffs’ demonstration that no rational attorney could have believed or advised his or her client that there was an enforceable settlement agreement at the end of the mediated session is hardly “out of place” in this appeal. It proves the trial court’s analytical error: the case was not settled on December 18, 2008; the Kerckhoffs did not mislead or trick anybody into believing that it was; and the ultimate failure of the mediation process was not something for which the Kerckhoffs can reasonably be held responsible.

The respondents argue that evidence regarding events occurring after the mediation session on December 18, 2008, “establish that a settlement in principle was reached” at the session. Resp.’s Br. at 41. They posit: “If Kerckhoff Defendants really believed that no settlement had been reached, their counsel surely would not have been working to prepare settlement documents.” *Id.* That paints a bogus picture of the testimony given by the plaintiffs’ counsel, Mr. Rugo:

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. Mr. Rugo's recollection reflected the efforts of counsel for the Kerckhoffs to get the case settled. The notion that he was led to believe his adversaries were spending the months of December, January, and February in a drafting exercise cannot be squared with his testimony. The respondents' attempt to bolster this argument by noting that they were surprised to learn at the evidentiary hearing that the Kerckhoffs never considered the termless mediation form an enforceable agreement is equally spurious. *Id.* Judge Corrigan and every lawyer who took part in the mediation went home from the mediation session knowing to a legal certainty that they had not reached a binding agreement or settled all of the material issues in the case.

First, the three plaintiffs who had attended the mediation session—who themselves had not signed the mediation form—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 mediated session, neither condition was satisfied.

Judge Corrigan testified that the parties had made progress toward achieving a settlement and that he held hope for an eventual resolution. Tr. III at 11-12, 31. It is astonishing that the respondents continue suggesting to courts that they believed the only thing remaining to do after the mediated session was the drafting of a final agreement. The plaintiffs insisted then that they required “security” for the future installation of a “global watering system.” Tr. I at 61-62. The term sheets themselves memorialized the status of this unresolved and crucial issue:

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 that Mr. Kilo volunteered to “investigate a bond” and stated that was the reason “that language found itself into the second and then third [term sheets].” Tr. I at 61. His testimony regarding telephone conversations with counsel for the Kerckhoffs during the weeks following the mediated session makes it clear that counsel were endeavoring to resolve impediments to settlement. Tr. II at 142.

It also is remarkable that the respondents claim to have “believe[d] that the case had been settled” at the end of the session. Resp.’s Br. at 48-49. The plaintiffs had made it clear they would not accept the remaining terms of the proposal unless future performance was guaranteed. Tr. I at 61-62. That is, they

wanted certainty that the irrigation system would be paid for by someone other than them. Tr. I at 61; Ex. 3 at 2. That was the financing of the entire settlement plan. The possibility of satisfying the plaintiffs' with a bond was to be "investigated" by the Kerckhoffs' attorney. Id. No other alternative means of meeting the plaintiffs' demand is in the terms sheets. The respondents could not reasonably have "believe[d] that the case had been settled" any more than the Kerckhoffs did.

The Kerckhoffs acknowledge the testimony of Kenneth Slavens and Vincent Keady, attorneys for two parties to the underlying litigation and the mediation process, that they did leave the mediated session on December 18, 2008, thinking that the case had been settled. Tr. II at 98-100, 121-123. Mr. Slavens testified that it had been his "assumption" that the entire case was settled. Id. at 101. Mr. Slavens also testified that Mr. Kilo had called him in "either . . . late December or early January" and told him: "[W]e're far from a settlement and getting further apart." Id. at 102. Mr. Keady testified that his communication with the Kerckhoffs' attorney at the mediated session had been limited to remarks "in passing" and "didn't have anything to do with the terms of the settlement." Id. at 125. Mr. Keady testified that he received a telephone call from Mr. Kilo indicating that there was no settlement. Id. at 124-125. Mr. Keady stated: "I recall [Mr. Kilo] saying something to the effect that you were still attempting to resolve the case." Id. The testimony of Mr. Slavens and Mr. Keady, both called as witnesses by the present respondents, belies the notion that the Kerckhoffs or

their attorneys were sandbagging anybody about the existence of a settlement at the end of the mediated session or the status of negotiations thereafter.⁴

The respondents seem to believe that the fact that “the attending Kerckhoff Defendants did not have the authority to settle” at the mediated session, and that this was not communicated to them, was proof of bad faith. Resp.’s Br. at 46. If that is so, the trial court should have called offsetting penalties. Only three of more than two dozen plaintiffs attended the session. Tr. III at 7, 30. The plaintiffs had not deigned to tell Judge Corrigan that they lacked authority to bind their co-parties: “[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

⁴ The appellants have filed a motion for leave to file newly discovered evidence that presently is pending before the Court. The evidence consists of an email message dated December 22, 2008, that was sent by Mr. Rugo to a plaintiffs’ expert witness. Mr. Rugo asked the witness “to check on something for me as soon as you can.” He explains that “[a] settlement *is being discussed*” and outlines certain terms of the proposed settlement. He asks: “Can you check quickly with a call to DNR . . . to make sure that *if we settle on this basis* DNR won’t block that number of temporary wells?” And he concludes: “We really need to know these answers ASAP as *settlement discussions are ongoing on this basis.*” (Emphasis added.)

other people.” *Id.* at 11-12, 43. He testified that the three representative property owners declined to sign the Mediation Form. *Id.* at 22, 24, 33, 40, 44.

The respondents note that Arthur Kerckhoff III did “most of the negotiating for Kerckhoff Defendants” at the mediation session on December 18, 2008, and that Arthur Kerckhoff, Jr., eventually testified that his son had lacked authority to settle the case. Resp.’s Br. at 46-47. They seem to suggest that this was proof of bad faith on the part of the Kerckhoffs. *Id.* at 47. They do not mention or controvert the “ill health” of Arthur Kerckhoff Jr. Tr. I at 134. The respondents do not suggest that the elder Mr. Kerckhoff was absent from the session. The authority they cite is this:

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.

Resp.’s Br. at 46 (citing *Nick v. Morgan’s Foods, Inc.*, 99 F.Supp. 2d 1056 (E.D.Mo. 2000)). Of course the record does not begin to suggest that the Kerckhoffs came to the mediation session without “the party with the ability to meaningfully negotiate.” Nor have the respondents provided the Court with authority for an argument that the elder Mr. Kerckhoff was the only appropriate party to *conduct* the negotiation.

The respondents’ attempt to justify the critical findings of the Circuit Court is not up to the task. 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.

The Kerckhoffs requested that the trial court order attorneys and law firms representing the plaintiffs and defendant PF Development LLC to pay attorney fees incurred responding to the motions that those attorneys had filed for the enforcement of a settlement agreement that never existed. The Kerckhoffs based their motion in the first instance on the sanction provisions of Rule 55.03(d). They subsequently invoked the inherent authority of the trial court to impose sanctions

for behavior in bad faith during the course of judicial proceedings. Legal File at 190.

The respondents contend that the trial court lacked authority to impose sanctions against them because the Kerckhoffs did not comply with the procedural requirements of Mo. R. Civ. P. 55.03. Resp.'s Br. at 54-57. They argue further that the Circuit Court's inherent authority to sanction their conduct "was not properly at issue" before that court. Id. at 57-59. Finally they argue that the trial court's denial of the Kerckhoffs' motion for the imposition of sanctions was supported by substantial evidence. Id. at 59-61. None of those arguments can overcome the patent frivolity of the respondents' motions to enforce a non-existent Rule 17 mediated settlement agreement or save the trial court's ruling.

Rule 55.03 authorizes the imposition of sanctions against lawyers, law firms, or parties for filing frivolous or unfounded or otherwise improper pleadings. Mo. R. Civ. P. 55.03(d). 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. "[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). The

respondents' several motions to enforce the termless mediation form under Rule 17.06(c) were hopelessly frivolous.

The Kerckhoffs acknowledge that they were unable to comply with the procedural requirements of Rule 55.03(d)(1)(A). The Circuit Court solicited motions for sanctions at the end of the evidentiary hearing on August 10, 2009, and ordered that the motions be filed within 21 days. Legal File at 100. But there was no impediment to the trial court's exercise of its inherent power to impose sanctions and thereby "protect . . . the orderly administration of its business." *Rea v. Moore*, 74 S.W.3d 795, 800 (Mo.App.S.D. 2002). In *Rea* the Court of Appeals recognized the "responsibility" of courts to impose sanctions for the filing of pleadings exhibiting a patent lack of legitimate foundation. *Id.* at 799. The motions filed by the respondents in this case purported to seek the enforcement of an "agreement" that was singularly incapable of qualifying for enforcement under Rule 17.06(c), which mandates that mediated settlement agreements be executed by the settling parties and contain the terms of settlement. The termless mediation form provided by the respondents in support of their motion for enforcement met neither condition. The filing of the motion was a textbook example of frivolous pleading and wasting of judicial and litigant resources.

The misconduct in this case was the respondents' commencement of proceedings to enforce a "mediated settlement agreement" that they knew to a certainty could not be enforced. In this Court the respondents characterize that conduct under the rubric of "an attorney's enthusiasm or creativity in pursuing

factual or legal theories.” Resp.’s Br. at 59 (quoting *Noland v. State Farm Mutual Automobile Insurance Co.*, 853 S.W.2d 327, 331 (Mo.App.W.D. 1993)). That is not an apt description of what they did.

This Court should reverse the trial court’s denial of the Kerckhoffs’ motion for the imposition of sanctions. The 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. If the Court does not see fit to enter judgment for sanctions against the respondents, the case should be remanded to the Circuit Court for the entry of such a judgment.

CONCLUSION

For the reasons set forth in this reply brief and the appellant's initial 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 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 and enter judgment upon those determinations, or (b) remand the case to the Presiding Judge of the St. Louis County Circuit Court with instructions to conduct a hearing to determine the amount of attorney fees to be awarded and the assignment of liability among the offending attorneys and law firms, and to enter judgment upon those determinations.

Respectfully submitted:

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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 7,642 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 delivered on February 4, 2011, to:

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