No. 89291

IN THE

SUPREME COURT OF MISSOURI

DALE LAWRENCE, individually and
As the personal representative of the estate of DOROTHY LAWRENCE
Plaintiff/Respondent,

vs.

BEVERLY MANOR, a Missouri Corporation,
Defendant/Appellant

RESPONDENT'S SUBSTITUTE BRIEF

Appeal from the Circuit Court of Jackson County, Missouri
Division 18 Honorable Jon R. Gray
District Court Case Number: 04CV237251

After Opinion by the Missouri Court of Appeals
Western District; Cause No. WD67920

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RESPONDENT REQUESTS ORAL ARGUMENT

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

CASES AND AUTHORITIES CITES

JURISDICTIONAL STATEMENT

Dale Lawrence, individually and As the Personal Representative of the Estate of Dorothy Lawrence hereinafter [“Respondent”] agrees with the Appellant’s jurisdictional statement.

STATEMENT OF FACTS

On or about March 27, 2003, Defendant under took to provide services through their facility in Nodaway, County, Missouri, for Decedent Dorothy Lawrence. (L.F. 9). On or about March 30, 2003 Defendant's agents were lifting Dorothy Lawrence from a chair and dropped decedent Dorothy Lawrence, allowing Dorothy Lawrence's head to come into a hard contact with the floor of Appellant's facility. (L.F. 10).

Plaintiff, Dale Lawrence, son of the decedent Dorothy Lawrence, (hereinafter Plaintiff) filed a Petition for wrongful death on December 23, 2004, alleging that Defendant's negligent acts led to the death of Dorothy Lawrence on March 31, 2003 (L.F. 66). Plaintiff filed a Second Amended Petition in April 2005, and served Defendant, Beverly Manor on or about December 2005. (L.F. 66) Plaintiff thereafter filed a Third Amend Petition on June 28, 2006 and Defendant Beverly Manor filed their answer on May 19, 2006 (L.F. 8-22). Defendant's filed their Motion and Memorandum of Law to Enforce Arbitration Agreement on June 30, 2006 stating that the arbitration should be ordered because Phyllis Skoglund, the daughter of the decedent and sister to the Plaintiff signed the resident and facility arbitration agreement on March 27, 2003 as Power of Attorney for decedent. (L.F. 24-33). Plaintiff opposed and filed Suggestions in Opposition to Defendants' Motion to Enforce Arbitration on July 10, 2006 stating Defendant's

failed to provide proof that it was in fact Ms. Skoglund whom signed the arbitration agreement and had authority to do so. (L.F. 35-38). Defendant's filed a reply and Plaintiff filed a surreply (L.F. 40 & 47). The trial court held a case management conference on August 21, 2006 and took the Motion under advisement (L.F. 53-54). On January 5, 2007, the trial court issued their order overruling defendant's motion to enforce arbitration (L.F. 59). Defendant's filed their Notice of Appeal on January 12, 2007 (L.F. 64). The trial court entered a Judgment on February 9, 2007 to allow the Defendant the ability to appeal. Defendant Beverly Manor appeals from the trial courts overruling of the motion to enforce arbitration.

On March 18, 2008, the Missouri Court of Appeals, Western District, issued its opinion affirming the trial courts decision. On April 2, 2008, Appellant filed with the Court of Appeals, Western District, an Application for Transfer to this Court pursuant to Rule 83.02. The Court of Appeals denied Appellant's Application for Transfer on April 29, 2008. On May 9, 2008 Appellant filed its Application for Transfer with this Court pursuant to Rule 83.04, which was granted on June 24, 2008. Accordingly, this Court has Jurisdiction pursuant to Missouri Constitution Article 5, Section 10.

POINTS RELIED ON

I. THE TRIAL COURT PROPERLY OVERRRULED THE DEFENDANT'S MOTION TO ENFORCE ARBITRATION AGREEMENT BECAUSE THE ARBITRATION AGREEMENT IS NOT A BINDING AGREEMENT BECAUSE IT ONLY COVERS CLAIMS DURING THE DECEDENT'S LIFE TIME NOT ANY OTHER ACTION THAT OTHERS WOULD HAVE SUCH AS THIS WRONGFUL DEATH CLAIM.

Finney v. National Healthcare Corp., 193 S.W.3d 393 (Mo. App. S.D. 2006).

Kinzenbaw v. Dir. Of Revenue, 62 S.W.3d 49, 52 (Mo. Banc 2001).

Campbell v. Callow, 876 S.W.2d 25, 26 (Mo. App. S.D. 1994).

O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo banc 1983)

II. THE TRIAL COURT PROPERLY OVERRULED DEFENDANT BEVERLY MANORS MOTION TO ENFORCE ARBITRATION AGREEMENT BECAUSE EVEN THOUGH PHYLLIS SKOGLUND, THE DECEDENT'S DAUGHTER WAS DURABLE POWER OF ATTORNEY FOR THE DECEDENT MS. SKOGLUND IS NOT THE PERSON WHO BROUGHT THE WRONGFUL DEATH CLAIM.

RSMo § 442.150(2)

Estate of Athon v. Conseco Fin. Servicing Corp.,

88 S.W.3d 26, 30 (Mo.App. 2002).

Netco v. Dunn, 26064 (Mo.App. 2005)

Estate of Burford ex. rel. Bruse v. Edeard D. Jones & Co. L.P.,

83 S.W.3d 589, 592 (Mo.App. 2002)

III. THE TRIAL COURT PROPERLY OVERRULED THE DEFENDANT'S MOTION TO ENFORCE ARBITRATION BECAUSE THE ARBITRATION AGREEMENT COVERS ALL CLAIMS ARISING OUT OF ANY HEALTHCARE PROVIDED BY BEVERLY MANOR TO THE DECENDENT DURING HER LIFE AND RESPONDENT'S WRONGFUL DEATH CLAIM IS NOT DERIVATIVE OF THE CLAIM THAT DOROTHY LAWRENCE COULD HAVE BROUGHT.

State ex. rel. Burns v. Whittington, 219 S.W.3d 224, 226 (MO. Banc 2007)

Estate Orlanis v. Oakwood Terrace, 3D05-2366 (Fla. App. 3 Dist. 8-29-2007)

Watson v. Williams, 2005-CA-01239-SCT (Miss. 1-3-2008)

Sumner v. Sumner, 701 S.W.2d 720 (Mo. banc 1985)

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY OVERRRULED THE DEFENDANT'S MOTION TO ENFORCE ARBITRATION AGREEMENT BECAUSE THE ARBITRATION AGREEMENT IS NOT A BINDING AGREEMENT BECAUSE IT ONLY COVERS CLAIMS DURING THE DECEDENT'S LIFE TIME NOT ANY OTHER ACTION THAT OTHERS WOULD HAVE SUCH AS THIS WRONGFUL DEATH CLAIM.

A. **STANDARD OF REVIEW**

Beverly Manor appeals the trial court's overruling of their Motion to Enforce Arbitration. Appellate review of the trial court's denial of motion to enforce arbitration is *de novo.* Finney v. National Healthcare Corp., 193 S.W.3d 393 (Mo. App. S.D. 2006). (citing Dunn Indus. Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421, 428 (Mo. Banc 2003.). Although the reviewing court should consider the record below, deference should not be given to the trial court's conclusion. Kinzenbaw v. Dir. Of Revenue, 62 S.W.3d 49, 52 (Mo. Banc 2001).

A determination of whether the parties contractually agreed to arbitration must occur before the parties are forced to submit to arbitration. Korte Const. C. v. Deaconesss Manor Ass'n, 927 S.W.2d 395, 398 (Mo. App. E. D. 1996). A party

cannot be compelled to arbitration unless they have agreed to do so. Dunn; bid 112 S.W.3d at 435.

B. Argument and Analysis

The trail court did not error in overruling Appellant's motion to enforce arbitration agreement (L.F. 59). The wrongful death claim does not belong to the deceased or even to a decedent's estate. Campbell v. Callow, 876 S.W.2d 25, 26 (Mo. App. S.D. 1994). "The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the decedent" O'Grady v. Brownl, 654 S.W.2d 904, 910 (Mo banc 1983) (quoting State ex rel. Jewish Hospital v. Buder, 540 S.W.2d 100, 104 (Mo.App.St.L.D. 1976). A wrongful death action is not a transmitted right nor a survival right but is created and vested in the statutory designated survivors at the moment of death Finney vs. National Healthcare Corp., 193 S.W.3d 393 (Mo.App.S.D. 2006). Once Dorothy Lawrence, decedent's death occurred the signed arbitration agreement by her daughter, Phyllis Skoglund, acting as Power of attorney for decedent became void as the decedent no longer has a claim on her behalf.

Further the Power of Attorney was terminated on her death.

Since this wrongful death claim was brought by her son, an heir at law who was not a party to the arbitration agreement he cannot be said to be bound by the

one the appellant has. This is because a new cause of action for wrongful death occurred on Defendant's death and did not belong to decedent but to her heirs.

II. THE TRIAL COURT PROPERLY OVERRULED DEFENDANT BEVERLY MANORS MOTION TO ENFORCE ARBITRATION AGREEMENT BECAUSE EVEN THOUGH PHYLLIS SKOGLUND, THE DECENDENT'S DAUGHTER WAS DURABLE POWER OF ATTORNEY FOR THE DECENDENT MS. SKOGLUND IS NOT THE PERSON WHO BROUGHT THE WRONGFUL DEATH CLAIM.

A. **442.150(2) R.S.Mo.** provides: "If acknowledged or proved without this state and within the United States, by any notary public or by any court of the Untied States, or of any state or territory, having a seal, or the clerk of any such court or any commissioner appointed by the governor of this state to take the acknowledgement of deeds [emphasis added]. Section 442.210 R.S.Mo indicates that an acknowledgement must include:

1. The certificate of acknowledgement shall state the act of acknowledgement, and that the person making the same was personally known to at least one judge of the court, or to the officer granting the certificate, to be the person whose name is subscribed to the instrument as a party

thereto, or was proved to be such by at least two witnesses, whose names and places of residence shall be inserted in the certificate; and the following forms of acknowledgement may be used in the case of conveyances or other written instruments affecting real estate; and any acknowledgement so taken and certificated shall be sufficient to satisfy all requirements of law relating to the execution or recording of such instruments (begin in all cases by caption, specifying the state and place where the acknowledgement is taken):

(1) In case of natural persons acting in their own right

On this ____ day of ___, 20__, before me appeared A B (or A B and C D), to me known to be the person (or persons) described in and who executed the foregoing instrument, and acknowledged that he (or they) executed the same as his (or their) free act and deed.

B. Argument and Analysis

In the case at bar, the requirements of “personally known” or two witnesses,

is not present, therefore, the durable power of attorney is void.

Another reason the durable power of attorney in the instant case fails is provided in § 404.705.2 R.S.Mo., which provides:

All acts done by an attorney in fact pursuant to a durable power of attorney shall inure to the benefit of and bind the principal and principal's successors in interest, notwithstanding any disability or incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

The copy of Durable power of attorney attached to the Reply Suggestions by the defendant's bears no notary seal and the original document was never provided to plaintiff. (L.F. 40-45).

Whether a case is covered by arbitration is firmly a matter of law. Estate of Athon v. Conseco Fin. Servicing Corp., 88 S.W.3d 26, 30 (Mo.App. 2002). A fairly detailed discussion about when a motion to compel arbitration should be granted was had in the case Netco v. Dunn, 26064 (Mo.App. 2005) which states:

> "Missouri courts have held that under either the Missouri Arbitration act or the [FAA] before a court may grant a party's motion to compel arbitration, it must decide whether the agreement containing the arbitration provision is valid and legally binding,"Estate of Burford ex. rel. Bruse v. Edeard D. Jones & Co. L.P., 83 S.W.3d 589, 592 (Mo.App. 2002)(quoting Hitcom Corp. v. Flex Fin. Corp. 4 S.W.3d 618, 620 (Mo.App. 1999)."

The trial court must determine and resolve issues related to the validity of the contract. (1) that a valid agreement exists between the parties and (2) that the dispute at issue falls within that agreement, Dunn, 112 S.W.3d at 427-28…If the trial court finds the contract void or, for some other reason, unenforceable, there is obviously no valid arbitration provision." Id. In such determinations, "generally state law principals of contracts and agency govern the question of which parties are bound by an arbitration agreement" Bryd, 931 S.W.2d at 813.

Further under the Missouri laws of contracts and agency Ms. Lawrence could not contract to eliminate a claim for her own wrongful death as that would be claim which had not even arisen yet. Missouri does not allow the claimant to contract away or assign future tort claims therefore Ms. Lawrence could not bind claims after her death.

The Court of Appeals in its decision herein analyzed this issue following Campbell v. Callow,876 S.W.2d 25,26 (Mo. App. S.D. 1994) pages three (3) and four (4) as follows:

> The circuit court correctly relied on Finney v. National Healthcare Corporation, 193 S.W.3d 393, 395 (Mo. Ap. 2006), which declared:
>
> The wrongful death claim does not belong to the deceased or even to a decdent's estate. Campbell v. Callow, 876 S.W.2d 25,26 (Mo. App. S.D. 1994). "The wrongful death act creates a new cause of action where none

existed at common law and did not revive a cause of action belonging to the deceased." O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. banc 1983)(quoting State ex. rel. Jewish Hospital v. Buder, 540 S.W.2d 100, 104 (Mo. App. St. L.D. 1976)). A wrongful death action is not a transmitted right not a survival right but is created and vested in the statutorily designated survivors at the moment of death. *Id.* At 9101. The damages under section 537.080 are different than the damages Decedent would have been entitled to in a personal injury action against Appellants. Under the Missouri wrongful death statute, the party or parties may receive "pecuniary losses suffered by reason of the death, funeral expenses, and the reasonable value of the services, consortium, companionship comfort, instruction guidance, counsel, training, and support of which those on whose behalf suit may be brought have been deprived by reason of such death." Section 537.090.

The Court of Appeals goes on to state:

> The circuit court is correct that the issue of Finney is essentially identical to the issue raised by Dale Lawrence's action. In Finney, the decedent was admitted to a nursing home, and her granddaughter signed an arbitration agreement on her behalf, which required her to

> arbitrate any claims against the nursing home. After the decedent's death, her daughter brought a wrongful death claim against the nursing home. Relying on the legal principle that a wrongful death claim is a new and independent cause of action and is not derived from a cause of action that he decedent would have had, the Finney court held that the daughter was not bound by an arbitration agreement that she did not sign.

Consequently under Campbell and Finney this wrongful death claim is not derivative and the Arbitration Agreement is not binding on Ms. Lawrence.

Finally the Court of Appeals states:

> The legal position announced in Finney—that a wrongful death claim is a new and independent cause of action and not a derivative action—is consistent with the legal position that the Supreme Court has taken. The Finney court correctly quoted the Supreme court's opinion in O'Gardy*:* "The wrongful death act creates a new cause of action where none existed at common law and did not revive a cause of action belonging to the deceased'…. The right of action thus created is neither a transmitted right nor a survival right." 654 S.W.2d at 910 (citation omitted). The Supreme Court reiterated this legal position in Sullivan v. Carlisle, 851 S.W.2d 510, 515 (Mo. banc 1993), and

American Family Mutual Insurance Company v. Ward, 774 S.W.2d 135, 136-37 (Mo. banc 1989). In Ward, the Supreme Court traced this legal principle back to the 1940s. Hence, at first blush, *Finney* would provide an appropriate legal basis for the circuit court's conclusion. Lawrence v. Manor, ____ S.W.3d ___, 2008 WL 731561 (Mo. App. W.D.).

"As the obligations to arbitrate rest on free assent and agreement, the subsistence and validity of an arbitration clause are governed by the usual rules and cannons [sic] of contract construction." Greenwood, 895 S.W.2d at 174. (L.F.47-51). Consequently the Plaintiff here is not bound by an arbitration agreement under a previous but no longer existing Power of Attorney which became void on Ms. Lawrence's death.

III. THE TRIAL COURT PROPERLY OVERRULED THE DEFENDANT'S MOTION TO ENFORCE ARBITRATION BECAUSE THE ARBITIRATION AGREEMENT COVERS ALL CLAIMS ARISING OUT OF ANY HEALTHCARE PROVIDED BY BEVERLY MANOR TO THE DECEDENT DURING HER LIFE AND RESPONDENT'S WRONGFUL DEATH CLAIM IS NOT DERIVATIVE OF THE CLAIM THAT DOROTHY LAWRENCE COULD HAVE BROUGHT.

The Missouri Supreme Court's decision in State ex rel. Burns v. Whittington, 219 S.W.3d 224, 226 (Mo. Banc 2007) was handed down while this cause of action was pending decision by the Missouri Court of Appeals, Western District and does not apply to the present case. This action has always been a wrongful death action and has never been amended to claim a new action. The Burns case was originally a personal injury claim which was amended to a wrongful death claim after the death of Plaintiff. In the case at bar there have been no amendments to the original Pleadings claiming a new action and therefore the issues have never been questioned or changed. Burns only dealt with the issue of where the proper venue was in an amended claim filed in one county and moved to another. The Court found that the amendment was a further causation of the original cause of action and should have the same venue. Venue is not an issue here and Burns does not apply.

Further even the Burns case holding is contrary to any retroactive or extended application since it normally applied the previous venue law rather than expanding the new law to encompass cases previously filed. In Judge Holliger's concurring opinion of the case at bar he states that Burns is distinguishable because it involves an "amended petition" rather than a new petition for wrongful death. Lawrence v. Beverly Manor ____ S.W.3d ___, 2008 WL 731561 (Mo. App. W.D.). Judge Howard's concurring opinion of the case at bar considers the

declaration in Burns as dictum and therefore does not bind the Missouri Court of Appeals. Lawrence v. Beverly Manor, ____ S.W. 3d. ___ 2008 WL 731561 (Mo. App. W.D.)

There is no Missouri case law on point to address the application of a decedent's arbitration agreement in a wrongful death claim Respondent's have found two cases on point to support their claim. The Court in the case of Estate Orlanis v. Oakwood Terrace, 3D05-2366 (Fla. App. 3 Dist. 8-29-2007) found that Oakwood Terrace waived their right to arbitrate by affirmatively engaging in the discovery process before filing their respective motions to arbitrate. As in the case at bar, the Appellees actively engaged in the discovery process for seven months prior to the filing of their motion to compel arbitration.

The Court in the case of Watson v. Williams, 2005-CA-01239-SCT (Miss. 1-3-2008) found that because the signed arbitration provision was not a part of the consideration necessary for admission in to the nursing home and not necessarily in the best interest of Wyse as required by the Act, the daughter did not have the authority as Wyse's health care surrogate to enter into the arbitration provision contained within the admissions agreement that states:

> The Resident and/or Responsible Party understand[s] that (1) he/she has the right to seek legal counsel concerning this agreement, (2) the execution of this Arbitration is not a precondition to the furnishing of

services to the Resident by the Facility; and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within 30 days of signature. If not rescinded within 30 days, this Arbitration Agreement shall remain in effect for all care and services subsequently rendered at the Facility, even if such care and services are rendered following the Resident's discharge and readmission to the Facility.

In the case at bar the Arbitration Agreement also clearly states:

The Resident understands that (1) he/she has the right to seek legal counsel concerning this Arbitration Agreement, (2) that execution of this Arbitration Agreement is not a precondition to admission or to the furnishings of services to the Resident by the Facility, and (3) this Arbitration Agreement may be rescinded by written notice to the Facility from the Resident within thirty days of signature. If not rescinded within thirty days, this Arbitration Agreement shall remain in effect for all subsequent stays at the Facility, even if the Resident is discharged from and readmitted to the Facility.

Because there is no clear Missouri Case Law on the issue at hand this Court should take into account and follow other jurisdictions that have been faced with this same issue and affirm the trial courts decision.

a. State ex. rel. Burns v. Whittington, should not applied retroactively.

The Court of Appeals in applying Sumners v. Sumners, 701 S.W.2d 720 (Mo. banc 1985) in considering whether Burns should be applied retroactively accepts that the first factor of Sumners was met. In Burns the Court of Appeals states that "first, the decision " 'must establish a new principle of law…by overruling clear past precedent[.]' " *Id.* 724". However, Judge Holliger distinguishes that as only applying to and amended petition for wrongful death after an original petition for negligence as far as determining venue, which is clearly not the case here. Lawrence v. Beverly Manor, ____ S.W. 3d. ___ 2008 WL 731561 (Mo. App. W.D.)

Then Judge Howard distinguishes the Burns "derivative" language as dictum and not a "new principle of law." Lawrence v. Beverly Manor, ____ S.W. 3d. ___ 2008 WL 731561 (Mo. App. W.D.) Therefore the Court of Appeals did not ever fully agree that the first factor of Sumners was met.

In applying the second factor of Sumner the Court of Appeals states:

> "the Supreme Court did not explain the purpose of rationale of declaring the change. Indeed, the purpose of this rule is quite unclear, but we can assume that the Supreme Court had a reason for the change and applying the new rule to this case will enhance the

Supreme Court's purpose." Lawrence v. Beverly Manor, ____ S.W. 3d. ___ 2008 WL 731561 (Mo. App. W.D.)

However as pointed out above two of three Court of Appeals Judge disagreed that the Burns Court was changing the rules or had met factor number one of Sumners.

In applying the third factor of Sumners the Court of Appeals stated as follows:

> "the third factor, the balancing of interests and hardship, weighs against applying the rule retroactively. It appears that, in light of the case law before *Burns*, the parties presumably knew when they executed the arbitration agreement that it did not cover wrongful death claims. Why Beverly Manor, as the party that prepared the contract, should gain the benefit of an unexpected and surprising change in Missouri law is unclear. Perhaps Dorothy Lawrence's daughter would have refused to sign the agreement had she known that a wrongful death claim was a derivative action and would be included in the arbitration agreement. Hence, fairness dictates that the parties receive the benefit of their bargain and that the courts construe the law as it existed when Beverly Manor and Dorothy Lawrence's daughter

entered into this agreement." Lawrence v. Beverly Manor, ____ S.W. 3d. ___2008 WL 731561 (Mo. App. W.D.)

b. Ms. Skoglund did not and could not bind or limit Mr. Lawrence's wrongful death claim. The Court of Appeals states:

"Nothing in the record, however, indicates that Skoglund signed the arbitration agreement on her own behalf or on behalf of the wrongful death class. The evidence instead was that she signed it in her capacity as her mother's attorney in fact. She was acting as her mother's agent and was not bound by the arbitration agreement in the manner suggested by Beverly Manor. Nirtro Distributing, Inc. v. Dunn, 194 S.W.3d 339, 345 (Mo. banc 2006)." Lawrence v. Beverly Manor, ____ S.W. 3d. ___2008 WL 731561 (Mo. App. W.D.)

Since the record fails to show that Ms. Skoglund was acting as anything but her mother's Power of Attorney, Mr. Lawrence is not bound by the arbitration agreement. Since the burden of proving otherwise is on Beverly Manor and it has not met that, this court cannot find otherwise. Therefore, this court should find that Mr. Lawrence's claims are not bound by the arbitration agreement and deny Beverly Manor's appeal.

CONCLUSION

WHEREFORE, for the forgoing reasons, Respondent, Dale Lawrence, individually and As the Personal Representative of the Estate of Dorothy Lawrence prays for an order of this Court affirming the decision of the trial court and Court of Appeals overruling the motion to enforce arbitration agreement in favor of Dale Lawrence and against Beverly Manor and to remand this matter to the Circuit Court to dispose of Dale Lawrence's claim by trial and State ex. rel. Burns v. Whittington, 219 S.W.3d 224, 226 (Mo. banc 2007) should not be applied retroactively as it was not the law at the time this action arose.

Respectfully Submitted:

_____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed by first class, postage prepaid mail, this ___ day of August 2008 to the following:

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_____
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CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Rule of Civil Procedure 84.06(c), the undersigned attorney certifies that:

1. This brief includes the information required by Missouri Rule of Civil Procedure 55.03.
2. This brief complies with Missouri Rule of Civil Procedure 84.06(b).
3. This brief contains approximately 4,005 words according to the Word Count feature of Microsoft Word.
4. The submitted disk has been scanned for viruses and is virus-free.

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APPENDIX LISTING