NO. SD29088

MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

ROGER WORLEY,

Appellant,

vs.

RONALD HOFFMAN, ET AL.,

Respondents.

APPELLANT'S REPLY BRIEF

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REPLY CONCERNING INTRODUCTION AND JURISDICTIONAL STATEMENT

Appellant Roger E. Worley (hereinafter also "Mr. Worley" or "Appellant") disagrees that his jurisdictional statement "is deficient and fails to comply with Missouri Rule 84.04(b)." ***Respt. Br. 1.*** Appellant attempted to clearly set forth the basis for jurisdiction. Trusting that this Court will decide for itself whether Appellant has succeeded in so doing, Appellant has no further reply regarding jurisdiction.

Respondents Ronald Hoffman and Board of Trustees of the Springfield Police and Fire Retirement System (hereinafter also "Board of Trustees" or, collectively, "Respondents") also assert that "the Transcript of Proceedings conducted before the Hearing Examiner, . . ., constituting seven volumes of proceedings taking place on seven separate dates, is wholly absent and not contained in Appellant's Legal File. . . . This was Appellant's duty, therefore Appellant preserves nothing for appeal." ***Id.*** The transcript submitted to this Court was that ordered from and certified by the clerk of the trial court, as required in Mo. R. Civ. P. 81.12(c). No rule requires filing a transcript of proceedings held before a hearing officer where nothing in those proceedings is necessary to determine any question presented. Certainly the transcript of the proceedings before the hearing examiner would have added nothing and, consisting of over a thousand pages, would have been unduly burdensome to the Court. The record submitted by Appellant contains "all of the record, proceedings and evidence necessary to the determination of all questions to be presented, by either appellant or respondent, to the appellate court for decision," as required by Mo. R. Civ. P. 81.12(a).

If Respondents are dissatisfied with Appellant's record on appeal, Respondents are invited under the court rules to file any additional parts of the record as Respondents deem necessary. **Mo. R. Civ. P. 81.12(c).**

Regarding Respondents' charge concerning the "mis-numbering confusion," Respondents' complaint may have merit. Admittedly, the numbering could have been made clearer, and in response, Appellant seeks the forgiveness and patience of the Court and Respondents.

REPLY CONCERNING STATEMENT OF FACTS

Certainly Respondents are unhelpful by repetitiously revealing confusion regarding the numbering and dispersing "multi-numbering" throughout their response to Appellant's statement of facts and elsewhere in their brief. This Court will decide for itself whether argumentation was presented in the facts (none was intended by Appellant) and act appropriately based on that decision.

ARGUMENT

APPELLANT'S POINT RELIED ON I.

The circuit court erred in entering judgment against Appellant Roger E. Worley on Count I of his Second Amended Petition for Review Under Chapter 536 RSMo, which sought relief for Respondents' violation of Mr. Worley's due process rights as guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, § 10 of the Missouri Constitution, because the undisputed evidence proved a due process violation, in that the attorney who advocated for the City of Springfield in an administrative hearing against Mr. Worley's entitlement to duty-related retirement benefits, subsequently entered into extensive *ex parte* communications with the final decisionmaker, *i.e.*, the Board of Trustees of the Springfield Police and Fire Retirement System, giving it evidence outside the record, with no opportunity for Mr. Worley or his attorney to be present during those communications so as to allow for fair and impartial decisionmaking.

In response to Appellant's first Point Relied On, Respondents argue that it should be dismissed because the appellate court is to review the board's decision rather than the judgment of the circuit court. That is generally true, however, this point addresses the error of the circuit court ruling in favor of the Board of Trustees concerning Mr. Worley's due process claim brought before the circuit court.

There was no opportunity to consider this violation before the Board of Trustees, the violation being made *by* the Board of Trustees and its attorney at the end of the decisive meeting concerning Mr. Worley and with Mr. Worley and his attorney excluded therefrom. Respondents maintain, therefore, that Appellant failed to object to a due process violation at the time of the Board's decision, which, they claim, was the first opportunity. By failing to do so, Respondents contend, Appellant also failed to preserve the issue for review.

Generally speaking, judicial review of administrative decisions *is* limited to matters considered by the board, dealing only with questions of law on that record, and bars consideration of evidence other that what was brought before the board. ***Boyer v. City of Potosi,* 38 S.W.3d 430, 434 (Mo. App. E.D. 2000).** However, Mo. Rev. Stat. § 536.140.4 provides that a court has discretion to "hear and consider evidence of alleged irregularities in the proceedings or agency unfairness not shown in the record." ***Id.*** Specifically applicable to this case, the statute states:

> 4. Whenever . . . the court is entitled to weigh the evidence and determine the facts for itself, the court may hear and consider additional evidence if the court finds that such evidence in the exercise of reasonable diligence could not have been produced or was improperly excluded at the hearing before the agency. . . . The court may in any case hear and consider evidence of alleged irregularities in procedure or of unfairness by the agency, not shown in the record.

Mo. Rev. Stat. § 536.140.4 (2005).

The trial court entertained evidence outside the administrative record for the purposes of considering whether a due process violation occurred. Respondents responded to discovery requests regarding this issue with no apparent objection to the circuit court allowing discovery. ***Respt. Br. 16.*** In attempting to establish whether the Board of Trustees' attorney, Carl Yendes, presented evidence to that board that was outside the record, and further that he influenced the Board of Trustees with *ex parte* argument, interrogatories were met with objections due to attorney-client privilege.

The due process violation against Appellant was considered at the first opportunity before the circuit court, because there was no opportunity for it to be in the Board of Trustees' record. Appellant didn't even learn until after the Board of Trustees handed down its final decision that Attorney Yendes's Report / Findings, which was not part of the record on review, was adopted by the Board of Trustees essentially unchanged, as its findings and decision in the matter.

Since Mo. Rev. Stat. § 536.140.6 allows that "[a]ppeals may be taken from the judgment of the court as in other civil cases," it is appropriate for this Court to review that portion of the circuit court's judgment that is not and could not be in the limited record that was to be reviewed by the Board of Trustees.

Respondents additionally complain that the due process violation did not appear in Mr. Worley's initial petition and, in fact, not until his Second Amended Petition. This is inconsequential. The trial court granted leave to amend Mr. Worley's pleading, as is within

its discretion. ***Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 701 (Mo. 2008)**. "Amendments should be liberally allowed and constitutional claims can be asserted by amendment to the initial pleadings." ***Id.*** (citing ***Anheuser-Busch Employees' Credit Union v. Davis*, 899 S.W.2d 868, 869 (Mo. banc 1995)**). Respondents have not appealed the trial court's grant of leave to amend.

Lastly on this point, Respondents state that multiple roles of the Board of Trustees' attorney were authorized and proper. It is true, as Respondents state, that "a combination of roles, by itself, . . ., is not reversible error for a denial of due process claim" ***Respt. Br. 18*** (citing ***Lewis v. City of University City*, 145 S.W.3d 25, 31 (Mo. App. E.D. 2004)**). ***Lewis*** is inapposite in that it discussed the propriety of a city manager having dual roles of investigator and decision maker. The ***Lewis*** court correctly held that there was nothing in that which violated due process so long as the hearing was subject to judicial review. ***Id.*** Due process requires a fair hearing, which includes "knowing the opponent's claims, hearing the evidence submitted, confronting and cross examining witnesses, and submitting one's own witnesses." ***Id.*** Appellant was not given this opportunity at the decisive meeting from which he and his attorney were excluded. The impropriety was not so much in the Board of Trustees being the investigators and decision makers, but in receiving and reviewing evidence from its attorney that was not included in the record developed at the hearing level.

Furthermore, it is also true that "The Board is entitled to a presumption of fairness." ***Respt. Br. 16*** (citing ***Gamble v. Hoffman*, 732 S.W.2d 890, 895 (Mo. en banc 1987)**). The

Board of Trustees is presumed fair – that is until it violates the standards of fair due process as just described. In this case, the combination of roles is not considered entirely "by itself." The above-stated presumption is overcome where Appellant's evidence, as presented in his initial brief, shows that the Board of Trustees and its attorney went far outside the fair bounds found in ***Cochran v. Board of Educ. of Mexico School Dist. No. 59*, 815 S.W.2d 55 (Mo. App. W.D. 1991)**. "Due process requires Appellant to have a fair hearing." ***Lewis*, 145 S.W.3d at 31.** There is nothing fair about presenting evidence outside the record to the Board of Trustees with no opportunity for Appellant to object or present opposing evidence.

APPELLANT'S POINT RELIED ON II.

The Board of Trustees of the Springfield Police and Fire Retirement System erred in rejecting the hearing examiner's award of duty-related disability retirement benefits to Mr. Worley, because the Board of Trustees' decision was unreasonable, unlawful and unsupported by competent and substantial evidence upon the whole record, which is reviewable under Mo. Rev. Stat. § 536.140 (2005), in that the Board of Trustees based its decision on evidence outside the record [and] failed to review the record from the administrative hearing as required under Mo. Rev. Stat. § 536.080 (2000) and under Section 2-449 of the Policemen's and Firemen's Pension Plan ordinances, resulting in the Board of Trustees denying Mr. Worley benefits to which he was and is entitled under the Policemen's and Firemen's Pension Plan.

While Point I focused more closely on the irregularities in procedure by the attorney for the City and the Board of Trustees, Attorney Yendes, this point focuses more on the role of the Board of Trustees in those irregularities. Much of the argument in the previous point is applicable here.

The irregularity concerning the Decision consists of the fact that Yendes's Report / Findings (***Applt. App. 133***), which was not part of the record, was submitted to the Board of Trustees in its entirety and adopted essentially verbatim (plus a few opening remarks) as its own Findings of Fact, Conclusions of Law and Decision (***Applt. App. 109***). Board members Anthony Gomez, David Hall and James Brown all reveal that Attorney Yendes provided

them with a document or documents "beyond the record itself" prior to the closed session meeting on April 8, 2004. ***Applt. App. 177-178; 181-182; 189.*** The document or documents were described as "Legal Update dated April 7, 2004," (***Applt. App. 178***); "Legal Update dated 3/10/04,"(***Applt. App. 181; 189***); and "Findings of Fact, Conclusions of Law and Decision" drafted by Attorney Yendes (***Applt. App. 182***). That is the crux of the irregularity in procedure concerning the Decision handed down by the Board of Trustees – that Attorney Yendes provided the document or documents *prior to* the decisive vote, complete with his own legal reasoning, findings and conclusions, and afforded no opportunity to Mr. Worley to present a brief or to otherwise refute Attorney Yendes's interpretation of the facts and law directly to the decision making Board of Trustees.

The next irregularity pointed out evidence that was in the record and received and considered by Hearing Examiner Budd that was entirely ignored by Respondent Board of Trustees. The "that evidence" referred to in Appellant's initial brief and in Respondent's Brief at page 22 refers to the medical opinion of Dr. Tom Kuich, which was favorable to Mr. Worley's claim. It is true that Dr. Kuich did not testify at the hearing, but he did submit an evaluation of Mr. Worley, acting as one of the three medical doctors appointed by the Board of Trustees to make all physical examinations required under the Pension Plan (Springfield City Code (Mo.) § 2-474 (2002)). Admittedly, Hearing Examiner Budd gave Dr. Kuich's evaluation little weight, but he did consider it and mention it. The Board of Trustees appears to have given it no consideration at all. As stated in Appellant's initial brief, "a reviewing

court must 'conside r all evidence in the record, including that which opposes or is unfavorable to the award, take account of the overall effect of all of the evidence, and determine whether the award is against the overwhelming weight of the evidence.'" ***Clark v. Fag Bearings Corp.*, 134 S.W.3d 730, 737 (Mo. App. S.D. 2004)** (quoting ***Davis v. Research Med. Ctr.*, 903 S.W.2d 557, 571 (Mo. App. W.D. 1995)**).

The letter that was referred to under Point II of Appellant's initial brief was the letter sent by Attorney Yendes to Dr. Shawn Rice, which is not in the record, requesting Dr. Rice's medical opinion as to whether Mr. Worley's disability was a direct result of his duties as a police officer. This was explained more fully under Point III in Appellant's initial brief.

Attorney Yendes, in the letter, asked Dr. Rice to determine whether Mr. Worley's disability was directly caused by his occupational duties "as opposed to other factors or causes." Dr. Rice testified that the "direct result of occupational duties" meant that Mr. Worley's occupational duties were the sole cause of his disability, without any other consequences or factors. The missing letter apparently misled Dr. Rice with respect to the correct definition of causation in this case. Since the Board of Trustees put so much stock in Dr. Rice's evaluation when determining Mr. Worley's case, it should have been informed about the error espoused in that letter.

Respondents reiterate the Board of Trustees' Decision at the end of Point II of its Response to state that "Appellant's disability condition was not 'the direct result of occupational duties, either alone or as an aggravation of an existing condition.'" **R. 84;**

Respt. Br. 23. However, Mr. Worley never had any diagnosis of a preexisting condition. This is discussed below, under Count III.

APPELLANT'S POINT RELIED ON III.

The Board of Trustees of the Springfield Police and Fire Retirement System erred in rejecting the hearing examiner's award of duty-related disability retirement benefits to Mr. Worley, because the Board of Trustees erroneously applied the law to the evidence, allowing review of the agency decision as provided in Mo. Rev. Stat. § 536.140 (2005), in that the Board of Trustees misconstrued and misapplied the applicable causation and pre-existing condition standard found in the Policemen's and Firemen's Pension Plan, Springfield City Code (Mo.) § 2-474, which specifically allows that "[a]ny employee of the police department . . . who becomes disabled *as the direct result* of occupational duties, including but not limited to accidents and or hazards peculiar to the employment, shall be entitled to a duty disability pension," (emphasis added) irrespective of any latent pre-existing condition, where disability was found by all medical examiners to have directly resulted from occupational duties.

Appellant's third Point Relied On goes directly to the standard of causation. With no legal foundation Respondents attempt to change the standard by which the Board of Trustees is to determine a duty-related disability. Specifically, Respondents state, "Appellant's disability was caused or occasioned from a young age and did not occur because or from a specific act of duty as a policeman. Rather, his disability was revealed while he was a policeman for the City, hence not duty-related." ***Respt. Br. 29.*** It their response, Respondents state that the evidence shows that "Dr. Rice found Appellant's concrete thinking a cognitive disorder he was born with, such as one born with a learning disability." ***Respt. Br. 28.*** This mischaracterizes the evidence. Dr. Shawn Rice speculated that that might be the case, but no testing was done to determine that. Here are the relevant opinions of Dr. Rice:

- Mr. Worley, with neuropsychic testing, **might be found** to have a cognitive disorder. **R. 263; R. 283** (emphasis added).
- There is no doubt that Mr. Worley's depression and anxiety are secondary to work-related incidents. **R. 284.**
- It was "absolutely" his opinion, to a "reasonable degree of medical certainty" that Mr. Worley's duties as a police officer caused him stress, anxiety and depression. **R. 326; R.330.**

- He believes that being a police officer and performing the duties of a police officer caused Mr. Worley pain, suffering, depression and anxiety. **R. 291; R. 328.**
- Dr. Rice testified that Mr. Worley was disabled due to:

. . . major depressive disorder, single episode, severe, that's the depression. I do believe that this depression is there, I believe it's severe and I believe that the depression is that he meets criteria for that, and I also believe he meets criteria for generalized anxiety disorder with the worrying and the obsessing about work and the muscle tension and symptoms of anxiety and panic that he is having. **R. 93.**

- Dr. Rice again testified:

And I also have no doubt in my mind that the depression and anxiety, having not had those until he was subjected to those work-related incidents, that I have no doubt in my mind that the depression and anxiety are secondary to that. And that the problems can interfere with his ability to perform his work. **R. 284.**

* * *

But I would have to say in this case though, . . . that I do believe that his anxiety and depression is from this situation of being a police officer, because there is no family history and he wasn't depressed before. **R. 291.**

(All alterations added by Appellant.)

The other medical professional whose opinion the Board of Trustees regarded as "credible and persuasive" was Dr. Dale Halfaker, a psychologist, not a medical doctor. ***Respt. Br. 28.*** Dr. Halfaker concluded in his written evaluation of Mr. Worley that: "It is my impression that his major depression and anxiety disorder did result from the stress related to his work." **R. 97.** He further testified that he had no evidence of any dysfunction prior to Worley's experiences at work. Respondents, in their brief, state that Dr. Halfaker "adds Appellant is sensitive to criticism because he is possessed from a young age an obsessive-compulsive personality disorder." ***Respt. Br. 28.*** Respondents extricate this from Dr. Halfaker's deposition testimony.

Certain other parts of that deposition testimony are worthy of note. Dr. Halfaker issued a report dated July 25, 2002, concerning his evaluation of Mr. Worley from a few days earlier. **R. 168.** The diagnosis of obsessive-compulsive *disorder* is found nowhere in Dr. Halfaker's report on Mr. Worley. The following excerpts from Dr. Halfaker's deposition testimony of April 3, 2003, will help explain:

A. . . . [P]rior to the last deposition, [] I met with Mr. Platter and Mr. Yendes and they were inquiring as to what my opinions were.

* * *

Q. (by Mr. Worley's attorney, Mr. Crites) Tell me what the conversations were as you recall.

A. I believe around the time that Mr. Yendes had sent me letters requesting more information or clarifications of opinions or further opinions, that we may have spoken on the phone so that he could explain to me what kind of information he was trying to find.

* * *

Q. Okay. So what happened between [the date of the report] July 25, 2002, and when we were here before for you to change your opinion from obsessive-compulsive personality traits to obsessive-compulsive personality disorder?

A. Sure. I think in preparing for the deposition and reviewing things, that it appeared that there were greater indications of obsessive-compulsive personality disorder than I had previously taken into account at the time I did my report.

* * *

A. So my conclusion that the [obsessive-compulsive personality disorder] diagnosis fit quite well is not going to be listed in the report.

R. 191-192 (alterations added).

The test interpretations as stated by Dr. Halfaker in his report are: Major Depressive Disorder; Anxiety Disorder; Obsessive-compulsive *traits*; and Occupational problems. **R. 179.** It was not until after speaking with the City of Springfield's attorneys that he changed

the interpretation of the tests to diagnose Mr. Worley with obsessive-compulsive personality disorder.

In the Board of Trustees' Decision, it explained that one reason for rejecting the hearing examiner's decision was the "insufficient weight given by the hearing examiner in his decision to the findings and opinions in the testimony of Drs. Rice and Halfaker, who both stated to a reasonable degree of medical certainty that the disabling condition they diagnosed in Mr. Worley was not the direct result of occupational duties." This is invalid. It is partially true only to the extent that a latent cognitive disorder or an obsessive-compulsive personality disorder, if actually present in Mr. Worley, was the actual "disabling condition." As shown above, both doctors stated that Mr. Worley was in fact disabled as a result of occupational duties. To state as the Board of Trustees did in its Decision mischaracterizes the doctors' testimony.

Hearing Officer Budd correctly specifically discounted the deposition testimony of Drs. Halfaker and Rice concerning a preexisting condition "for the reason that in the absence of previous baseline testing of [Mr. Worley], there is no evidence to substantiate their opinions on this critical matter." **R. 97.**

Not that it even really matters whether Mr. Worley was "possessed from a young age" with some latent disorder. Even if there was a latent preexisting condition such as a cognitive disorder or an obsessive-compulsive personality disorder, there is no evidence that any preexisting condition was ever disabling prior to Mr. Worley's disability from being a

police officer. Moreover, the proper standard for causation does not preclude duty-related disability benefits from being awarded to someone with a preexisting condition. *See* ***Mitchell v. City of Springfield,*** **410 S.W.2d 585, 587-588 (Mo. App. S.D. 1966)** and ***Sprague v. City of Springfield,*** **641 S.W.2d 814, 820 (Mo. App., S.D. 1982)**. What the Pension Plan requires is that the applicant for such benefits be disabled as "the direct result of occupational duties." **R. 586.**

Dr. James Neal was a medical doctor, a psychiatrist, whose opinion the Board of Trustees apparently discounted. Dr. Neal performed a clinical mental status examination of Mr. Worley and rendered an opinion that he was disabled and "that the duties and the environment of work appeared to have resulted in the disability." **R. 92.** He provided the City of Springfield with a completed disability claim form on November 13, 2002. In that form, Dr. Neal indicated to the City that Mr. Worley was disabled and that based upon his examination of Mr. Worley, it was Dr. Neal's opinion that the disability was a result of occupational duties. **R. 493.**

In his November 2002 report, Dr. Neal statetd that Mr. Worley was completely disabled from performing police work and that he believes "that Mr. Worley is disabled and that it is a duty-related disability." **R. 495.** Dr. Neal testified that there was no evidence of any problem Mr. Worley had functioning either in the work place or outside of the work place prior to stress-related symptoms from work, and rendered the opinion that "the duties and the environment of work appeared to have resulted in the disability." **R. 424.**

ALL of the medical and paramedical professionals who evaluated Mr. Worley found that his disabling conditions – the stress, depression, anxiety, etc. – were a direct result of his duties as a police officer. THIS is the standard. There is no legal authority for Respondents' standard as set forth in its brief that a disability be the result of a specific act of duty as a police officer.

In its Decision, the Board of Trustees rejects the standard used by the hearing examiner and based on ***Mitchell***, though it is unclear in the Decision what standard of causation is actually used. The Board of Trustees states as explanation for the rejection of that standard:

> The hearing examiner's decision improperly shifted the burden of proof in this case from the applicant to the Board of Trustees and the City, by finding in favor of the applicant based upon a claimed lack of evidence of a preexisting condition. The hearing examiner further misinterpreted and misapplied the relevant standard by concluding that Mr. Worley's manifestation of psychological problems while he was employed as a police officer equated to Mr. Worley's becoming disabled by these conditions because he was employed as a police officer. Finally, the hearing examiner improperly imposed a burden of proof upon the City in its response to Mr. Worley's claim to produce and document a specific preexisting condition to rebut his claim of duty related causation.

The Board of Trustees' Decision never precisely sets forth what it believes the standard of causation should be. ***Mitchell*** relevantly states that a claimant, in order to receive duty-related disability benefits under the Pension Plan, must not only show that he is permanently and totally disabled, but "must go a step farther and show a direct causal connection between his duties and his disability, or . . . that his disability occurred because he was a [police officer] rather than merely while he was a [police officer]." ***Mitchell,* 410 S.W.2d at 587.** This standard is still good law and applicable to Mr. Worley's case. Mr. Worley's only burden is to show that his disability occurred because he was a police officer or, in the words of the Pension Plan itself, occurred "as a direct result of occupational duties." **R. 586.** The perceived errors pointed out by the Board of Trustees are inaccurate and the resulting standard is unsupported by any legal authority.

Respondents, in their brief and in the Board of Trustees' Decision, cite several duty-related stressors, including: writing tickets (particularly those written to friends of commanders); chain of command issues; traffic stops; and a hostage situation involving his own residence and family. ***Respt. Br. 28;* R. 68-76.** No one, not Respondents nor the medical and paramedical professionals, points to any *non*duty-related stressor(s) that caused Mr. Worley to be disabled from performing police work. Mr. Worley has met the required burden of showing that his disability occurred *because* he was a police officer rather than merely *while* he was a police officer.

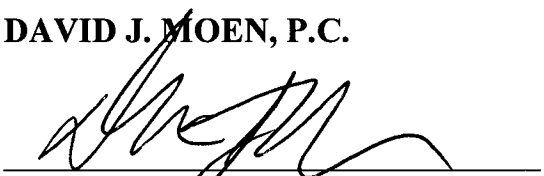
The other-jurisdiction cases cited by Respondents use a different standard that requires the stress be unique to law enforcement. ***Respt. Br. 28***. While this standard has not been adopted in Missouri, even if it were, Respondents concede in their own brief, as shown above, that the stressors that caused Mr. Worley to be disabled from performing police work all came from duty-related acts.

CONCLUSION

Points I and II present procedural irregularities that prejudiced the Board of Trustees against Mr. Worley in his attempt to receive duty-related disability benefits. Point III focuses on the wrong and legally unsupportable standard used by the Board of Trustees in denying those benefits to Mr. Worley. For any or all of these reasons the decision against providing duty-related disability retirement benefits to Mr. Worley should be reversed. Appellant respectfully requests that this Court does so, granting him duty-related disability retirement benefits.

Respectfully submitted,

DAVID J. MOEN, P.C.



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	)	
Appellant,	)	**JUDGE C. DAVID DARNOLD**
	)	
vs.	)	**CIRCUIT COURT NO.:**
	)	**104CC2668**
	)	
RONALD HOFFMAN, et al.	)	**CASE NO.: SD29088**
	)	
	)	
Respondents.	)	

CERTIFICATE OF SERVICE

I hereby certify that two copies of Appellant's Reply Brief and one copy of the disk required by Rule 84.06(g) were served via U.S. Mail, 1st Class postage prepaid on this 9th day of January, 2009, to:

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APPELLANT'S APPENDIX TO REPLY BRIEF

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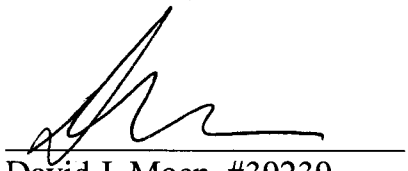
	)	
Respondents.	)	

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Appellant's Brief complies with the limitations set forth in Rule 84.06(b), contains 4,725 words and 424 lines, as counted by the word-processing software used, WordPerfect Office X3, and that the floppy disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.



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C

Vernon's Annotated Missouri Rules Currentness
Supreme Court Rules
Rules of Civil Procedure
Part I. Rules Governing Civil Procedure in the Circuit Courts
Rule 81. Appeals (Refs & Annos)
→ 81.12. Contents of the Record on Appeal--Designation of the Record on Appeal--Compiling, Ordering, Filing and Service of Record on Appeal--Errors, Omissions and Supplemental Record on Appeal

(a) Contents of Record on Appeal. The record on appeal shall contain all of the record, proceedings and evidence necessary to the determination of all questions to be presented, by either appellant or respondent, to the appellate court for decision. In order to reduce expense and expedite the preparation of the record on appeal, it is divided into two components, i. e. the "legal file" and the "transcript."

The legal file shall be so labeled with a cover page and contain clearly reproduced exact copies of the pleadings and other portions of the trial record previously reduced to written form. The documents in the legal file shall be arranged with a docket sheet or case record on top numbered as page 1. The oldest document shall follow the docket sheet, with the remaining documents arranged in chronological order, ending with the notice of appeal at the bottom.

The transcript shall contain the portions of the proceedings and evidence not previously reduced to written form.

The legal file shall always include: the docket sheet or case record, which contains a complete summary of all events in the case; the pleadings upon which the action was tried, the verdict, the findings of the court or jury, the judgment or order appealed from, motions and orders after judgment, and the notice of appeal, together with their respective dates of filing or entry of record; except the parties may agree in writing upon an abbreviated or partial record on appeal or upon a statement of the case as provided in Rule 81.13.

(b) Matters Omitted. The record on appeal shall not include or set forth the original or any subsequent writ or the return thereto unless a question is raised as to the regularity of the process or its execution or as to the jurisdiction of the court. If any pleading be amended the record on appeal shall include the last amended pleading and shall not set forth any abandoned pleadings or abandoned part of the record not introduced in evidence. No matter touching on the organization of the court, or any continuance, motion, or affidavit, not material to the questions presented for determination, shall be inserted in the record on appeal. Documentary evidence, where there is no dispute as to its admissibility or legal effect, may be stated according to its legal effect. Formal parts not in dispute shall be omitted. No part of the record when once set forth in the record on appeal should be repeated in any other part of the record on appeal.

The following items shall not be included in the record on appeal unless specifically requested and necessary to determination of issues on appeal: voir dire, opening statements, closing arguments, MAI 2.01, evidence regarding damages, briefs and memoranda, notices of filing, subpoenas, summonses, motions to extend time, affidavits and admissions of service and mailing, notices of settings, depositions and notices, and jury lists.

(c) Duty of Appellant to Order the Transcript and Compile the Record on Appeal. Within ten days after the notice of appeal is filed, appellant shall order the transcript, in writing, from the reporter or from the clerk of the trial court if the proceedings were recorded by means of an electronic sound recording. Charges due for preparation of the transcript shall be paid as directed in § 512.050, RSMo. The written order shall designate the portions of the proceedings and evidence not previously reduced to written form that are to be included in the transcript. Appellant's certificate stating the date on which the transcript was ordered and the date on which the transcript charges were paid shall be filed in the appellate court within ten days after the payment of the charges. A copy of appellant's certificate shall be served on all other parties.

Appellant also shall prepare the legal file, including the index thereto, and serve a copy upon all other parties. Unless the parties file a written agreement regarding the legal file as provided in Rule 81.15(c), appellant shall order any documents that are needed for the legal file from the clerk of the trial court within thirty days after the notice of appeal is filed. Unless the parties file a written agreement regarding the legal file as provided in Rule 81.15(c), the clerk of the trial court shall certify copies of the documents needed for the legal file as provided in Rule 81.15(a). Appellant shall be responsible for preparing the legal file, including the index thereto, from the certified copies of such documents.

If a respondent is dissatisfied with appellant's record on appeal, that respondent may file within the time allowed for filing respondent's brief such additional parts of the record on appeal as respondent considers necessary. Respondent shall contemporaneously serve a copy of such supplemental record on all other parties.

(d) Record on Appeal--When and Where Filed and Served. Within the time prescribed by Rule 81.19, the appellant shall cause the record on appeal to be prepared in accordance with the provisions of this Rule 81 and to be filed with the clerk of the proper appellate court and shall serve a copy thereof on the respondent or, in the case of multiple respondents, in the manner provided in Rule 81.14(d). If a floppy disk is filed with the transcript, a copy of the disk also shall be served. Proof of such service shall be filed with the appellate court. A copy of both the index of the transcript and the index of the legal file, with the caption of the case noted thereon, shall be filed with the clerk of the trial court. A copy of the complete transcript and legal file shall not be filed with the trial court except upon court order. In the event of the filing of any additional or supplemental record pursuant to Rule 81.12(c) or Rule 81.12(e), such additional or supplemental record shall be served, and copies of the indexes thereto shall be filed with the clerk of the trial court as provided herein.

(e) Exhibits--Appellant Shall Deposit. Appellant is responsible for depositing all exhibits that are necessary for the determination of any point relied on. If a party other than appellant has custody of exhibits, appellant may request that party to either deposit the exhibits with the appellate court or deliver them to appellant for deposit with the court. The party having custody shall either promptly deliver them to appellant or deposit them with the court. Respondent may deposit such additional exhibits as respondent considers necessary.

All exhibits shall be deposited pursuant to Rule 81.16.

A party depositing exhibits with the appellate court shall serve on all other parties on the day of deposit a listing and description of the exhibits deposited.

(f) Errors--Omissions--Supplemental Record on Appeal. If anything material is omitted from the record on appeal, the parties, by stipulation, or the appellate court, on a proper suggestion or of its own initiative, shall direct that the omission or misstatement be corrected. The appellate court may, if it deems necessary, order that a supplemental record on appeal be prepared and filed by either party or by the clerk of the trial court including any additional part of the trial record, proceedings, and evidence, or the clerk may be directed to send up any original documents or exhibits.

CREDIT(S)

(Adopted June 13, 1979, eff. Jan. 1, 1980. Amended June 10, 1980, eff. Jan. 1, 1981; Nov. 9, 1982, eff. Jan. 1, 1984; June 3, 1983, eff. Jan. 1, 1984; June 1, 1993, eff. Jan. 1, 1994; Dec. 17, 1996, eff. July 1, 1997; Aug. 12, 1997; May 26, 1998, eff. Jan. 1, 1999; Dec. 20, 2005, eff. July 1, 2006; June 27, 2006, eff. Jan. 1, 2007.)

Current with amendments received through 5/15/2008.

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