SC No. 87369

IN THE MISSOURI SUPREME COURT

MARK SPIECE,
Plaintiff/Respondent,

v.

MELODY GARLAND,
Defendant/Appellant

APPELLANT'S SUBSTITUTE REPLY BRIEF FILED BY RESPONDENT, MARK SPIECE

Appeal from the Circuit Court of Jackson County, Missouri
Honorable Marco Roldan
Circuit Court Case No. 02CV208248

ANDREW J. GELBACH – MO - 26003
Professional Corporation
109 E. Market Street
P.O. Box 375
Warrensburg, MO 64093
(660) 747-5138
[FAX: (660) 747-8198]

TURNER & SWEENY
John E. Turner - MO - 26218
Christopher P. Sweeny- MO - 44838
10401 Holmes Road
Suite 450
Kansas City, MO 64131
(816) 942-5100
[FAX: (816) 942-5104]

ATTORNEYS FOR MARK SPIECE

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ARGUMENT

THE TRIAL COURT DID NOT ERR IN GRANTING RESPONDENT, MARK SPIECE'S, MOTION FOR NEW TRIAL BECAUSE JUROR NUMBER 3, MARTHA TEODORI, INTENTIONALLY FAILED TO DISCLOSE HER INVOLVEMENT IN PRIOR CIVIL LITIGATION IN THAT THERE WAS NO REASONABLE INABILITY TO COMPREHEND THE INFORMATION SOLICITED BY COUNSEL'S QUESTION: "IS THERE ANYBODY ON THE JURY WHO YOU OR A FAMILY MEMBER HAS EVER BEEN A PLAINTIFF IN A LAWSUIT FOR PERSONAL INJURY?" AND MS. TEODORI FAILED TO RESPOND EVEN THOUGH SHE REMEMBERED BEING INVOLVED IN A SLIP AND FALL CASE.

A. STANDARD OF REVIEW.

1. The Court's June 28, 2004 "Order" Was Not Appealable.

This Court has specifically found that even when an Order is an appealable Order pursuant to §512.020 RSMo, the Order must be denominated a Judgment or Decree pursuant to Rule 74.01(a) to be appealable. See Brooks v. Brooks, 98 S.W.3d 530, 532 (Mo. En Banc. 2003). Contrary to Appellant, Melody Garland's, argument, this Court in no way limited its holding in Brooks to only qualified domestic relations Orders. See Godefroid v. Kiesel Co., 2003 W.L. 22399710 (Mo.App. E.D. 2003) where the Court of Appeals, relying on Brooks, found that an Order granting a new trial was not a final appealable Order because it was not denominated a Judgment or Decree. Id. at *3 (this case is included in the Appendix).

At page 12 of her brief, Appellant Garland argues that this Court rejected Respondent's argument when it denied Respondent's Writ. Appellant's argument is contrary to existing case law. In Rodriguez v. Suzuki Motor Corp., 996 S.W.2d 47, 61 (Mo. En Banc. 1999), this Court stated, "The mere denial of a petition for writ of prohibition where the appellate court issues no opinion is not a conclusive decision on the merits of the issue presented." (citations omitted). The Court went on to note, "Indeed, there are a number of reasons why the appellate court might decline to review a writ petition on the merits, not the least of which is the probability that the issue presented can be adequately reviewed, as here, on direct appeal after the facts pertaining to the issue are fleshed out more thoroughly at trial. *See* Rule 84.22." Thus, this Court's denial of Respondent's Writ was in no way a decision on the merits of Respondent's argument.

Appellant Garland suggests at page 14 of her Brief that there can be no confusion over whether a new trial Order is intended to be final and appealable, and therefore, it is unnecessary for the Order to be denominated a Judgment. Appellant cites no authority for this proposition. In Briggs v. Orf, 148 S.W.3d 853, 854-855 (Mo.App. E.D. 2004) the Court of Appeals found that an "order" dismissing the Plaintiff's petition with prejudice was not appealable because it was not denominated a Judgment. There obviously is no confusion when a trial court dismisses a petition with prejudice that the order is final and the trial court does not seek to retain jurisdiction over the matter. Nonetheless, the order must be denominated a Judgment or Decree to be appealable. Id. Thus, even where there can be no confusion over whether an order is final and appealable, the order must be

denominated a judgment or decree to be appealable.

Appellant Garland relies heavily on the Court of Appeal's decision in Duckett v. Troester, 996 S.W.2d 641 (Mo.App. 1999). That case was decided before this Court rendered its decision in Brooks. For a case subsequent to the Brooks decision which addressed the very issue before this Court, see Godefroid v. Kiesel Co., 2003 W.L. 22399710 (Mo.App. E.D. 2003). There, the Court of Appeals, citing Brooks, specifically found that an Order granting a new trial was not appealable in that it was not denominated a Judgment or Decree. Id. at *3. Likewise, here, the Court's June 28, 2004, Order was not denominated a Judgment, and therefore, was not appealable. Id.

2. The Trial Court Had Not Lost Jurisdiction Before It Entered Its July 2, 2004 "Judgment/Order."

Appellant argues at page 14 of its Brief that the trial court lost jurisdiction over this matter once it ruled on Respondent's Motion for New Trial. Citing State ex rel. Stickelber v. Nixon, 54 S.W.3d 219, 223 (Mo.App. W.D. 2001), Appellant claims, "Missouri courts have long adhered to the general rule that a trial court loses jurisdiction over a case once it rules on a motion for new trial." The Nixon case makes no such statement. Rather, the case notes that a trial court loses "almost all" jurisdiction over a case upon filing of a notice of appeal. Id. If the Court lost jurisdiction over a matter by simply ruling on a motion for new trial, then if the trial court granted the motion and no appeal was taken, the court would be without jurisdiction to actually conduct the new trial. Thus, the trial court did not lose jurisdiction once it ruled on the motion for new

trial.

Appellant next argues that the trial court lost jurisdiction when Appellant filed her Notice of Appeal on June 30, 2004. As discussed above, the Court's June 28, 2004, Order was not appealable. Consequently, Appellant's June 30, 2004, Notice of Appeal had no effect whatsoever on the trial court's jurisdiction. See Brooks, 98 S.W.3d at 532. In Brooks, the appellant filed his notice of appeal on August 20, 2001. Then on November 1, 2001, the trial court entered a nunc pro tunc order re-titling its previous Order as a "Judgment." This Court found that the nunc pro tunc order was ineffective, but it clearly indicated an intent to finalize the judgment for purposes of appeal, and therefore, the judgment was appealable as of November 1, 2001. The notice of appeal filed two months before that date was found to be premature. Id. at 532.

Here, Respondent filed a timely motion for new trial; the trial court, therefore, had jurisdiction over this matter for ninety days after the motion was filed. See Missouri Supreme Court Rule 78.06 and 81.05. The trial court's "Judgment/Order" was entered within the trial court's ninety-day jurisdiction. As discussed above, Appellant's Notice of Appeal filed before the Court's "Judgment/Order" did not deprive the trial court of jurisdiction because the notice was premature. See Brooks, 98 S.W.3d at 532 and Godefroid, 2003 W.L. 22399710 at *3. Thus, the trial court had not lost jurisdiction before it entered its July 2, 2004, "Judgment/Order."

3. Rule 84.05 Does Not Preclude Consideration Of Discretionary Grounds; Rather, It Precludes "Presuming That The New Trial Was

Granted On Discretionary Grounds."

The language of Rule 84.05(c) and (d) was set out on page 17 of Respondent, Mark Spiece's, Brief. Mr. Spiece pointed out that nothing in the plain language of those rules precludes a trial court from considering discretionary grounds in support of the trial court's order granting a new trial. Rather, the plain language prevents only the presumption that the new trial was granted on discretionary grounds. In her response, Appellant Garland fails to point to any language in the rule in support of her argument that Appellate Courts are precluded from considering discretionary grounds. Rather, Appellant Garland relies on Pretti v. Herre, 403 S.W.2d 568 (Mo. 1966).

"A judicial opinion should be read in light of the facts pertinent to that case, it being improper to give permanent controlling effect to statements outside the scope of the real inquiry of the case." See McKinney v. State Farm Mutual Insurance, 123 S.W.3d 242, 247 (Mo.App. W.D. 2003). The facts pertinent to the Pretti decision, i.e., what grounds were stated in the motion for new trial, cannot be determined by reading that decision, and therefore, the permanent and controlling effect of any statements in that case is difficult to determine. However, it does not appear that either the Appellant or the Respondent raised any issue with respect to the construction and interpretation of Rule 83.06 which was the predecessor to current rule 84.05. The Pretti Court does not undertake an analysis of what the language in the rule means; rather, it merely quotes the language and renders its decision.

More importantly, Pretti was erroneously decided in that it fails to follow the plain

language of the rule and its interpretation of the rule leads to an unreasonable and unjust result. Consequently, it is not binding on this Court and should not be followed. See, Southwestern Bell Yellow Pages, Inc., v. Director of Revenue, 94 S.W.3d 388, 390-391 (Mo. En Banc. 2002) where this Court noted that the doctrine of *stare decisis* is never applied to prevent repudiation of a decision that is erroneously decided. In the Southwestern Bell case, this Court refused to follow its prior decision interpreting a statute because the prior decision could not be reconciled with the language of the statute. Id. at 391. Likewise, the Pretti Court's interpretation of the rule at issue here cannot be reconciled with the language of the rule, and therefore, it should no longer be followed.

4. Interpretation Of Rule 84.05 Which Precludes Appellate Review of Trial Court Error Is Unjust, And Therefore, Should Not Be Followed.

In his original Brief, Respondent, Mark Spiece, pointed out the fact that under the current interpretation of Rule 84.05, a party who loses a motion for new trial receives Appellate review of all trial court errors; yet, a party who wins a motion for new trial is only entitled to Appellate review of errors involving "non-discretionary" matters if the trial court fails to specify the reasons for its order. Appellant, Melody Garland, does not dispute that this is in fact a result of the current interpretation of Rule 84.05. In addition, under the current interpretation of the rule, there is no appellate review at all if the only grounds stated in the motion for new trial were discretionary grounds. See Bishop v. Carper, 81 S.W.3d 616 (Mo.App. W.D. 2002). Again, Appellant Garland does not dispute that this is in fact the result of the current interpretation of Rule 84.05.

Thus, the question for this Court is whether or not the above-described results are unjust or unreasonable. If so, courts have incorrectly interpreted the rule. See Moxness v. Hart, 131 S.W.3d 441, 447 (Mo.App. W.D. 2004) where the Court stated, "in interpreting Supreme Court rules, this court must avoid interpretations that are unjust, absurd, or unreasonable." (citations omitted)(emphasis added). Because the prior decisions have incorrectly interpreted the rule, they should no longer be followed regardless of which court authored them. See, Southwestern Bell Yellow Pages, Inc., 94 S.W.3d at 390-391, cited above.

5. Rule 84.05, As Currently Interpreted, Precludes Appellate Review, And Therefore, Is Unconstitutional.

In response to Mark Spiece's argument that Rule 84.05, as currently interpreted, is unconstitutional in that it changes the right of appeal, Appellant Garland argues that the rule, as presently interpreted by this Court in Pretti, "changes only the mode of review, not the right." (Appellant Garland's Brief at 25). Rule 84.05(c) states that "the presumption shall be that the trial court erroneously granted the motion for new trial and the burden of supporting such action is placed on the Respondent…." Respondent agrees that this Rule changes the mode of review and not the right to review. But, Courts interpreting Rule 84.05(d) have held that there is no right to review at all of trial court errors involving discretionary matters. This is not a change in the mode of review; rather, it is a denial of any review at all.

Appellant Garland goes on to say, "it cannot be said that there was no Appellate

review in Bishop or Pretti…." Respondent, Mark Spiece, respectfully disagrees. The fact that the Courts in Bishop and Pretti issued opinions does not necessarily mean that there was appellate review of the trial court errors which necessitated a new trial. In fact, both of those Courts specifically refused to review any of the grounds in support of a new trial. Those courts summarily reversed the trial court for violating Rule 84.05 without reviewing a single error in support of a new trial. It is the actual review of the trial court errors that makes the right of appeal worthy of constitutional protection. The mere opportunity to file a brief setting forth the errors which necessitate a new trial without actual appellate review of those errors is meaningless. Precluding review of discretionary errors is not just a change in the mode of review; it is a denial of any review at all. The current interpretation of the rule precluding review of trial court errors is a denial of or a change in the right of appeal, and therefore, is unconstitutional. See Article V, § 5 of the Missouri Constitution.

6. To The Extent Rule 84.05 Has Been Properly Interpreted, Respondent Respectfully Suggests That The Rule Be Changed.

In his original Brief, Respondent, Mark Spiece, urged the Court to change Rule 84.05 and suggested that the Court could adopt a rule similar to the procedure followed when a trial court fails to enter findings of fact and conclusions of law as required by Missouri Rule 73.01(a)(3). When a trial court violates Rule 73.01(a)(3), the appellate courts reverse and remand the trial court's order with directions that the trial court enter an order specifying the grounds for its decision. See Legacy Homes Partnership v.

General Electric Capital Corp., 10 S.W.3d 161, 162 (Mo.App. E.D. 1999). This same procedure could be followed when a trial court fails to specify the grounds upon which it is granting a motion for a new trial. Appellant Garland claims that the rule suggested by Respondent Spiece "would embark on a confusing and uncertain new scheme." This procedure is currently being followed with respect to Rule 73.01(a)(3) violations, and Appellant cites no case finding that the procedure is confusing or uncertain. There is no reason why applying the same procedure here would result in confusion or uncertainty.

Respondent Spiece also respectfully suggested that an even more efficient rule would be to simply find that an order granting a new trial that fails to specify the ground or grounds on which it is granted is not final for purposes of appeal. Appellant Garland suggests without explanation that this rule would run contrary to the statutory right of appeal. The rule would be no more contrary to §512.020(1) than the current rule requiring that a judgment is appealable only if it is denominated a "judgment" or "decree." Appellant Garland then suggests that the rule would be confusing and offers as an example the following question: "What if an order granting a new trial is issued within 90 days … but fails to specify the ground or grounds on which it is granted? Is it deemed overruled if ninety days pass from the filing of the motion and still no grounds have been specified?" Certainly this question can be answered and the purported confusion avoided by a properly drafted rule.

Respondent's point is that the current rule, as interpreted by the courts, is unjust and unreasonable, and therefore, should be changed. Respondent leaves it to this Court to

determine what an appropriately just rule would be. Even a rule stating that a motion for new trial is deemed denied if the order sustaining the motion does not specify the ground or grounds in support of the order would be infinitely more just than the current rule in that if the motion is deemed denied, the party aggrieved by the trial court errors would then have the right to appeal the judgment and have all of the trial court errors reviewed. Under the current rule, the party aggrieved at trial by the trial court's errors is precluded from having all errors reviewed by the Court of Appeals when a trial court enters an order granting a new trial but fails to specify the reasons for the order.

The fact that Respondent would have been better off if his motion for new trial was deemed denied underscores the harshness and unreasonableness of the current rule.

B. A JUROR'S INTENTIONAL NON-DISCLOSURE REQUIRES A NEW TRIAL, AND THEREFORE, IT IS A NON-DISCRETIONARY GROUND FOR NEW TRIAL.

Even if this Court accepts the standard of review set forth by Appellant Garland, the trial court's Judgment/Order granting Plaintiff's Motion for New Trial should be affirmed. As Appellant points out, Respondent is only required to demonstrate an adequate, non-discretionary ground to support the trial court's Judgment/Order granting Plaintiff's Motion. Intentional non-disclosure by a juror is an adequate non-discretionary ground for granting a new trial, and therefore, Respondent has met his burden.

In Williams v. Barnes Hospital, 736 S.W.2d 33, 37 (Mo. En Banc. 1987) this Court stated: "If a juror intentionally withholds material information requested on voir

dire, bias and prejudice are inferred from such concealment. For this reason, **a finding of intentional concealment 'becomes tantamount to a per se rule mandating a new trial** .'" (emphasis added). In other words, a trial court has no discretion to deny a motion for new trial if there has been intentional non-disclosure; rather, the trial court is required to grant a new trial. Thus, intentional non-disclosure is a non-discretionary ground for the grant of a new trial.

In the alternative, if this Court finds that intentional non-disclosure is a discretionary ground for the grant of a new trial, then it should not preclude Appellate review even under Rule 84.05. As discussed above, the plain language of Rule 84.05 precludes this Court from presuming that the new trial was granted on any discretionary grounds. Here, if this Court finds that intentional non-disclosure by a juror is a discretionary ground, then all grounds stated in Plaintiff's Motion for New Trial were discretionary grounds. (L.F. 43-49). Therefore, by the trial court's very act of sustaining the motion for new trial, this Court knows, and does not have to presume, that the motion for new trial was sustained on a discretionary ground. See Ray v. Bartolotta, 408 S.W.2d 838, 840 (Mo. 1966).

Appellant Garland asserts that this argument would require the Court to conclude that the trial court, by failing to specify any grounds in support of its order, "must have sustained Respondent's motion on all of" the grounds set forth in Respondent's Motion. (Appellant's Brief at 31). Respondent's argument does not require such a conclusion, and Respondent Spiece is not urging that conclusion. Rather, Respondent Spiece is

suggesting that if this Court finds that all of the grounds set forth in Respondent's Motion for New Trial were discretionary grounds, then the Court does not have to presume that the trial court's Order sustaining the motion for new trial was based on a discretionary ground. This Court knows that it was based on a discretionary ground because only discretionary grounds were set forth in the motion. Rule 84.05(d) precludes only presuming the order was based on discretionary grounds; it does not preclude consideration of discretionary grounds. If this Court finds that all of the grounds set forth in the Motion for New Trial were discretionary, the Court can consider those grounds without presuming that the motion was sustained on those grounds.

C. THE TRIAL COURT PROPERLY CONSIDERED MARTHA TEODORI'S AFFIDAVIT.

Without citation to any authority, Appellant, Melody Garland, claims that the trial court could not consider the Affidavit of Martha Teodori. Appellant apparently overlooked Missouri Supreme Court Rule 78.05 which specifically authorizes the trial court to consider affidavits in determining a motion for new trial. That rule states:

> When any after trial motion, including a **motion for new trial**, is based on facts not appearing of record, **affidavits may be filed** which affidavits shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits. Depositions and oral testimony may be presented in connection with after-trial motions.

(emphasis added).

Thus, contrary to Appellant's contention, the trial court could, and did, consider the Affidavit of Martha Teodori. Although the rule provides for opposing affidavits, Appellant offered no such affidavits in response to the Affidavit of Martha Teodori.

Appellant further complains that "no hearing was ever held on Respondent's Motion for New Trial…" Again, Appellant fails to cite any authority mandating that a hearing be held on a motion for new trial. Rule 78.05 has no such mandate. Rather, the rule states, "depositions and oral testimony **may** be presented in connection with after-trial motions." (emphasis added). If Appellant Garland thought a hearing was necessary so that she could cross examine Martha Teodori, she could have requested such a hearing. She didn't. She should not be heard to complain on appeal that there was no hearing.

Likewise, after the trial court entered its Order sustaining Plaintiff's Motion for New Trial, Appellant Garland could have requested the trial court to reconsider its ruling and hold an evidentiary hearing. Instead, Appellant Garland chose to race to the courthouse to file a notice of appeal in an attempt to deprive the trial court of jurisdiction. Finally, Appellant Garland, pursuant to Rule 78.05, could have presented her own affidavit in opposition to Respondent Spiece's affidavit but she chose not to.

D. JUROR TEODORI'S NON-DISCLOSURE WAS INTENTIONAL

Intentional non-disclosure occurs "where there exists no reasonable inability to comprehend the information solicited by the question asked the prospective juror, and

where it develops that the prospective juror actually remembers the experience…" Brines, by and through Harlan v. Cibis, 882 S.W.2d 138, 139 (Mo. En Banc. 1994). Thus, if there was no reasonable inability for juror Teodori to comprehend the information solicited by the question, and it develops that she actually remembers her involvement in a prior slip and fall case, then her non-disclosure was intentional.

Appellant Garland admits that "the question asked by plaintiff's counsel … unequivocally triggered jury (sic) Teodori's duty to disclose prior lawsuits she had filed …." See Appellant's Brief at 33. And Appellant does not dispute that juror Teodori's involvement in prior litigation is material information. See Appellant's Brief at 35. Rather, Appellant argues that Juror Teodori's prior involvement in a slip and fall "case" was not prior involvement in a "lawsuit," and therefore, she had no duty to disclose it.

Appellant offers no support for her claim that a "case" and "lawsuit" are two different things. In fact, Appellant's counsel himself used the words "case" and "lawsuit" interchangeably. Consider the following examples:

- "My name is Dick Modin and I represent Melody Garland in this **case**." (Tr. 111) (emphasis added).
- "In the usual **lawsuit** – and I'm going to way over simplify this, but in the usual **lawsuit**, a car wreck type **case**, plaintiff has to put on evidence on two issues…. So there's two questions in the ordinary **case**…." (Tr. 119) (emphasis added).
- "and that is that you may have an opinion or belief or an experience in your life

that you think would be important for the parties to know in this **case** and you've been sitting there waiting to raise your number and tell us what that experience is." "…Is there anybody here today who has an opinion or belief or experience in your life that you think the parties in this **lawsuit** ought to know about and we haven't already talked about?" (Tr. 137) (emphasis added).

The above list is not exhaustive but demonstrates that Appellant's counsel himself considers the terms "lawsuit" and "case" to be synonymous. So do Missouri Courts. See e.g., Rock House Farm, Inc., v. Ridgeway Lions Club, 894 S.W.2d 262, 263 (Mo.App. 1995) where the Court used the terms interchangeably stating, "since 1990, this lease has been the subject of three **lawsuits** brought by Rock House against Ridgeway regarding Ridgeway's use of the leased property and adjoining lake. The first **suit** was filed on June 27th, 1990. In that **case**, Rock House in Count I …." (emphasis added).

Like Appellant's counsel and our Courts, Respondent's counsel used the words "lawsuit" and "case" interchangeably in asking questions of the jury. In the very question at issue, Respondent's counsel asked:

Is there anybody on the jury who you or a family member has ever been a plaintiff in a **lawsuit** for personal injury? You or a family member has filed a **lawsuit** where you were seeking money damages for an injury? Okay. I'm not talking about divorce **cases** or landlord/tenant **case** or a suit on contract, okay? You or a family member filed a **lawsuit** for personal injury. Anyone up here?" (Tr. 69-70).

(emphasis added).

It is disingenuous for Appellant Garland to claim that this question did not require juror Teodori to disclose her involvement in a slip and fall case. The question was clear and Juror Teodori's use of the word "case" instead of "lawsuit" in her affidavit does not support Appellant's argument that the trial court's Judgment should be reversed.

As discussed above, Appellant admits that counsel's question unequivocally triggered juror Teodori's duty to disclose her involvement in prior personal injury litigation. See Appellant's Brief at 33. In other words, there was no reasonable inability for juror Teodori to comprehend the information solicited by the question. Thus, the first prong of the Brines test has been met. The second prong of the test – "where it develops that the prospective juror actually remembers the experience" – has also been met. Juror Teodori's affidavit demonstrates that she actually remembered the experience of being involved in a prior slip and fall case. This is sufficient to meet the second prong of the Brines test. In addition, the trial court was free to infer from the fact that Ms. Teodori did not offer any explanation for her failure to report her prior slip and fall case that she did not have any such explanation. Because both prongs of the Brines test were met, the trial court was required to order a new trial. Williams, 736 S.W.2d at 37.

E. IF THIS COURT FINDS THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S JUDGMENT GRANTING A NEW TRIAL, THEN REMAND IS APPROPRIATE.

Respondent respectfully requests that this Court affirm the trial court's judgment granting a new trial, and remand this matter to the trial court for a new trial. In the alternative, if this Court finds that the evidence is insufficient to support the trial court's judgment, then Respondent respectfully requests that this Court remand this matter and

direct the trial court to hold a hearing on Plaintiff's Motion for New Trial to allow for the presentation of additional evidence and argument. See Commerce Bank, N.A. v. Blasdel, 141 S.W.3d 434, 458 (Mo.App. W.D. 2004) and State ex rel. Division of Family Services v. Standridge, 676 S.W.2d 513, 517 (Mo. En Banc. 1984).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court affirm the trial court's judgment granting a new trial, and remand this case to the trial court for a new trial. In the alternative, Respondent respectfully requests that if this Court is going to reverse the trial court, that it also remand this case with directions that the trial court hold a hearing on Plaintiff's Motion for New Trial to allow for the presentation of additional evidence and argument.

RESPECTFULLY SUBMITTED,

ANDREW J. GELBACH – MO – 26003

Professional Corporation
109 E. Market Street
P.O. Box 375
Warrensburg, MO 64093
(660) 747-5138
FAX: (660) 747-8198

TURNER & SWEENY

John E. Turner - MO - 26218
Christopher P. Sweeny- MO - 44838

10401 Holmes Road, Suite 450
Kansas City, MO 64131
(816) 942-5100
FAX: (816) 942-5104

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of the foregoing together with a disc were duly mailed, postage prepaid this 13th day of April, 2006, to:

Mr. Richard Modin
Dougherty, Modin & Holloway
10100 Ambassador Drive
Suite 220
Kansas City, MO 64153
ATTORNEY FOR APPELLANT

ANDREW J. GELBACH

CERTIFICATION PURSUANT TO RULE 84.06

1. Respondents' Attorneys: John E. Turner, Turner & Sweeny, 10401 Holmes Road, Suite 450, Kansas City, Missouri, 64131, Missouri Bar No: 26218 and Andrew J. Gelbach, 109 E. Market Street, Warrensburg, Missouri, 64093, Missouri Bar No: 26003.

2. This brief contains 5,499 words in compliance with Rule 84.06(b).

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ANDREW J. GELBACH

APPENDIX

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