No. SC96219

IN THE

Supreme Court of Missouri

RONALD FENNEWALD, *et al.*
Relator

v.

THE HONORABLE PATRICIA S. JOYCE,
Respondent

Appeal from the
Circuit Court of Cole County, Missouri

Honorable Patricia S. Joyce

BRIEF FOR RESPONDENT AND DEFENDANTS

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STATEMENT OF THE FACTS

Respondent Honorable Patricia S. Joyce, Presiding Judge of the 19th Judicial Circuit, entered an Order Authorizing the Release of Medical Records (Order) that was specifically tailored to, and allowed for discovery into, the issues, claims, and defenses put at issue under the Petition for wrongful death. *See* Rel. A1-A12; Resp. A2-A14. In summary, the Petition alleges that Defendants' were negligent in not recommending or ordering certain cancer screening tests and thereby directly caused Decedent Thomas Fennewald's death, it is alleged, from preventable, curable, and survivable colon cancer and metastatic cancer. *See* Rel. A4-A12.

Judge Joyce was the only individual authorized to issue a court order for the release of Decedent's medical records, because Decedent died intestate and no personal representative was appointed to act on Decedent's behalf. *See* Rel. A1, A5. On Defendants' Motion for an Order Authorizing the Release of Medical Records (Motion), Judge Joyce was required to evaluate the law and the petition for wrongful death and to determine whether and to what extent a physician-patient privilege survived or was waived, and in doing so possessed "broad discretion to control discovery." Rel. A13-A26.

The record reflects that Judge Joyce approached and presided over this determination deliberately and that the information sought by Defendants fell within the scope of the pleadings and that any privilege over the information had been waived. To-wit: Judge Joyce found the proposed Order on its face to reasonably relate to the issues under the pleadings and entered the Order *sua sponte*; thereafter, Judge Joyce set aside the Order at Relator's request. Rel. A31-A34. Relator filed suggestions in opposition to the Motion.

Rel. A35-A39. Judge Joyce thereafter heard oral arguments from the parties on the issue for an hour, and again entered her Order.[1] *See* Rel. A1-A3.

[1] As reflected by the Order, Defendants' Motion was necessary due to an inability to obtain any medical records or information about Decedent's medical history and the identity of his medical providers through discovery. *See* Rel. A1-A2. Decedent first filed this case as a medical negligence claim. Defendants propounded pattern interrogatories for medical negligence. Decedent objected to pattern interrogatories asking about Decedent's medical history and the identity of his medical providers and did not provide a privilege log. Relator refiled this case as a wrongful death claim. Defendants propounded pattern interrogatories for wrongful death. Decedent objected to pattern interrogatories asking about Decedent's medical history and the identity of his medical providers and did not provide a privilege log. *See* Resp. A15-A17.

These pattern interrogatories are approved and published by two of Missouri's largest circuit courts, the Boone County Circuit Court and the St. Louis City Circuit Court and are considered so fundamental that these circuits mandate the use of these interrogatories in medical malpractice and wrongful death claims and prohibit any party from objecting to answering the same. *See, e.g.*, LOCAL COURT RULES OF THE THIRTEENTH JUDICIAL CIRCUIT STATE OF MISSOURI A12-1 thru A12-7 (Dec. 23, 2016) available at http://www.courts.mo.gov/file.jsp?id=50452; DEFENDANT'S APPROVED MEDICAL MALPRACTICE INTERROGATORIES TO PLAINTIFF (WRONGFUL DEATH) available at http://www.stlcitycircuitcourt.com/CourtForms/defendant4.pdf.

To establish a prima facie case of wrongful death arising out of medical malpractice, a plaintiff must show: (1) an act or omission of the defendant failed to meet the requisite medical standard of care; (2) the act or omission was performed negligently; and (3) the act or omission directly caused or directly contributed to cause the plaintiff's death. *Sundermeyer v. SSM Reg'l Health Servs.*, 271 S.W.3d 552, 554 (Mo. banc 2008). With respect to the element of causation, a plaintiff must prove that "but for the defendant's actions or inactions, the patient would not have died." *Id.*

Judge Joyce considered the pleadings and allegations relating to these essential elements. It is alleged that the standard of care required Decedent's physicians to recommend a colonoscopy to Decedent starting at the age of forty (Decedent turned forty in 1989 and did not begin treating with Defendants until 2008, when he was fifty-nine)

Relator did not produce any medical records in formal response to discovery, including a death certificate, which naturally lists the causes of death and significant contributing factors in causing death. Decedent did at one point sign a now expired medical records authorization that was so narrow in scope (i.e., limited to "cancer, colon, and GI disease") that multiple health care providers rejected Defendants' request for records pursuant to the authorization and Defendants were unable to obtain any records with it. Rel. A21-A23; Resp. A18. The only reason that any of Decedent's medical history is known to Defendants is because Decedent's counsel noticed up his client for a preservation deposition soon after filing his medical negligence claim. *See, e.g.*, Resp. A23-A33.

and that Defendants were negligent in not recommending or ordering a colonoscopy or other cancer screening. *See* Rel. A4-A12; Resp. A21-A22.

It is alleged that but for Defendants' negligence the sixty-five year old Decedent, whose medically significant co-morbidities included Hodgkin's lymphoma, renal disease, endocrinosis (diabetes), and coronary artery disease with triple bypass and angioplasty, would not have died and would have lived a normal, healthy life, without any interruption to his employment or earning capacity and without any physical, mental, or emotional pain and suffering. It alleges that Defendants' negligence directly caused Decedent to suffer economic and non-economic damages, a loss of life expectancy, and a loss of enjoyment of life during his final years. *See* Rel. A4-A12. *See also supra* note 1.

Judge Joyce further considered information during and after oral argument that Decedent's co-morbidities and overall health history are relevant to issues relating to Decedent's survivability, treatment, recovery, quality of life, and the causes of Decedent's death. For example, one or more of Defendants' expert(s) will testify on the importance of a patient's performance status. A patient's performance status is the anticipation of how a patient will respond to treatment based on that patient's co-morbidities and health history. This performance status determines what type of treatment a cancer patient is able to receive and the extent to which a cancer patient will be able to

tolerate or survive a particular treatment, and be successfully treated for cancer.[2] Rel. A41-A43.

Having considered the essential elements of Relator's claim and the issues, claims, and defenses placed at issue under the pleadings and allegations in this case, Judge Joyce ruled, "Mr. Fennewald's medical care and treatment, including various physical conditions prior to and at the time of his death have been called into issue by Plaintiff's Petition for wrongful death." Rel. A1. The Order permits the discovery and release of

[2] Relator's claims that Defendants engaged in improper ex parte communications with the trial court regarding the anticipated testimony of Defendants' expert(s) and the affidavit setting forth the same are simply false. *See* Black's Law Dictionary 296 (8th ed. 2004) (defining ex parte communication as "[a] communication between counsel and the court when opposing counsel is not present"). First, Relator was copied on the correspondence sent to the trial court, and Relator received a copy of all documents included at Rel. A40-A43 at the same time that these documents were submitted to the trial court. Second, at the December 19, 2016, oral arguments on the proposed Order, Relator asserted to the trial court that Defendants' position was lacking without an affidavit as to Defendants representations of their expert's anticipated testimony. The affidavit set forth at Rel. A41-A43 was submitted to the trial court following oral argument, in order to satisfy Relator's assertion that such an affidavit was necessary. Relator also responded to this correspondence in an identical manner by sending a letter to Judge Joyce and copying Defendants. Rel. A44.

medical records relating to "Mr. Fennewald's conversations with other doctors about cancer screening; discussion prior to his treatment with Defendants that any providers had regarding the need for, prescription for, or recommendation for a colonoscopy or other screening tests based upon Mr. Fennewald's age, medical history, family history, and published guidelines." Rel. A2. The Order permits the discovery and release of medical records relating to "medically significant injury or illness suffered by Mr. Fennewald . . . that is called into issue by the allegations set forth in Plaintiff's wrongful death action including, but not limited to: Mr. Fennewald's colon cancer; Mr. Fennewald's history of and treatment for Hodgkin's lymphoma and other forms of cancer; Mr. Fennewald's co-morbidities and medical history . . . ." Rel. A2.

Judge Joyce further ruled in her Order that the discovery and release of medical records be limited to the time from August 1, 1987, to Decedent's death. Rel. A2. Decedent was first diagnosed with and began treating for the medically significant co-morbidity of Hodgkin's lymphoma in August 1987 and thereafter treated for Type II diabetes, kidney disease, and coronary artery disease, including a history of triple-bypass and angioplasty, which on information and belief was the negative result of the chemotherapy treatment Decedent underwent for his Hodgkin's lymphoma. *See, e.g.*, Resp. A23-A33. This date range also includes Decedent's pertinent medical history since January 24, 1989, when Decedent turned forty, the age at which it is alleged that the standard of care required physicians to recommend a colonoscopy to Decedent. *See, e.g*, Resp. A21-A22.

Judge Joyce further ruled in her Order that the discovery and release of medical records be limited to that class of health care providers who possess records of Decedent "relating to medically significant injury or illness suffered by Mr. Fennewald during said time that is called into issue by the allegations set forth in Plaintiff's wrongful death action . . . ." Rel. A2.

POINTS RELIED ON

I. Judge Joyce acted within her jurisdiction and did not abuse her discretion when she properly applied the law to determine the nature and extent to which the physician-patient privilege had been waived in relation to the essential elements of the wrongful death claim and the issues, claims, and defenses raised under the pleadings, and issued her Order that was specifically tailored to the broad theories of standard of care and causation in this case.

Brandt v. Med. Defenses Assocs., 856 S.W.2d 667 (Mo. banc 1993).

State ex rel. Crowden v. Dandurand, 970 S.W.2d 340 (Mo. banc 1998).

Sundermeyer v. SSM Reg'l Health Servs., 271 S.W.3d 552 (Mo. banc 2008).

Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. banc 1992).

II. Relator misconstrues the Order as an unlimited medical records authorization.

Lusk v. Lyon, 247 S.W.2d 617 (Mo. 1952).

Woodfill v. Shelter Mut. Ins. Co., 878 S.W.2d 101 (Mo. App. S.D. 1994).

III. Relator simply disagrees with Judge Joyce's interpretation of the medical issue joined under the pleadings, which is not a basis for the extraordinary relief of a permanent writ of prohibition to issue.

State ex rel. Eggers v. Enright, 609 S.W.2d 381 (Mo. banc 1980).

Wilkerson v. Prelutsky, 943 S.W.2d 643 (Mo. banc 1997).

STANDARD OF REVIEW

"The extraordinary remedy of a writ of prohibition is appropriate in one of three circumstances: (1) to prevent the usurpation of judicial power when the trial court lacks jurisdiction; (2) to remedy a[n] excess of jurisdiction or an abuse of discretion where the lower court lacks the power to act as intended; or (3) where a party may suffer irreparable harm if relief is not made available in response to the trial court's order." *State ex rel. Proctor v. Bryson*, 100 S.W.3d 775, 776 (Mo. banc 2003). A writ of prohibition is not meant to provide a remedy for all legal difficulties or serve as a substitute for appeal, and it will not be granted "except when usurpation of jurisdiction or an act in excess of the same is *clearly evident*." *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 382 (Mo. banc 1980) (emphasis added) (internal quotation marks omitted). "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 648 (Mo. banc 1997). Relator has the burden of establishing that a writ of prohibition should issue. *Eggers*, 609 S.W.2d at 382.

ARGUMENT

I. JUDGE JOYCE ACTED WITHIN HER JURISDICTION AND DID NOT ABUSE HER DISCRETION WHEN SHE PROPERLY APPLIED THE LAW TO DETERMINE THE NATURE AND EXTENT TO WHICH THE PHYSICIAN-PATIENT PRIVILEGE HAD BEEN WAIVED IN RELATION TO THE ESSENTIAL ELEMENTS OF THE WRONGFUL DEATH CLAIM AND THE ISSUES, CLAIMS, AND DEFENSES RAISED UNDER THE PLEADINGS, AND ISSUED HER ORDER THAT WAS SPECIFICALLY TAILORED TO THE BROAD THEORIES OF STANDARD OF CARE AND CAUSATION IN THIS CASE.

In presiding over this case as explained herein, Judge Joyce recognized and applied the law to the existing physician-patient privilege, the same as she recognized and applied the law to the waiver of that physician-patient privilege over medical issues joined under the broad theories of standard of care and causation in this case. Having properly evaluated and applied the law to the same, she issued her Order that was specifically tailored to the broad theories of standard of care and causation in this case. In doing so, Judge Joyce acted within her jurisdiction and did not abuse her discretion.

Missouri has long recognized that a plaintiff waives the physician-patient privilege on medical issues joined under the pleadings. *Brandt v. Med. Defenses Assocs.*, 856 S.W.2d 667, 671 (Mo. banc 1993) ("Brandt II"). "Once the plaintiff makes a decision to enter into litigation, this decision carries with it the recognition that any information with the knowledge of the treating physician relevant to the litigated issues will no longer be confidential." *Id.* at 674.

The Order allows discovery and release of medical records related to the essential elements of standard of care and negligence, most specifically Decedent's treatment with physicians since the age of forty. By alleging that the standard of care required all physicians to recommend or order a colonoscopy or other cancer screening to Decedent starting at the age of forty, Relator waived any physician-patient privilege to medical information and records bearing on his prior medical care since the age of forty, and Defendants are entitled to know if indeed Decedent's medical records are consistent with Relator's posited theory on standard of care. MO. SUP. CT. R. 56.01(b)(1); *Brandt II*, 856 S.W.2d at 671. Defendants are further entitled to have its expert(s) evaluate and rely upon this information as a basis for determining whether Relator's theory is accepted within the medical community and followed by medical providers. MAI 11.06 Definitions – Negligence – Health Care Providers.

Relator's standard of care theory places no limits on the medical providers who are required to follow his theory on standard of care. For example, Relator not only seeks to hold Decedent's alleged primary care physician, Defendant Dr. Tom Schneider, negligent for allegedly not following this liability theory, but he further seeks to hold Decedent's treating endocrinologist, Defendant Dr. Christopher Case, who treated Decedent for Type II diabetes and renal disease, negligent for allegedly not following this theory.

Defendants should be allowed to defend against this standard of care theory. Thus, they should be permitted to evaluate the frequency of visits and limited outcome of Decedent's visits during the pertinent time frame (i.e., since January 24, 1989, when Decedent turned forty) to determine if those providers followed, or not, Relator's

standard of care theory. Such information is presently unavailable as Relator refuses to provide information related to Decedent's medical history or the identity of his medical providers, and he has refused to produce a privilege log as to information he claims is privileged.[3] *See, e.g.*, MO. SUP. CT. R. 57.01(c)(3); 58.01(c)(3).

The Order allows discovery and release of medical records related to the essential elements of causation and damages, most specifically records related to Decedent's medical history and medically significant co-morbidities. Decedent must prove that but for Defendants' alleged negligence, Decedent would not have died. *Sundermeyer v. SSM Reg'l Health Servs.*, 271 S.W.3d at 554. This is a broad and rigorous standard. *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681, 682 (Mo. banc 1992).[4] Decedent did not exist in a

[3] Defendants are further entitled to plead and prove the comparative fault of the plaintiff, *see Teeter v. Mo. Highway & Transpo. Comm'n*, 891 S.W.2d 817, 819 (Mo. banc 1995), and prepare their defense and test the merits of Relator's claims as they determine, § 537.085, RSMo, such that they should be allowed to discover the extent to which Decedent's previous providers recommended a colonoscopy or cancer screening starting when Decedent was forty, and the extent to which Decedent knew about the same.

[4] This standard is rigorous enough in cases of cancer that this Court established a cause of action for lost chance of recovery, which requires a lesser standard of causation. *Wollen*, 828 S.W.2d 681 (Mo. banc 1992). Relator does not merely allege, however, that Decedent lost a percentage chance of surviving colon cancer. Relator has brought a claim for wrongful death, unequivocally asserting that Defendants caused Decedent to die, and

vacuum. By alleging that Defendants' negligence directly caused or contributed to cause the injuries and damages set forth above, Relator waived any physician-patient privilege to medical information and records bearing on those issues, including information relating to Decedent's performance status and disease processes and the multiple factors that determine Decedent's preventability, survivability, treatment, recovery, quality of life, including the effects of Decedent's chronic disease systems his pain and suffering and his ability to work and his claims for lost employment, and most importantly the causes of his death.[5] *Brandt II*, 856 S.W.2d at 673. *See also State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 342 (Mo. banc 1998).

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he must prove that "but for the defendant's actions or inactions, the patient would not have died." *Sundermeyer*, 271 S.W.3d at 554.

[5] The breadth of the allegations relating to causation and damages is set forth *supra* in the Statement of Facts and in the Petition for wrongful death. These allegations are so broad in scope that just setting them out verbatim requires multiple pages in Relator's Brief, *see* Rel. Br. 6-7. The dissent of Judge Edward D. Robertson, Jr., in *State ex rel. Jones v. Syler* ably illustrates the broad scope of information placed at issue under personal injury pleadings. 936 S.W.2d 805, 809-10 (Mo. banc 1997) (Robertson, J., dissenting). As Judge Robertson explained, previous injuries or complaints of injuries to the body parts or systems that a plaintiff alleges a defendant's negligence caused "is highly relevant to the defendant's case – if not on the issue of negligence then certainly on the question of the extent of the defendant's contribution to the plaintiff's averred damages." *Id.* at 810.

Relator's Brief is silent on and does not identify how Judge Joyce acted in excess of her jurisdiction or abused her discretion when she undertook to evaluate the Petition for wrongful death and determine the issues, claims, and defenses raised under the pleadings; ruled that the physician-patient privilege was waived as to those issues, claims, and defenses; or entered an Order that tailored discovery and release of medical records related to the issues, claims, and defenses she determined were raised under the pleadings.

Judge Joyce acted within her jurisdiction and did not abuse her discretion when she issued an Order that was specifically tailored to the broad theories of standard of care and causation in this case. This Court's Preliminary Writ of Prohibition should not be made absolute.

II. RELATOR MISCONSTRUES THE ORDER AS AN UNLIMITED MEDICAL RECORDS AUTHORIZATION.

Relator misconstrues the Order as an unlimited medical records authorization by unilaterally calling substantial aspects of the Order a "preamble." In so doing, Relator ignores Missouri law on the construction of written instruments and does not give effect to large parts of the Order, specifically those parts that limit and explain its scope.[6]

[6] Respondent agrees with the black letter law cited by Relator that Missouri does not allow unlimited medical records authorizations and that the physician-patient privilege continues after death, just as surely as a plaintiff waives any physician-patient privilege over medical issues joined under the pleadings. Defendants have never sought or claimed

The rules of construction of written instruments apply to the construction of judgments. *Woodfill v. Shelter Mut. Ins. Co.*, 878 S.W.2d 101, 103 (Mo. App. S.D. 1994). Relator's dismissal of almost half of the Order as mere meaningless "preamble" ignores that the Order, by law, must be considered in its entirety, and its words and clauses must be construed according to their natural and legal import. *Id.* By doing so, Relator ignores the very provisions of the Order that properly explain its scope, why the scope of the Order is tailored to the medical issues joined under the pleadings, and why the Order is necessary.[7] *See* Rel. A1-A2.

Relator also unilaterally declares that the Order is limitless as to the medical providers from whom Defendants may request records. This seems illogical and unequitable, since Relator has refused to disclose or identify any of Decedent's medical providers in response to discovery. Yet the Order properly considers this issue and limits the

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they are entitled to an unlimited medical records authorization, and the Order is specifically tailored to the broad theories of standard of care and causation in this case, as explained herein.

[7] The Order further incorporates by reference the Motion, which further explains the proper scope of the Order, why the scope of the Order is tailored to the medical issues joined under the pleadings, and why the Order is necessary, *see* Rel. A1, A13-A26, and by such reference the Motion is as much a part of the Order as if it had been set out *in haec verba Intertel, Inc. v. Sedgwick Claims Mgmt. Servs.*, 204 S.W.3d 183, 196 (Mo. App. E.D. 2006). *See also Lusk v. Lyon*, 247 S.W.2d 617, 618 (Mo. 1952).

discovery and release of medical records to that class of health care providers who possess records of Decedent relating to medically significant injury or illness suffered by Mr. Fennewald during said time that is called into issue by the allegations set forth in Plaintiff's wrongful death action. *See Lusk v. Lyon*, 247 S.W.2d 617, 618 (Mo. 1952) ("The expression . . . of things of a class implies the exclusion of all not expressed, even though all would have been implied had none been expressed.").

Relator (and Amicus MATA) misconstrue the Order as an unlimited medical records authorization; stating that the Order is an unlimited medical records authorization does not make it so. Relator ignores Missouri law and the very parts of the Order and Judge Joyce's ruling that specifically limit and explain the scope of the Order as related to the waiver of the physician-patient privilege on medical issues that Judge Joyce found to have been joined under the pleadings. *See Brandt II*, 856 S.W.2d at 671. The Order is not unlimited; the Order is specifically tailored to the broad theories of standard of care and causation in this case.

III. RELATOR SIMPLY DISAGREES WITH JUDGE JOYCE'S INTERPRETATION OF THE MEDICAL ISSUE JOINED UNDER THE PLEADINGS, WHICH IS NOT A BASIS FOR THE EXTRAORDINARY RELIEF OF A PERMANENT WRIT OF PROHIBITION TO ISSUE.

This proceeding is fundamentally about the fact that Relator simply disagrees with Judge Joyce's interpretation of the Petition for wrongful death and the scope of the issues, claims, and defenses joined under the pleadings – Relator believes it should be limited solely to "cancer, colon, and GI disease." Relator provides no authority for why the extraordinary relief of a writ of prohibition shall issue in an instance where there is a

difference of interpretation of the Petition and its elements and defenses. Such a disagreement is never a basis for the extraordinary relief of a writ of prohibition. "If reasonable persons can differ as to the propriety of the trial court's action, then it cannot be said that the trial court abused its discretion." *Wilkerson*, 943 S.W.2d at 648. A writ of prohibition is not meant "to provide a remedy for all legal difficulties nor serve as a substitute for appeal." *Eggers*, 609 S.W.2d at 382.

CONCLUSION

Relator has not met his burden of establishing that a permanent writ of prohibition should issue, as he has not identified how Judge Joyce acted in excess of her jurisdiction or abused her discretion when she properly applied the law to determine the medical issues joined under the pleadings over which any physician-patient privilege had been waived, and issued an Order that was specifically tailored to those broad theories of standard of care and causation in this case.

Relator also unilaterally misrepresents and attacks the Order as an unlimited medical records authorization. He does so by ignoring large sections of the Order and Judge Joyce's ruling, specifically those sections that limit and explain the scope of the Order, by unilaterally and without basis labeling these sections as a "preamble." This ignores Missouri law regarding the weight that is to be given the Order in its entirety. The Order is not unlimited.

This proceeding is instead about Relator's disagreement with Judge Joyce's interpretation of his Petition for wrongful death and the issues, claims, and defenses raised thereunder. That is not a proper basis for the extraordinary relief sought.

Wilkerson, 943 S.W.2d at 648. Relator's attempts to be the sole arbiter on this issue is a bare attempt to improperly use the physician-patient privilege as both a sword and a shield. "Missouri courts have made it abidingly clear that a patient should not be allowed to use the medical privilege strategically to exclude unfavorable evidence while at the same time admitting favorable evidence." *Brandt II*, 856 S.W.2d at 672.

For the foregoing reasons, Respondent and Defendants respectfully request that Relator's Petition for Writ of Prohibition, or in the Alternative, Petition for Writ of Mandamus be denied; that this Court deny the issuance of a final writ of prohibition; that this Court's Preliminary Writ of Prohibition be quashed and not be made absolute; and for any and all further relief as this Court may deem just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

1. This brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b), in that it contains 5,733 words.

Respectfully submitted,

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CERTIFICATE OF FILING
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I hereby certify that on July 20, 2017, I electronically filed the foregoing with the Clerk for the Supreme Court of Missouri, by using the CM/ECF system, to the following parties:

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