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## **JURISDICTIONAL STATEMENT**

This case presents the Missouri Supreme Court with a writ of prohibition under Missouri Supreme Court Rule 84.24 and Rule 97. Relator's Petition for Writ of Prohibition seeks to have this Court enjoin Respondent, the Honorable Craig E. Hellmann ("Respondent"), from exercising any jurisdiction in the underlying matter, a reformation of deed case captioned *AJKJ, Inc. v. New Sites, LLC, et al.*, Franklin County Circuit Court Case Number 18AB-CC00115 (the "Reformation Lawsuit"). Furthermore, Relator seeks an Order of this Court voiding Respondent's September 13, 2018, Orders joining the Birch Creek Residents as parties to the Reformation Lawsuit and setting aside the Reformation Judgment, for an Order prohibiting Respondent from taking any further action on the Reformation Lawsuit, for an Order reinstating the original Reformation Judgment entered by Respondent on July 19, 2018, and for an Order confirming that the Reformation Lawsuit is final.

This Court has jurisdiction to enter original remedial writs under Article V, Section 4.1 of the Missouri Constitution which grants the Supreme Court "general superintending control over all courts and tribunals" and the authority to "issue and determine original remedial writs." Missouri Revised Statute § 530.020 also grants this Court "power to hear and determine proceedings in prohibition." An original proceeding in prohibition is appropriate where, as here, the trial court judge has exceeded his or her jurisdiction by entering orders more than thirty (30) days after the entry of a final judgment.

## **STATEMENT OF FACTS**

On June 1, 2018, Relator AJKJ, Inc. (“Relator” or “AJKJ”), filed its Petition for Reformation of Deed in the Franklin County Circuit Court in the case styled *AJKJ, Inc. v. New Sites, LLC, et al.*, Case Number 18AB-CC00115 (the “Reformation Lawsuit”). *See*, Exhibit 1<sup>1</sup>; Petition for Writ of Prohibition (“Petition”), ¶¶ 4-5; Respondent’s Return, Answer and Suggestions in Opposition to Petition for Writ of Prohibition (“Answer”), p. 4, ¶¶ 4-5. The Reformation Lawsuit named as defendants New Sites, LLC (“New Sites”), Legends Bank, a Missouri Banking Company (“Legends Bank”), and Bequette Construction, Inc. (“Bequette Construction”). *See*, Exhibit 1; Petition, ¶ 6. The Reformation Lawsuit was assigned to Respondent, the Honorable Craig E. Hellmann (“Respondent” or “Trial Court”), pursuant to the Twentieth Judicial Circuit’s Local Court Rules. *See*, Petition, ¶ 8; Answer, p. 4, ¶ 8.

The single-count Reformation Lawsuit sought a judgment reforming the General Warranty Deed dated August 25, 2014, conveyed by AJKJ to New Sites, and recorded with the Franklin County Recorder of Deeds as Document Number 1411867 (the “New Sites Deed”). Reformation of the New Sites Deed was sought because the deed mistakenly omitted the words “including developer rights,” which omission had caused confusion and a dispute over whether AJKJ’s developer rights were conveyed to New Sites. *See*, Petition, ¶ 11; Exhibit 1, p. 2, ¶ 14. AJKJ filed the Reformation Lawsuit on June 1, 2018, to remove any and all doubt about its original intent regarding the New

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<sup>1</sup> All “Exhibits” referenced herein are those attached to Relator’s Petition for Writ of Prohibition filed with this Court on or about October 8, 2018.

Sites Deed and to clarify that AJKJ had always intended to, and did, as far as it was concerned, convey developer rights to New Sites by execution and delivery of the New Sites Deed. *See*, Petition, ¶ 4; Exhibit 1, p. 3, ¶ 18.

All defendants in the Reformation Lawsuit filed their answers and no counterclaims or crossclaims were filed. The Reformation Lawsuit was scheduled for trial on July 13, 2018, on a non-contested basis.<sup>2</sup> Prior to trial, counsel for all parties met in chambers to discuss extraneous matters related to the Reformation Lawsuit. *See*, Exhibit 5, p. 11.<sup>3</sup> During this in-chambers conference on July 13, 2018, counsel for AJKJ informed Respondent that there existed a declaratory judgment lawsuit styled *Ronald D. Ruff, et al. v. Bequette Construction, Inc., et al.*, Case Number 16AB-CC00083 (the “Declaratory Judgment Case”), which had recently made an adverse ruling on the issue of developer rights and that said ruling spurred AJKJ to file the Reformation Lawsuit. *See*, Exhibit 5, p. 11. The judgment issued in the Declaratory Judgment Case mentioned the possibility of such proceeding (a deed reformation). *See*, Exhibit 5, p. 11; Answer,

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<sup>2</sup> The July 13, 2018, trial date was scheduled by AJKJ’s attorney after a telephone conference with Respondent’s clerk and consultation with all opposing counsel on July 9, 2018, via email. *See*, Appendix, p. A21-A26 – Email Correspondence. A Notice of Trial was filed with the Franklin County Circuit Court on July 10, 2018, confirming scheduling of the case. *See*, Appendix, p. A27. Despite Respondent’s contentions, counsel for AJKJ did **not** meet with the Trial Court on July 10, 2018. Counsel for all parties discussed the case with Respondent in chambers immediately prior to trial on July 13, 2018.

<sup>3</sup> *See also*, the Affidavits of Attorneys Mark Vincent and Sean D. Brinker, both of which were referenced in Exhibit 5, but were not previously filed with this Court. Both documents are included in Relator’s Appendix. *See*, Appendix, p. A29 and A33.

Exhibit B, p. 16, ¶ 57. Counsel for AJKJ offered a copy of the adverse judgment to the Trial Court prior to trial. It is believed the Trial Court did not review the same.

Trial was held on July 13, 2018, at which time the Court heard the evidence and took the case under advisement. *See*, Petition, ¶ 12. The Court issued its Judgment on July 19, 2018, reforming the New Sites Deed (the “Reformation Judgment”) by adding the words “including developer rights.” *See*, Petition, ¶ 13; Answer, p. 6, ¶ 13; Exhibit 3.

On August 14, 2018, Ronald D. Ruff, *et al.* (the “Birch Creek Residents”), filed a Motion to Intervene and Set Aside [Reformation] Judgment (“Motion to Intervene”) in the Reformation Lawsuit. *See*, Petition, ¶ 14; Answer, p. 6, ¶ 14; Exhibit 4. No party to the Reformation Lawsuit ever filed an after-trial motion. *See*, Petition, ¶ 17; Answer, p. 6, ¶ 17. On August 31, 2018, AJKJ filed a Response and Objection to the Birch Creek Residents’ Motion to Intervene and Set Aside [Reformation] Judgment for the purpose of informing Respondent that the Trial Court no longer had jurisdiction to entertain or rule upon the Birch Creek Resident’s Motion to Intervene because the Reformation Judgment became final on August 18, 2018. *See*, Petition, ¶ 19; Answer, p. 6, ¶ 19; Exhibit 5. Defendants Legends Bank and Bequette Construction filed pleadings joining in AJKJ’s objection and opposing the Birch Creek Residents’ Motion to Intervene. *See*, Petition, ¶ 20; Answer, p. 6, ¶ 20; Exhibits 6 and 7.

On September 13, 2018, without a hearing or notice to any party, Respondent granted the Birch Creek Resident’s Motion to Intervene and vacated the Reformation Judgment entered on July 19, 2018. *See*, Petition, ¶ 21; Answer, p. 7, ¶ 21; Exhibit 4, p. 9. Believing that Respondent’s September 13, 2018, Order was made without



jurisdiction, AJKJ filed its Petition for Writ of Prohibition with the Missouri Court of Appeals, Eastern District, on September 21, 2018. *See*, Petition, ¶ 30; Answer, p. 8, ¶ 30. The Eastern District Court of Appeals denied AJKJ's Petition on October 4, 2018. *See*, Petition, ¶ 32; Answer, p. 8, ¶ 32. Thereafter, AJKJ filed its Petition for Writ of Prohibition, together with certain required documents, with this Court on October 8, 2018. This Court granted its Preliminary Writ of Prohibition on December 4, 2018.

As confirmed by Respondent's Answer, the sole issue to be addressed by this Court is whether the Trial Court had jurisdiction to enter the September 13, 2018, Orders joining the Birch Creek Residents as a party and vacating the Reformation Judgment. *See*, Answer, p. 14. If Respondent acted in excess of his jurisdiction, AJKJ is requesting this Court take the appropriate steps to prohibit and correct such conduct.

## **POINTS RELIED ON**

### **FIRST POINT RELIED ON**

**AJKJ is entitled to an order prohibiting Respondent from exercising further jurisdiction over the Reformation Lawsuit and for an order voiding Respondent's September 13, 2018, Order granting the Birch Creek Residents' Motion to Intervene, because the Reformation Judgment became final on August 18, 2018, in that, pursuant to Rule 75.01, Respondent lost jurisdiction over the Reformation Lawsuit thirty (30) days after entry of the Reformation Judgment and once divested of jurisdiction, Respondent lacked the jurisdiction necessary to grant the Birch Creek Residents' Motion to Intervene or to take any other action on the Reformation Lawsuit.**

State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. banc 1997)

Pius v. Boyd, 857 S.W.2d 238 (Mo. App. W.D. 1993)

Sherman v. Kaplan, 522 S.W.3d 318 (Mo. App. W.D. 2017)

Spicer v. Donald N. Spicer Rev. Living Trust, 336 S.W.3d 466 (Mo. banc 2011)

Missouri Supreme Court Rule 75.01

## **SECOND POINT RELIED ON**

**AJKJ is entitled to an order prohibiting Respondent from exercising further jurisdiction over the Reformation Lawsuit and for an order voiding Respondent's September 13, 2018, Order granting the Birch Creek Residents' Motion to Set Aside Judgment, because Respondent had no jurisdiction or authority to grant the requested relief, in that, the Birch Creek Residents were not "a party" to the Reformation Lawsuit as required to entitle them to file a motion under Missouri Supreme Court Rule 74.06(b).**

State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. banc 1997)

Allen v. Bryers, 512 S.W.3d 17 (Mo. banc 2016)

Sherman v. Kaplan, 522 S.W.3d 318 (Mo. App. W.D. 2017)

Missouri Supreme Court Rule 74.06(b)

## ARGUMENT

### FIRST POINT RELIED ON

AJKJ is entitled to an order prohibiting Respondent from exercising further jurisdiction over the Reformation Lawsuit and for an order voiding Respondent's September 13, 2018, Order granting the Birch Creek Residents' Motion to Intervene, because the Reformation Judgment became final on August 18, 2018, in that, pursuant to Rule 75.01, Respondent lost jurisdiction over the Reformation Lawsuit thirty (30) days after entry of the Reformation Judgment and once divested of jurisdiction, Respondent lacked the jurisdiction necessary to grant the Birch Creek Residents' Motion to Intervene or to take any other action on the Reformation Lawsuit.

#### **I. Standard of Review.**

This Court has the authority to issue and determine original remedial writs, including a writ of prohibition. Mo. Const. art. V, § 4. The extraordinary remedy of a writ of prohibition is available: (1) **to prevent the usurpation of judicial power when the trial court lacks authority or jurisdiction;** (2) to remedy an excess of authority, jurisdiction or 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 granted. State ex rel. Bayer Corp. v. Moriarty, 536 S.W.3d 227 (Mo. banc 2017) (emphasis added). A writ of prohibition may also be appropriate where an appeal is inadequate to remedy the improper order, State ex rel. Malashock v. Jamison, 502 S.W.3d 618, 619 (Mo. banc

2016), or to prevent unnecessary, inconvenient and expensive litigation, State ex rel. Heart of Am. Council v. McKenzie, 484 S.W.3d 320, 324 (Mo. banc 2016).

In this case, issuance of a writ of prohibition is appropriate because Respondent has exceeded his jurisdictional authority. Pursuant to both Missouri Supreme Court precedent and the Missouri Constitution, this Court has the express authority to issue a writ declaring void Respondent's untimely and unauthorized September 13, 2018, Order granting the Birch Creek Residents' Motion to Intervene and declaring the Reformation Judgment final. Issuing the requested permanent writ of prohibition would confine Respondent to the jurisdictional limitations imposed by the Missouri Constitution and this Court's Rules of Civil Procedure.

## **II. Respondent Lacked Jurisdiction to Grant the Birch Creek Residents' Motion to Intervene.**

Respondent entered the Reformation Judgment on July 19, 2018. *See*, Exhibit 3. Missouri Supreme Court Rule 75.01 provides that Respondent only retained control over the Reformation Judgment for the thirty (30) day period immediately after its entry on July 19, 2018. Thus, on August 18, 2018, the Reformation Judgment became final and Respondent lost all jurisdiction over the case. Rule 75.01; Spicer v. Donald N. Spicer Rev. Living Trust, 336 S.W.3d 466, 468 (Mo. banc 2011). Respondent's control over the Reformation Judgment could only have been extended past the thirty (30) days prescribed by Rule 75.01 if an authorized post-trial motion was filed by **a party**. *Id.* at 468-69. This Court has recognized six (6) types of post-trial motions, **of which a motion to intervene is not one**. Nast by & through Freeman v. Gateway Ambulance Serv., LLC, 502 S.W.3d

653, 657 (Mo. App. E.D. 2016). Since no post-trial motions were filed by any party, the Reformation Judgment became final on August 18, 2018.<sup>4</sup>

The Birch Creek Residents filed their Motion to Intervene on August 14, 2018, nearly four (4) weeks after entry of the Reformation Judgment. *See*, Petition, ¶ 14. Although the Birch Creek Residents’ Motion to Intervene was filed while Respondent retained jurisdiction over the Reformation Lawsuit, it was not granted until September 13, 2018 – some twenty-six (26) days **after** the Reformation Judgment had already become final. *See*, Exhibit 4, p. 9. Because a motion to intervene is not an authorized post-trial motion, Nast by & through Freeman, 502 S.W.3d at 657, Respondent’s jurisdiction over the case was not extended past the thirty (30) day limitation imposed by Rule 75.01, thus rendering his September 13, 2018, Order granting intervention void.

Numerous cases establishing the foregoing principals are directly on point with the current situation. In State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. banc 1997), **an action in prohibition was brought to prevent enforcement of an order granting intervention and setting aside judgment.** In Wolfner, the trial court entered its judgment on one count of the lawsuit on December 13, 1996, with the remaining counts dismissed on December 17, 1996. Id. at 928. On October 4, 1996, prior to entry of judgment, three non-parties filed a motion to intervene. Id. at 929. On February 13,

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<sup>4</sup> It is important to note that the finality of the Reformation Judgment is not affected by the Birch Creek Residents’ Rule 74.06(b) Motion to Set Aside Judgment. Pursuant to the express terms of Rule 74.06(c), a “motion under subdivision (b) does not affect the finality of a judgment or suspend its operation.” In addition, as explained below, the Birch Creek Residents are not permitted to file a Rule 74.06(b) motion because they were not “a party” to the Reformation Lawsuit.

1997, the same three non-parties filed a motion to set aside judgment and for leave to file their answer and counterclaims, in relation to their previously filed motion to intervene. Id. at 928. The trial court granted the motion to intervene on February 21, 1997. Id. On review, this Honorable Court granted a preliminary writ of prohibition, which was ultimately made absolute, and held that **the trial court was divested of its jurisdiction over the case thirty (30) days after the judgment became final.** Id. at 931. Therefore, the trial court in that case had no power to permit intervention once the judgment became final, even though a motion to intervene was filed prior to entry of the judgment.

A case almost chronologically identical to the present case is Pius v. Boyd, 857 S.W.2d 238 (Mo. App. W.D. 1993). In Pius, the judgment was entered on July 23, 1991. On August 8, 1991, following entry of the judgment, but within thirty (30) days of the judgment, the intervenors filed a motion to intervene. Id. at 242. The trial court did not rule on the motion to intervene until January 16, 1992, more than thirty (30) days **after** entry of its judgment. Id. Citing the Eastern District Court of Appeals' decision in Model Hous. Dev. Corp. v. Collector of Revenue, 583 S.W.2d 574 (Mo. App. E.D. 1979), the Pius Court held that **"once judgment is final, the trial court loses jurisdiction and an application for intervention is precluded because no pending action exists into which the applicant could intervene"** (emphasis added). Id. Ultimately, the Pius Court held that the trial court lacked jurisdiction to enter the January 16, 1992, order because the July 23, 1991, judgment was already final, thereby depriving the trial court of jurisdiction. Id. 242-43.

Numerous other Missouri Supreme Court and Appellate Court opinions have reached the same conclusions. In Allen v. Bryers, 512 S.W.3d 17 (Mo. banc 2016), Spicer v. Donald N. Spicer Rev. Living Trust, 336 S.W.3d 466 (Mo. banc 2011), and Sherman v. Kaplan, 522 S.W.3d 318 (Mo. App. W.D. 2017), each of the respective Courts held that the trial court exceeded its jurisdictional authority when it ruled upon (either granting or denying) a motion to intervene **after** the underlying judgment had become final. **“Following divestiture [of jurisdiction], any attempt by the trial court to continue to exhibit authority over the case, whether by amending the judgment or entering subsequent judgments, is void”**. Allen, 512 S.W.3d at 28 (emphasis added). Simply put, after the underlying judgment becomes final, the trial court no longer has the authority to rule upon the proposed intervenor’s motion to intervene. Id.

To illustrate the similarity of the instant case to the chronology of the Wolfner and Pius cases, the following illustrative chart is helpful:

	Date of Judgment	Date of Motion to Intervene	Date Judgment Final	Date Intervention Granted	Days After Finality	Permanent Writ Granted?
<u>Wolfner</u>	12/17/1996 <sup>5</sup>	10/4/1996 <sup>6</sup>	1/16/1997	2/21/1997	36	Yes
<u>Pius</u>	7/23/1991	8/8/1991	8/22/1991	1/16/1992	147	Yes
Present Case	7/19/2018	8/14/2018	8/18/2018	9/13/2018	26	Preliminary

<sup>5</sup> In Wolfner, the judgment resolving one count was entered on December 13, 1996, but the remaining counts were not dismissed until December 17, 1996. Therefore, the clock for finality began to run on December 17, 1996. See, Wolfner, 955 S.W.2d at 930.

<sup>6</sup> In Wolfner, the motion to intervene was actually filed **before** judgment was entered. Nonetheless, the Supreme Court still found the trial court lacked jurisdiction to rule upon the motion **after** the judgment had become final. See, Wolfner, 955 S.W.2d at 930.



In this case, trial on the Reformation Lawsuit was concluded on July 13, 2018, and the **Reformation Judgment was entered on July 19, 2018**. *See*, Exhibit 3. The Birch Creek Residents filed their Motion to Intervene and Set Aside Judgment on August 14, 2018, nearly four (4) weeks after entry of the Reformation Judgment. *See*, Exhibit 4. Since no authorized post-trial motion was filed by any **named party** to the Reformation Lawsuit that could have enlarged Respondent's jurisdiction over the case, **the Reformation Judgment became final on August 18, 2018**. Rule 75.01. On that date, Respondent was divested of all jurisdiction and the subsequent Orders issued on September 13, 2018, were made when the Trial Court was without jurisdiction, rendering the Orders void. Allen, 512 S.W.3d at 17; Sherman, 522 S.W.3d at 318. Thus, Respondent's orders should be declared null and void.

By untimely granting the Birch Creek Residents' Motion to Intervene, Respondent exceeded his constitutionally permitted jurisdiction. Accordingly, AJKJ requests this Court make its Preliminary Writ of Prohibition permanent and declare the Trial Court's September 13, 2018, Orders void, prevent Respondent from taking any further action on the Reformation Lawsuit, and confirm the finality of the Reformation Judgment.

## **SECOND POINT RELIED ON**

**AJKJ is entitled to an order prohibiting Respondent from exercising further jurisdiction over the Reformation Lawsuit and for an order voiding Respondent's September 13, 2018, Order granting the Birch Creek Residents' Motion to Set Aside Judgment, because Respondent had no jurisdiction or authority to grant the requested relief, in that, the Birch Creek Residents were not "a party" to the Reformation Lawsuit as required to entitle them to file a motion under Missouri Supreme Court Rule 74.06(b).**

### **I. Standard of Review.**

The standard of review for AJKJ's Second Point Relied On is the same as that for AJKJ's First Point Relied On. In the interest of brevity, this Court is directed to the standard of review set forth in AJKJ's First Point Relied On.

In this case, issuance of a writ of prohibition is an appropriate remedy because Respondent has exceeded his jurisdictional authority. Pursuant to both Missouri Supreme Court precedent and the Missouri Constitution, this Court has the express authority to issue a writ declaring void Respondent's September 13, 2018, Order setting aside the Reformation Judgment and barring the Trial Court from exercising any further jurisdiction thereon. Making the Preliminary Writ of Prohibition permanent would confirm the jurisdictional limitations imposed on trial courts by the Missouri Constitution and Rule 75.01.

## II. Only a Party to a Lawsuit May Seek Relief Pursuant to Rule 74.06(b).

Filed contemporaneously with the Birch Creek Residents' Motion to Intervene was a Motion to Set Aside Judgment (the Reformation Judgment) pursuant to Rule 74.06(b). *See*, Exhibit 4. The Birch Creek Residents' Motion to Set Aside Judgment was granted by Respondent on September 13, 2018. *See*, Exhibit 4, p. 9.

Rule 74.06(b) permits a trial court to set aside a judgment upon excusable neglect, fraud, irregular, void or satisfied judgments. The movant in a Rule 74.06 motion for relief from judgment has the burden of proving that he is entitled to relief. First Bank of the Lake v. White, 302 S.W.3d 161, 165 (Mo. App. S.D. 2009). A motion to set aside a judgment cannot prove itself. Johnson v. Brown, 154 S.W.3d 448, 451 (Mo. App. S.D. 2005). There must be competent evidence to establish a right to relief and the motion must be verified or supported by affidavits or sworn testimony produced **at a hearing** (emphasis added). Id. Here, the Birch Creek Residents were not a party, no hearing was ever held on their Motion to Set Aside Judgment, and no evidence was offered which would support or prove their Motion to Set Aside Judgment under Rule 74.06(b).<sup>7</sup> Accordingly, their request should fail as a matter of law.

In addition to the foregoing deficiencies, the Birch Creek Residents are not entitled to relief pursuant to Rule 74.06(b) because they were never **a party** to the Reformation Lawsuit. A necessary component of the Birch Creek Residents' Motion to

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<sup>7</sup> The Birch Creek Residents supplied the trial court with no evidence supporting their Motion to Intervene and Set Aside Judgment. The Birch Creek Residents supplied no affidavits, deposition transcripts or other evidence which would have supported their position as required by Rule 74.06. *See*, Exhibit 4.

Set Aside Judgment was the need to first be timely granted leave to intervene and become a party. (*See*, Point One, above). That did not happen in this case. The Trial Court’s grant of intervention did not occur until twenty-six (26) days **after** the Reformation Judgment had become final and Respondent had already lost jurisdiction.

**By its express terms, Rule 74.06(b) applies only to “a party” to the litigation.**

Rule 74.06(b) states, in pertinent part: “on motion and upon such terms as are just, the court may relieve **a party** or his legal representative from a final judgment or order...” (emphasis added). Rule 74.06(b) uses the term “party,” not “persons.” The intent and plain language of Rule 74.06(b) signifies that only those persons or entities who are actually **parties** to the litigation may seek relief pursuant to the terms of Rule 74.06(b).<sup>8</sup> Since the Birch Creek Residents were never timely joined as a “party” to the Reformation Lawsuit, Respondent had no jurisdiction to set aside the Reformation Judgment.

This Court confronted a very similar situation in State ex rel. Wolfner v. Dalton, 955 S.W.2d 928 (Mo. banc 1997). In Wolfner, this Court held that only **a party** may seek relief under Rule 74.06(b). There, a consent judgment was entered without the knowledge or involvement of the purported intervenors. Id. at 929. The purported intervenors filed a motion to intervene, but it was not ruled upon until **after** the judgment had become final. Id. at 931. This Court made permanent its writ of prohibition to prevent the trial court from continuing with the case, reasoning that the trial court was

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<sup>8</sup> When interpreting the Missouri Rules of Civil Procedure, courts are to apply the plain and ordinary meaning of the rule as written. Hanks v. Rees, 943 S.W.2d 1, 4 (Mo. App. S.D. 1997).

without jurisdiction since the judgment was final. Id. at 930-31. **This Court further held that since the purported intervenors were never joined as parties, they could not seek relief pursuant to Rule 74.06(b), because those provisions “are limited to parties”** (emphasis added). Id. at 930.

Likewise, in Allen, 512 S.W.3d at 17, this Court held that the provisions of Rule 74.06(b) are limited to the **parties**. In Allen, the purported intervenor failed to secure intervention prior to the judgment becoming final. Id. at 29. This failure resulted in the intervenor having never been made a party. Id. Although the purported intervenors’ motion to set aside the judgment was filed timely, the failure to timely be joined as a party deprived the trial court of the authority to grant the Rule 74.06(b) motion.<sup>9</sup> Id. Simply put, the intervenor was not a “party” entitled to bring a Rule 74.06(b) motion. Id. *See also*, Sherman, 522 S.W.3d at 326 (Relief pursuant to Rule 74.06(b) is limited to only parties).

Try as they might, the Birch Creek Residents simply are not “parties” to the Reformation Lawsuit. Although having filed a Motion to Intervene, the Birch Creek Residents failed to secure a ruling on said Motion during the time Respondent retained jurisdiction over the case. Once the Reformation Judgment became final, Respondent lost all jurisdiction or authority to permit their intervention. And, once the Birch Creek

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<sup>9</sup> Missouri Supreme Court Rule 74.06(c) requires a Rule 74.06(b) motion to be filed within one year of the judgment. Allen, 512 S.W.3d at 29. However, the movant must still be a party to the underlying lawsuit in order to invoke Rule 74.06(b). Id.

Residents lost the opportunity to be joined as a party, they also lost the opportunity to seek relief pursuant to Rule 74.06(b).

**III. No Equitable Basis Exists for the Birch Creek Residents to Intervene or Set Aside the Reformation Judgment.**

In their Answer, the Birch Creek Residents attempt to persuade this Court to quash its Preliminary Writ of Prohibition and to deny a permanent writ based on a claim of equity. Specifically, in their quest to divert this Court from its jurisdictional analysis, the Birch Creek Residents assert the Trial Court somehow had the authority to treat their Motion to Intervene as an independent action grounded in equity based on their unsubstantiated allegations of fraud and material misrepresentations/omissions. *See*, Answer, p. 16. When considering these equitable claims, this Court should keep in mind the following information.

**A. The Birch Creek Residents had knowledge of the Reformation Lawsuit within five days of its filing and over a month before trial.**

The Reformation Lawsuit was filed on June 1, 2018. Five (5) days later, on June 6, 2018, the Birch Creek Residents attached an actual copy of the Reformation Lawsuit to a pleading in the Declaratory Judgment Case entitled “Plaintiffs’ Opposition to Motion to Reconsider Judgment or, in the Alternative, for New Trial.” *See*, Appendix, p. A36 and A56. This pleading was filed before the Honorable Ada Brehe-Krueger in the Declaratory Judgment Case. The plaintiffs in the Declaratory Judgment Case are the same as those now identified as the Birch Creek Residents or purported intervenors. Additionally, during an oral argument in the Declaratory Judgment Case, and before the

trial date in the Reformation Lawsuit, the Birch Creek Residents' attorney, Michael Clithero, openly discussed the pending Reformation Lawsuit with Judge Brehe-Krueger and in the presence of Sean D. Brinker, counsel for AJKJ.

Given the purported intervenors "actual knowledge" of the Reformation Lawsuit at least four (4) weeks before trial, it is unfathomable for the Birch Creek Residents to now claim some equitable exception should be established for their benefit. Not only did the Birch Creek Residents have knowledge of the Reformation Lawsuit within five (5) days of its filing, but they also had knowledge of the case for over five (5) weeks before it even went to trial.<sup>10</sup> Quite simply, the Birch Creek Residents had more than ample time to file their Motion to Intervene before trial, but, for reasons unknown, waited nearly four (4) weeks **after** the Reformation Judgment was entered and over two (2) months **after** they had knowledge of the Reformation Lawsuit before filing their Motion to Intervene.

Unfortunately for the Birch Creek Residents, the fact that Respondent's jurisdiction over the Reformation Lawsuit expired before the grant or denial of their Motion to Intervene is attributable to no one other than themselves. This Court should not create a new equitable exception for the Birch Creek Residents when they had "actual knowledge" of the lawsuit within five (5) days of filing and for more than five (5) weeks before trial. Rather, this Court should adhere to its longstanding and well-established

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<sup>10</sup> Moreover, a Notice of Trial was publicly filed through the Court's E-Filing system on July 10, 2018, setting the date and time of the trial. *See*, Appendix, p. A27.

precedent and maintain the bright-line jurisdictional rule already in existence as set forth in Wolfner, Pius, and Allen, among other cases.

**B. The Birch Creek Residents' claims of fraud or material misrepresentation are without merit.**

AJKJ's attorneys have never intentionally, knowingly or negligently mislead or withheld information from Respondent. How the Birch Creek Residents can even allege such a misrepresentation occurred is concerning considering they were not present in court on the day of trial and no hearing was ever held on their Motion to Intervene and Set Aside Judgment where Relator could have addressed any concerns raised.

Apparently, the Birch Creek Residents attempted to learn what was or was not stated to the Trial Court by way of an *ex parte* conversation with Respondent. *See*, Respondent's Answer, p. 12, footnote 2 (addressing conversations between the Birch Creek Residents' Attorney, Michael Clithero, and Respondent). The foregoing is what makes AJKJ's request for a permanent writ of prohibition all the more disheartening.



## CONCLUSION

AJKJ filed its Petition for Reformation of Deed on June 1, 2018. Trial was held on July 13, 2018, and Respondent entered his Reformation Judgment on **July 19, 2018**. On August 14, 2018, some four (4) weeks after entry of the Reformation Judgment, the Birch Creek Residents filed their Motion to Intervene and Set Aside Judgment. Since no **party** to the Reformation Lawsuit filed an authorized post-trial motion, the Reformation Judgment became final thirty (30) days after its entry, or on **August 18, 2018**, per Rule 75.01. The time for a party to appeal expired on August 28, 2018, with no **party** having filed a notice of appeal. However, without even holding a hearing, Respondent untimely granted the Birch Creek Residents' Motion to Intervene and Set Aside Judgment on **September 13, 2018**, some twenty-six (26) days after the Reformation Judgment became final.


As of August 18, 2018, Respondent was divested of all jurisdiction over the Reformation Lawsuit as it relates to the Birch Creek Residents' Motion to Intervene and Set Aside Judgment. Accordingly, Respondent's September 13, 2018, Order granting the Birch Creek Residents' Motion to Intervene and Set Aside Judgment should be declared null and void for want of jurisdiction. For all the foregoing reasons, this Court should make permanent its Preliminary Writ of Prohibition declaring all of Respondent's September 13, 2018, Orders void, barring Respondent from taking any further action on the Birch Creek Residents' Motion to Intervene and Set Aside Judgment, and confirming the finality of the Reformation Judgment.

WHEREFORE, Relator AJKJ, Inc., respectfully requests this Court make permanent its Preliminary Writ of Prohibition barring Respondent, the Honorable Craig E. Hellmann, from proceeding further with the underlying case of *AJKJ, Inc. v. New Sites, LLC, et al.*, Case Number 18AB-CC00115; for an Order voiding Respondent's September 13, 2018, Orders granting the Birch Creek Residents' Motion to Intervene and Set Aside Judgment; for an Order barring Respondent from enforcing his September 13, 2018, Orders; and for an Order declaring the Reformation Judgment final.

Dated: January 22, 2019.

Respectfully submitted,

ZICK, VOSS, POLITTE & RICHARDSON  
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### **CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that Relator's Brief contains the required elements of Missouri Supreme Court Rule 55.03 and said brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b). The undersigned also certifies he has relied upon Microsoft Word 2016's word count in preparing this brief and said word count is 5,633.



Sean D. Brinker, MBE #67404

### **CERTIFICATE OF SERVICE**

The undersigned certifies that: (1) the original Brief of Relator, AJKJ, Inc., was filed electronically and that a true and correct copy of the foregoing was served on registered counsel via the Missouri Courts E-filing System on January 22, 2019; (2) that a copy of Relator's Brief was emailed to the Honorable Craig E. Hellmann (craig.hellmann@courts.mo.gov); and (3) that the undersigned has signed the original of Relator's Brief and is maintaining the same pursuant to Rule 55.03(a).



Sean D. Brinker, MBE #67404