IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. AJKJ, INC. Relator, v. THE HONORABLE CRAIG E. HELLMANN, Respondent.	)	Case No. SC97461

WRIT OF PROHIBITION

RELATOR'S REPLY BRIEF

Kurt A. Voss, MBE #36668
Sean D. Brinker, MBE #67404
Zick, Voss, Politte & Richardson, P.C.
438 West Front Street
P.O. Box 2114
Washington, Missouri 63090
Phone: (636)239-1616
Fax: (636)239-5161
kav@zvplaw.com
sdb@zvplaw.com

Attorneys for Relator AJKJ, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

ARGUMENT

I. Preliminary Matters

A. Respondent's statement of facts Violates Missouri Supreme Court Rule 84.04(c).

In their response, the Birch Creek Residents, purportedly acting on behalf of Respondent, the Honorable Craig E. Hellmann (hereinafter "Respondent" or "Trial Court"), include an Introduction and Summary of the Case, as well as a section entitled Factual Background. *See*, Brief of Respondent, pages 5-12. Missouri Supreme Court Rule 84.24(h) provides that briefs in original writ proceedings shall be filed as required on appeals. In any appeal, Missouri Supreme Court Rule 84.04(f) authorizes a respondent to file a competing statement of facts. Pursuant to Rule 84.04(c), the respondent's statement of facts must be fair, concise and argument free.

Here, Respondent's Statement of Facts violates Rule 84.04(c) in numerous respects because it contains a plethora of inaccurate and irrelevant material. Respondent attempts to inject irrelevant material, such as the proceedings before the Honorable Ada Brehe-Krueger, Case Number 16AB-CC00083, in an attempt to litigate that case before this Court. Including those materials violates the rule requiring a fair and concise statement of facts because the allegations are irrelevant to this proceeding or the Reformation Lawsuit. Furthermore, Respondent's Factual Background is misleading

because it contains numerous disputed allegations cloaked as facts.[1] Again, this violates Rule 84.04(c).

Lastly, Respondent's "Factual Background" could be characterized as being highly argumentative and offensive. Respondent spends over one-third of its Brief (eight of twenty-three pages) waging a disguised attack against AJKJ's counsel. Arguably, this too violates Rule 84.04(c) and is an attempt to create a controversy where none exists. Accordingly, this Court should disregard Respondent's Introduction and Summary of the Case, as well as the Factual Background and focus on the sole issue in this case of whether the Trial Court exceeded its jurisdiction.

II. Relator's First Point Relied On

B. The sole issue before this Court is whether the Trial Court had Jurisdiction to enter the September 13, 2018, Orders.

Relator agrees with Respondent, as stated on page thirteen of its Brief, that the sole issue before this Court is whether the Trial Court had jurisdiction to enter the September 13, 2018, Orders. Despite all the subterfuge raised in Respondent's Brief, this Court is tasked with answering that one straightforward question – Did the Trial Court

[1] For instance, Respondent and the Birch Creek Residents assert that Donald Kappelmann **testified** during trial that he never intended to convey developer rights. *See*, Brief of Respondent, page 9. This purported allegation is not supported in the record. In fact, contrary to the Birch Creek Residents' position, Mr. Kappelmann actually testified to the exact opposite stating, on both direct and cross-examination, that he intended to convey developer rights at the time he executed the New Sites Deed on August 25, 2014. However, the adopted judgment upon which the Birch Creek Residents rely contains contrary language allegedly because the trial court adopted the proposed judgment submitted by the Birch Creek Residents. It contains the language they **hoped** had been Mr. Kappelmann's testimony; but the trial transcript reveals no such testimony exists.

have jurisdiction to enter its September 13, 2018, Orders vacating the Reformation Judgment and allowing the Birch Creek Residents to intervene when such orders were entered more than thirty days after entry of the Reformation Judgment? According to Missouri Supreme Court Rules 75.01 and 74.06(b), as well as this Court's holdings in 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), Spicer v. Donald N. Spicer Rev. Living Trust, 336 S.W.3d 466 (Mo. banc 2011), the answer to the issue presented is "no"; the Trial Court did not have jurisdiction to enter the September 13, 2018, Orders.[2]

C. The Trial Court's Order Granting Intervention was Untimely.

Absent from Respondent's Brief was any direct argument pertaining to the timeliness of the Trial Court's order granting the Birch Creek Residents' motion to intervene. Presumably, this is because this Honorable Court's precedent on the subject is so clear – in order to be granted intervention, an intervenor must be joined as a party while the trial court maintained jurisdiction over the case. Wolfner, 955 S.W.2d at 928; Allen, 512 S.W.3d at 17; and Pius v. Boyd, 857 S.W.2d 238 (Mo. App. W.D. 1993). Here, the Reformation Judgment became final on August 18, 2018, at which time the Trial Court lost jurisdiction. Respondent did not rule upon the Birch Creek Residents' Motion to Intervene until September 13, 2018, some twenty-six days after the Trial Court lost jurisdiction.

[2] The determination that the Trial Court lacked jurisdiction to enter the September 13, 2018, Orders is also confirmed by holdings in the Appellate Court opinions of Sherman v. Kaplan, 522 S.W.3d 318 (Mo. App. W.D. 2017), and Pius, 857 S.W.2d at 238.

D. The Birch Creek Residents cannot invoke Rule 74.06(b) because they are not parties to the Reformation Lawsuit.

In their response to Relator's Brief, the Birch Creek Residents confirm that they requested Respondent set aside the Reformation Judgment by invoking Rule 74.06(b). *See*, Brief of Respondent, page 13. Ignoring the plain requirements of Rule 74.06(b), the Birch Creek Residents assert that Rule 74.06(b) motions are not subject to any particular time constraint, but only that they must be made within a reasonable time. *See*, Brief of Respondent, page 13. If the sole issue were the timeliness of a **party's** Rule 74.06(b) motion, we likely would not be before this Court. *See*, Rule 74.06(c). However, Respondent and the Birch Creek Residents simply ignore the key requirement that a Rule 74.06(b) movant must be a **party** to the lawsuit.[3] Rule 74.06(b); Wolfner, 955 S.W.2d at 930-31 (only a **party** may seek relief under Rule 74.06(b)); Allen, 512 S.W.3d at 29. Because the Birch Creek Residents were not joined as a party while the Trial Court maintained jurisdiction over the case, they are not now entitled to invoke Rule 74.06(b).

E. The Reformation Judgment was NOT granted by a default judgment proceeding.

Next, Respondent attempts to use Rule 74.05**, governing default judgments**, to assert that the Trial Court somehow had jurisdiction to grant the orders vacating the

[3] Respondent and the Birch Creek Residents have also ignored the procedural requirements of Rule 74.06(b) motions. Particularly, the movant must supply the trial court with competent evidence to establish a right to relief under Rule 74.06(b) and must produce that evidence at a hearing. Rule 74.06(c); Johnson v. Brown, 154 S.W.3d 448, 451 (Mo. App. S.D. 2005). No evidence was ever produced and no hearing was ever held on their motion.

Reformation Judgment and granting intervention more than thirty days after entry of the Reformation Judgment. Respondent's attempt to use the default judgment rule is inappropriate for numerous reasons, including: (1) the Reformation Judgment was not granted by a default judgment (it followed a trial); and (2) this Court's precedent addressing the same issues presented herein expressly holds to the contrary. *See*, Wolfner, 955 S.W.2d at 928; Allen, 512 S.W.3d at 17; and Pius, 857 S.W.2d at 238.

Absent from citing two Rules which do not apply, Respondent cited no authority which would contradict this Court's prior holdings in Wolfner and Allen or which would support the conclusion that the Trial Court retained jurisdiction over the case more than thirty days after entry of the Reformation Judgment.

1. The cases relied upon by Respondent addressing Rule 74.05 are inapplicable to the present action.

While pointing to Rule 74.05, Respondent relies on Nervig v. Workman, 285 S.W.3d 335 (Mo. App. S.D. 2009), and Kranz v. Centropolis Crusher, Inc., 630 S.W.2d 136 (Mo. App. W.D. 1982), for the proposition that the Trial Court had jurisdiction to grant the Birch Creek Residents' Motion to Intervene and Set Aside [Reformation] Judgment. Using Nervig and Kranz, Respondent asserts that under Rule 74.05, a trial court has jurisdiction to grant intervention during the one-year period within which it could set aside a default judgment. *See*, Brief of Respondent, pages 14-15. Respondent further argues that a motion to set aside a default judgment under Rule 74.05 is an independent action in equity and a ruling thereon is an independent judgment. *See*, Brief of Respondent, page 14.

Nervig and Kranz may be good law with respect to setting aside default judgments and Rule 74.05; but neither has any application to the present case **because the Reformation Lawsuit was not disposed of by default judgment**. The Reformation Lawsuit was concluded by a trial on the merits.

Rule 74.05 is expressly reserved for those particular cases disposed of by a default judgment. The Reformation Lawsuit is not such a case. Moreover, throughout Rule 74.05, it expressly refers to "default judgments." Conversely, Rule 74.06(b) applies to "a final judgment or order." Simply put, Rule 74.06 does not apply to default judgments, and Rule 74.05 does not apply to final judgments determined on the merits, like the Reformation Lawsuit.

If this Court does not confine the mechanism of Rule 74.06 only to **parties** – actual litigants to the case – then conceivably any person or entity could petition for a trial court to set aside a prior judgment on some meritless and wild claim of fraud. No case would ever have finality. To function properly, the judicial system needs and relies upon certainty, and under this Court's current precedent, there exists certainty and a bright-line rule determining finality and jurisdiction of judgments. This Court should not, as Respondent requests, undue that bright-line precedent.

2. The remaining cases cited by Respondent are inapposite.

Respondent also cites In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006), Bi-State Dev. Agency of Mo.-Ill. Metro. Dist. v. Ames Realty Co., 258 S.W.3d 99 (Mo. App. E.D. 2008), and McCullough v. Commerce Bank, N.A., 368 S.W.3d 296 (Mo. App. W.D. 2012), for the proposition that a Rule 74.06(b) proceeding, after a final

judgment has been entered, is an independent proceeding requiring a separate judgment. *See*, Brief of Respondent, page 15-16. Even if a Rule 74.06(b) action is an independent proceeding, these cases do not support Respondent's position that the Trial Court had jurisdiction **because the Birch Creek Residents were not parties to the Reformation Lawsuit, and therefore, cannot invoke Rule 74.06(b).**

Keep in mind, in each of the foregoing cases, the Rule 74.06(b) movant was a **party** to the case in chief. *See*, In re Marriage of Hendrix, 183 S.W.3d at 584-85; Bi-State Dev. Agency of Mo.-Ill. Metro. Dist., 258 S.W.3d at 102-06; McCullough, 368 S.W.3d 296 at 297-98. Here, the Birch Creek Residents were not parties. This is confirmed by their Motion to Intervene filed on August 14, 2018, in which they sought to join as parties. This motion was not ruled upon until September 13, 2018, or twenty-six days after the Reformation Judgment became final. For argument sake, it really matters not whether the Rule 74.06(b) motion is an independent proceeding or one forming a part of the underlying lawsuit because, either way, it is expressly reserved for use by only parties. Since the Birch Creek Residents were not a party to the Reformation Lawsuit, they have no right to seek relief under Rule 74.06.

3. Rule 74.06(d) did not extend the Trial Court's jurisdiction over the Reformation Lawsuit.

Lastly, in response to Relator's First Point Relied On, Respondent argues that Rule 74.06(d) somehow extends the Trial Court's jurisdiction. Rule 74.06(d) provides that a motion brought pursuant to Rule 74.06 shall be by motion as prescribed therein, or by an independent action. However, Respondent again ignores the operative provision of Rule

74.06(d), which provides that "Rule 74.06 does not limit the power of the court to entertain an independent action to relieve **a party** from a judgment…" Again, since the Birch Creek Residents were not joined as parties while the Trial Court retained jurisdiction, they have no right to invoke any subsection of Rule 74.06.

III. Relator's Second Point Relief On

A. Respondent's allegations of fraud are meritless and without evidentiary support.

In response to Relator's Second Point Relied On, Respondent asserts that it was proper to set aside the Reformation Judgment on the basis of fraud.[4] As set forth above, this argument wholly ignores the requirement that: (1) the Birch Creek Residents must be **a party** to the litigation to invoke Rule 74.06(b); and (2) that the Trial Court must have jurisdiction over the case to join the Birch Creek Residents as a party. Unfortunately for the Birch Creek Residents' argument, the Trial Court's attempt to join the Birch Creek Residents as litigants some twenty-six days after the Reformation Judgment became final was ineffective because the Trial Court lacked jurisdiction. The simple fact remains, they were not parties and could not invoke Rule 74.06(b).

[4] Even if the Birch Creek Residents had timely been joined as parties – which they were not – they were still required to furnish concrete evidence of fraud which could only be assessed after a hearing on the merits. Johnson, 154 S.W.3d at 451. Here, the Birch Creek Residents supplied no substantiated evidence of fraud. Unsubstantiated allegations do not satisfy their legal obligation if Rule 74.06(b) even applied.

B. The Birch Creek Residents are not necessary and/or indispensable parties.

Respondent asserts that the Reformation Judgment is somehow void because the Birch Creek Residents are necessary and indispensable parties. Rule 52.04 governs whether an individual is a "necessary and indispensable" party. That Rule, in pertinent part, reads:

> A person shall be joined in the action if: (1) in the person's absence complete relief cannot be accorded among those already parties,[5] or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of the claimed interest.

Under Rule 52.04(a), an interest compelling joinder **must be such a direct claim upon the subject matter** that the person will either gain or lose by direct operation of the judgment to be rendered. Saladin v. Jennings, 111 S.W.3d 435 (Mo. App. E.D. 2003). **An interest demanding joinder is not merely consequential, remote or conjectural**. Sterling Inv. Grp., LLC v. Bd. of Managers of Brentwood Forest Condo. Ass'n, 402 S.W.3d 95, 97 (Mo. App. E.D. 2013). The absence of a necessary party is not fatal to jurisdiction; the remedy is joinder. Id. at 98.

[5] Complete relief could be and was accorded to those persons who were parties to the Reformation Lawsuit. The Reformation Judgment reformed the New Sites Deed to add words which confirmed that the original intent of AJKJ was to transfer developer rights to New Sites. In any event, this basis was not addressed or argued by Respondent.

1. The Birch Creek Residents are not necessary parties.

Respondent asserts, without any evidentiary or legal support, that the Birch Creek Residents are necessary and indispensable parties to the Reformation Lawsuit. Without asserting a direct claim upon the actual subject matter of the Reformation Lawsuit[6] – the developer rights – Respondent makes an unsubstantiated assertion that

> [i]f Bequette is the developer, it will use this status as a basis for developing homes whose size and design is wholly inconsistent with the existing homes in the Subdivision and the metrics set forth in the Covenants, thereby decreasing the property values of the existing homes in the Subdivision and eradicating the intent of the Covenants. *See*, Brief of Respondent, page 19.

This unsupported allegation is jam-packed with nothing more than pure speculation and conjecture. Moreover, Respondent fails to show **how** the Birch Creek Residents can or have asserted a **direct claim upon developer rights** (the subject matter of the Reformation Lawsuit).[7] Not one of the Birch Creek Residents has ever or could even claim an interest as the Subdivision developer.

In analyzing the Birch Creek Residents' claim, it is crucial to remember that only three words in the New Sites Deed were reformed; specifically, the words "including developer rights" were added. Nothing affecting **title** to any property, including title

---

[6] Not every person with some tangential interest in property is a necessary and indispensable party. In Dreyer v. Dreyer, 657 S.W.2d 363 (Mo. App. E.D. 1983), the Court of Appeals held that in a dissolution of marriage action, a deed conveying property to husband, wife and a third party did not require joinder of the third party because their interest was not being affected by the dissolution judgment. Only the interest held jointly by the husband and wife was being affected. Id.

[7] In determining which parties are required before the court, the court considers the nature of relief requested and the interests to be adjudicated. Sterling Inv. Grp., LLC, 402 S.W.3d at 97.

allegedly owned by the Birch Creek Residents, was reformed or affected. The only interest affected by the Reformation Judgment was a personal right belonging, at one time or another, to the four parties named in the Reformation Lawsuit. *See*, Hellman v. Sparks, 500 S.W.3d 252, 260 (Mo. App. S.D. 2015) (developer rights of a platted subdivision are personal rights). Both the Eastern and Southern Districts of the Court of Appeals have held that "only in cases where an adjudication of **title** to real estate is sought are absent landowners necessary or indispensable parties." Saladin, 111 S.W.3d at 440 (emphasis added), citing Frye v. Shuman, 806 S.W.2d 157, 159 (Mo. App. S.D. 1991).

In an action for the reformation of an instrument on the grounds of mutual mistake, the parties affected by the mistake are the only ones who are necessary. Shaffer v. Dalrymple, 507 S.W.2d 65, 69 (Mo. App. 1974). Here, the only interest affected by the Reformation Judgment is the developer rights to the Subdivision – a personal right. The only parties to the original mistake were AJKJ and New Sites. Because New Sites expressly transferred developer rights to Legends Bank by deed, and Legends Bank conveyed those exact same developer rights to Bequette Construction by deed, those parties were joined. However, the Birch Creek Residents have never claimed, nor could they even claim, an interest in the developer rights to the Subdivision. Therefore, they are not and should not be considered necessary and/or indispensable parties.

2. The Birch Creek Residents are not indispensable parties.

To determine if a party is an indispensable party, such that litigation cannot progress without that party, Rule 52.04(b) sets out the following four factors:

> (i) to what extent a judgment rendered in the person's absence might be prejudicial to that person or those already parties; (ii) the extent to which by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (iii) whether a judgment rendered in the person's absence will be adequate; and (iv) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In asserting the Birch Creek Residents are somehow indispensable parties, Respondent again relies on arguments which are wholly conjectural, speculative and remote. Respondent asserts that the Birch Creek Residents have an interest in the Covenants, **and but for** the Covenants, they have an interest in the identity of the developer, **and that if** Bequette Construction is the developer, it **may** build "smaller and cheaper" homes which **may** adversely affect the Birch Creek Residents' financial interests.[8] First, these arguments should be reserved for alternative litigation; particularly, litigation concerning enforcement of the Covenants, not litigation correcting a mistake in the written conveyance of developer rights. Second, this is again pure speculation and conjecture, and not a direct claim upon the subject matter of the Reformation Lawsuit (i.e. ownership of developer rights).

Now, turning to the factors enumerated by Rule 52.04(b), the Birch Creek Residents are not indispensable parties because the foregoing factors show that they have no interest affected by the Reformation Judgment. First, the Reformation Judgment is not prejudicial to the interests of the Birch Creek Residents because they have no interest in developer rights. In an attempt to confuse the issues, they assert they have an interest

[8] The conjecture, remoteness and speculation of Respondent's own argument is nearly self-proving.

in the actions of the current developer and his compliance with the Covenants. That interest is wholly distinct from the actual identity of the developer and the right to own or possess developer rights.

Second, since there is no prejudice to the Birch Creek Residents, there need not be any protective provisions or shaping of relief in the Reformation Judgment. However, since the Reformation Judgment pertained only to developer rights, which are personal rights that have only ever been owned by four parties, all of whom were parties to the Reformation Lawsuit, the Reformation Judgment is extremely limited in scope.

Third, a judgment rendered in the absence of the Birch Creek Residents was more than adequate because they were not needed to adjudicate the matter. Fourth, AJKJ, and for that matter all defendants in the Reformation Lawsuit, would have no adequate remedy if the Reformation Lawsuit were dismissed or the Reformation Judgment set aside. This is a viable mechanism to correct a mistake in the wording of the New Sites Deed.

An analogous case finding that the missing homeowners were not necessary or indispensable parties is Saladin, 111 S.W.3d at 435. There, certain subdivision homeowners filed suit against the trustees seeking to compel maintenance of a particular subdivision road. Id. at 438. The defendant-trustees moved to dismiss on the basis that the plaintiffs failed to join all persons owning property abutting the street in question, arguing they were necessary and indispensable parties. Id. The Court of Appeals held that the missing property owners were **not** necessary and/or indispensable parties because

they had no direct claim of ownership in the street. Id. at 440. Therefore, any judgment would not affect them because they had neither gained nor lost anything. Id.

See also, Adams v. White, 512 S.W.2d 905 (Mo. App. 1974), wherein the Court of Appeals held that the defendant's wife was not a necessary or indispensable party in an ejectment proceeding where she claimed no ownership interest in the real estate forming the subject matter of the action.

Here, again, the simple fact remains that the Birch Creek Residents have no claim to ownership or control of the developer rights. The subject matter of the Reformation Lawsuit dealt only with developer rights. It did **not** change any parties' ownership interest in real estate, it did not change any legal description, and it did not change any Covenants. The Birch Creek Residents neither gained nor lost anything by entry of the Reformation Judgment.

C. The Birch Creek Residents are not bona fide purchasers.

Respondent further argues that setting aside the Reformation Judgment out of time was still proper because the Birch Creek Residents are bona fide purchasers. As an initial matter, a claim that the Birch Creek Residents are bona fide purchasers does not invalidate the Reformation Judgment. This is a claim or affirmative defense which they would be required to plead and prove. *See*, Will Inv., Inc. v. Young, 317 S.W.3d 157, 165 (Mo. App. S.D. 2010).

Next, Respondent argues that because the Birch Creek Residents purchased their real estate subject to restrictive covenants, the New Sites Deed can never be reformed. *See*, Brief of Respondent, page 20. In support, Respondent cites authority asserting one

who purchases real estate subject to restrictive covenants is bound by those covenants, and that a change to restrictive covenants is valid as to all of the restricted lots or none of the restricted lots. Id. This argument is misguided and seeks to confuse the issues. The Covenants affecting the Birch Creek Residents' lots were not reformed or changed by the Reformation Judgment. Rather, the only matter affected by the Reformation Judgment was to confirm AJKJ's prior intent to convey developer rights to its co-developer, New Sites.[9] It had no bearing on the Covenants governing the Birch Creek Residents' lots.

Lastly, but perhaps most importantly, the Birch Creek Residents cannot claim to be bona fide purchasers because they fail to satisfy a key element. To be a bona fide purchaser, they must: (1) be a **purchaser** for valuable consideration, (2) in good faith, and (3) without notice of the rights of others. La Near v. CitiMortgage, Inc., 364 S.W.3d 236, 239 (Mo. App. E.D. 2012). The issue for the Birch Creek Residents is their claim as "purchaser." Not one of the Birch Creek Residents ever purchased, or claimed to purchase, the developer rights. Therefore, they are not bona fide purchasers as to the narrow issue addressed in the Reformation Lawsuit.

D. Equity and fairness require this Court enforce its rules and precedents.

Finally, the Birch Creek Residents assert that it would somehow be inequitable to allow the Reformation Judgment to stand. Here, it appears that Respondent is asking this

[9] Remember, the Subdivision was originally started by AJKJ and New Sites as co-developers. After AJKJ issued its deed, it gave all rights to New Sites who was also an original developer and remained as the sole developer after conveyance of the New Sites Deed.

Court to abandon its clear precedent, the governing Supreme Court Rules, and to eliminate the bright-line rule established thereby in a last-ditch effort to carve out an equitable exception for the Birch Creek Residents. In trying to create this new equitable exception to the thirty-day jurisdiction rule, the Birch Creek Residents have failed to inform this Court of all necessary and pertinent facts, **namely, that the Birch Creek Residents had actual and personal knowledge of the Reformation Lawsuit five days after it was filed and five weeks before it went to trial, and yet did nothing to intervene**.[10]

For the Court's convenience, AJKJ provides the following timeline for the Court's consideration:

- June 1, 2018 – Reformation Lawsuit filed by AJKJ
- **June 6, 2018 – Birch Creek Residents attach copy of Petition for Reformation of Deed as Exhibit C to Plaintiffs' Opposition to Motion to Reconsider Judgment or, in the Alternative, for New Trial in Case No. 16AB-CC00083**
- July 10, 2018 – Notice of Trial electronically filed with Court
- July 12, 2018* (possibly July 6, 2018) – Counsel for the Birch Creek Residents discusses the Reformation Lawsuit with the Honorable Ada Brehe-Krueger and Attorney Sean Brinker in Case Number 16AB-CC00083[11]

[10] At the very least, counsel for the Birch Creek Residents had actual and personal knowledge of the Reformation Lawsuit as early as June 6, 2018 because the Petition for Reformation of Deed was attached by the Birch Creek Residents' attorney to a motion filed in the 16AB-CC00083 case. This knowledge, obtained during the course and scope of his representation, is imputed to the Birch Creek Residents. Fitzgerald v. State ex rel. Adamson, 987 S.W.2d 534, 536 (Mo. App. S.D. 1999).

[11] Attorney Brinker and Attorney Clithero appeared before Judge Brehe-Krueger on July 6, 2018, and July 12, 2018. During an in-chambers conversation which occurred on

- July 13, 2018 – Trial held on the Reformation Lawsuit
- July 19, 2018 – Reformation Judgment entered
- August 14, 2018 – Birch Creek Residents file their Motion to Intervene and Set Aside Judgment
- August 18, 2018 – Judge Hellmann loses jurisdiction thirty days after entry of the Reformation Judgment which is now a final judgment
- August 31, 2018 – AJKJ files its Response and Objection to the Birch Creek Residents' Motion to Intervene and Set Aside Judgment advising the Trial Court that it lacked jurisdiction to enter any orders
- September 13, 2018 – the Trial Court *sua sponte* enters an order granting the Birch Creek Residents' Motion to Intervene and Set Aside Judgment without a hearing or receiving evidence

The above timeline is critical for this Court if it chooses to apply equity because it shows that the Birch Creek Residents had actual and personal knowledge of the Reformation Lawsuit a mere five days after it was filed and approximately five weeks before trial, yet they chose to do nothing until nearly four weeks after entry of the Reformation Judgment. Even after discussing the Reformation Lawsuit with Judge Brehe-Krueger and Attorney Brinker, the Birch Creek Residents did nothing until almost four weeks after the Reformation Lawsuit trial. The problem they now ask this Court to correct is solely one of their own making.

---

either July 6, 2018, or July 12, 2018, although the exact date is unknown, Judge Brehe-Krueger and Attorney Clithero discussed, in detail, the Reformation Lawsuit in the presence of Attorney Brinker. Attorney Clithero also addressed the Reformation Lawsuit during oral argument on July 12, 2018, oral argument was audio recorded.

Given the foregoing facts, it is hard to fathom how the Birch Creek Residents can, in good faith, assert a claim of sneakiness or fraud, or seek an equitable exception to be allowed to intervene out of time. Not only did the Birch Creek Residents have actual knowledge of the Reformation Lawsuit five days after it was filed, and approximately five weeks before trial, but their attorney even discussed this very case with Judge Brehe-Krueger. Based upon these facts, there is no justifiable or worthy basis for this Court to abandon its clear precedent and carve out some equitable exception for the Birch Creek Residents.

Remember, to even get equity, one must do equity. In this case, no equitable exception should be established because the Birch Creek Residents have not done equity. The undisputed facts show that the Birch Creek Residents had actual and personal knowledge of the Reformation Lawsuit five days after it was filed and some five weeks before trial. Yet, it was the Birch Creek Residents who, despite their actual knowledge of the Reformation Lawsuit, and for reasons unknown, delayed in attempting to intervene in the Reformation Lawsuit. The Birch Creek Residents' unexplained delay, caused solely by them, put Judge Hellmann in an untenable situation as they sought his assistance to resolve their own failure to timely secure intervention during the time when the Trial Court still had jurisdiction over the Reformation Lawsuit.

CONCLUSION

Both parties agree that the sole issue to be determined by this Court is whether the Trial Court had jurisdiction more than thirty days after entry of the Reformation Judgment when it entered its orders vacating the Reformation Judgment and allowing the

Birch Creek Residents to intervene. Under this Court's precedent established by Wolfner, Allen, and Spicer, as well as Rule 75.01, the answer is "no"; the Trial Court did not have jurisdiction to enter its September 13, 2018, Orders.

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: March 7, 2019.

Respectfully submitted,

ZICK, VOSS, POLITTE & RICHARDSON
A Professional Corporation

By:_____
Kurt A. Voss, MBE #36668
Sean D. Brinker, MBE #67404
438 West Front Street
P.O. Box 2114
Washington, Missouri 63090
Phone: (636) 239-1616
Fax: (636) 239-5161
kav@zvplaw.com
sdb@zvplaw.com

Attorneys for Petitioner/Relator

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 5,615.

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 March 7, 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

W:\A-B-C-D-E-F\AJKJ Inc\Writ Prohibition\Reply Brief.docx