

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**CHILDREN'S WISH FOUNDATION
INTERNATIONAL, INC.,**

APPELLANT,

**v.
MAYER HOFFMAN McCANN PC,
ET AL.,**

RESPONDENTS.

DOCKET NUMBER WD70616

DATE: April 27, 2010

Appeal From:

Jackson County Circuit Court
The Honorable Robert M. Schieber, Judge

Appellate Judges:

Division Four: Thomas H. Newton, Chief Judge, Presiding, James M. Smart, Jr., and Cynthia L. Martin, Judges

Attorneys:

Michael W. Blanton, Leawood, KS, for appellant.

John C. Aisenbrey and Russell J. Keller, Kansas City, MO, for respondents.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**CHILDREN'S WISH FOUNDATION
INTERNATIONAL, INC.,**

APPELLANT,

**v.
MAYER HOFFMAN McCANN PC,
ET AL.,**

RESPONDENTS.

No. WD70616

Jackson County

Before Division Four Judges: Thomas H. Newton, Chief Judge, Presiding, James M. Smart, Jr., and Cynthia L. Martin, Judges

Children' Wish Foundation appeals the trial court's judgment following jury verdicts in favor of Mayer Hoffman McCann PC and CBIZ Tax & Advisory of KC, Inc. on claims of professional negligence. Children's Wish claims the trial court erred in submitting a contributory negligence instruction because such an instruction is not permissible in economic loss negligence cases. Children's Wish contends that at most a comparative fault instruction would have been permissible in light of *Gustafson v. Benda*. Should contributory negligence remain a defense, Children's Wish argues for adoption of the audit interference rule which would limit the defense to circumstances where a client's negligence has interfered with an auditor's ability to perform its professional duties.

AFFIRMED.

Division Four holds:

- (1) Contributory negligence remains an available affirmative defense in economic loss negligence cases following *Gustafson v. Benda*.
- (2) Comparative fault is not an available defense in economic loss negligence cases.
- (3) In professional negligence economic loss cases, the contributory negligence defense cannot be submitted where the effect would be to relieve a professional of liability by assessing fault to a client for failing to discharge a responsibility within the scope of the professional's duty. The audit interference rule need not be formally adopted as the rationale for the rule is otherwise encompassed by this principle.
- (4) Though the contributory negligence instruction submitted in this case erroneously assessed fault to the client for failing to discharge a responsibility within the scope of the

professional's duty, this instructional error was not preserved, and plain error review is not warranted.

Opinion by: Cynthia L. Martin, Judge

April 27, 2010

This summary is UNOFFICIAL and should not be quoted or cited.