IN THE SUPREME COURT OF MISSOURI

GATEWAY FOAN INSULATORS, INC.,	)	
	)	
Respondent,	)	
	)	
	)	Case No. SC89576
	)	Twenty-Third Judicial Circuit
JOKERST PAVING &	)	(Case No. CV304-6740-CC-J2)
CONTRACTING, INC.,	)	
	)	
Appellant.		

Appeal From The Circuit Court Of Jefferson County
Honorable Gary P. Kramer
Division II

Substitute Reply Brief of Appellant Jokerst Paving & Contracting, Inc.

Jessica A. Mikale #52839
Bianca L. Eden #50301
WEGMANN, STEWART, DIEFFENBACH, TESREAU
SHERMAN & EDEN, P.C.
Attorneys for Appellant/Defendant
P.O. Box 740, Hillsboro, MO 63050
(636) 797-2665; FAX (636) 797-3505
jam@wegmannlaw.com
ble@wegmannlaw.com

INDEX

TABLE OF AUTHORITIES

ARGUMENT

I. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOSS OF USE OF VEHICLE AND LOST PROFITS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE LOSS OF USE IS ONLY AVAILABLE FOR RECOVERY FOR DAMAGE TO PERSONAL PROPERTY IF THE PROPERTY IS REPAIRED AND THE VEHICLE WAS REPLACED NOT REPAIRED.

Respondent in its substitute brief fails to comply with Missouri Supreme Court Rule 83.08(b) as points put forth by Respondent alter the basis of a claim that was raised in the response to the Court of Appeals brief.

1. APPELLANT'S RELIANCE ON ORR IS NOT MISGUIDED

Loss of use of vehicle is limited to the reasonable cost of a rental vehicle for the time period of repair of the damaged vehicle unless the claimant can establish the uniqueness of the vehicle and the inability to rent a similar vehicle and only then is lost profits for a reasonable period available to claimant. Lewis v. Lawless Homes, Inc., 984 S.W.2d 583, 586 (Mo. App. E.D. 1999).

Respondent attempts to assert that Orr v. Williams, 379 S.W.2d 181(Mo. App. W.D. 1964) stands as authority that lost profits are available for the time period it takes to replace unique personal property. Respondent's assertion though is a misstatement of the holdings in Orr v. Williams.

In Orr v. Williams, the plaintiff's tractor-trailer had been damaged in an accident

caused by a wrecker that had a cable stretched across the roadway attempting to pull another vehicle from the ditch. Id. at 184-185. Plaintiff Orr's "tractor was towed to Kansas City to a framing company for **repairs**". Id. at 186. (Emphasis added). The Orr court held:

> In respect to the measure of damages through negligence to personal property used in business there are two classifications of such property to be considered. One is property that has been entirely destroyed by the negligence complained of, in which class a recovery of the full value of the destroyed chattel excludes recovery for loss of use of same. The other class is composed of property that has not been destroyed …but merely damaged, permitting recovery of the value of loss of use of such property for the reasonable period during which the owner is deprived of the damaged chattel for **repairs.** (Emphasis added)

Id. at 189. The court found that the eight weeks it took to repair the **tractor** was reasonable and awarded loss of profits for the time of repair. Id. at 190-191.

Respondent would like the court to belief that Orr was really a replacement case because the trailer component was replaced with "a specifically built unit necessary to serve his purposes." (Res. Sub. 17). What Respondent fails to note is that the trailer to Mr. Orr was useless unless he had a tractor to pull it. The trailer was merely a part of the tractor-trailer combination which was repaired. The trailer in effect was a part, much like brakes or tires, which had to be replaced in order for the entire vehicle to be repaired. The court notes same by awarding lost profits for the eight week time period it took to have the tractor repaired. Orr v. Williams, 379 S.W.2d at 190-191. The uniqueness of

the tractor was the reason the court awarded lost profits, stating that Mr. Orr's "evidence of the special features of the damaged tractor …was substantial evidence of the unavailability of a similar machine for hire in plaintiff's locality." Id. at 190.

It is undisputed that Respondent replaced its vehicle. Respondent's assertion that Appellant withheld possession of the destroyed vehicle from Respondent is 1) not supported by the evidence and 2) irrelevant as Respondent did not repair the vehicle. Respondent states that testimony showed that Appellant had withheld the property from Respondent, however, that is not the case. Ron Vunesky stated he had called an insurance adjuster and been told that he could not get the property. (T. 105, l. 4-13). There was no testimony that Appellant refused access. Further, by Mr. Vunesky's testimony it was established that, after retrieving the vehicle, it was placed in storage and thereafter title was transferred to said storage facility for $2500. (T. 106, l. 11-T. 107, l. 8).

The burden of proof to show reasonableness is upon the Respondent. Stallman v. Hill, 510 S.W.2d 796 (Mo. App. W.D. 1974). Respondent presented no evidence of its inability to borrow funds other than a blanket statement by its owner and accountant. Further, Respondent admits that new employees were hired. (T. 75, l. 23-25). Also, the evidence showed that the year after the accident more than $66,000 in depreciable assets were placed into service. (T. 159, l. 15-21; Ex. C). Also, it is undisputed that a new rig could have been built in two to three weeks. The only due diligence shown by Respondent is in bringing its decommissioned its decommissioned vehicle back into service which took 8 days. (Ex. 6).

Under Orr v. Williams, as the vehicle was replaced and not repaired, Respondent was not entitled to an award of lost profits and therefore the judgment of the court must be reversed.

2. **AMERISTAR IS NOT THE NEXT STEP FROM ORR**.

Respondent in its second subpoint tries very hard to convince the court that its case is no different than the Plaintiffs in Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo banc 2005). Respondent though ignores that the question of repair versus replacement damages was not raised by the parties and the court did not address the issue. Further, Ameristar Jet Charter Inc. did not own the jet that was damaged by Dodson, it leased the plane from the co-plaintiff Sierra American Corporation. Id. at 53. As such the only damages available to Ameristar Jet Charter were for loss of use. The trial court's order did not split the judgment between the plaintiffs and the appellate court did not reach a determination as to percentages as it found insufficient evidence for an award of lost profits and reversed the judgment of the trial court and remanded for rehearing on the issue of damages. Id. at 53-54, 57. [1]

3. **AMERISTAR DOES NOT COMPENSATE RESPONDENT.**

As Respondent notes, "the goal of awarding damages is to compensate a party for a legally recognized loss." Ameristar at 54. What Respondent ignores is that loss of profits is not a legally recognized loss when damaged personal property is replaced and not repaired. The holding in Orr was that recovery for lost profits was only available to a

[1] This argument was never raised by Appellant until this brief and Respondent, though stating Appellant argued same, does not cite to any writing of Appellant. (Res. Sub. Brief p. 19)

claimant with a unique vehicle when the vehicle was repaired. Orr at 189-190. Respondent continues to misconstrue the law as set forth in Orr. (Res. Sub. Br. p. 20) The Eastern District Court of Appeals noted, not with dissatisfaction as claimed by Respondent, that Missouri's rule of law regarding lost profits is in conformance with the majority of states. (Res. App. A66).

Respondent would have the court rely on what it terms a "modern" case decided in California in 1959. (Res. Sub. Br. 22). The court should note that Orr v. Williams was decided subsequent to the California case of Reynolds v. Bank of Am. Nat'l Trust and Sav. Assoc., 345 P.2d 926 (Cal. 1959).

Further, Respondent's arguments regarding references to the Restatement of Torts and Restatement (Second) of Torts are not persuasive. Respondent does not cite to any case reversing long standing Missouri law to adopt the Restatement of Torts. Sides v. St. Anthony's Medical Center, 258 S.W.3d 811 (Mo 2008) was a matter of first impression before the court in which the court adopted the Restatement position. In Harris v. Niehaus, 857 S.W.2d 222, 226 (Mo. 1986), the court adopted certain sections of the Restatement as being a correct statement of the law of Missouri. Said decision was not a reversal of longstanding Missouri law. In Dillard v. Earnhart, 457 S.W.2d 666, 670 (Mo. 1970), the court found that the evidentiary standard set forth in the Restatement was in conformance with Missouri law. In Dickinson v. Eden Theatre Co., 231 S.W.2d 609, 610 (Mo. 1950), the court found the Restatement position regarding third party activities in businesses to be in conformance with Missouri law.

The current law regarding the unavailability of loss of use for property that is replaced and not repaired should be upheld and the judgment of the trial court should be reversed.

4. MISSOURI'S LAW ON REPAIR VS. REPLACEMENT IS IN CONFORMANCE WITH A MAJORITY OF THE STATES IN THE UNION.

The arguments set forth in Respondent's subpoint 4 were not raised before the appellate court and therefore said argument is an alteration of the basis of Respondent's argument to sustain the trial court's judgment which is not in conformance with Missouri Supreme Court Rule 83.08(b) and should be disregarded.

The argument of Respondent is acknowledging that loss of profits is not available in Missouri to a plaintiff in a situation when damaged personal property is replaced and not repaired. Respondent is essentially requesting the court to play follow the leader with a minority of other states by following what Respondent has termed a "modern" view with no explanation as to what is modern about it other than it is not the longstanding law of Missouri and defeats Respondent's claim.

5. NO SPLIT IN MISSOURI EXISTS.

Respondent puts forth the argument that Missouri's case law is split as to the issue of loss of use damages. Respondent's argument though is flawed. Hanes v. Twin Gable Farm, Inc., 714 S.W.2d 667 (Mo. App. 1986) was not a negligence case, it was a fraudulent misrepresentation case. The court held that in an action for fraud the fraudulent party may be held liable for all consequential damages which included loss of

use. Id. at 670-671. As the damages available in a fraud action are different than those available in a negligence property damage claim, there was no need for the court to discuss the ludicrous proposition of "whether or not the plaintiff repaired the sterile bull" as put forth by Respondent. (Res. Sub. Br. 28). Further because the theory of recovery was fraud and not negligence the Hanes case has no value to this court to determine the question before the court of whether a party must repair personal property in order to have loss of use available as an element of damages.

Further, in Smith v. Morgan Drive Away, Inc., 613 S.W.2d 469, 471 (Mo. App. 1981), the court made clear that the matter was primarily a bailment action on which the plaintiffs never declared whether they were proceeding on the bailment contract or the negligence. The issue of repair or replacement was never reached as at the time of the appeal in that the bailment had not ended as the defendant still had possession of the mobile home and the cause was remanded for a new trial as to damages. Id. at 472. As such the case is of little value as the core question of this case was not at issue in Smith.

Further Respondent is incorrect in its statement that the court in Weller v. Hayes Truck Lines, 197 S.W.2d 657 (Mo. 1946) made no statement as to whether the trailer was repaired. The appellate court quotes another court ruling in stating that "the loss of use of the automobile during the period of repair is as much the natural and necessary consequence of the tortious act of the defendant described in the declaration as is the cost of the repair." Id. at 663-664. As such the inference is that the trailer was repaired, and therefore Weller does not deviate from the rule set forth in Orr v. Williams.

Respondent further tries to garner the sympathy of the court by stating to the court facts that were not in evidence before the trial court. Respondent's assertion that Appellant withheld possession of the destroyed vehicle from Respondent is 1) not supported by the evidence and 2) irrelevant as Respondent did not repair the vehicle. Respondent states that testimony showed that Appellant had withheld the property from Respondent, however, that is not the case. Ron Vunesky stated he had called an insurance adjuster and been told that he could not get the property. (T. 105, l. 4-13). There was no testimony that Appellant refused access or for that matter that Respondent had even attempted access. Further, by Mr. Vunesky's testimony it was established that, after retrieving the vehicle, it was placed in storage and thereafter title was transferred to said storage facility for $2500. (T. 106, l. 11-T. 107, l. 8).

As none of the cases cited by Respondent are on point with the question at hand, they are not persuasive to the issue of overturning longstanding Missouri law on the unavailability of loss of use damages when personal property is replaced and not repaired.

6. THE LACK OF AWARD OF LOST PROFITS FOR A REPLACED VEHICLE IS NOT AGAINST PUBLIC POLICY.

The arguments set forth in Respondent's subpoint 6 were not raised before the appellate court and therefore said argument is an alteration of the basis of Respondent's argument to sustain the trial court's judgment which is not in conformance with Missouri Supreme Court Rule 83.08(b) and should be disregarded.

In further reply, the court has already set forth the public policy of the State of Missouri on the question of damages of loss of use when personal property is replaced and not repaired in Orr v. Williams. The court in In re Estate of Rahn, 291 S.W. 120, 123 (Mo. 1927) stated that "the only authentic and admissible evidence of the public policy of a state on any given subject are its constitution, laws and judicial decisions. The public policy of a state, of which courts take notice, and to which they give effect, must be deduced from these sources." No change in the law or in judicial decisions of Missouri has been cited by Respondent in regards to purely economic losses to warrant the court declaring a change in public policy as requested by Respondent.

The cases cited by Respondent had nothing to do with purely economic loss as complained of by Respondent. In re Estate of Rahn, 291 S.W. 120, 123 (Mo. 1927) centered around the bequest of money to a German Red Cross soon after World War I. Schulte v. Missionaries of LaSalette Corp. of Mo. dealt with the issue of immunity of charitable organizations under the law of Missouri. 352 S.W.2d 636 (Mo. 1961). Finally, Brandt v. Medical Defense Assocs., 856 S.W.2d 667 (Mo. 1993) deals with the issue of when a doctor may release medical information regarding a patient.

Respondent continues to attempt to refer to facts that were not in evidence before the trial court. Respondent's assertion that Appellant withheld possession of the destroyed vehicle from Respondent is 1) not supported by the evidence and 2) irrelevant as Respondent did not repair the vehicle. Respondent states that testimony showed that Appellant had withheld the property from Respondent, however, that is not the case. Ron Vunesky stated he had called an insurance adjuster and been told that he could not get the

property. (T. 105, l. 4-13). There was no testimony that Appellant refused access or for that matter that Respondent had even attempted access. Further, by Mr. Vunesky's testimony it was established that, after retrieving the vehicle, it was placed in storage and thereafter title was transferred to said storage facility for $2500. (T. 106, l. 11-T. 107, l. 8).

The judgment of the trial court as to lost profits should be reversed as the public policy long stated by the courts of Missouri is that when a vehicle is replaced and not repaired, loss of use for same is not available to the plaintiff.

7. HYPOTHETICAL EXAMPLES ARE OF NO VALUE.

The hypothetical examples put forth by Respondent are inopposite because they are not the facts of this case as put before the trial court. While Respondent tries to garner sympathy from the court for the economic loss of the mom and pop business for what they term an archaic rule of law, the plight of the mom and pop business is no different now than when Orr v. Williams was decided.

III. THE TRIAL COURT ERRED IN AWARDING RESPONDENT LOST PROFITS IN THAT THERE WAS NOT SUBSTANTIAL EVIDENCE TO SUPPORT THE AWARD BECAUSE THE TESTIMONY THAT RESPONDENT'S REVENUE WOULD INCREASE WAS MERE SPECULATION AND NOT COMPETENT PROOF AS TO ANTICIPATED PROFITS.

Respondent's reliance on the opinion in Ameristar Jet Charter, Inc. v. Dodson Int'l Parts, Inc., 155 S.W.3d 50 (Mo. 2005) is misplaced. The issue in Ameristar regarding lost profits centered around which expenses were to be deducted from the lost revenue to calculate the lost profit. Id. at 55-56. Appellant made no attack on the expenses of Respondent. Appellant's argument is that the anticipated revenue was mere speculation as Respondent's expert made no correlation between growth in the construction industry and growth in the use of the product offered by Respondent.

Respondent failed in its argument to negate Appellant's statements as to the flaws of Respondent's expert testimony. Respondent did not deny that Ms. Burke was incorrect in her testimony that Respondent's revenue if not for the accident would have increased eighteen percent in 2002 over the 2001 amount. (Res. Sub. Br. 37-43). Nor did Respondent show any correlation between Respondent's revenue prior to the accident and the data relied on by Ms. Burke. Id.

As the evidence presented by Respondent was mere speculation as to expected revenue and therefore profits, the judgment of the trial court must be reversed.

IV. THE TRIAL COURT ERRED IN AWARDING RESPONDENT INTEREST ON A LOAN IN THE SUM OF $11,723.83 INTEREST IN THAT SAID RULING MISAPPLIES THE LAW BECAUSE THE PROPER MEASURE OF DAMAGES TO PERSONAL PROPERTY IS DIMUNITION IN VALUE AND THE AWARD OF INTEREST ENCOMPASSES REPLACEMENT COSTS AND IS A DOUBLE RECOVERY FOR THE RESPONDENT.

The arguments set forth in Respondent's Point IV in response to Appellant's Points IV and V were not raised before the appellate court and therefore said argument is an alteration of the basis of Respondent's argument to sustain the trial court's judgment which is not in conformance with Missouri Supreme Court Rule 83.08(b) and should be disregarded.

Respondent cites to no authority which states that the recovery of interest incurred in purchasing a new vehicle is recoverable and by doing so is conceding this point. Respondent's reliance on section 408.020 RSMo and Orr are either blatant misstatements of the law or gross misreadings of the law. Section 408.020 RSMo (2000) is mainly at issue in contract actions or where the claim is liquidated. Respondent made no demand in this tort action for prejudgment interest. (L.F. 7-8). Further Orr clearly states that the proper measure of damages is diminution in value and has no discussion of interest. Orr at 190. The trial court clearly states that the award is for interest on the loan to replace the vehicle. (L.F. 16).

Respondent cites to no case in which interest on a loan for a replacement vehicle is held to be general damages. Respondent ignores that the definition of special damages is

that said damages "are the natural but not necessary result of a wrongful act." Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 84 (Mo. 1958); Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 809 (Mo. App. W.D. 2005). Respondent misconstrues the requirements of general versus special. "Necessary" might be better phrased as "necessarily" in that special damages are the natural consequences but do not necessarily appear in the average tort case. Interest is such a category. It is a natural and necessary consequence of a personal property damage case that property be replaced or repaired as determined by the proper measure of damages. Interest on a loan is a natural but not necessarily a normally occurring damage. Therefore, if interest would be legally recoverable which Appellant does not concede, it is necessary to specifically pled. Interest, like loss of use, is not included within the standard measure of damages for damage to personal property. Orr v. Williams, 379 S.W.2d 181(Mo. App. W.D. 1964).

The court misapplied the law by awarding interest and the judgment for same must be reversed.

VI. THE TRIAL COURT ERRED IN AWARDING CLEANUP COSTS IN THAT THE JUDGMENT MISAPPLIED THE LAW BECAUSE THE COST OF CLEANUP IS A SPECIAL DAMAGE THAT WAS REQUIRED TO BE PLED AND PROVEN TO BE REASONABLE AND NECESSARY AND BECAUSE THE INVOICE OF ENVIRONMENTAL RESTORATION WAS NOT A BUSINESS RECORD OF RESPONDENT.

The argument set forth in Respondent's Point V cites to no case in which hazardous cleanup of an environmental spill is held to be general damages. Respondent ignores that the definition of special damages is that said damages "are the natural but not necessary result of a wrongful act." Johnson v. Flex-O-Lite Mfg. Corp., 314 S.W.2d 75, 84 (Mo. 1958); Shirley's Realty, Inc. v. Hunt, 160 S.W.3d 804, 809 (Mo. App. W.D. 2005). Respondent misconstrues the requirements of general versus special. "Necessary" might be better phrased as "necessarily" in that special damages are the natural consequences but do not necessarily appear in the average tort case. Hazardous cleanup is such a category. It is a natural and necessary consequence of a personal property damage case that property be replaced or repaired as determined by the proper measure of damages. Hazardous cleanup is a natural consequence of an accident involving a vehicle containing hazardous materials but is not necessarily a normally occurring damage and is therefore a special damage. As such the cost of cleanup must be specifically pled. It is undisputed that the item was not specifically pled.

Further, as Respondent states, the judgment of St. Louis County court was admissible as a court record, however the affidavit cited was not subject to cross

examination by Appellant. Appellant did not object to the entry of Exhibit 13 on the basis that it was a court's file admissible under section 490.130 RSMo. However, Appellant did not stipulate to the entry of the affidavit of Mr. Wilhelm to be used as evidence. Missouri courts have held that without stipulation there is no basis for the admission of affidavits as evidence at trial. Jhala v. Patel, 154 S.W.3d 12, 20 (Mo. App. E.D. 2004).

Further, the fact that the invoice amount matches the affidavit amount is not evidence as to the reasonableness of the charges. Reasonableness could have been shown by payment, which Respondent did not do. Johnson v. Summers, 608 S.W.2d 574, 575 (Mo. App. S.D. 1980).

As the environmental cleanup was not pled as a special damage and as the reasonableness of the charges were not established, the judgment of the trial court awarding same must be reversed.

VII. THE TRIAL COURT ERRED IN AWARDING RESPONDENT $68,500 IN THAT INSUFFICIENT EVIDENCE WAS PRESENTED AS TO THE DIMINUTION IN VALUE OF THE VEHICLE, EQUIPMENT, SUPPLIES BECAUSE NO TESTIMONY WAS ADDUCED AS TO THE FAIR MARKET VALUE OF THE PROPERTY PRIOR TO THE ACCIDENT OR SUBSEQUENT TO THE ACCIDENT.

By Respondent's own argument in its Point VI, Ron Vunesky did not testify as to the fair market value of the property just prior to the accident but at the time of purchase. (Res. Sub. Br. 40). Further, unlike how portrayed in Respondent's brief, Mr. Vunesky's testimony regarding the air compressor and generator were not value immediately following the accident but as what he would try to sell it for as of the date of trial almost five years after the accident. (Res. Sub. Br. 54; T. 107, l. 14-23).

Also, the sale of the vehicle for the storage bill is not demonstrative of its fair market value immediately after the accident. "Fair market value" is the amount of money the personal property "will bring when it is offered for sale by an owner who is willing but under no compulsion to sell and is bought by a buyer who is willing or desires to purchase but is not compelled to do so." Bridgeforth v. Proffitt, 490 S.W.2d 416, 425 (Mo. App. S.D. 1973). The sale to the storage facility for credit on the bill cannot fall into the definition set forth in Bridgeforth. Further, said sale two years after the accident is not indicative of the fair market value after the accident.

Mr. Wilson testified that he did not know the condition of the vehicle prior to the accident. (T. 120, l. 23-25). Mr. Wilson testified in general as to the value of used equipment but not as to that particular vehicle prior to the accident. (T. 116, l. 6-7).

As Respondent did not establish the diminution in value of the personal property damaged in the accident, the judgment of the trial court must be reversed.

CONCLUSION

Well-established Missouri case law states that loss of use is only available when the personal property is repaired, and here the personal property was not. Further, almost two years after the accident is not a reasonable period for repair or replacement. Also Respondent failed to establish competent proof of the amount of anticipated profits and merely speculated as to Respondent's net profits with no basis on past performance and history of the company. As such the judgment for $120,000 for loss of use must be reversed.

As interest for replacement vehicle is not a proper measure of damage in an automobile property damage case and is in essence a double recovery, the judgment for interest must be reversed. Further, the judgment for interest must be reversed as Respondent did not request the award of same in its pleadings and the court should have sustained Appellant's objection to the entry of evidence regarding interest paid.

As the court should have sustained the objection of Appellant as to the admittance of the invoice of Environmental Restoration and that there was no evidence as to the reasonableness of the bill presented and the clean up costs were not pled as special damages, the judgment of the court for the clean up costs must be reversed.

As no witness testified as to the fair market value of the particular items of Respondent prior to the accident or after the accident, the court did lacked substantial evidence on which to base an award for actual damages and as such the judgment of the court for the award of $68,500 must be reversed.

WEGMANN, STEWART, DIEFFENBACH, TESREAU
SHERMAN & EDEN, P.C.
Attorneys for Appellant/Defendant
P.O. Box 740, Hillsboro, MO 63050
(636) 797-2665; FAX (636) 797-3505
ble@wegmannlaw.com
jam@wegmannlaw.com

By: _____
Bianca L. Eden #50301

By: _____
Jessica A. Mikale #52839

AFFIDAVIT OF SERVICE OF APPELLANT'S SUBTITUTE REPLY BRIEF

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state that on the 11th day of December, 2008, two (2) copies on paper and one (1) copy on disk of the foregoing Appellant's Substitute Reply Brief were mailed by United States mail, postage prepaid to:

Mark Kragle
William Cheeseman
Attorneys for Respondent
P.O. Box 343
Troy, MO 63379
(636)528-5299

_____
Bianca L. Eden, MBE 50301
455 Maple Street
P.O. Box 740
Hillsboro, MO 63050
(636) 797-2665

Subscribed and sworn to before me this 11th day of December, 2008.

_____
Notary Public

AFFIDAVIT OF COMPLIANCE

STATE OF MISSOURI)
) SS.
COUNTY OF JEFFERSON)

BIANCA L. EDEN, being first duly sworn, does state as follows:

1. That Appellant's Reply Brief complies with the limitations set forth in Missouri Supreme Court Rule 84.06(a);

2. That the number of words in Appellant's Reply Brief is 5,051;

3. That the disk of the Appellant's Reply Brief has been scanned for viruses and is virus-free.

_____
Bianca L. Eden, MBE 50301
455 Maple Street
P.O. Box 740
Hillsboro, MO 63050
(636) 797-2665

Subscribed and sworn to before me this 11th day of December, 2008.

_____
Notary Public