IN THE
SUPREME COURT OF MISSOURI

A.E.B., a minor by next friend, L.D., and L.D., Individually,	)	
Petitioner/Respondent/ Cross-Appellant,	)	**No. 91716**
v.	)	
T.B.,	)	
Respondent/Appellant/ Cross-Respondent.	)	

Appeal from the Circuit Court of
Saint Charles County, State of Missouri
Honorable Nancy L. Schneider, Judge

SUBSTITUTE BRIEF OF RESPONDENT/APPELLANT/CROSS-RESPONDENT T.B.

GILLESPIE HETLAGE & COUGHLIN, L.L.C.
By: LAWRENCE G. GILLESPIE #29734
7701 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105
lgillespie@ghc-law.com
(314) 863-5444
(314) 863-7720 Facsimile
Attorneys for Respondent/Appellant/Cross-Respondent

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JURISDICTIONAL STATEMENT

This is an action pursuant to Missouri's version of the Uniform Parentage Act, Section 210.817 et seq. R.S.Mo. On July 8, 2008, Petitioner/Respondent/Cross-Appellant, L.D. (hereinafter referred to as "Father") filed his Petition for Declaration of Paternity, Order of Support and Custody, and Change of Name. On July 16, 2008, Respondent/Appellant/Cross-Respondent, T.B. (hereinafter referred to as "Mother") was served with Father's petition. On August 27, 2008, Mother filed her Answer to Petitioner's Petition for Declaration of Paternity, Order of Support and Custody and Change of Name and her own

Petition for Declaration of Paternity and Order of Custody, Support, Medical Insurance, Necessaries and Past Support.

Trial was held November 12, 2009 and November 13, 2009. On February 11, 2010, the trial court issued its Judgment and Decree of Paternity and Order for Child Support, Visitation and Temporary Custody, which granted Mother sole physical custody of the minor child, A.E.B., born March 3, 2006 and designated the parties as joint legal custodians. The judgment specifically ordered Mother to relocate her residence from Ohio to Saint Charles County, Saint Louis County or Lincoln County, Missouri and entered a Siegenthaler physical custody plan.

On March 2, 2010, Mother filed her Motion for New Trial and/or in the Alternative, Motion to Amend. On March 17, 2010, Father filed his Motion to Re-Open the Evidence, Amend the Judgment and Order dated February 11, 2010 or in the Alternative Motion for a New Trial. On March 18, 2010, the trial court overruled both motions. Mother properly filed her Notice of Appeal to the Missouri Court of Appeals, Eastern District, March 23, 2010. Father timely filed his Notice of Cross-Appeal on March 31, 2010.

Mother appealed from the trial court's judgment on the basis that the trial court's requirement that she relocate her residence from the State of Ohio to a three-county area in East Central Missouri was based upon a misapplication of the law, was unsupported by substantial evidence and constituted an abuse of the trial court's discretion.

On April 26, 2011, the Missouri Court of Appeals, Eastern District, filed its opinion reversing the trial court's judgment as to the physical custody plan pursuant to Mother's appeal and, with regard to Father's cross-appeal, affirmed the placement of sole physical custody of the minor child with Mother. The Court of Appeals simultaneously transferred this matter to this Court pursuant to Rule 83.02. Consequently, the Missouri Supreme Court has jurisdiction herein pursuant to Article V, Section 10 of the Missouri Constitution.

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STATEMENT OF FACTS

On February 11, 2010, the trial court entered its Judgment and Decree of Paternity and Order for Child Support, Visitation and Temporary Custody. [L.F. p. 91]. The judgment granted Respondent/Appellant/Cross-Respondent, T.B. ("Mother") sole physical custody of the minor child, A.E.B., born March 3, 2006, and designated the parties as joint legal custodians. [L.F. pp. 8, 93]. The judgment specifically ordered Mother to relocate her residence from Ohio to Saint Charles County, Saint Louis County or Lincoln County in Missouri. [L.F. p. 93]. The physical custody plan entered by the trial court was in accordance with the customary Siegenthaler schedule. [L.F. pp. 98-101].

A.E.B. was born March 3, 2006 at Saint John's Mercy Hospital in Saint Louis County, Missouri. [Tr. pp. 171-172]. Mother and Father were dating at the time Mother became pregnant with A.E.B., but were not living together. [Tr. p. 174]. Father was not present for A.E.B.'s birth but later came to the hospital and participated in choosing her name. [Tr. pp. 5, 173].

Upon being informed that Mother was pregnant, Father sent a text message on August 13, 2005 stating, "Honey, I will be a good dad. I won't be around, goodbye." [Tr. p. 223]. That sentiment set the stage for Father's involvement with A.E.B. A.E.B. resided exclusively with Mother her entire life. [Tr. p. 176]. From the time of A.E.B.'s birth until commencement of these proceedings, Father had no set schedule for visitation, nor did he request one. [Tr. pp. 187-188]. Father had contact with A.E.B. between five (5) and ten (10) times before initiation of this case. [Tr. p. 94]. In fact, Father never had any time alone with A.E.B. prior to the commencement of these proceedings. [Tr. p. 303].

Mother asked Father to sign an affidavit of paternity when A.E.B. was born. [Tr. p. 172]. Father requested that paternity testing be done. [Tr. p. 6]. Such testing was finally accomplished when Mother initiated support proceedings through the Division of Child Support Enforcement. [Tr. p. 93]. Until this time, Father made no voluntary support payments because "I don't believe I should be responsible for paying for a child that I wasn't sure was mine." [Tr. p. 66].

Father lives in Saint Charles County with his parents. [Tr. p. 3]. Father had a spotty work history, having worked at National Dealer Warranties,

Pundmann Ford and Extended Warranty during A.E.B.'s lifetime, but was unemployed at the time of trial. [Tr. pp. 8, 77].

Mother was employed by Ameristar Casino as a waitress in the VIP lounge. [Tr. pp. 178-179]. In the spring of 2008, Mother's roommate informed her that she was moving. [Tr. pp. 184-185]. Mother decided to move to live near her mother in Aurora, Ohio. She purchased one-way plane tickets for her and A.E.B. July 6, 2008. [Tr. p. 190].

Meanwhile, Father "heard" that Mother was moving, [Tr. p. 102], and commenced the within action July 8, 2008. [L.F. p. 1].

Thereafter, on July 11, 2008, Mother made arrangements with her employer to take a leave of absence. [Tr. p. 182]. The leave of absence allowed her to maintain health insurance on A.E.B. until she obtained a new job. [Tr. p. 183].

Mother then made arrangements on July 13, 2008, with Federal Gateway Moving and Storage to transport her belongings to Ohio. [Tr. pp. 193-194]. A few days later, on July 16, 2008, Mother's last day of work at Ameristar, she was served with the summons herein. [Tr. pp. 182-183]. Mother and A.E.B. flew to Ohio July 17, 2008 and continued to reside there through trial. [Tr. pp. 171, 195]. Mother lives in an apartment in Ohio with A.E.B., [Tr. p.191], where she has continued to work as a waitress. [Tr. p.191]. Many members of Mother's family, including her mother and step-father, as well as her sister and brother and their children, reside nearby. [Tr. pp.179-180].

On October 6, 2008, a temporary visitation schedule was entered, which essentially allowed Father seven (7) days per month. [L.F. pp. 69-74]. Father missed his visit in February. [Tr. p. 40]. Father refused additional visitation with A.E.B. for the period from November 11 through November 27, 2009. Father claimed he was concerned that he would lose other time at the holidays with A.E.B. if he took the additional time. [Tr. pp. 118-122].

Mother requested that the trial court enter an order awarding her sole legal and physical custody in Ohio, although she also proferred a back-up plan in the event the trial court required her to return to Missouri. [Tr. pp. 177, 206-207]. Father asked the trial court to implement a custody plan which awarded the parties joint legal and physical custody in Missouri. [Tr. p. 45].

POINT RELIED ON

THE TRIAL COURT ERRED IN REQUIRING MOTHER TO MOVE FROM OHIO TO A THREE-COUNTY AREA IN MISSOURI BECAUSE SUCH PORTION OF ITS JUDGMENT MISAPPLIED THE LAW AND CONSTITUTED AN ABUSE OF ITS DISCRETION IN THAT NO AUTHORITY EXISTS IN CHAPTER 452 TO REQUIRE A PARENT AT THE TIME OF AN INITIAL CUSTODY DETERMINATION TO MOVE FROM ONE STATE TO ANOTHER, OR TO RESTRICT A PARENT'S RESIDENCE TO A PARTICULAR SET OF COUNTIES; FURTHER, INSOFAR AS AN INITIAL CUSTODY DETERMINATION TAKES INTO ACCOUNT THE "INTENTION" OF EITHER PARENT TO RELOCATE, THE PROCEDURES OF SECTION 452.377 DO NOT COME INTO PLAY, THE TRIAL COURT DOES NOT HAVE THE ABILITY TO UNDERTAKE TO CREATE AN IDEAL ENVIRONMENT FOR THE CHILD BY REQUIRING MOTHER TO MOVE, AND ITS ORDER TO REQUIRE MOTHER TO MOVE CREATES A GREATER BURDEN UPON MOTHER AS THE CUSTODIAL PARENT THAN UPON FATHER AS THE UNFETTERED NON-CUSTODIAL PARENT.

In re Marriage of Littlefield, 940 P.2d 1362 (Wash. 1997)

DeFreece v. DeFreece, 69 S.W.3d 109 (Mo. App. 2002)

Matter of Custody of D.M.G., 951 P.2d 1377 (Mont. 1998)

Murray v. Rockwell, 952 S.W.2d 350 (Mo. App. 1997)

ARGUMENT

THE TRIAL COURT ERRED IN REQUIRING MOTHER TO MOVE FROM OHIO TO A THREE-COUNTY AREA IN MISSOURI BECAUSE SUCH PORTION OF ITS JUDGMENT MISAPPLIED THE LAW AND CONSTITUTED AN ABUSE OF ITS DISCRETION IN THAT NO AUTHORITY EXISTS IN CHAPTER 452 TO REQUIRE A PARENT AT THE TIME OF AN INITIAL CUSTODY DETERMINATION TO MOVE FROM ONE STATE TO ANOTHER, OR TO RESTRICT A PARENT'S RESIDENCE TO A PARTICULAR SET OF COUNTIES; FURTHER, INSOFAR AS AN INITIAL CUSTODY DETERMINATION TAKES INTO ACCOUNT THE "INTENTION" OF EITHER PARENT TO RELOCATE, THE PROCEDURES OF SECTION 452.377 DO NOT COME INTO PLAY, THE TRIAL COURT DOES NOT HAVE THE ABILITY TO UNDERTAKE, TO CREATE AN IDEAL ENVIRONMENT FOR THE CHILD BY REQUIRING MOTHER TO MOVE, AND ITS ORDER TO REQUIRE MOTHER TO MOVE CREATES A GREATER BURDEN UPON MOTHER AS THE CUSTODIAL PARENT THAN UPON FATHER AS THE UNFETTERED NON-CUSTODIAL PARENT.

The trial court's judgment of February 11, 2010 awarded sole physical custody of the minor child to Mother. [L.F. p. 93]. However, the judgment went on to require that Mother relocate her residence with the minor child and reside in a three-county area of Saint Charles County, Saint Louis County or Lincoln

County, Missouri. [L.F. p. 93]. The trial court misapplied the law and abused its discretion in entering an order, i.e., compelling Mother to move to Missouri, for which it had no authority and which further was not justified by the evidence. Consequently, this restriction on Mother's residence must be reversed.

This Court must affirm the trial court's custody determination unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law or erroneously applies the law. *Dunkle v. Dunkle*, 158 S.W.3d 823, 832 (Mo. App. 2005). In making provisions for child custody, the trial court has broad discretion. *Jobe v. Jobe*, 708 S.W.2d 322, 328 (Mo. App. 1986). A trial court's discretion in a domestic relations case, however, is not unlimited. *In re Marriage of Harris*, 908 S.W.2d 854, 859 (Mo. App. 1995).

The trial court had before it a question of custody: in whose legal custody should the minor child be placed, and how should the physical custody be scheduled? Mother's move to Ohio had occurred nearly eighteen (18) months before trial. As noted by the Western District of the Court of Appeals in *DeFreece v. DeFreece*, 69 S.W.3d 109 (Mo. App. 2002):

> The typical scenario is one where a … parent with… custody decides that he or she wants to **relocate** and, as required by § 452.377, provides notice to the other parent of his or her desire to change the child's… residence. [Citation omitted] The other parent then objects to the **relocation** and, pursuant to the statute,

> files a motion seeking an order to prevent the **relocation**. [Citation omitted] The party seeking to relocate then has the burden of proving that the **relocation** is in the best interest of the child and that the request is made in good faith. [Citation omitted]
>
> In the case at bar, the trial court was faced with the task of making an **initial** custody determination…

Id. at 113 (emphasis added).

In essence, the trial court plays the hand which it is dealt in making its custody determination. Having come to the conclusion that the child's best interest was served by being in the sole physical custody of Mother in its application of section 452.375 R.S.Mo., the trial court was not then to treat this case as a relocation case under section 452.377. The question of whether Mother should be allowed to continue to reside in Ohio was no more before the trial court than the mother's relocation to South Carolina was in *Baxley v. Jarred*, 91S.W.3d 192, 206 (Mo. App. 2002). Ms. Baxley had followed the procedure under section 452.377 to relocate to South Carolina with her son. Mr. Jarred did not file his motion in opposition until sixty-three (63) days after receipt of the notice. Thus, in *Baxley*, as here, the controversy was not about the mother's relocation, but how to appropriately structure the physical custody schedule.

As noted by Judge Norton in *Dunkle, supra*, section 452.377 does not apply to an initial custody determination at all. *Id* at 835. Consequently, if the trial

court is to have any authority to require that a parent move his or her residence at the time of an initial determination, the basis for such power must be found elsewhere.

Section 452.375 R.S.Mo. sets out the factors which the trial court is to consider in its determination of custody. As noted above, section 452.375.2 (7) references "[t]he intention of either parent to relocate the principal residence of the child." Therefore, the intention to relocate is already part of the trial court's custody determination under this section. *Defreece, supra; Baxley*, *supra*; *Dunkle*, *supra*. Moreover, insofar as "intention" connotes being set to do something in the future, *see In re Premier Entertainment Biloxi, L.L.C.*, 445 B.R. 582, 619-620, (S.D. Miss. 2010), citing Black's Law Dictionary, the issue of Mother's move to Ohio is moot; i.e., it already occurred.

Section 452.375.9 also provides that any judgment regarding custody shall include a specific written parenting plan as detailed in section 452.310. The provisions of section 452.310 go into great detail regarding the contents of the parenting plan, but neither it nor section 452.375 contain any authorization to allow a trial court to require a parent to move his or her residence. In this respect, the decision of the Washington Supreme Court in *In re Marriage of Littlefield*, 940 P.2d 1362 (1997) is almost exactly on point. *In Littlefield*, the mother challenged the trial court's order that she relocate to Washington from her residence in California as part of its initial dissolution decree. The court construed its Parenting Act, which was strikingly similar to the provisions of section 452.310 regarding

the contents of a parenting plan, and concluded that while a trial court, in applying the "best interests" standard, had the authority to prohibit a parent from relocating, *id.* at 1367, it had no power under the statute to require a parent to move to and live in a particular geographic area. As noted above, the geographic restriction in *Littlefield*, extended, as here, to a requirement that a parent move her residence from a different state.

In a line of cases extending back nearly thirty (30) years, Missouri courts have been uniform in holding that a trial court does not have the power to confine a parent's residence to a particular area. In *In re Marriage of Dusing,* 654 S.W.2d 938 (Mo. App. 1983), the Southern District of the Court of Appeals eliminated a provision of a decree that provided for an automatic transfer of custody in the event the mother moved from Butler County. *Id* at 942-943. In *Kline v. Kline*, 686 S.W.2d 13 (Mo. App. 1984), the Western District of the Court of Appeals affirmed the trial court's refusal to restrict the mother's residence to either Boone or Calloway Counties. *Id* at 17. In *In re Marriage of Greene*, 711 S.W.2d 557 (Mo. App. 1986), the father's efforts to enforce a clause of the separation agreement of the parties restricting the residence of the children to either Greene or Christian Counties failed insofar as such clause was void as against public policy. *Id* at 564. In *Fuchs v. Fuchs,* 887 S.W.2d 414, 418 (Mo. App. 1994), the Southern District of the Court of Appeals, while eliminating a provision that prohibited the mother from moving to Mississippi, also noted that the decree should not have restricted the mother's residence to "Southeast Missouri."

Similarly, in *Murray v. Rockwell*, 952 S.W.2d 350 (Mo. App. 1997), the trial court's restriction of the child's residence to the Greater Kansas City Metropolitan Area was eliminated. *Id* at 353. In *Jennings v. Jennings*, 37 S.W.3d 267, 273 (Mo. App. 2000), the Southern District of the Court of Appeals removed a requirement that the children remain in Marionville, Missouri. Finally, the trial court's restriction of both parents to Jackson County, Missouri was deemed invalid in *Haden v. Riou*, 90 S.W.3d 538, 541 (Mo. App. 2002).

In *Littlefield*, the court was dealing with an order by a trial court that the mother move from California to Washington so that the father would be closer to the child. Judge Schneider's ruling in the instant case, requiring Mother to move from Ohio to the three-county area of Saint Louis County, Saint Charles County, and Lincoln County, endeavored to accomplish the same purpose for Father, who resides in Saint Charles County. However, the Washington Supreme Court came to the same conclusion at which this Court should arrive:

> There is nothing in this state's Parenting Act that gives a trial court the authority to alter the physical circumstances of the parties in order to create an environment that is, in the trial court's opinion, more desirable for the child than that which exists…
>
> The trial court does not have the responsibility or the authority or the ability to create ideal circumstances for the family. Instead, it must make parenting plan decisions which are based on the actual

> circumstances of the parents and of the children as they exist at the time of trial.

Id at 1371.

However well-intentioned the trial court was in fashioning its judgment, it is both impractical and, in the long run, unwise to attempt to fashion a "Leave it to Beaver" scenario to replace a plot line more likely to be part of an MTV reality series. *Dusing*, *Kline, Greene, Fuchs, Murray*, *Jennings* and *Haden* all recognized the inherent difficulties in attempting to impose such restrictions on parents. *Littlefield*, employing a statutory scheme akin to Missouri's, modestly abstained from finding authority within its statute to engage in what amounts to incipient social engineering.

In *Matter of Custody of D.M.G,* 951 P.2d 1377 (Mont. 1998), the Montana Supreme Court addressed a very similar fact pattern to that faced by this Court. In *D.M.G*, the father initiated an action in Montana to establish custody rights to his twin sons. At the time the father filed his lawsuit, the mother was living with the boys in Oregon. The trial court granted the mother physical custody provided that she moved from Oregon to Montana.

As illustrated above, *Littlefield* provides the roadmap to show that the trial court is not authorized under our statutes to require a parent to move with the minor from another state. The reasoning of *D.M.G.*, albeit couched in constitutional terms, illustrates why trial courts should not have such authority. While Mother did not raise a constitutional objection based on infringement of the

right to travel in the trial court, the reasoning of *D.M.G.* is persuasive and should be considered by this Court.

In noting that the circumstances of *D.M.G.*, as here, differ from the normal situation where a trial court is asked to rule upon a custodial parent's request to move to another state, the Montana Supreme Court observed:

> Instead of preserving the stability of the home and community to which the children are accustomed by restraining their relocation from their home state to another state, the court order at issue here effectively requires the custodial parent to disrupt the stability and continuity of the children's home in the state where they have lived for a substantial portion of their young lives and to instead relocate and start over again in Montana.

Id. at 1384-1385.

That is precisely the situation which is presented to this Court. A.E.B. was three and a half (3-1/2) years old at the time of trial, and had lived in Ohio for nearly a year and a half (1-1/2). The effect of the trial court's order that Mother move to Missouri only served to disrupt the stability and continuity of her home, not preserve it.

The *D.M.G.* court went on to say:

> While as a general proposition, it may be preferable that… parents both live in the same community and that their children have

> frequent and consistent contact with each parent, realistically that ideal cannot always be met….
>
> [T]he custodial parent who bears the burdens and responsibilities of raising the child is entitled, to the greatest possible extent, to the same freedom to seek a better life for herself or himself and the children as enjoyed by the non-custodial parent.

Id. at 385.

Resolution of questions concerning the location of a minor child's residence, as recognized by *D.M.G.*, results in a greater burden upon the custodial parent in choice of residence than upon the non-custodial parent. In many instances, undue attention, almost amounting to micromanagement, is paid to a custodial parent's residential situation, without similar contemplation of the non-custodial parent's domicile. By their terms, the provisions of Chapter 452 are both gender-neutral and impartial as to their application to custodial and non-custodial parents. However, to say that the obligations imposed by this chapter apply equally to men and women, custodial and non-custodial parents alike, is merely a truism. The more relevant truth is that, more often than not, the custodial parent is the one asserting the right to live where he, or, more accurately, she desires. It is a right that non-custodial parents, such as Father here, take for granted. *Hollandsworth v. Knyzewski*, 79 S.W.3d 856, 874 (Ark. App. 2002) (J. Griffin, concurring).

There is no question but that determinations with regard to children should be made with an eye toward their best interest. As is often stated, it is the pole-star guiding the resolution of such disputes. *Walters v. Walters*, 113 S.W.3d 214, 217 (Mo. App. 2003). Judge Schneider, with the child's best interest in mind, came to that conclusion when she decided that Mother should have sole physical custody. However, custodial parents also have rights which must be considered. It should not be impossible to determine and provide for the best interest of a minor child while still allowing custodial parents to enjoy the same freedom of movement as non-custodial parents. It is more than coincidental that, with the exception of *Haden*, *supra*, which actually purported to apply to both parents, all of the other cases discussed herein involve a singular focus on the mother's place of residence. Clearly, there are gender-specific consequences resulting from the assessment of where a custodial parent may live. On the other hand, non-custodial parents are not burdened by the same difficulties. Here, Father would likely be allowed to live wherever he desired. Moreover, there could be no credible assertion that the trial court was empowered to direct him to pack up and move to Ohio. Hence, the "disquieting inconsistency [that] disproportionately affects women more than men." *Hollandsworth*, *supra* at 873. It is just one more reason that this Court should discern no authority in Chapter 452 for the trial court to require Mother to move from Ohio to Missouri with the minor child.

As recognized by the Southern District of the Court of Appeals in *In re Marriage of Johanson*, 169 S.W.3d 897, 900 (Mo. App. 2005), "the court takes

parties where it finds them." The parties were in Ohio and Missouri. Absolutely no authority exists under Chapter 452, whether in section 452.375 or the parenting plan provisions of section 452.310, to allow the trial court to require Mother to move her residence from Ohio to Missouri as part of its initial custody determination. Further, under the circumstances of this case, the judgment requiring Mother to move from Ohio and its direction to limit Mother's residence to a three-county area constituted an abuse of its discretion. Consequently, this requirement should be eliminated. In recognition of the direction of the Eastern District in *Riley v. Riley*, 904 S.W.2d 272, 279 (Mo. App. 1995), that the "*Siegenthaler* schedule" as implemented by the trial court below "was never designed for situations where the non-custodial parent and child live hundreds of miles apart," the physical custody elements of Mother's proposed parenting plan, [L.F. pp. 53-55], should be implemented.

CONCLUSION

For all the foregoing reasons, Respondent/Appellant/Cross-Respondent, T.B., respectfully requests this Court reverse the trial court's judgment as to the physical custody plan for the minor child and remand to the trial court with directions to eliminate the requirement that Mother move with the minor child from Ohio to either Saint Louis County, Saint Charles County or Lincoln County, Missouri and implement the physical custody component of her proposed Parenting Plan.

Respectfully submitted,

GILLESPIE HETLAGE & COUGHLIN L.L.C.

By: _____

LAWRENCE G. GILLESPIE #29734
7701 Forsyth Boulevard, Suite 300
Clayton, Missouri 63105-1877
lgillespie@ghc-law.com
(314) 863-5444
(314) 863-7720 Facsimile
Attorneys for Respondent/Appellant/Cross-Respondent

CERTIFICATE OF SERVICE

The undersigned hereby certifies that one (1) copy of the foregoing Substitute Brief of Respondent/Appellant/Cross-Respondent, T.B., as specified in Rule 84.06(a), one (1) copy of the disk as specified in Rule 84.06(a) were sent via U.S. Mail, postage prepaid, this _____ day of _____, _____ to: Joshua Knight, 118 North Main Street, P.O. Box 953, Saint Charles, Missouri 63302, *Attorney for Petitioner/Respondent/Cross-Appellant.* Further, the undersigned states that said Substitute Brief contains Four Thousand Eight Hundred Thirty-One (4,831) words and that the disk filed with this Court, as well as the disks provided to counsel, have been scanned for viruses and are virus free.

_____

LAWRENCE G. GILLESPIE

STATE OF MISSOURI)
) ss
COUNTY OF SAINT LOUIS)

Comes now, LAWRENCE G. GILLESPIE, being duly sworn upon his oath, deposes, and states that the facts stated in the foregoing are true and correct to the best of his knowledge, information and belief.

_____
LAWRENCE G. GILLESPIE

Subscribed and sworn to before me, a Notary Public, this the _____ day of _____, 2011.

_____
Notary Public

My Commission Expires: