IN THE SUPREME COURT OF MISSOURI

IN THE MATTER OF:	)	
	)	
J.C.W.,	)	
T.D.W.,	)	
by and through their Next Friend,	)	
	)	
KELLY K. WEBB,	)	Case No. SC89404
as Next Friend and Individually,	)	
	)	
Petitioners-Appellants,	)	
	)	
v.	)	
	)	
JASON L. WYCISKALLA,	)	
	)	
Respondent-Respondent.	)	

On Appeal from the Circuit Court of Jefferson County
Cause No. CV302-4541-DR-J5
Hon. Lisa K. Page, Circuit Judge

SUBSTITUTE OPENING BRIEF OF APPELLANT

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
Creve Coeur, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

JURISDICTIONAL STATEMENT

On September 16, 2005, in the Circuit Court of Jefferson County, State of Missouri, Respondent Jason Wyciskalla ("Father") filed a Motion to Modify Consent Judgment. On July 18, 19 and 25, 2006, the Hon. Lisa K. Page, Circuit Judge, conducted a hearing on the Motion to Modify. On January 25, 2007, Judge Page issued her Judgment of Modification. On February 26, 2007, Petitioner-Appellant Kelly Webb ("Mother") filed a Motion for New Trial. On April 18, 2007, Judge Page denied the Motion for New Trial. On April 26, 2007, Mother filed a timely Notice of Appeal. On May 6, 2008, the Missouri Court of Appeals, Eastern District, issued its published opinion vacating those portions of the Judgment of Modification relating to child custody and past-due child support. On August 26, 2008, this Court ordered this case transferred pursuant to Rule 83.04 of the Missouri Rules of Civil Procedure.

The Record on Appeal will be referenced as follows: "LF" shall denote the Legal File, "TR" shall denote the Transcript of the Trial, and "APP" shall denote the Appendix to this Opening Brief.

STATEMENT OF FACTS

On May 19, 2003, the Circuit Court of Jefferson County, State of Missouri, entered a Judgment finding Respondent Jason Wyciskalla ("Father") the natural father of the minor children, J.C.W. and T.D.W. (twins born on June 18, 2002), awarding Appellant Kelly Webb ("Mother") sole legal and physical custody of the minor children, with Father receiving a schedule of visitation. (LF 22-23). The Judgment also ordered Father to pay child support to Mother in the amount of $1,090 per month, and retroactive child support to Mother in the amount of $10,928.75. (LF 23). On April 12, 2004, the parties entered a consent modification of the original Judgment, gradually increasing Father's temporary custody and visitation to a *Siegenthaler* schedule. (LF 34, 38).

On July 27, 2004, Father filed a new Motion to Modify, principally seeking to reduce current and back child support. (LF 43-45). On January 18, 2005, Mother moved for summary judgment on Father's Motion to Modify, asserting that no substantial and continuing changed circumstances developed in the three months between the entry of the consent modification and the filing of the new motion to modify. (LF 55-66). On March 21, 2005, Father filed an Amended Motion to Modify, adding new claims relating to legal and physical custody. (LF 92-98). On April 4, 2005, the court sustained Mother's motion for summary judgment and dismissed Father's Motion to Modify with prejudice. (LF 101). The

trial court also denied Father's motion for leave to file his Amended Motion to Modify. (LF 101).

On September 16, 2005, Father filed a Motion to Modify Consent Judgment, claiming the following substantial and continuing changed circumstances: denial of telephone contact; denial of visitation and make-up visitation; delayed development in the minor children; abuse and medical neglect by Mother of the minor children; parental animosity and alienation; unworkable transportation arrangements; and inability to pay child support. (LF 133-141). Father prayed for sole legal and joint physical custody, make-up visitation and a new child support amount. (LF 141-142). On October 19, 2005, Mother moved to strike the allegations in the latest Motion to Modify, as the allegations referenced facts, events and occurrences prior to the entry of the consent judgment, issues which had already been adjudicated and dismissed with prejudice by the court. (LF 167-168). On October 31, 2005, the trial court denied the motion to strike. (LF 10).

On July 18, 19, and 25, 2006, Mother and Father appeared before the Hon. Lisa K. Page, Circuit Judge, for a hearing on Father's Motion to Modify. (LF 16). At the very start of the trial on the latest Motion to Modify, the trial court made clear it would not relitigate earlier claims:

> THE COURT: Irregardless [sic], all remedies for any procedural defects have run on that issue. And all the procedural remedies have

> run on the Motion for Summary Judgment that was argued in front of my predecessor, Commissioner Stewart, now Judge Stewart. All the remedies for that are gone.

(TR 8-9). Father called Mother as his first witness. (TR 3). Mother testified she has had difficulty securing employment. (TR 16). She stated she has a master's degree in geology from Southern Illinois University, and that she has an offer from an employer in California to relocate to California for a position with a salary of $64,000 per year. (TR 15-16). Mother filed an adult abuse order against Father in February of 2005. (TR 24-25). Mother testified Father "has been violent" toward her in the past and has "physically assaulted" her in the past. (TR 26). She admitted to following Father when he had the custody of the minor children on three occasions, worried for the safety of the minor children. (TR 26-27). Mother requested to relocate on four separate occasions from July 21, 2004 through April 28, 2006. (TR 32-33). Mother stated she enrolled the minor children in Head Start without first consulting Father. (TR 35-36). Counsel for Father began an extended interrogation of Mother regarding her having passed on herpes to the minor children during labor and delivery, and whether Mother has informed the minor children's treating physicians of this potential concern. (TR 39-50). Mother denied passing on herpes to the minor children. (TR 39).

Phyllis Mast testified she is a counselor employed by The Caring Corner in Festus, Missouri, appointed by the trial court to work with the family in this case. (TR 52). She is a licensed clinical social worker who has 17 years experience as a professional counselor. (TR 56). Ms. Mast met with Father on six occasions, each with the minor children present, and often with his mother, Joyce Wyciskalla, present as well. (TR 52-53). Ms. Mast also met with Mother on six occasions, each with the minor children present, and on one visit accompanied by her mother. (TR 57). Mother expressed as a concern a fear for her safety, in part relating to a vehicular manslaughter in which Father caused the death of a woman in Illinois and for which he went to prison. (TR 60). In her opinion, Ms. Mast did not "see any behavior differences" in the children when with either parent. (TR 64). She stated her "largest concern" is how the parties "get along," and averred that "it would be very difficult for them to share 50-50 custody in that they cannot talk to each other and make a decision." (TR 66). She had formed no opinion as to which parent should have sole legal custody. (TR 67). With regard to physical custody, Ms. Mast stated she did not observe anything in her sessions that would contraindicate joint physical custody. (TR 68). Ms. Mast stated that after reviewing collateral materials involving threats made by Father to Mother, that Mother "was reasonable in her fears" of Father. (TR 76). She believes that custodial exchanges should take place at daycare or school rather than at the police

station. (TR 82-83). The trial court asked Ms. Mast "which parent is more likely to even try to discuss legal custody issues with the other parent," and Ms. Mast replied, "Difficult for me to ascertain." (TR 84). She noted that Father said he would be willing to try a joint session with Mother, but Mother refused to do so. (TR 84-85).

Larry Flowers testified Father retained his services as a private investigator to observe exchanges between the parties at the Festus Police Department. (TR 94-95). He also investigated Mother. (TR 95). He stated he observed eight exchanges in 2004-2006. (TR 96). He noted that on three separate occasions Mother followed Father after a custodial exchange and would watch for fifteen minutes the interaction of Father and the minor children. (TR 99-110). He stated he charged Father $400.00 to $500.00 per exchange, which included driving time from Illinois. (TR 117-119).

Father testified he had moved to Festus from Illinois to be closer to his children. (TR 166-167). He stated he has a master's degree in geology. (TR 173). He complained Mother erases messages he leaves on Mother's answering machine for the minor children. (TR 174). He did not state when these acts occurred. (TR 174). He admitted he has said "some nasty stuff" to Mother in the past. (TR 175). He alleged he expressed to Phyllis Mast a willingness to continue counseling sessions to "start down the right road to work for the boys." (TR 176-177). He

claimed that Mother "has taken the labels off" of the children's medication "since they were infants." (TR 179). He stated she last engaged in such behavior in the summer of 2005. (TR 180). He alleged Mother does not confer with him on any health issues for the children. (TR 181). He learns about doctor visits after the fact. (TR 183). He claimed his persistence in trying to have Mother clarify whether she has herpes has to do with Mother placing the children's health in jeopardy. (TR 186-187). He admitted to seeking a child protection order for which, after speaking with Ms. Mast, he agreed he lacked grounds. (TR 200). He denied ever physically attacking Mother in any way. (TR 209). He opposed Mother relocating to California because he would lose physical custody time with the minor children. (TR 211-212). He requested joint legal custody and does not want any child support. (TR 214). Father has visited Head Start on at least one occasion and spoken with the minor children's teacher. (TR 230-231). He claimed to have conducted an internet search of geology related jobs in Illinois, and discovered several opportunities. (TR 235). He stated Mother has applied for only one of these openings. (TR 237). He acknowledged intentionally denying Mother phone contact with the minor children. (TR 247). He felt he should have phone contact with the minor children at least once a day when they are with Mother. (TR 325).

Father admitted than in early January of 2005, he created a profile using Mother's name on two internet dating sites, Adult Friend Finder and Date.com. (TR 258). He created the bio entries and kept the site up for a month before removing it. (TR 256, 259). The entry contained Mother's name and provided an email address for responses. (TR 262). The entry read as follows:

> I teach at the Festus high school and want to find someone for a casual relationship. I have been diagnosed with genital herpes, just so you know. But if you don't care or if you have it, too, then let's get together. I really like young guys. I have a body made for fun, 38BB-24-32, and constantly get comments on my large natural breasts with big nipples. I have just had a hard time getting on with my life since my fiancé dumped me. If you are sincere and open-minded, drop a line. I am lonely. I look at hot young students all day. When I get home, and [sic] I feel like I'm going to explode.
>
> It's been a long time, and I am bugging up. I have an active imagination and have even gone so far as to wear a short dress to class without panties. I know it sounds crazy, but the excitement makes me tremble. Another favorite is to wear lower cut tops and bend over to help a lost student. It drives the boys in front of class crazy. You

never saw so many jocks trying to sit in the front row. I'm not a bad person, just a little lonesome.

(TR 261). Father acknowledged he thought from the entry that one reading it could deduce that Mother worked at Festus High School. (TR 262). He realized people might try and track her down at her place of employment, and that the email produced "so many responses." (TR 262-263). He admitted not thinking that if these people tried to track down Mother at home, that could place the minor children in jeopardy as well. (TR 263).

Father stated he is currently employed with International Mining Services located in Benton, Illinois. (TR 264-265). He works out of his home, and his immediate supervisor would be his mother, his uncle and other members of his family who "would be the donors of the company, basically." (TR 266). The company formed "a month" prior to the trial. (TR 266). Of the family members, only the brother has any mining experience. (TR 267). The corporation is registered in South Africa, "for economic reasons." (TR 268). Father made no other attempts to apply for work. (TR 281). He claims he had no prospects because of his transportation issues and his felony conviction. (TR 336). Father admitted traveling to Canada "within the last four or five weeks" investigating employment opportunities. (TR 291-292). He has called Mother from Canada "this year." (TR 292-293). When he travels to Canada, he drives, and his mother

accompanies him, as he does not have his driver's license privileges reinstated. (TR 293). Father testified he was on disability from June, 2004 until he started this recent company venture, and also that he had been searching for other employment opportunities for at least a year as well. (TR 304-305). He explained the inconsistency as a product of his doctor's advice to look for employment to suit his current physical condition. (TR 305). Father claimed no income earned from April of 2004 until one month prior to trial. (TR 306). He stated he has made what child support payments he has in the past by "selling everything I had" or securing family loans, and "odds and ends." (TR 311). He admitted to a child support arrearage in excess of $12,000. (TR 313-314). When asked by the trial court if he would work with Mother if granted legal custody, he stated "I would," and that he would notify her of school events and doctor's appointments, and to work on agreements rather than unilateral decisions. (TR 343-344). When asked if he had "any other stupid stunts up your sleeve like the internet prank," Father stated, "No, ma'am, I do not." (TR 344). When asked if he is "fully aware, after everything that's happened to you, how dangerous that could have been," he responded, "Yes, I know now." (TR 344).

Douglas Mayger testified he works for Specialty Minerals in Lucerne Valley, California, as head of operations for the west coast. (TR 377). He stated that Mother applied for a position with his company, and that he extended an offer

of employment to her. (TR 379). She would earn a salary of $64,000 per year, with a full benefits package. (TR 379). He came to court voluntarily, and Mother covered none of his expenses. (TR 381). Mother would only have to travel three days per year in this new position. (TR 396). Mother has worked for Mr. Mayger as a subcontractor for "roughly about a year." (TR 397).

Rhonda Kane testified she is a licensed professional counselor with seven years experience with an emphasis on families with small children. (TR 406). The parties employed her to address concerns "for behavior problems" resulting from the child custody litigation. (TR 408). She met with each parent three times, accompanied by the children. (TR 407). Father was accompanied by his mother. (TR 408). During sessions with Father, Ms. Kane observed the children as very clingy, anxious, not laughing, not talking, not making eye contact. (TR 417). They became upset if grandmother left the room. (TR 417). Grandmother indicated this behavior happens at home as well. (TR 418). Father made "several serious allegations against" Mother, "said a lot of bad things about her as a mother, trying to convince me she was a bad mother." (TR 419). During visits with Mother, Ms. Kane observed the children as "completely different" – "very happy, they were relaxed, very spontaneous." (TR 416). When she brought up the fact that the children would have a visit with Father the next day, the children began screaming, "No, Mommy, no. No go to daddy's." (TR 416). The children

subsequently threw a tantrum. (TR 416). When asked her opinion, Ms. Kane offered she "saw no concerns" with Mother and that she and the boys "had a very good relationship, they were very bonded with her." (TR 419). Father became angry with Ms. Kane in one session, raising his voice, and the boys "froze, looked at him…and bolted out the door and tried to leave the building." (TR 421). Ms. Kane stated the working relationship with the family ended when Father alleged that she had a relationship with Mother's attorney. (TR 423). Ms. Kane testified she has a "good, positive, strong working professional relationship" with counsel for Mother, but nothing more, nothing even approaching friendship. (TR 424). Ms. Kane noted a concern that the minor children had difficulty with overnights away from Mother. (TR 426). She had discussed limiting visitation as a possibility with Father. (TR 426). When asked if she had concerns about the children with Father, she stated, "Something is very wrong there. There is some reason why the relationship between him and his children is the way it is, and why the children are so distressed when they're with him. I do not know what that is." (TR 430). Ms. Kane believes Mother fears Father. (TR 432). She also explained that victims of abuse have been known to follow their abuser, "because they are doing it out of fear. If they know where they are, then they feel safer." (TR 433). When asked by the trial court if she felt Mother could work with Father in a joint legal custody situation, Ms. Kane stated, "I don't know." (TR 450).

Angela Pogue testified she works as a patrol officer for the Festus Police Department. (TR 462). In February of 2005, Mother filed a complaint of harassment, explaining a bouquet of flowers had been sent to her at her place of employment, relating to an internet site that had her picture. (TR 462-463). Officer Pogue investigated and located the sender of the flowers, who directed her to the website created by Father. (TR 463). When asked whether Mother seemed afraid and concerned for her safety at the time of the complaint, Officer Pogue indicated she did. (TR 474). Mother suggested to Officer Pogue that Father may have been the source of the harassment. (TR 475).

Lance Sago testified he has been friends with Mother for "over three years" and is presently dating Mother. (TR 493). He stated he has seen the minor children actively participate in telephone calls with Father, "if they're up for it." (TR 494). He said Mother "encourages" the minor children to speak with Father. (TR 494). He related that sometimes Father would call later in the evening after already speaking with the children or after they had gone to bed, and on those occasions Mother would let the phone go to voicemail. (TR 496). He never witnessed Mother act aggressive or violent to anyone, nor treat the children in a manner that would cause concern. (TR 501-502).

Mother testified that with regard to Head Start, she did not contact Father in advance because she did not even know if she would qualify when she went for the

initial visit. (TR 534). After Head Start contacted her and told her it had two available slots for the boys, she informed Father via telephone. (TR 535-536). Father voiced no concern that he had not been notified earlier, nor did he object to the enrollment. (TR 537). Mother explained that she and Father have difficulty scheduling summer visitation because Father does not follow the parenting plan and select his dates in a timely manner. (TR 542). With regard to the labels on medicine bottles, Mother noted that these instances occurred in 2002 or 2003. (TR 546). The boys would have "sticky liquid" medication, which would get on the bottle when it dripped. (TR 546). Mother would use a damp cloth to wipe off the liquid; over time, the labels soon began to peel off. (TR 546-547). Mother would write the information from the label onto the bottle in permanent marker so that Father would know the dosage and other details. (TR 547). Mother stated she never intentionally removed a label to keep information from Father. (TR 547). She also added that there were "very few occasions" when this happened, it occurred when the boys were "18 months to two years old, and it's not happened at all since then." (TR 702). With regard to notice of doctor's appointments, Mother explained that for those visits she did not inform Father, she did so "for her own sense of security" – unsure whether the boys had been cared for with Father, Mother would take the boys for a check-up to the doctor to ease her mind. (TR 551). Also, the boys often get sick at odd hours of the night, and Mother would

subsequently notify Father of the visits. (TR 553). She related that she takes extra precautions documenting the children's health because Father "has come back on me and said that I'm not properly caring for them, I'm not taking care of them, I'm not being a good mother." (TR 553). Mother stated she believes Father cannot care for the boys when they are sick, and that his mother often cares for them when they are ill rather than Father. (TR 569). With regard to Father's employment, Mother averred that Father is employed "out of the country in such a capacity that he can have great liberties with documentation that would report any kind of income." (TR 573). He "gloats" about his success, including appearing "on the cover of the premier journal for the mining industry." (TR 575). With regard to telephone contact between the boys and Father, Mother stated that the boys talk with Father five out of seven days of a given week. (TR 578). Father leaves often nasty phone messages, including one where Father said Mother "used a knife to try to cut you [the boys] out of her belly." (TR 585). Mother stated she has made numerous attempts to find employment in the mining industry in Missouri or Illinois, sending out resumes to every opening she sees. (TR 607). Mother cannot be employed as a teacher any longer because of how she "was portrayed on the internet." (TR 731). Mother stated she fears Father will "someday snap and he's going to hurt me," he is going "to do it purposely so that he doesn't have to deal with me, or that he's going to take that aggression that he has towards me out on

the boys." (TR 629). With regard to her having genital herpes, Mother stated she does not know, but has talked with the boys' pediatrician about the issue. (TR 637). Rashes the boys have had have never been connected to exposure to herpes. (TR 638). Mother stated she "would have a problem with making any joint decisions" with Father. (TR 652). She would not be willing to have counseling sessions with Father or discuss issues relating to the children's health and education. (TR 687).

The guardian ad litem offered her recommendation that the parties share joint legal custody. (TR 754-755). She also recommended joint physical custody with Mother as the residential custodian. (TR 760).

On January 25, 2007, Judge Page issued her Judgment of Modification. (LF 197-208). She found that a sufficient change in circumstances had occurred warranting modification. (LF 200). She based part of her decision to modify on the "bitterly long and protracted history of fighting not only over these two small children but with each other." (LF 200). She found that Mother "adamantly refuses to discuss any and all issues relating to the children with Father." (LF 201). She added that "Father is far from blameless in this situation as his action may be aptly characterized as mean and/or bone-headed stupid in posting pictures of Mother on the internet suggesting she was looking for male companionship." (LF 201). "Furthermore, in the past he has been verbally obnoxious in the extreme

when denied phone contact and visitation with his children." (LF 201). Judge Page found "the testimony of therapist, Phyllis Mast, credible in that Father is seeing the error of his past ways and wishes to be a good father to his children." (LF 201). She also agreed with Ms. Mast that Father would more likely inform the other parent of legal custody issues. (LF 201). She found that "Mother has gone so far as to peel labels from medicine bottles in order to keep Father in the dark as to the medical status of the children." (LF 202). She concluded "it would be tremendously detrimental to Mother to completely divest her of legal custody" and "acknowledges the strong potential for Father to abuse an award of sole legal custody due to the protracted history of litigation and the obvious animosity each parent bears the other." (LF 202). Judge Page found Mother's desire to relocate "significantly contributes to the change in circumstances warranting modification." (LF 203). She added Father "has been attending counseling with Phyllis Mast where he has focused on changing his behavior and has focused on the best interests of the children," while Mother "has not made an effort to change." (LF 203). Judge Page ordered custody modified so that the parties share joint legal and joint physical custody, with Mother as residential custodian. (LF 205). She further ordered neither party shall pay child support and erased any arrearage owed by Father to Mother, claiming Father "has overpaid child support." (LF 207).

On February 26, 2007, Mother filed a Motion for New Trial. (LF 218-220). On April 18, 2007, Judge Page denied the Motion for New Trial. (LF 221). On April 26, 2007, Mother filed a timely notice of appeal. (LF 222-224).

POINTS RELIED ON

I. The trial court erred in modifying the Consent Judgment of April 12, 2004, because pursuant to Mo. Rev. Stat. § 452.455.4, the trial court lacked jurisdiction to entertain Father's Motion to Modify Consent Judgment in that Father had a past due child support arrearage in excess of $10,000 but failed to post a bond in the amount of the arrearage prior to filing his motion to modify. Whether considered an issue of subject matter jurisdiction or jurisdictional competence, posting the bond is a jurisdictional condition precedent to the filing of a motion to modify, a condition that cannot be waived by the parties, and a trial court lacks the authority to entertain any such motion prior to the posting of the bond. As Father failed to post the bond, the trial court never obtained jurisdiction over the motion to modify, and its Judgment of Modification must be vacated as void for want of jurisdiction.

Miller v. Miller, 210 S.W.3d 439 (Mo. App. 2007)

State ex rel. Lambert v. Flynn, 154 S.W.2d 52 (Mo. banc 1941)

In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006)

State ex rel. Mo. Pac. R.R. Co., 120 S.W. 740 (Mo. banc 1909)

Mo. Rev. Stat. § 452.455

II. The trial court erred in modifying the Consent Judgment of April 12, 2004, because the doctrine of *res judicata* precludes relitigation of previously adjudicated claims and all the claims raised in the current Motion to Modify have been previously adjudicated, in that the trial court previously considered these claims and granted summary judgment against Father, with prejudice. *Res judicata* bars reconsideration of claims previously adjudicated on the merits, including those that could have been raised at the time of the last adjudication. The claims raised by the current Motion to Modify had been raised in the previous motion to modify and amended motion to modify against which the trial court granted summary judgment. As Father presented no new evidence on these claims, *res judicata* applies and precludes reconsideration. The Judgment of Modification should be reversed.

Noakes v. Noakes, 168 S.W.3d 589 (Mo. App. 2005)

Walker v. Walker, 954 S.W.2d 425 (Mo. App. 1997)

III. The trial court erred in modifying the Consent Judgment of April 12, 2004, because the evidence presented in the pleadings fail to support a substantial change in circumstances since the entry of summary judgment in 2005, as required by Mo. Rev. Stat. § 452.410.1, in that all the allegations made by Father involve facts and events that took place prior to the entry of summary judgment in 2005. Given that Father waited only four months after the entry of summary judgment to file the current motion to modify, it hardly seems surprising that those four months failed to produce substantial changed circumstances warranting modification. As the evidence fails to reveal the predicate changed circumstances for modifying the Consent Judgment, the Judgment of Modification should be reversed.

Searcy v. Seedorff, 8 S.W.3d 113 (Mo. banc 1999)

McCreary v. McCreary, 954 S.W.2d 433 (Mo. App. 1997)

Mo. Rev. Stat. § 452.410

IV. The trial court erred in entering a Judgment of Modification modifying legal custody from sole legal custody for Mother to joint legal custody because the parties lack the requisite commonality of beliefs and ability to function as a parental unit to make joint decisions as required by Mo. Rev. Stat. § 452.375, in that the evidence unmistakably indicates that the "bitter history" between the parties, fomented in large part by Father's violent, threatening and harassing behavior which has Mother in a permanent state of fear of Father, precludes any hope the parties can work together or function as a "parental unit." Two experts testified at trial, and both agreed the parties cannot share joint legal custody. Mother testified she could not exercise joint legal custody with Father. No evidence offered, and none cited by the trial court, suggest the parties have the demonstrated capacity to co-parent. Consequently, that part of the Judgment of Modification awarding the parties joint legal custody should be reversed.

Sutton v. Sutton, 233 S.W.3d 786 (Mo. App. 2007)

Kroeger-Eberhart v. Eberhart, 2007 WL 4233318 (Mo. App. 2007)

McCauley v. Schenkel, 977 S.W.2d 45 (Mo. App. 1998)

Mo. Rev. Stat. § 452.375

V. The trial court erred in entering a Judgment of Modification modifying physical custody from sole physical custody for Mother to joint physical custody because no changed circumstances indicate that expanding physical custody with Father is in the best interests of the minor children as required by Mo. Rev. Stat. § 452.410.1, in that the evidence unmistakably indicates that the children have thrived with Mother and have a healthy and stable home environment, while Father continues to exhibit violent, threatening, menacing, harassing and unstable behavior that pose a risk of physical and emotional harm to the minor children. Consequently, that part of the Judgment of Modification awarding the parties joint physical custody should be reversed.

Clark v. Clark, 805 S.W.2d 290 (Mo. App. 1991)

Humphrey v. Humphrey, 888 S.W.2d 342 (Mo. App. 1994)

Mo. Rev. Stat. § 452.410

VI. The trial court erred in modifying Father's past due child support arrearage from a figure in excess of $16,000 to $0.00 because said modification is against the weight of the evidence, in that the trial court is bound by the previous arrearage determination at the time of the original Judgment and the subsequent Consent Judgment, and can only discount any perceived overpayment in child support from the date the trial court granted summary judgment in April of 2005. Any alleged overpayment cannot exceed $2,400, leaving an arrearage somewhere between $10,000 and $13,600 – not $0.00. Additionally, and critically, Father never prayed for a reduction in his past due child support nor requested it at trial, and the trial court cannot grant relief beyond that requested by the moving party. Finally, a trial court that enters judgment on an issue not pleaded nor tried by consent lacks subject matter jurisdiction over the issue. The modification of past due child support should be vacated.

State ex rel. Sanders v. Martin, 945 S.W.2d 641 (Mo. App. 1997)

Adams by Northcutt v. Williams, 838 S.W.2d 71 (Mo. App. 1992)

State ex rel. Mohart v. Romano, 924 S.W.2d 537 (Mo. App. 1996)

In re Marriage of Hendrix, 183 S.W.3d 582 (Mo. banc 2006)

ARGUMENT

I. The trial court erred in modifying the Consent Judgment of April 12, 2004, because pursuant to Mo. Rev. Stat. § 452.455.4, the trial court lacked jurisdiction to entertain Father's Motion to Modify Consent Judgment in that Father had a past due child support arrearage in excess of $10,000 but failed to post a bond in the amount of the arrearage prior to filing his motion to modify. Whether considered an issue of subject matter jurisdiction or jurisdictional competence, posting the bond is a jurisdictional condition precedent to the filing of a motion to modify, a condition that cannot be waived by the parties, and a trial court lacks the authority to entertain any such motion prior to the posting of the bond. As Father failed to post the bond, the trial court never obtained jurisdiction over the motion to modify, and its Judgment of Modification must be vacated as void for want of jurisdiction.

Father conceded in his testimony at trial that he owes in excess of $12,000 in past due child support. (TR 313-314). Further, Father offered into evidence Exhibit HH, a payment history of Father, which by his own calculation showed an arrearage of $13,508.75 as of September, 2005. (Resp. Ex. HH). Mother testified the arrearage exceeded $16,000. (TR 619). Hence, by admission of both parties, Father owed past due child support in excess of $10,000 at the time of the filing of

his Motion to Modify Consent Judgment. Mo. Rev. Stat. § 452.455.4 specifically addresses the impact of such an arrearage on the filing of a motion to modify:

> When a person filing a petition for modification of a child custody decree owes past due child support *in excess of ten thousand dollars,* such person *shall post a bond in the amount of past due child support owed* as ascertained by the division of child support enforcement or reasonable legal fees of the custodial parent, whichever is greater, *before the filing of the petition.*

(Emphasis added). Father never posted a bond for his arrearage; consequently, his failure to post this bond deprived the trial court of jurisdiction to entertain the motion to modify.

In ***Miller v. Miller,*** 210 S.W.3d 439 (Mo. App. 2007), the Western District interpreted Section 452.455.4 for the first time in the courts of appeal. *Id.* at 443. Father filed a motion to modify, but failed to post a bond. Mother moved to dismiss, and the trial court granted the motion. Father appealed, challenging the interpretation of the statute. The Western District held that "it is clear that the posting of the bond in question is *a condition precedent* to the filing of the petition or motion for modification. In other words, *before* the trial court can take up and consider a qualifying petition or motion for modification, the bond required by Section 452.455.4 *must be filed*." *Id.* at 444 (emphasis added). "Hence, absent the

filing of the requisite bond, a trial court would not have any authority to proceed on a qualifying motion under Section 452.455.5, or in other words, it would *lack personal jurisdiction* over the non-movant to proceed on the motion." *Id.* (emphasis added). The *Miller* court based its conclusion on a lack of personal jurisdiction – as opposed to subject matter jurisdiction or jurisdictional competency – solely on the following dicta from this Court in ***State ex rel. DePaul Health Center v Mummert,*** 870 S.W.2d 820, 821 (Mo. banc 1994): "Personal jurisdiction, however, is about the authority of a court to render judgment over a particular defendant." The use of "however" served to contrast personal jurisdiction from the issue of venue, the sole issue before this Court in *DePaul Health Center. Id.* The *Miller* court offered no other legal authority or further explanation for its conclusion that the issue of the failure to post a bond pursuant to Section 452.455.4 is one of personal jurisdiction.

In ***Roach v. Hart,*** 249 S.W.3d 224 (Mo. App. 2008), the Western District reiterated that it based its decision in *Miller* on the want of personal jurisdiction. *Id.* at 225. Further, the *Roach* court asserted that, because personal jurisdiction may be waived if not raised in the responsive pleading, *see,* Mo. R. Civ. P. 55.27 (g)(2), the failure to raise the posting of the bond under Section 452.455.4 may be waived if not raised in the responsive pleading. *Id.* Under the Western District

approach, Mother in this case would be deemed to have waived her jurisdictional claim because she failed to raise it in her responsive pleading.

Mother asserts to this Court that *Miller* correctly understood the posting of the bond as a condition precedent to pursuing a motion to modify child custody, but erred in casting that requirement as one of *personal* jurisdiction rather than one of *subject matter* jurisdiction or jurisdictional competency. This Court has long recognized that the "jurisdiction of a court to adjudicate a controversy rests on three essentials: (1) jurisdiction of the subject matter; (2) jurisdiction of the res or the parties; (3) and jurisdiction to render the particular judgment in the particular case." ***State ex rel. Lambert v. Flynn,*** 154 S.W.2d 52, 57 (Mo. banc 1941). "The first two are the grand subdivisions of jurisdiction." *Id.* These three categories of jurisdiction remain true today: "The essential bases of a court's authority to adjudicate a controversy are its jurisdiction over the subject matter of the controversy and jurisdiction of the parties." ***In re Marriage of Hendrix,*** 183 S.W.3d 582, 587 (Mo. banc 2006). "This Court has also recognized that in certain narrow circumstances a party may question the authority, or jurisdictional competence, of a court to 'render the particular judgment in the particular case.'" *Id.*

"Subject-matter jurisdiction concerns the nature of the cause of action or the relief sought and exists only when the court has the right to proceed to determine

the controversy or question in issue between the parties, or grant the relief prayed." ***Missouri Soybean v. Missouri Clean Water,*** 102 S.W.3d 10, 21 (Mo. banc 2003). A court obtains subject matter jurisdiction "by operation of law" and "although a court may be a court of general jurisdiction, when it engages in the exercise of a special statutory power, the court is confined strictly to the authority given by the statute." *Id.* at 22. "The traditional concept of subject matter jurisdiction in a statutory proceeding is that strict compliance with the statutory requirements set out by the legislature is necessary to confer subject matter jurisdiction upon the court." ***American Indus. Resources, Inc. v. T.S.E. Supply Co.,*** 708 S.W.2d 806, 808 (Mo. App. 1986). "Restated, where a trial court's subject matter jurisdiction arises solely by statutory creation, absent conformity with the statute, no such jurisdiction exists in the trial court." *Id.* Subject matter jurisdiction cannot be conferred by consent. *Hendrix*, 183 S.W.3d at 588.

The relief contemplated by a motion to modify child custody is entirely a creation of statute. A party who desires a modification of a previous decree of child custody may not apply to any court in any state and expect relief. Rather, the party must meet several hurdles of subject matter jurisdiction. First, the party must have an actual judgment setting forth custodial rights of the children at issue, and if that judgment was not entered in Missouri, it must be properly registered in Missouri. *See,* Mo. Rev. Stat. §§ 511.760-787. Second, the court to which the

party applies must have subject matter jurisdiction over the children. *See*, Mo. Rev. Stat. § 452.450. Third, if the party is in arrears in child support in excess of $10,000, the party must post a bond in the amount of the arrearage. *See*, Mo. Rev. Stat. § 452.455.4. All three requirements may be deemed conditions precedent; however, because the courts of this state consider the first two issues of *subject matter* jurisdiction, *see*, ***McMinn v. McMinn,*** 884 S.W.2d 277, 280 (Mo. App. 1994)(failure to properly register foreign judgment deprives court of "subject matter jurisdiction" to enforce child support order) *and* ***Butler v. Butler,*** 922 S.W.2d 18, 20 (Mo. App. 1996)(compliance with UCCJA is issue of subject matter jurisdiction), it seems patently illogical to consider the final requisite anything other than an issue of subject matter jurisdiction.

In the domestic relations arena, Missouri courts regularly interpret statutory conditions precedent as issues of subject matter jurisdiction. For example, the General Assembly imposes a residency requirement in order to initiate a dissolution proceeding – at least one of the parties must have been a resident of the state "for ninety days immediately preceding the commencement of the proceeding." Mo. Rev. Stat. § 452.305.1(1). In ***Goeman v. Goeman,*** 833 S.W.2d 476 (Mo. App. 1992), husband filed a petition for dissolution, but at the time of filing, both he and wife resided in California. Husband happened to be in Missouri on a business assignment for a week, and while here, decided to file for divorce.

While the trial court entered a default judgment, the Western District vacated the judgment for want of subject matter jurisdiction. "[T]his court holds that the trial court lacked *subject matter* jurisdiction to enter a decree of dissolution because the evidence does not show that [husband] 'resided' in Missouri for ninety days prior" to filing his petition for dissolution. *Id.* at 478 (emphasis added). "It is a well established principle that a dissolution of marriage is void for lack of *subject matter* jurisdiction if it is entered in a state in which neither of the parties to the action are domiciled at the commencement of the action." *Id.* (emphasis added).

The Uniformed Services Former Spouses Protection Act limits the authority of a court to divide a military pension unless the member of the military resides within the jurisdiction of the court or consents to the jurisdiction of the court. *See,* 10 U.S.C. § 1408(c)(4). Missouri courts interpret the federal restriction as one of subject matter jurisdiction. *See,* ***Sola v. Bidwell,*** 980 S.W.2d 60, 66 (Mo. App. 1998).

Time limitations are another common issue of subject matter jurisdiction. If a party fails to file a motion for new trial within thirty days of the entry of judgment, the trial court lacks subject matter jurisdiction to consider the motion. ***Lacher v. Lacher,*** 785 S.W.2d 78, 80 (Mo. banc 1990)("In the absence of a motion for new trial filed pursuant to Rule 78.04, the trial court loses jurisdiction at the expiration of thirty days."). "The power of a court to correct, amend, vacate,

reopen or modify a judgment upon its own motion (and for good cause) is limited to thirty days after entry of the judgment." ***Wiseman v. Lehmann,*** 464 S.W.2d 539, 543 (Mo. App. 1971); Mo. R. Civ. P. 75.01. Even when the trial court has subject matter jurisdiction to hear a timely filed after-trial motion, "the court's jurisdiction is limited to granting relief sought by one of the parties in its after trial motions for reasons stated in that motion." *Id.* Hence, when a trial court failed to award mother attorney fees in the original judgment and only father filed a timely after-trial motion that did not raise the issue of attorney fees for mother, the trial court lacked subject matter jurisdiction to enter the attorney fee award for mother. ***Antonacci v. Antonacci,*** 892 S.W.2d 365, 368 (Mo. App. 1995).

The General Assembly also requires that a party filing a petition of dissolution "shall set forth…the relief sought." Mo. Rev. Stat. § 452.310.2(8). Parties are limited to the "four corners" of the pleadings – only issues properly pled trigger subject matter jurisdiction. Consequently, if a party fails to request maintenance in the original petition, the trial court lacks subject matter jurisdiction to enter an award of maintenance. ***Higgins v. Higgins,*** 918 S.W.2d 383, 384 (Mo. App. 1996). And if a party fails to request attorney fees in the original petition, the trial court lacks subject matter jurisdiction to enter an attorney fee award. *Id.* at 385.

The requirement of posting a bond as a condition precedent to proceeding on a civil action authorized by statute has long been considered an issue of subject matter jurisdiction. In ***State ex rel. Mo. Pac. R.R. Co.,*** 120 S.W. 740 (Mo. banc 1909), the Circuit Attorney of the City of St. Louis sought to enforce certain antitrust laws against numerous railroads in the rates they charged passengers. The Circuit Attorney obtained a temporary injunction against the railroad and the trial court issued the same. However, a statute at the time required the posting of a bond before the issuance of an injunction. After determining that the Circuit Attorney was not exempt from posting a bond by any constitutional provision, this Court held as follows:

> In view of the reason of the statute exacting a bond as a condition precedent to the granting of an injunction, we are of the opinion that the requirement *goes to the very jurisdiction of the court,* and that an injunction under the statute, without requiring the bond and its execution and approval before the issuing of the injunction, is and would be *in excess of the jurisdiction of the circuit court*; that, notwithstanding its general equity powers, the statute must control and be held to modify and regulate its jurisdiction, and, when the consequences to a defendant are considered, the statute is a wise and salutary one and should be enforced. On this point our opinion is that

> the respondent, in issuing his restraining order and refusing to discontinue, set aside, or annul it, *exceeded his jurisdiction*, and should be prohibited from further maintaining said temporary injunction and ordered to set aside the same.

Id. at 751 (emphasis added). When this Court spoke of the trial court exceeding its jurisdiction, it referred explicitly to its "right to proceed to determine the controversy or question in issue," *Missouri Soybean*, 102 S.W.3d at 121, the very definition of subject matter jurisdiction. Indeed, only five years later, this Court described its decision as one of "subject matter jurisdiction." *See*, ***Laymaster v. Goodin,*** 168 S.W. 754, 756 (Mo. banc 1914).

In the present case, Father failed to post the bond explicitly required by the plain language of Section 452.455.4 – for an arrearage Father admits, through testimony and exhibits offered into evidence, exceeds the statutory minimum to trigger the posting of a bond. Consequently, the trial court had "no authority to proceed" on the motion. Mother asserts that "want of jurisdiction" for failure to post a bond means lack of subject matter jurisdiction, which may never be waived and may be raised at any level of the proceedings, including by the appellate court acting *sua sponte.* ***State Tax Commission v. Administrative Hearing Commission,*** 641 S.W.2d 69, 72 (Mo. banc 1982). So interpreted, Mother could not and did not waive any right to have this Court consider the issue of subject

matter jurisdiction, and furthermore, the failure to post the bond deprived the trial court of subject matter jurisdiction to act on the petition filed by Father to modify custody.

This Court in *Flynn* also recognized the requirement of jurisdictional competency: "If the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provision of the law in this regard." *Flynn,* 154 S.W.2d at 57. *Flynn* involved a claim for benefits from the Police Retirement System of the City of St. Louis. By statute, any claim had to proceed to the board of trustees, and that decision could subsequently be reviewed under certain circumstances by a trial court. In *Flynn,* the claimant tried to get into court without going through the required board procedures. This Court deemed that process of exhaustion a condition precedent to the trial court having jurisdiction. "In the instant case respondent's court had no power to try the case until statutory conditions had been complied with and administrative remedies had been exhausted, and also unless these facts were shown by petition upon which respondent's jurisdiction was invoked." *Id.* Of the trial court's actions, this Court concluded: "It partook of *jurisdiction of the subject matter* and could not be waived by mere appearance of the relators." *Id.* (Emphasis added). While the

common law may have drawn a semantic line between subject matter jurisdiction and jurisdictional competency, this Court has always considered the impact of the two requisites the same – they cannot be waived, they can be raised at any time by the parties or the court on its own initiative, and a trial court lacking either cannot proceed.

Thus, whether this Court construes the failure of Father to post the bond as required by Section 452.455.4 as a condition precedent in the category of jurisdictional competency or a pre-requisite to acquiring subject matter jurisdiction over the motion to modify custody, the outcome will be the same – absent the posting of the bond, the trial court lacks the authority to proceed on the motion to modify custody. The fact that Mother did not raise this issue in her pleadings has no relevance; subject matter jurisdiction may not be waived and may be raised at any time. The Western District in *Miller* and *Roach* erred in classifying the failure to comply with Section 452.455.4 as an issue of "personal" jurisdiction. The Eastern District in this case below and in ***Burton v. Swann,*** Case No. ED91385 (Mo. App., July 29, 2008), correctly interpreted the issue of compliance as one of "subject matter" jurisdiction. Consequently, this Court should vacate those portions of the Judgment of Modification relating to custody as void for lack of subject matter jurisdiction and order the trial court below to reinstate the status quo ante at the time immediately preceding the filing of the motion to modify custody.

II. The trial court erred in modifying the Consent Judgment of April 12, 2004, because the doctrine of *res judicata* precludes relitigation of previously adjudicated claims and all the claims raised in the current Motion to Modify have been previously adjudicated, in that the trial court previously considered these claims and granted summary judgment against Father, with prejudice. *Res judicata* bars reconsideration of claims previously adjudicated on the merits, including those that could have been raised at the time of the last adjudication. The claims raised by the current Motion to Modify had been raised in the previous motion to modify and amended motion to modify against which the trial court granted summary judgment. As Father presented no new evidence on these claims, *res judicata* applies and precludes reconsideration. The Judgment of Modification should be reversed.

Mother asserts that Father has raised in successive motions the same claims that the trial court dismissed with prejudice on summary judgment, and therefore the doctrine of *res judicata* precludes the trial court from reconsidering the claims raised in the earlier judgment. On July 27, 2004, Father filed a Motion to Modify seeking to change the amount of current and past due child support, to change the names of the minor children and to change the manner of custodial exchanges. (LF 43-45). On January 18, 2005, Mother moved for summary judgment on the Motion to Modify. (LF 55-66). On March 21, 2005, Father filed an Amended

Motion to Modify, expanding his grounds to include a wide array of factors relating to child custody and seeking sole legal and physical custody of the minor children. (LF 92-98). On April 4, 2005, the trial court sustained the motion for summary judgment and dismissed the motion to modify with prejudice, as well as denying Father leave to file his Amended Motion to Modify. (LF 101). On September 16, 2005, Father filed a Motion to Modify Consent Judgment, in which he raised claims set out in the Amended Motion to Modify and the original Motion to Modify. (LF 127-143). At the very start of the trial on the latest Motion to Modify, the trial court made clear it would not relitigate earlier claims:

> THE COURT: Irregardless [sic], all remedies for any procedural defects have run on that issue. And all the procedural remedies have run on the Motion for Summary Judgment that was argued in front of my predecessor, Commissioner Stewart, now Judge Stewart. All the remedies for that are gone.

(TR 8-9). The trial court held to this ruling throughout the lengthy trial, excluding any evidence prior to the summary judgment ruling.

"Res judicata, which means 'a thing adjudicated,' is a common law doctrine that precludes relitigation of an already adjudicated claim." ***Noakes v. Noakes,*** 168 S.W.3d 589, 595 (Mo. App. 2005). "The doctrine of res judicata is applicable

to child custody and visitation provisions, except to the extent that such provisions later may be modified pursuant to applicable statutes." *Id.*

> Res judicata applies not only to all the points and issues raised by the parties upon which the court was actually required to pronounce judgment, but also to *every point properly belonging to the subject matter of litigation,* and which the parties, exercising reasonable diligence, *might have brought forward at the time.*

Id. (emphasis added). In order for a claim to be barred by res judicata, "the following factors must be met: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons and parties to the action; and 4) identity of the quality of the person for or against whom the claim is made." ***Walker v. Walker,*** 954 S.W.2d 425, 428 (Mo. App. 1997).

In his latest Motion to Modify, Father sets out over eight pages twenty-two separate changed circumstances warranting modification. (LF 133-141). However, virtually all of the claims raised in these twenty-two paragraphs mirror claims set out in the Amended Motion to Modify which the trial court denied leave to file. The following table lists the different claims Father alleged in his latest Motion to Modify and matches it with the exact same claim in one or more of the earlier Motion to Modify and Amended Motion to Modify:

Claim	Original Motion	Amended Motion	Latest Motion
Denial of telephone contact		10(a)(5)	22(d), (p)
Denial of visitation		10(a)(4)	22(e)
Denial of make-up visitation		10(a)(4)	22(f)
Child support – ability to pay	(4)	10(b)(2)-(4)	22(g), (h), (r), (s), (t)
Children's delayed development		10(a)(9)	22(i), (l)
Abuse of children		10(a)(7), (a)(8)	22(j)
Medical neglect of children		10(a)(3)	22(k)
Transportation arrangements		10(d)(3)	22(m)
Parental animosity/alienation		10(a)(1), (a)(8)	22(n), (o)
Determine support arrearage	(7)		22(q)

The Amended Motion to Modify and the latest Motion to Modify request the same relief: change in legal and physical custody; compensatory physical custody; change in current child support obligation. (LF 97, 141-42). In fact, the Amended Motion to Modify requests more relief than the latest Motion to Modify. (LF 97). The only claim for relief in terms of child support arrearages is found in the original Motion to Modify on which the trial court already granted summary judgment. (LF 45).

As the table above makes clear, every claim Father presented to the trial court in his latest motion was raised either in the earlier Amended Motion to Modify or the original Motion to Modify. Consequently, all of these claims were known to Father and could have been raised by Father at the time of the original Motion to Modify – indeed, they were presented to the trial court by the attempted

filing of the Amended Motion to Modify. All of the requirements to apply claim preclusion – identity of claims and parties and cause of action – are present. The doctrine of *res judicata* bars the relitigation of these claims and the trial court erred in modifying the earlier Consent Judgment unless the pleadings and the evidence reveal that Father has actually raised new claims based on facts that arose after the trial court granted summary judgment. As the pleadings are duplicative, Father must have raised new evidentiary claims to avoid *res judicata*. However, a review of the presentation of his evidence at trial shows a rehash of his earlier claims. He opened his case by calling Mother and spent most of that questioning dwelling on whether she had genital herpes and with which medical providers she discussed the condition, somehow intimating that the rashes the boys had as infants related to their contracting genital herpes. (TR 39-50). Mother having genital herpes at the time she gave birth to the twins obviously predates the 2005 summary judgment, and seems to have no relevance anyway, other than to malign Mother. Larry Flowers, an investigator hired by Father, testified about eight custodial exchanges, the majority of which predated the 2005 summary judgment and dealt with issues specifically raised in the Amended Motion to Modify. (TR 96-110). Father testified at length about issues raised in the earlier motions to modify – his alleged inability to work, his alleged injury and disability, Mother's medical neglect (from 2003) and lack of communication, frustrated telephone contact and visitation – all

prior to the 2005 summary judgment. The only new information Father discussed involved his false allegation of suspected abuse by a boyfriend of Mother, which he recanted to Phyllis Mast (TR 200); and his creating an internet dating profile of Mother that readily identified her and placed her in fear of harassment, subjected her to embarrassment, put the children in potential danger and resulted in the end of Mother's employment with the Festus School District (TR 262-263). Phyllis Mast testified to an ongoing state of animosity and fear and complete breakdown of communication between the parties – facts plainly evident at the time Judge Stewart entered the original Judgment of Paternity in 2003. (TR 52-76). Hence, at the end of all of Father's evidence, he produced nothing new in terms of claims or evidence he brought or could have brought prior to the issuance of summary judgment. *See*, *Noakes*, 168 S.W.3d at 595 (previous intervention of grandparents in original dissolution precludes relitigation of intervention of grandparents in motion to modify); *Walker*, 954 S.W.2d at 428 (husband who failed to challenge a QDRO on appeal after dissolution cannot subsequently relitigate the same issues in a motion to modify).

Because all of the claims in the Motion to Modify Consent Judgment involve claims that were raised or could have been raised in the previous motions to modify and on which the trial court had adjudicated on the merits – once in a motion to modify, once on summary judgment – Father had to raise new claims or

new evidence to avoid *res judicata*. Father did not raise new claims or evidence, but chose only to present evidence and claims previously adjudicated. Consequently, the entire Motion to Modify Consent Judgment was barred by *res judicata,* and this Court should reverse the Judgment of Modification and remand with instructions to reinstate the custody and support orders in effect prior to the filing of the Motion to Modify Consent Judgment.

III. The trial court erred in modifying the Consent Judgment of April 12, 2004, because the evidence presented in the pleadings fail to support a substantial change in circumstances since the entry of summary judgment in 2005, as required by Mo. Rev. Stat. § 452.410.1, in that all the allegations made by Father involve facts and events that took place prior to the entry of summary judgment in 2005. Given that Father waited only four months after the entry of summary judgment to file the current motion to modify, it hardly seems surprising that those four months failed to produce substantial changed circumstances warranting modification. As the evidence fails to reveal the predicate changed circumstances for modifying the Consent Judgment, the Judgment of Modification should be reversed.

A. The Law Governing Modification of Custody

Modification of a custody decree is governed by statute: a court shall not modify a custody decree unless it finds, "upon the basis of facts that have arisen since the prior decree or were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child." Mo. Rev. Stat. § 452.410.1. "A finding of changed circumstances under this section is a precursor to a finding that the best interests of the child necessitate a modification of a prior decree." ***McCreary v. McCreary,*** 954 S.W.2d 433, 439

(Mo. App. 1997)(internal quotations omitted). The change in circumstances "must relate to the circumstances of the children or their custodian, not the non-custodial parent," and they "must be of a nature that the child will substantially benefit from the transfer and the welfare of the child requires it." *Id.* "The party seeking to change custody has the burden of proving a change in circumstances and that the modification is necessary to serve the best interests of the children." *Id.* Because "the parties did not agree on the custody arrangement for the children, the circuit court was required to include findings of fact in its judgment based on the public policy in Section 452.375.4 and the factors listed in Section 452.375.2 detailing the specific relevant factors that caused it to conclude that the chosen custodial arrangement was in the [child's] best interests." ***Tipton v. Joseph-Tipton,*** 173 S.W.3d 692, 694 (Mo. App. 2005). The circuit court "must detail what it deems to be the relevant factors," and cannot simply declare its modification is "in the best interests of" the minor child. *Id.*

With regard to legal custody, case law requires that the change in circumstances warranting a modification "substantially" and/or "materially" affect the child. ***Searcy v. Seedorff,*** 8 S.W.3d 113, 116 (Mo. banc 1999). A lesser standard applies for physical custody: "Courts should not require a 'substantial' change from the circumstances of the original judgment where the modification sought is simply a rearrangement in a joint physical custody schedule." ***Russell v.***

Russell, 210 S.W.3d 191, 198 (Mo. banc 2007). In this case, the parties did not share joint physical custody, necessitating a showing of substantial change.

B. The Trial Court Judgment

The trial court listed the following changed circumstances in its Judgment of Modification: Mother "adamantly refuses to discuss any and all issues relating to the children with Father"; Father "has been verbally obnoxious in the extreme when denied phone contact and visitation with his children"; Father "is seeing the error of his past ways and wishes to be a good father to his children"; Mother "has failed and refused to share any information with Father regarding every single issue regarding the children from serious medical issues to scheduling extracurricular activities"; and Mother has attempted to relocate out of state. (LF 201-203).

C. Standard of Review

In reviewing a judge-tried case, this Court must affirm the judgment unless it is not supported by substantial evidence, is against the weight of the evidence, or it erroneously declares or applies the law. ***Murphy v. Carron,*** 536 S.W.2d 30, 32 (Mo. banc 1976). This Court reviews the evidence in the light most favorable to the decision of the trial court. *McCreary,* 954 S.W.2d at 439. "The trial court's order will not be overturned unless the appellant demonstrates it was not in the best interest of the child." ***Larkins v. Larkins,*** 921 S.W.2d 152, 153 (Mo. App. 1996).

D. How and Why the Judgment Is Against the Weight of the Evidence and Reflects an Erroneous Application of the Law

The trial court finding regarding changed circumstances has two fatal flaws: first, several of its contentions misstate the evidence, and second, it fails to indicate new circumstances that arose after the 2005 summary judgment ruling different from the circumstances at the time of the 2005 summary judgment ruling.

The trial court states Mother "adamantly refuses" to discuss with Father any and all issues relating to the children, and that Mother "fails and refuses" to share information with Father regarding the welfare of the children. The trial court seems to have forgotten that Mother exercised sole legal custody prior to this recent modification, and as such, Mother only had the legal duty to confer with Father about issues relating to the welfare of the children, not to engage in joint decision-making. (LF 40). While Mother may have on occasion failed to confer with Father in advance, the evidence refutes the finding that she did so consistently. Similarly, Father received information regarding the minor children and their general welfare, with some notable exceptions. The record refutes that Mother consistently refused to keep Father apprised of any changes in the health, educational or other needs of the minor children. The trial court seemed to have forgotten that Mother had an active order of protection against Father during large periods of time, and by these orders Mother would communicate information

through third parties. Mother cannot be faulted by complying with a court order of protection entered in her best interest and safety. Finally, Phyllis Mast did not opine that Father had seen the error of his ways and started on a path of reformation, only that Father expressed a willingness to try joint sessions with Mother in an attempt to explore issues relating to the health, education and welfare of the minor children. (TR 84-85).

Beyond misstating the evidence, the trial court either failed to cite changed circumstances after the 2005 entry of summary judgment or in fact cited circumstances prior to the 2005 entry of summary judgment – in contravention of her own statement at the beginning of the trial in this case she would not consider any such evidence. The trial court begins by referencing the history of adult abuse actions filed between the parties from 2002 to 2005 as evidence of a "bitterly long and protracted history of fighting" that "constitutes a sufficient change in circumstances warranting modification." (LF 200). The trial court references a cancellation of visitation that Father admits in his pleadings occurred prior to the entry of summary judgment. (LF 136). The trial court cites as an example Mother peeling off labels of medicine bottles – an incident which occurred in 2003. Hence, the trial court's changed circumstances are not changes at all – they occurred prior to Father filing his Motion to Modify Consent Judgment or at the latest prior to the entry of summary judgment in 2005. By the plain language of

Section 452.410.1, the evidence and the findings of the trial court fail to establish a change in circumstances different from that which existed when the trial court entered summary judgment in 2005. This should come as no surprise, given that Father waited *only four months* after entry of summary judgment to file his latest motion to modify. As no changed circumstances actually existed at the time Father filed his latest motion to modify, the trial court erred in entering its Judgment of Modification and this Court should reverse.

IV. The trial court erred in entering a Judgment of Modification modifying legal custody from sole legal custody for Mother to joint legal custody because the parties lack the requisite commonality of beliefs and ability to function as a parental unit to make joint decisions as required by Mo. Rev. Stat. § 452.375, in that the evidence unmistakably indicates that the "bitter history" between the parties, fomented in large part by Father's violent, threatening and harassing behavior which has Mother in a permanent state of fear of Father, precludes any hope the parties can work together or function as a "parental unit." Two experts testified at trial, and both agreed the parties cannot share joint legal custody. Mother testified she could not exercise joint legal custody with Father. No evidence offered, and none cited by the trial court, suggest the parties have the demonstrated capacity to co-parent. Consequently, that part of the Judgment of Modification awarding the parties joint legal custody should be reversed.

A trial court may only modify a custody decree if it finds, "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child." Mo. Rev. Stat. § 452.410.1. In this case, the trial court

found changed circumstances it deemed warranted changing legal custody from sole legal custody with Mother to joint legal custody.

"Joint legal custody is favored in Missouri on public policy grounds." ***Karolat v. Karolat,*** 151 S.W.3d 852, 860 (Mo. App. 2004); Mo. Rev. Stat. § 452.375.4. "This statute, however, does not create a presumption favoring imposition of joint custody." ***Malawey v. Malawey,*** 137 S.W.3d 518, 525 (Mo. App. 2004). The "dominant consideration" in choosing a custodial arrangement remains the one "that best serves the interests of the child." ***Margolin v. Margolin,*** 796 S.W.2d 38, 49 (Mo. App. 1990).

Joint legal custody "means that the parents share the decision-making rights, responsibilities, and authority relating to the health, education, and welfare of the child, and, unless allocated, apportioned or decreed, the parents shall confer with one another in the exercise of decision-making rights, responsibilities and authority." Mo. Rev. Stat. § 452.375.1(2). "A commonality of beliefs concerning parental decisions, and the ability of the parties to function as a parental unit in making those decisions, are two important considerations in determining whether joint legal custody is in the child's best interests." ***McCauley v. Schenkel,*** 977 S.W.2d 45, 50 (Mo. App. 1998). "Joint legal custody is only appropriate where the parents demonstrate the willingness and ability to share the rights and responsibilities of raising their children." ***Leone v. Leone,*** 917 S.W.2d 608, 614

(Mo. App. 1996). "Where the parties are unable to communicate or cooperate and cannot make shared decisions regarding the welfare of their children, joint custody is improper." *McCauley*, 977 S.W.2d at 50. While joint legal custody is not "always or necessarily inappropriate merely because there is some level of personal tension and hostility between the former spouses," the record must contain "substantial evidence" in such circumstances "that despite this acrimony the parties nonetheless have the ability and willingness to fundamentally cooperate in making decisions concerning their child's upbringing." *Id.*, at 50-51.

Two recent cases from the Eastern District provide guidance on the impropriety of joint legal custody in the present case. In ***Sutton v. Sutton,*** 233 S.W.3d 786 (Mo. App. 2007), both mother and father sought to modify the original decree of dissolution awarding joint legal custody, each seeking sole legal custody. The trial court chose to retain joint legal custody, "strongly influenced by the preference for joint custody" expressed in Section 452.375. *Id.* at 791. The Eastern District found the factual circumstances simply could not sustain a joint custody award:

> In this case, the trial court's factual findings on the parties' inability to interact with each other without acrimony, their unwillingness or inability to engage in civil discourse, their failure to make joint decisions about the children, their failure to notify each

> other about decisions that were made, and their subjection of the children to their bickering and their criticism of each other were supported by substantial evidence in the record. There was evidence the parties bickered constantly and criticized each other in the children's presence; had great difficulty communicating with each other; were unwilling or unable to engage in civil discourse, either on the telephone or in person; did not function as a unit; and had not been able to work together to make joint decisions about the children's education or medical treatment. In fact, they took opposite positions when confronted with the children's educational and medical issues that required decisions.

Id. at 792. The Eastern District concluded that the "record contains no basis for a conclusion that the parties were able to function as a unit in making parental decisions about the children's health, education and welfare," and reversed the award of joint legal custody. *Id.* at 793.

In ***Kroeger-Eberhart v. Eberhart,*** Case No. ED88716, 2007 WL 4233318 (Mo. App. E.D., December 4, 2007), mother appealed the trial court's award of joint legal custody in the decree of dissolution. The Eastern District noted that "[w]hile no evidence showed the parties had the ability to work together, ample evidence demonstrated the contrary." *Id.* at *9 Among the difficulties, mother

"had not kept the father apprised of anything concerning the child," the parties "had no meaningful discussions," they could not agree on a pediatrician or a babysitter, they "cursed and exchanged racial and sexual slurs in the children's presence," and they were "in constant turmoil over numerous issues." *Id.* Notably, father "testified that he could try to co-parent, but that the mother was unwilling," and mother "testified that she thought she and the father could talk in the future." *Id.* The Eastern District concluded the parties "have failed to show that they share a commonality of beliefs and an ability to function as a parental unit in making decisions for the benefit of their child," and therefore "the joint legal custody award is improper." *Id.* at *10.

The facts of this case mirror those in *Sutton* and *Eberhart.* The parties have a long history involving "acrimony" and "animosity," to the extent that they hardly communicate at all. They exchange custody at the Festus Police Department. Mother has a justifiable fear of Father, and Father clearly bears much hostility toward Mother, as evidenced by his hiring a private investigator, his manufacturing allegations of abuse, and his reckless and vindictive posting of an internet profile of Mother on an adult dating site portraying her as a pedophiliac school teacher. (TR 261-263). Father regularly left phone messages for the minor children at Mother's home seriously disparaging Mother as a parent and as an individual, including one message that suggested Mother tried to "cut them out of her belly"

during pregnancy. (TR 175, 585). Father testified he would be willing to work with Phyllis Mast on addressing issues with Mother relating to the welfare of the children, but Mother testified she would not do so. (TR 343, 652). Both Phyllis Mast and Rhonda Kane gave their expert opinions that the parties cannot exercise joint legal custody. (TR 66, 450). Judge Page in her Judgment stated she recognized "the strong potential for Father to abuse an award of sole legal custody due to the protracted history of litigation and the obvious animosity each parent bears the other." (LF 202). She found that Mother "adamantly refuses to discuss any and all issues relating to the children with Father." (LF 201). She added that Father "is far from blameless in this situation" as "he has been verbally obnoxious in the extreme when denied phone contact and visitation with his children." (LF 201). Judge Page made not one single finding that indicates the parties could co-parent, that they could actually work together to make joint decisions in the best interest of the minor children. Judge Page did note that for the last five years the parties have had dueling adult abuse orders against one another, a seemingly impassable hurdle for cooperative parenting. The record refutes any contention Mother and Father can exercise joint decision making, and awarding joint legal custody was improper and an abuse of discretion. This Court should reverse that part of the Judgment of Modification awarding the parties joint legal custody.

V. The trial court erred in entering a Judgment of Modification modifying physical custody from sole physical custody for Mother to joint physical custody because no changed circumstances indicate that expanding physical custody with Father is in the best interests of the minor children as required by Mo. Rev. Stat. § 452.410.1, in that the evidence unmistakably indicates that the children have thrived with Mother and have a healthy and stable home environment, while Father continues to exhibit violent, threatening, menacing, harassing and unstable behavior that pose a risk of physical and emotional harm to the minor children. Consequently, that part of the Judgment of Modification awarding the parties joint physical custody should be reversed.

A trial court may only modify a custody decree if it finds, "upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child." Mo. Rev. Stat. § 452.410.1. In this case, the trial court found changed circumstances it deemed warranted changing physical custody from sole physical custody with Mother to joint physical custody, significantly expanding the time the minor children would be in the temporary custody of Father. The changed circumstances were not delineated by the trial court in its

Judgment of Modification, other than that they follow the recommendation of the guardian ad litem. (LF 203-204).

Section 452.410.1 states explicitly that, regardless of changed circumstances, any modification of physical custody must serve the best interests of the minor children. "Only where the change in circumstances rises to such a level that the welfare of the children requires it, should custody be granted." ***Clark v. Clark,*** 805 S.W.2d 290, 294-295 (Mo. App. 1991). "Mere changed conditions, standing alone, do not justify a change in custody unless it is further shown that such a change is in the interest of the welfare of the children." *Id.* at 295. "Once custody has been originally adjudicated, the presumption arises that the custodial parent remains suitable." ***Humphrey v. Humphrey,*** 888 S.W.2d 342, 345 (Mo. App. 1994).

In this case, Father offered no new evidence of Mother as somehow an unfit parent, or more specifically, changed circumstances in the minor children's day to day lives with Mother that negatively impact their health, education or welfare. Father spent considerable time complaining about genital herpes and the medicine bottle label incidents, both of which preceded the date of this latest motion to modify. But he did not identify any other complaints that brought into question Mother's ability to parent. By contrast, Mother presented new evidence indicating Father should have limited contact with the minor children. As the record

indicates, Father originally had limited visitation with the minor children because his history of violent, threatening and unstable behavior kept Mother in fear for her safety and that of the children – behavior that led to the death of an innocent woman for which Father served time in prison. (LF 25; TR 26, 60). At trial, Father admitted to continuing to verbally harass Mother, including leaving threatening voice mail messages for the children describing how Mother wanted to "cut them out of her belly" during pregnancy. (TR 175, 585). Father's own mother, Joyce Wyciskalla, told Rhonda Kane that the minor children seemed fearful around Father and that she, not Father, took care of the minor children when Father had temporary custody. (TR 418). Ms. Kane also observed Father talk negatively about Mother in the presence of the minor children. (TR 419). Ms. Kane gave her expert opinion that "something is wrong" in the relationship between Father and the minor children, warranting a limitation – not expansion – of physical custody. (TR 426, 430). And finally, Father recklessly created a profile of Mother on two adult dating sites that not only identified Mother but also characterized her as a pedophiliac high school teacher and enabled strange men from around the country to find her at her place of work, if not her home. (TR 261-262). Father conceded he did not even consider at the time that his actions might place his children in jeopardy. (TR 263). All of these acts only validate that Father remains the same violent, disturbed and unstable individual that appeared

before Judge Stewart at the initial determination of paternity. If anything, Father has become worse, not better. The testimony of Phyllis Mast regarding Father's expressed willingness to change represents hollow, self-serving promises that belie the actions that have justified multiple orders of protection against Father over the last four years. Quite simply, Father poses a clear risk of physical and emotional harm to the minor children that warrant a restriction, not an expansion, of temporary custody.

Father had the burden of proving new circumstances that render the existing custodial arrangement untenable and no longer in the best interests of the children. Father failed to carry his burden. As our courts have long held, "there is value in keeping children with the parent who has custody, as against uprooting them and transplanting them to a new home. Children should not be moved from one environment to another upon slight changes in the status of the parents." *Clark*, 805 S.W.2d at 295. The minor children have been happy with Mother and thriving as far as the evidence presented at trial indicates. Because Father failed to carry his burden, the trial court erred in modifying physical custody. *See id.* (where children "happy and receiving as much love and affection as they could get" no modification is warranted). The part of the Judgment of Modification ordering a change in physical custody should be reversed.

VI. The trial court erred in modifying Father's past due child support arrearage from a figure in excess of $16,000 to $0.00 because said modification is against the weight of the evidence, in that the trial court is bound by the previous arrearage determination at the time of the original Judgment and the subsequent Consent Judgment, and can only discount any perceived overpayment in child support from the date the trial court granted summary judgment in April of 2005. Any alleged overpayment cannot exceed $2,400, leaving an arrearage somewhere between $10,000 and $13,600 – not $0.00. Additionally, and critically, Father never prayed for a reduction in his past due child support nor requested it at trial, and the trial court cannot grant relief beyond that requested by the moving party. Finally, a trial court that enters judgment on an issue not pleaded nor tried by consent lacks subject matter jurisdiction over the issue. The modification of past due child support should be vacated.

With regard to past due child support, the trial court made the following finding and conclusion: "The Court finds that Respondent has overpaid child support but that he had a large arrearage due since the original Judgment and throughout these proceeding [sic]. Therefore, the recalculated arrearage amount shall be $0.00, effective on the date of the Judgment." (LF 207). The trial court

made no factual findings explaining how Father has "overpaid" child support, nor in what amount nor for what period of time.

In the original Judgment of Paternity, the trial court determined an arrearage of $10,928.75 and ordered Father to pay that sum to Mother. (LF 23). Father did not appeal that original Judgment of Paternity, so it became a final and enforceable judgment debt against Father in favor of Mother. In his first Motion to Modify, Father sought to recalculate his arrearage. (LF 44). When the trial court entered summary judgment against Father on this Motion to Modify, Father lost his claim to recalculate any arrearage. (LF 101). Father did not appeal the summary judgment, so it too became final and conclusive against Father. Hence, as of April 4, 2005, the date the trial court granted Mother summary judgment, all arrearages in child support had been finally determined by the trial court and/or the Division of Child Support Enforcement, and therefore not subject to modification but immediately owing to Mother. Past due child support as of April 4, 2005, became *res judicata* as to any future claims by Father. ***State ex rel. Sanders v. Martin,*** 945 S.W.2d 641, 642 (Mo. App. 1997); ***Adams by Northcutt v. Williams,*** 838 S.W.2d 71, 73 (Mo. App. 1992).

Since the trial court must be bound by the previous judgments, any theoretical miscalculation in past due child support could only date back to April 4, 2005. In its Form 14 submitted with the Judgment of Modification, the trial court

found a gross child support obligation of $836.00. (LF 214). Father testified to no day care costs paid for time prior to trial, so that adjustment should not be considered. Furthermore, Father had limited temporary custody, so he would not be entitled to the generous adjustment issued by the trial court. Using a $200.00 difference between the existing child support award and the modified award, the 12 months would reduce the $16,000 arrearage by $2,400, leaving a balance in excess of $12,000 – not a *zero balance* or offset as the trial court concluded. The trial court had no authority to reduce the arrearage prior to April 4, 2005. Hence, erasing Father's past due child support – an amount that subjects him to felony prosecution, *see* Mo. Rev. Stat. § 568.040.4 – is patently against the weight of the evidence and contrary to the fundamentals of *res judicata* and respecting final judgments.

Additionally, Father never prayed for a reduction in past due child support in his Motion to Modify Consent Judgment, nor requested such a reduction at trial. To the contrary, Father indicated he has been able to pay over $36,000 in child support since entry of the original judgment. (TR 312). A trial court cannot enter judgment beyond what a party requests in his pleadings. "It is the established rule in this state that judgments must be responsive to the issues raised by the pleadings, and that the relief to be awarded by the judgment is limited to that sought by the pleadings; furthermore, a judgment which is based upon issues not

made by the pleadings is *coram non judice* and void, at least in so far as the judgment goes beyond the issues presented and raised by the pleadings." ***State ex rel. Mohart v. Romano,*** 924 S.W.2d 537, 540 (Mo. App. 1996). Father did plead that "child support arrearage due by Respondent to Petitioner has never been determined, and should be determined by the Court at this time." (LF 140). This averment misstates the facts – Judge Stewart had previously determined the arrearage – *in the original Judgment of Paternity.* Furthermore, Father in his prayer for relief makes no mention of recalculating – let alone erasing – the past due child support. (LF 141-142). The issue of revisiting the arrearage was not tried by consent because the evidence Father relies upon in the record was not offered solely on the issue of recalculating past due support, but rather involved principally, if not solely, whether present child support should be modified. *See,* ***Melton v. Padgett,*** 217 S.W.3d 911, 913 (Mo. App. 2007)(issue not raised by pleadings tried by implied consent only when evidence is offered without objection by opposing party and evidence bears solely on unpleaded issue). This Court has considered judgment on an issue not raised in the pleadings nor tried by consent one of subject matter jurisdiction. *Hendrix,* 183 S.W.3d at 588-89. As a result, the trial court either lacked subject matter jurisdiction to modify past due child support or abused its discretion in erasing the past due child support owed by Father to Mother, and this Court should vacate that part of the Judgment of Modification.

CONCLUSION

For the foregoing reasons, Petitioner-Appellant Kelly Webb requests this Court vacate the Judgment of Modification entered by the trial court as void for want of subject matter jurisdiction, or in the alternative, reverse the Judgment of Modification entered by the trial court for the reasons stated in Points II-VI, and for such further relief this Court deems just and proper.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

RULE 84.06 CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Opening Brief complies with Rule 84.06(b) of the Missouri Rules of Civil Procedure, and was prepared using Microsoft Word in 14 point Times New Roman font, and has a word count of 14,615 words, exclusive of the cover page, table of contents, table of authorities, this page, and the certificate of service. The undersigned further certifies that the floppy disk provided to counsel for Respondent has been scanned for viruses and is virus-free.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)

CERTIFICATE OF SERVICE

The undersigned certifies that the original and nine copies of this Substitute Opening Brief of Appellant were filed this ____ day of September, 2008, with the Supreme Court of Missouri; and that two copies and an electronic version of this Opening Brief were sent via first class mail this _____ day of September, 2008, to Lawerence G. Gillespie, Attorney for Respondent, 7701 Forsyth Boulevard, Suite 300, Clayton, Missouri 63105, and Julie K. Huffman, Attorney for Respondent, 4629 Yeager Road, Hillsboro, Missouri 63050.

Respectfully submitted,

JONATHAN D. MARKS MBN 47886
Attorney for Appellant
The Marks Law Firm, LLC
Four CityPlace Drive, Suite 497
St. Louis, Missouri 63141
(314) 993-6300
(314) 993-6301 (Facsimile)