No. SC93760

MISSOURI SUPREME COURT

MARY ELLISON, ARTHUR FRY, DAVID FRY AND SUSAN SLEEPER,
APPELLANTS/CROSS-RESPONDANTS/PLAINTIFFS

v.

J.D. FRY, DECEASED, BY LINDA FRY, TRUSTEE OF THE JOHN DELBERT FRY REVOCABLE INTERVIVOS TRUST; LINDA FRY, TRUSTEE OF THE JOHN DELBERT FRY REVOCABLE INTERVIVIOS TRUST; LINDA FRY; DELBERT FRY; FRY GRAIN ENTERPRISES, INC.,
RESPONDENTS/CROSS-APPELLANTS/DEFENDANTS

APPELLANT/CROSS-RESPONDANTS' INITIAL SUBTITUTE BRIEF

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STATEMENT OF JURISDICTION

Jurisdiction is now vested in this Court pursuant to its Order of Transfer dated December 24, 2013. The Missouri Court of Appeals, Southern District, issued its opinion on September 23, 2013. A timely Motion for Rehearing and an Alternative Application to Transfer were filed with the Southern District on October 8, 2013. Said Motions were denied on October 15, 2013. Jurisdiction of this cause is now properly in the Supreme Court of Missouri pursuant to Article V, § 10 of the Missouri Constitution and Rule 83.03 of the Missouri Rules of Civil Procedure.

This Court, pursuant to Article V, § 10 of the Missouri Constitution and Rule 83.09 of the Missouri Rules of Civil Procedure, now has jurisdiction as to all issues the same as if on original appeal.

STATEMENT OF FACTS

I. Parties

Vincil and Willa Fry were born in 1908 and 1907 respectively. They had three children: Arthur (Plaintiff Arthur), Mary (Plaintiff Mary), and John Delbert (Defendant J.D.). Arthur Fry married and had two children with his first wife: David Fry (Plaintiff David) and Susan Fry Sleeper (Plaintiff Susan). After the death of his first wife, Arthur married Betty Fry. Mary Fry Ellison married and had eight children. Defendant J.D. Fry married Linda Fry (Defendant Linda) and had one son, Delbert Fry (Defendant Delbert) and one daughter.

II. Vincil and Willa's Testamentary Intent before Undue Influence

In 1981, Vincil and Willa executed a Joint Will (1981 Will) which was prepared at their attorney's office, William J. Brown of the firm Buckley & Buckley. Exh. 72. The 1981 Will left a 40 acre tract of land and $5,000 to Mary, and a 160 acre tract to J.D. Exh. 72. The 1981 Will also left Arthur a life estate in the 200 acre tract, with the remainder going to David and Susan.[1] *Id.*; Tr. 392:12-21. The 1981 Will left the rest of the cash to Arthur, Mary, and J.D. equally. Exh. 72. On May 7, 1990, Vincil and Willa Fry

[1] This was an effort to keep the land in the bloodline and to prevent the 200 acre tract from going to the children or family of Arthur's second wife Betty.

leased a safe deposit box from Union Savings Bank which permitted "All Three Children Together" to access the box. Tr. 580:13-22.

III. Car Accident and the 1990 Documents Plaintiffs Alleged Resulted from Undue Influence

A month after designating "All Three Children Together" on the safe deposit box, on June 5, 1990, Vincil and Willa Fry at the ages of 82 and 83 respectively, were in a motor vehicle accident. Exh. 15. Vincil pulled out onto the highway, failing to yield the right of way to an oncoming vehicle. *Id*. Willa was hospitalized with injuries including broken ribs. Tr. 768:11-14. The driver of the other vehicle was hospitalized overnight, with the two children passengers in the second vehicle being examined and released. Tr: 215:19-216:7. The other vehicle was a total loss. Tr. 216: 8-11. A week and a half later, Willa was readmitted to the hospital due to her injuries which included fractured ribs, a scalp laceration, bruises and swelling. Tr. 768:11-14.

Soon after the accident, Willa expressed concern to Mary, her daughter, that they could lose the farm because of the car accident. Tr. 796:3-6. Around the same time, Defendant J.D., Vincil, and Mary's husband, Donald, were discussing the car accident. Mary and Donald's daughter, Donna Rowland, heard the conversation. Tr. 434:15-17. Defendant J.D. was heard saying to Vincil, "Those Ruegens are mean sons of bitches." Tr. 434:17-18.

The Ruegens were relatives of Barbara Clark Belt, the driver of the other vehicle, by marriage. Tr. 220:12-15; Ex. 100, 100A, 100B, 100C. Later that same month, Barbara Clark Belt visited Vincil and Willa at their farm. Barbara had heard that Willa was worried about the injuries sustained by the occupants of the other car and wanted to reassure Willa that the occupants of the other vehicle were fine. Tr. 220:02-04. Willa was afraid of losing all she and Vincil owned due to liability for the accident and pleaded, "Honey you-all can have the farm or anything you want but please don't take my dog." Tr. 219:24-220:02. Willa told Barbara she was afraid of losing the farm and the dog. *Id*.

On June 28, 1990, less than a month after the accident for which Vincil was liable and in which he had been injured and for which Willa was hospitalized twice and was greatly concerned about losing her farm, J.D. Fry took his parents to his own attorney, Jim Crews. Tr. 299:22-300:3. At J.D.'s lawyer's office, Vincil and Willa signed warranty deeds conveying the 160 acre tract of land to Delbert and the 200 acre tract of land to J.D. Exh. 1, 2. Vincil and Willa retained life estates in both tracts of land. *Id.* Also a deed conveying the noncontiguous 40 acre tract of land to Mary was executed but was never delivered to Mary. Exh. 2A. Vincil and Willa signed wills leaving everything to their spouse and then to their three children if their spouse was not living. Exh. 3 & 4. Neither Arthur nor Mary was informed of the June

28, 1990 documents. No gift tax returns were filed. Tr. 990:17-19. No money was paid for the 360 acres conveyed that day and no one ever thanked Vincil and Willa for the transfers. Arthur later found out about the deeds by reading about them in the newspaper. Tr. 654:15,16. Arthur assumed J.D. and Delbert had paid for the conveyances. Tr. 1319.2-12.

Jim Crews, J.D.'s attorney who is now deceased, prepared the 1990 documents. Crews had previously sold other real estate to Delbert Fry. The trial judge did not allow admission of Crews' file into evidence, which contained the words "J.D.'s Parents." Tr. 1123-1125. From 1990 on, Delbert farmed and received income from the 160 acres. Delbert did not tell Arthur or Mary about the 1990 deeds. Tr. 507:16-20; 508:7-11. Delbert did not thank Vincil or Willa for the 160 acres of land. Tr. 507:11-15. Delbert received a tax bill for the 160 acres, which he took to Willa, who told Delbert it must have been a mistake and that she would take care of it. Tr. 506:21-25.

J.D. and Arthur were added to Vincil and Willa's checking accounts so that they could sign checks in 1992. Tr. 1288:20-24. However, Arthur was never made aware of this fact and he never signed a check on his parents' accounts. Tr. 668:7-13.

Plaintiff had the land in question appraised after the lawsuit was filed. The 200 acres, which was to have gone to Arthur as a life estate with the

remainder to Susan and David under the 1981 Will, was appraised at $295,000. Ex. 46. Using RSMo. § 442.530 and § 442.540 to calculate the value of a life estate, Arthur's use of the 200 acres over his lifetime would have been worth $68,286. The value of David's one-half remainder interest was $113,357, as was Susan's one-half remainder interest. The court below did not allow Arthur's claims to be submitted to the jury.

IV. USDA Farm Payments/ Fry Grain Enterprises, Inc.

Arthur had farmed part of the 200 acre tract of land with his father since he was a little boy, starting in the late 1940s. Tr. 705:15-20. The part Arthur farmed contained good bottom ground. Tr. 381:11-13. In March 1986, Vincil signed a USDA farm contract that shows the ownership of the crops grown on the 200 acres to be jointly owned 50/50 between Vincil and Arthur. Tr. 486:15-20. However, on April 14, 1986, Delbert went to the USDA office and had the contract altered. Tr. 487:2-5. Arthur Fry's 50% interest was crossed out and replaced it with a 50% interest in "Fry Farms." Tr. 486-488. Fry Farms was a partnership between J.D. Fry and Delbert Fry. Tr. 489:8-10. In May 1988, Vincil and Willa became aware that Arthur did not receive the farm subsidy check for the 1987 crop year. Arthur told his dad, Vincil, he had not received his check. Willa wrote in her journal on May 9, 1988:

> Vincil told me at noon that Arthur hadn't gotten his deficiency payment on corn. It upset me no end for I guess when I sent note

> to Versailles that Delbie had rented the place he must have gotten the payment. Got to check with him as soon as I can get to talk with him.

Exh. 63; Tr. 492:20-21. On May 14, 1988 Willa's journal entry indicated that Defendant Delbert stopped by and told his grandmother he would look into why his uncle Arthur did not receive the subsidy. Tr. 493:21-23. However, there is no evidence that Delbert ever did look into the matter. Later that year, Arthur made the decision to stop farming his parents' 200 acre tract, after 40 years, partly because the subsidy payments were going to the J.D.-Delbert partnership, "Fry Farms" instead of to Arthur. Tr. 651:18-21. Arthur's decision to stop farming upset Vincil. Tr. 231:13-15.

Fry Grain Enterprises received $10,834 in farm government payments and did not pay rent every year to Vincil and Willa. Exhs. 43 and 43A. Defendant Delbert's' response was that they traded labor for rent, but he had no records of labor expended. Tr. 516:23-517:14.

V. The 1998 Power of Attorney Plaintiffs Alleged Resulted from Undue Influence

In June, 1998, J.D. took Vincil and Willa to J.D.'s attorney, Jim Crews, to draw up Durable Powers of Attorney naming J.D. as agent for Vincil and Willa. Tr. 318:10-13. At this time, Vincil was 90 years old and Willa was 91 years old. The couple had begun showing signs of dementia as early as 1990

and had in-home help. Exhs. 129, 131. After the Powers of Attorney were drawn up, J.D. took his parents to a grain elevator to have the documents signed and notarized by a friend of J.D.'s. Tr. 366:1-4; Exh. 5, 6. Vincil and Willa had accounts at a bank a short distance away.

Although J.D. took his parents to where the 1990 Wills were executed, and was Vincil and Willa's attorney-in-fact, J.D. did not have either of his parents' wills taken to the probate court until 2007, two and seven years after their deaths. Exh. 3A and 4A. He also did not inform Arthur and Mary about the existence of the wills. J.D.'s children provided a copy of the wills to Mary and Arthur, only after Mary asked J.D. whether their parents had Wills, which was more than a year after Willa had passed away and too late for a probate estate to be opened. Tr: 952:13-25.

VI. Defendants J.D. and Linda Fry's Actions under Color of the Powers of Attorney

In 1999, Defendant J.D. started cashing in Vincil and Willa's certificates of deposits under color of the Durable Powers of Attorney. The Powers of Attorney did not authorize the revocation of gifts, which is what Defendant J.D. was doing by cashing in CDs which had designated beneficiaries. With the proceeds from the old CDs, he bought new CDs with Defendant Linda's name on the new CDs. *See* Tr: 601:8-603:25. The Powers

of Attorney did not authorize making gifts with Vincil and Willa's money, which is what was being done by naming Linda on the CDs. *Id*.

Vincil and Willa had bought a certificate of deposit for approximately $30,000 and named Delbert as Payable on Death beneficiary. Tr. 518:8-111; Exh. 10. While Vincil and Willa were both still living, J.D. cashed it in, using the proceeds to pay down a Promissory Note of a farm corporation partly owned by J.D. at Farm Credit Services. Tr. 1086:22-1087:4. The Powers of Attorney did not grant authority to J.D. to take that action.

Later, in 2005, J.D.'s wife, Defendant Linda, signed checks drawn against Vincil and Willa's checking accounts to pay for things for her and J.D. Exh. 105. She did this despite having never been given authority to do so under a Power of Attorney document. Linda testified that the checks were written on J.D.'s parents' account unintentionally, yet she never corrected the mistake. Tr. 1008:13-17. Linda also signed a Do Not Resuscitate Order for Willa, with no authority to do so. Tr. 1012:4-7.

After Willa Fry had been diagnosed with dementia, Linda filled out a change of beneficiary form for Willa's life insurance policy which made J.D. the beneficiary. Tr. 1014:21-1015:10. This form was dated February 28, 2000, and was signed by Willa. Exh. 11. On November 14, 1999, Willa was admitted to Bothwell Hospital. The records note, "progressive forgetfulness over the last several years." Exh. 136. On November 17, 1999, Willa was

admitted to Tipton Oak Manor. The diagnosis included senility/dementia. Exh. 138.

Upon Willa Fry's death, there were two CDs missing from the safe deposit box. Exhs. 8 & 9; Tr: 598:11-17; 21,22. From December 22, 1999, until Willa Fry's death, Defendant J.D. entered the safe deposit box alone four times. Exh. 7A. Defendants J.D. and Linda divided the cash and CDs between Arthur, Mary, and J.D. Linda testified that she intended this division to be equal, however, J.D. ended up with more than Arthur and Mary. Linda testified it was a simple math error. Tr. 1009:23-1010:1. When Arthur, Mary, and J.D. went together to Vincil and Willa's safe deposit box, after Vincil and Willa were both deceased, as the CDs were passed out, J.D. complained, "Well I got the short end of the stick as usual." Tr. 801:8-9.

VII. Defendants Withhold Tangible Personal Property from Arthur and Mary

In equity, the personal property of Vincil and Willa should have been divided evenly among Arthur, Mary, and J.D. However in practice, J.D. gave what he wanted to his family and exerted control over others in the family who wanted personal items. On one occasion when he allowed others outside his immediate family to come to gather personal items from Vincil and Willa's home, J.D. followed them around, telling them what they could and could not take. He told Mary to put down a corn shucking peg of her fathers

that she wanted. Tr.774:21-25. J.D. also said to Mary, "How can you remove things out of this house with your mother looking at you from the wall in a picture?" Tr. 789:18-790:2. J.D. made Mary, Arthur and Betty sign receipts for items they took. Exh. 12 & 13. He gave them only a limited time to look for and gather things. Tr. 774:12-20. He did not make his son, Delbert, or his wife or his daughter, sign receipts for items they received. Tr. 954: 5-8. Donna Rowland, Mary's daughter, was so intimidated by J.D. at the time that she did not even ask for any items. She later bought a ceramic squirrel so she would have one that was similar to her grandmother Willa's. Tr. 437:15-18.

More than a year after Willa's death, J.D.'s children brought to Mary a pickup load of junk from Vincil and Willa's house, including a stained, ripped doily, Willa, Mary's mother had made. Tr. 532:2-8; Exh. 23 and 24. Mary ended up with none of her mother's quilts. Tr. 777:12-13. A beautiful doily Willa made is framed and hanging on Linda's wall. Tr. 529:21-24; Exh. 19. J.D. and Linda's daughter, Lori, ended up with five quilts. Tr. 955:18-22.

One of the personal items included Mary Ellison's Aunt Eula's sewing machine. Mary testified that her aunt had made Mary's school clothes on that sewing machine since Mary had been in first grade and that the sewing machine had sentimental value. Tr. 789:8-12. Nonetheless, the sewing machine went to Delbert instead. Tr. 532:9-11.

Arthur had sentimental feelings toward a cream separator of his parents. Tr. 670:10-12. Arthur's son, David, had sentimental feelings toward arrowheads which he had collected with his grandfather, Vincil, on the farm. Tr. 455:10-19. Nonetheless, these items were withheld from Arthur and David until around the time that J.D. sought to depose Arthur and thereby break his promise not to involve Arthur in the litigation. *Id.*; Tr. 955:9-15.

It was undisputed that J.D. and Delbert received $754,338 worth of land and money from Vincil and Willa. Exh. 41. Mary received $142,591 of money. Exh. 16. Arthur received $135,584 of money. Exh. 40.

VIII. The Lawsuit and the Purported Release/Settlement

Mary initially filed a six count petition for damages against three Defendants: J.D. Fry, Linda Fry, and Fry Grain Enterprises, Inc., a corporation owned by J.D., Linda, and their son, Delbert. L.F. 1. After the suit was filed, J.D. and Defendants' counsel approached Arthur Fry to "keep him out of the lawsuit." Tr. 533:20-534:2; Tr. 702:22-24; Exh. 124. Through counsel, Defendants offered Arthur $100 to keep him out of the lawsuit. *Id* at Tr. 702:22-24. When Arthur Fry received a notice to appear at a deposition, he was upset since he had been promised by J.D. that he would not have to be involved in the lawsuit. *Id.* This notice prompted further investigation into the facts surrounding Mary's lawsuit. Tr. 696. When he learned of the 1981 Joint Will and learned of the circumstances surrounding the 1990 Wills and

Deeds, Arthur decided to join the suit, along with his two children, David Fry and Susan Sleeper. TR. 696-697.

After Arthur joined the suit, Defendants produced a purported Release of claims bearing Arthur's signature and attempted to hold it against him. Tr. 660:11-12. The document produced by the Defendants has two pages of legal substance with short lines in the bottom right corner of the page and a third page which is a signature/notary page. Tr. 660. The Short lines, intended for Arthur's initials, were left blank. *Id*. At trial, Arthur Fry identified his signature on the signature page but testified he does not recall ever seeing pages 1 and 2, the substantive pages of the release. Tr. 660:11-12

IX. The Trial

A five day trial was held in April 2012. At the close of Plaintiffs' case, the court sustain Motions for Directed Verdict filed by Defendants and dismissed Arthur's claims based on the purported release, dismissed claims against Delbert, and ruled that Plaintiffs could not submit punitive damge instructions to the jury. L.F. 189-196. At the close of all evidence, the court dismissed the claim against Fry Grain. L.F. 197-208.

The jury rendered six verdicts in favor of Plaintiffs, and assigned damages on three of the verdicts:

- A verdict for David against Linda Fry, Trustee of the John Delbert Fry Revocable Inter Vivos Trust in the amount of $5,500,

- A verdict for Susan Sleeper against Linda Fry, Trustee of the John Delbert Fry Revocable Inter Vivos Trust in the amount of $5,500, and
- A verdict for $35,000 in favor of Mary against Linda Fry, Trustee of the John Delbert Fry Revocable Inter Vivos Trust.

L.F. 212, 214, and 216. Following the reading of the verdicts, Plaintiffs' counsel orally motioned the court for an Order requiring the return of the tangible personal property. Tr. 1500:23-1501:1. The court entered a judgment consistent with the verdicts for money damages, but did not address the return of the tangible personal property. L.F. 273-280. A written Motion was filed June 8, 2012, moving the court for an Order for the return of the property. L.F. 284. The court filed an amended Judgment on June 12, 2012, but did not address the tangible personal property. LF. 287.

POINTS RELIED ON

I. The Circuit Court erred in granting Defendant's Motion for Directed Verdict on the issue of punitive damages because Plaintiffs presented sufficient evidence that a reasonable juror could have concluded that the Defendants' conduct was outrageous because of malice and reckless indifference to the rights of the Plaintiffs.

Ries v. Shoemake, 359 S.W.3d 137, 145 (Mo. App. S.D. 2012).

Gilliland v. Missouri Athletic Club, 273 S.W.3d 516, 520 (Mo. banc 2009).

II. The Circuit Court erred in dismissing Arthur Fry as a plaintiff because there was sufficient evidence such that a reasonable juror could have concluded that Arthur did not execute the "Release" with the substantive pages 1 and 2 attached and because Arthur's execution of the Release was induced by fraud, was done without adequate consideration and without mutual assent such that the Release is unenforceable.

Andes v. Albano, 853 S.W.2d 936, 941 (Mo. 1993).

Precision Investments, L.L.C. v. Cornerstone Propane, L.P., 220 S.W.3d 301, 303 (Mo. 2007).

Ensmingers v. Burton, 805 S.W.2d 207, 217 (Mo. App. W.D. 1991) .

III. The Circuit Court erred in directing a verdict in favor of Defendant Fry Grain Enterprises, Inc., because the property that was converted by Fry Grain was legally capable of being converted and Plaintiffs submitted sufficient evidence that a reasonable juror could conclude that Fry Grain did in fact convert such property.

In re Estate of Boatright, 88 S.W.3d 500, 506 (Mo. App. S.D. 2002)

IV. The Circuit Court erred in directing a verdict in favor of Defendant Delbert Fry because Plaintiffs presented sufficient evidence such that a reasonable juror could have concluded that Delbert Fry was a part of the undue influence which lead to the 1990 Wills and conveyances.

In re Estate of Hock, 322 S.W.3d 574, 579 (Mo. App. S.D. 2010).

Estate of Gross v. Gross, 840 S.W.2d 253, 258 (Mo. App. E.D. 1992).

V. The Circuit Court erred in not granting Plaintiff Mary Ellison an Order requiring the return of tangible personal property items because the division of Vincil and Willa's personal property between Arthur, Mary, and J.D. was inequitable.

Citizens for Ground Water Prot. v. Porter, 275 S.W.3d 329, 347 (Mo. App. S.D. 2008).

Matthey v. St. Louis County, 298 S.W.3d 903, 907 (Mo. App. E.D. 2009).

ARGUMENT

I. The Circuit Court erred in granting Defendants' Motion for Directed Verdict on the issue of punitive damages because Plaintiffs presented sufficient evidence that a reasonable juror could have concluded that the Defendants' conduct was outrageous because of malice and reckless indifference to the rights of the Plaintiffs.

The trial court entered a directed verdict on the issue of punitive damages against Plaintiffs on all counts. The court cited a lack of "clear and convincing evidence" from the Plaintiffs to support their prayer for punitive damages. App. A6. At trial Plaintiffs presented unrefuted evidence, which the court below overlooked, that the Defendants knowingly acted to deprive the Plaintiffs of their rights.

A. Standard of Review

"A directed verdict is a drastic action to be taken sparingly and only where reasonable persons in an honest and impartial exercise in their duty could not differ on a correct disposition of the case." *Oak Bluff Partners, Inc. v. Meyer,* 3 S.W.3d 777, 783 (Mo. banc 1999). In a jury-tried case, a motion for directed verdict challenges whether the Plaintiff presented sufficient evidence to submit the case to a jury. *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 756 (Mo. 2011), *reh'g denied* (Mar. 29, 2011). The issue of whether a plaintiff made a submissible case is a question of law that is reviewed *de*

novo. D.R. Sherry Const., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899, 905 (Mo. banc 2010). When reviewing a trial court's grant of a directed verdict, an appellate court must view the evidence and all permissible inferences derived therefrom in a light most favorable to the plaintiff. *Id.* "If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper." *Spry v. Dir. of Revenue, State of Mo.*, 144 S.W.3d 362, 366-67 (Mo. App. S.D. 2004).

B. Plaintiffs did present a submissible case at trial

"Under Missouri law, a plaintiff is entitled to punitive damages if the plaintiff proves by clear and convincing evidence that the defendant's conduct was outrageous because of the defendant's evil motive or reckless indifference to the rights of others." *Ries v. Shoemake*, 359 S.W.3d 137, 145 (Mo. App. S.D. 2012) *citing Gilliland v. Missouri Athletic Club,* 273 S.W.3d 516, 520 (Mo. banc 2009). In deciding whether there is sufficient evidence, the appellate court will, "view the evidence and all reasonable inferences in the light most favorable to submissibility and we disregard all evidence and inferences which are adverse thereto." *Ries*, 359 S.W.3d at 145 (Mo. App. S.D. 2012). (emphasis added).

Ries v. Shoemake was a Court of Appeals, Southern District case that examined, *inter alia*, whether the Plaintiff made a case for punitive damages

that was submissible. 359 S.W.3d 137. In *Ries*, Defendant had built two connected lakes on land he owned, and then applied for required permits after the fact. *Id*. at 140. The permits were denied. *Id*. Nonetheless, the defendant entered into a contract to sell the land to Plaintiff. Id. Plaintiff inquired if the proper permits had been obtained. *Id*. Over a series of communications, Defendant represented to Plaintiff that the permit process was proceeding well and that it would be complete by the time of the closing. *Id*. at 141. At the time of the closing, Defendant said he was continuing working on the permits, and signed an affidavit that stated he knew of no adverse official determinations concerning the permit process regarding the lake. *Id*. at 142.

Like the defendant in *Ries*, the defendants in the case at bar made a series of intentional actions in which they consciously or recklessly helped themselves at the expense of Mary, Arthur, Susan and David. These tortious actions can be traced back to 1986. First, on April 14, 1986, Defendant Delbert Fry crossed out Arthur's name on USDA contracts to divert Arthur's 50% interest in the subsidies and deficiency payments on the crops on the 200 acres from Arthur to "Fry Farms" which was a partnership between Delbert and his father, Defendant J.D. Tr. 487-488. The diversion of the USDA payments was not an innocent mistake. It was a conscious decision by Delbert Fry and J.D. Fry of "Fry Farms" to deprive Arthur of payments.

Arthur had farmed said land for over forty years. When Arthur learned that the government payment was going to Delbert and J.D. (i.e. Fry Farms), he decided to stop farming on the 200 acres. Although Delbert told Willa he would check to see why Arthur did not receive his check for the corn crop, he did not do so because he knew the answer: he had changed the contract to divert the payment to himself and his father Defendant J.D. Tr. 493-494.

Then, following the 1990 car accident in which Vincil and Willa were emotionally shaken and physically injured, J.D. saw his opportunity to unduly influence his parents to the benefit of himself and his son, Delbert. J.D. began a campaign to frighten his parents of their potential liability for the car accident. On several occasions, Willa Fry expressed fears of losing the farm, and even pleaded with the driver of the other car that they could take the farm, but "please don't take our dog." Tr. 223:13-18. Rather than help his parents get good legal advice as to their potential liability or reassure them that they were not in danger of losing the farm because they had liability insurance on their vehicle, J.D. sought to demonize the victims of the car crash to his father, Vincil, by saying, "Those Ruegens are mean sons of bitches." Tr. 343:17-18.

The campaign of fear was effective. Once Vincil and Willa were sufficiently afraid of losing everything they worked their lives for, J.D. took his parents to J.D.'s own attorney, Jim Crews, rather thean to their attorney

at the Buckley Law Firm. Tr. 416. As a result of the documents drawn up at that meeting, the 200 acres, which was to have gone to Arthur as a life estate and his children, David and Susan, as a remainder interest per the 1981 Will, were instead conveyed by deed to J.D. The 160 acres, which was to have gone to J.D. under the 1981 Will, instead was conveyed by deed to Defendant Delbert. Delbert Fry was the only one of Willa and Vincil's 12 grandchildren to receive anything in the 1990 Deeds/Wills. Tr. 341:13-342:11; 518. Arthur and his children, David and Susan, were completely cut out of any land, which was contrary to the 1981 Will, under which they would have received the 200 acre tract of land that had been farmed by Arthur for 40 years. Exh. 72, Tr. 680. Although a deed was executed which conveyed 40 acres to Mary, that land was later sold by Vincil and Willa and Mary never received any real estate. Tr. 407:14-17. J.D. and Delbert never paid any consideration for the conveyance of the 200 acre and 160 acre tracts of land, and no gift tax returns were filed. Tr. 990:17-20.

Again, J.D. acted consciously to exert undue influence at a time when his parents were physically and emotionally weak from the motor vehicle accident, to enrich himself and his immediate family at the expense of his brother and niece and nephew. J.D. capitalized on and fed his parents' fear of losing their land due to liability from the accident by demonizing the relatives of the driver of the other car.

When Vincil and Willa were 90 and 91 years old and had begun to show further signs of dementia, J.D. took them back to Attorney Jim Crews who drew up two Durable Powers of Attorney naming J.D. as agent. Exhs 4, 5; Tr. 318. J.D. then took them to a family friend of J.D.'s at a grain elevator to have the documents executed and notarized, even though there was a bank that was closer where Vincil and Willa were known and had accounts. Tr. 366:1-4. Vincil and Willa likely did not know what they were signing or they would have been taken to the bank. J.D. used the Powers of Attorney to exert control of his parents' finances and heath care decisions to the exclusion of his siblings, Mary and Arthur. Exhs. 5, 6. J.D. used the Powers of Attorney, to make himself and his wife, Linda, the payable on death beneficiary of CDs owned by his parents. Tr. 601:8-603:25. This again was a conscious decision J.D. made to benefit himself and his immediate family at the expense of Mary and Arthur. This action constituted a gift of Vincil and Willa's assets which the Powers of attorney did not authorize. Exhs. 5, 6. J.D. cashed in CDs on which Arthur had been named as POD beneficiary. Exh. 10. Arthur never received equivalent proceeds. This action constituted the revoking of a gift, another action which was not authorized by the Powers of Attorney. *Id.*

J.D. was aware of his wrongdoing and concealed it from his siblings, Mary and Arthur. J.D. alone got into the safe deposit box that had been

designated to only be opened by "All Three Children Together." Tr. 334:8-335:4, 586:21-587:7. Two CDs that ultimately went to J.D. were removed from the box. By removing two CDs, J.D. made it appear that he was getting lesser in CDs than were Mary and Arthur. Tr. 1086:22-1087:4. J.D. complained to Mary and Arthur about getting the "short end of the stick" in the division of the CDs and cash. Tr. 801:8-9. After Mary's daughter asked if Vincil and Willa had Wills, J.D.'s children gave a copy of the 1990 Wills to Mary and Arthur after it was too late to open a probate estate. Tr: 952:13-25. J.D. had control over his parents' house and safe deposit box and intentionally concealed the 1990 Deeds and Wills from Mary, and the Wills from Arthur.

Mary filed this lawsuit under a theory of undue influence. Aware that Arthur had claims against him of which Arthur had no knowledge, J.D. had Arthur sign a document entitled, "Settlement Agreement and Full and General Release," promising to keep him out of the lawsuit in exchange for $100. Tr. 533:18-534:2, Exh. 124. Page 3, the signature page, was allegedly part of the Agreement although that fact is disputed. Arthur identified the signature as his, but does not recall seeing pages 1 or 2 at the time of signing. Tr. 745:5-7. It was years after the signing of this document that Arthur became aware of his brother J.D.'s wrongdoing. When Arthur attempted to intervene in Mary's lawsuit, J.D.'s representative tried to use the "Release"

as a shield to prevent Arthur from joining the suit. Judge Donald Barnes, who was one of the circuit judges who oversaw this case before it was brought to trial, saw J.D's conduct for what it was and allowed Arthur to intervene as a Plaintiff. Tr. 46, 49.

That pattern of conduct, from 1986 through the attempt to trick Arthur into releasing his claims, constitutes much more than the minimum requirement for punitive damages—a reckless disregard for the rights of others. The pattern of conduct shows a series of calculated and conscious actions which were taken by the Defendants to deprive the Plaintiffs of their rights. The evidence presented constitutes a submissible case for punitive damages. As such, this matter should be remanded for a new trial on this issue.

II. The Circuit Court erred in dismissing Arthur Fry as a plaintiff because there was sufficient evidence such that a reasonable juror could have concluded that Arthur did not execute the "Release" with the substantive pages 1 and 2 attached and because Arthur's execution of the Release was induced by fraud, was done without adequate consideration and without mutual assent such that the Release is unenforceable.

Defendants claimed that Plaintiff Arthur Fry released and settled any claims he had against them as a result of a document entitled, "Settlement

Agreement and Full and General Release." Exh. 124. On the basis of this "Release" the court below entered a directed verdict at the close of all evidence against Arthur Fry on all of his claims. App. A2. However, whether the Release was executed as a three page document is a question of fact that should have been submitted to the jury. In addition, the Court did not rule upon the various contract defenses available to Arthur including that his execution of the third page of the Release was induced by fraud, there was lack of mutual assent, and there was inadequate consideration to support a contract.

A. Standard of Review

As this is an appeal of a directed verdict, the standard of review is the same as was briefed for point I, *supra*. Most importantly: when reviewing a trial court's grant of a directed verdict, an appellate court must view the evidence and all permissible inferences derived therefrom in a light most favorable to the plaintiff. *D.R. Sherry Const., Ltd.* 316 S.W.3d at 905 (Mo. banc 2010). "If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper." *Spry,* 144 S.W.3d at 366-67.

B. Defendants did not present sufficient evidence to support their claim that the Release is legally enforceable and effective

As in any other matter interpreting a contractual agreement, the primary rule of construction is that the intention of the parties shall govern. *Andes v. Albano*, 853 S.W.2d 936, 941 (Mo. 1993). However, language that is plain and unambiguous on its face will be given full effect within the context of the agreement as a whole unless the release is based on, *inter alia*, fraud, misrepresentation, or unfair dealings. *Id.* It has been held to be an act of fraud where one party has superior knowledge of a material fact that is out of the reach of the other party and the first party fails to disclose or is silent on the matter. *Id.* The existence of a settlement agreement is a question of fact that requires the presenting party to prove factual issues. *Precision Investments, L.L.C. v. Cornerstone Propane, L.P.*, 220 S.W.3d 301, 303 (Mo. 2007).

In *Andes v. Albano*, this Court examined closely whether to uphold a written and executed release between two parties. 853 S.W.2d at 941. It noted that in cases where the execution of the release was induced by fraud or unfair dealing, then the release was not enforceable. The *Andes* case involved civil claims stemming from illegal wiretapping. In upholding the release in that case, this Court noted in the facts that (1) the releasing party knew the material facts at least ten months before executing the release, (2) that all of the parties were represented by counsel at the time the release was

executed, and that (3) none of the parties had a fiduciary relationship with each other. *Id*. On that third key fact, this Court noted that even if parties do not have a fiduciary relationship with one another, there may be a duty to speak when one party is in possession of material facts which the other party does not know and to which the other party does not have access. *Id*. at 943. In *Andes,* this Court found that the presenting party had proved the necessary facts and upheld the release as valid.

i. There was evidence presented from which a reasonable juror could have concluded that Arthur did not execute the full three page Release.

In the case at bar, Arthur Fry testified that soon after his sister Plaintiff Mary Ellison filed suit against Defendant J.D. Fry, J.D. contacted Arthur in an attempt to keep him out of the lawsuit. Tr. 533:20-534:2; Tr. 702:22-24. At trial, Arthur testified that at that time he wanted nothing to do with the lawsuit and J.D. offered to keep him out of it in exchange for signing a form and $100. Tr. 533:20-534:2; Tr. 702:22-24; Exh. 124.

There exists a question of fact whether Arthur received the full three page settlement form, or just the signature page. At trial, Arthur did identify his signature on the notary page, page 3, but also testified that he does not recall seeing the first two pages, or the cover letter from Defendant Attorney Simon's office. Tr. 660:4-5; 694:15,16. No evidence was presented from the

notary as to whether the notary recalls the number of pages of the document or the title of the document. It should be noted that the "Release" has short lines at the bottom right corner of each page for Arthur to place his initials. Tr. 660. No initials appear at the bottom of any of the pages. The substance of the purported Release appears on the first two, unsigned and uninitialed pages. Tr. 693.

ii. Even if Arthur did execute the full three page release, there are questions for the jury as to whether it could constitute a valid contract.

Aside from questions surrounding the execution of the release, there are basic questions about whether it can constitute a valid contract. The first basic question is whether the parties had mutual assent. It is obvious from the way that Defendants are using this purported release that they attempted to use it as a shield against any claims of wrongdoing that Arthur might bring or might have brought against them. However, Arthur's testimony makes it clear that his intent regarding the release was that he would not have to be involved in the suit in any way. Tr. 659:1-5; 569:11-16; 665:20-21.

Arthur made the decision to not be involved in the lawsuit as an attempt to stay out of a disagreement between what he saw at the time as involving his sister Mary and brother J.D. However, Arthur also testified

that he did not have all the facts. First, he did not know that the 200 acres that were conveyed to J.D. in 1990 had been slated to go to Arthur and his children under the 1981 Will. Tr. 656:14-16. Nor did Arthur know that the conveyance was done for no consideration. Tr. 668:3-6. Arthur assumed that J.D. and Delbert had paid for the land that had been conveyed to them in the 1990 Deeds. Arthur did not know that J.D. had cashed in CDs that were to go to Arthur. Tr. 656:17-20. He did not know that Delbert had crossed out Arthur's name on the USDA contract, which resulted in Arthur not getting the government payments on the 200 acre tract. Tr. 487-488. He did not know that J.D. had scared Willa and Vincil into thinking they would lose their farm because of the auto accident. Tr. 695:22-25. He did not know that J.D. took their parents to J.D.'s attorney rather than to their own attorney when their estate plan was changed in 1990 and when they made J.D. their agent in 1998. Tr. 324:1-7. J.D. had knowledge of all those facts and knew that Arthur had knowledge of none of those facts. Furthermore, Arthur testified that had he had the full details, he would not have executed the Release. Tr. 690.

The evidence presented at trial shows that the parties to the purported Release had very different ideas about what it was to be used for, and as such there was no mutual assent.

The second basic contractual issue that is present in this case is that there was a lack of consideration for the release. The Court of Appeals, Western District ruled that $10,000 paid in consideration for a release of claims was not adequate consideration for claims in excess of $25,000. *Ensmingers v. Burton*, 805 S.W.2d 207, 217 (Mo. App. W.D. 1991). In the instant case, the facts show an even larger disparity between the consideration paid and the amount of claims than was presented in *Ensmingers*.

The 200 acres which were conveyed to J.D. in 1990 by his parents who were afraid of losing it to the "mean sons of bitches" from the car accident, was appraised at $295,000, of which Arthur's life estate would have been worth $68,286. Exh. 46; RSMo. §§ 442.530, 442.540. In addition, J.D. damaged Arthur in the amount of at least $29,084 from CDs that would have gone to Arthur had J.D. not cashed in the CD in abuse of his authority under the Powers of Attorney. Tr. 518:8-111; Exh. 10. The *Ensmingers* court ruled that a $15,000 deficiency between consideration and claims invalidated the release. In the current case, there is a deficiency of nearly $100,000. Plainly, $100 is not sufficient consideration for releasing Arthur's claims of $68,386 and $29,084.

iii. Even if the release was a valid contract, it is not enforceable because it was induced by fraud

J.D. told Arthur that the Release would make it so that Arthur would not have to be involved in the lawsuit. J.D. thereafter involved Arthur in the lawsuit by having him served with a subpoena to give a video-taped deposition. It was only after that breach of the agreement that Arthur decided to intervene as Plaintiff in the case. Tr. 665:5-19. The real intent behind the Release, as evidenced by how the Release was used in this proceeding, was to attempt to shield Defendants from Arthur's potentially sizeable claims.

In this case, J.D. Fry exerted undue influence over his parents beginning with the 1990 land transfers which favored J.D. and Delbert. Once J.D. had the Powers of Attorney, he cashed in CDs and added his wife as owner on CDs, and even used his position as attorney-in-fact to exclude his sister Plaintiff Mary Ellison from healthcare decisions and from getting information concerning her parents well-being when they were in nursing homes. Tr. 809.

Through the Powers of Attorney, and his position of influence over Vincil and Willa, J.D. put himself in a position where he had superior information over Arthur. Since he had control over all the bank accounts, the keys to Vincil and Willa's home, and handled all of their affairs, J.D. knew material facts of his wrongdoing that Arthur could not know. Arthur had no

way of knowing of the existence of the 1981 Will or the 1990 Wills. The 1990 Wills were in the possession of J.D. Tr: 952:13-25

This case is immediately distinguishable from *Andes*. In this case, (1) Arthur did not know material facts prior to signing the third page of the release, (2) he was not represented by counsel, although J.D. and the other Defendants were, and (3) J.D. was in possession of material facts that only he could have known because of his position as attorney-in-fact for his parents, Vincil and Willa, since 1998 through the dates of their death. Arthur only learned the facts about the fraudulent transactions, conveyances, and influence that J.D. exerted after this litigation had commenced and Mary shared with him information that had been learned through discovery. Tr. 668. Since J.D. had knowledge of the material facts, and that knowledge was not made available to Arthur, J.D. had a duty to disclose these facts to Arthur before Arthur signed the release. Since J.D. instead chose to continue to conceal these facts, this case meets the *Andes* test for fraud, which would make this release unenforceable.

III. The Circuit Court erred in directing a verdict in favor of Defendant Fry Grain Enterprises, Inc., because the property that was converted by Fry Grain was legally capable of being converted and Plaintiff submitted sufficient evidence that a reasonable juror could conclude that Fry Grain did in fact convert such property.

The trial court's directed verdict in favor of Fry Grain Enterprises, Inc. (FGE) was based upon a legal error and factual errors, particularly a misunderstanding of the law of conversion in Missouri. App. A11; LF. 191-192.

A. Standard of Review

As this is an appeal of a directed verdict, the standard of review is the same as was briefed for point I, *supra*. Most importantly: when reviewing a trial court's grant of a directed verdict, an appellate court must view the evidence and all permissible inferences derived therefrom in a light most favorable to the plaintiff. *D.R. Sherry Const., Ltd.* 316 S.W.3d at 905 (Mo. banc 2010). "If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper." *Spry,* 144 S.W.3d at 366-67.

B. Plaintiff's claims against Fry Grain should have been submitted to the jury

i. Misappropriated USDA payments are subject to conversion

The trial Court cited to the Court of Appeals, Southern District's decision in *In re Boatright* to support its finding that Plaintiffs' claims for conversion against FGE could not be legally brought. 88 S.W.3d 500, 506 (Mo. App. S.D. 2002). *In re Boatright* cites the general rule that "a claim for

money may not be in conversion because conversion lies only for a specific chattel which has been wrongfully converted." *Id.* at 506. However, the trial court overlooked the exceptions to the general rule which were laid out by the Court of Appeals:

> Nevertheless, money can be an appropriate subject of conversion when it can be described or identified as a specific chattel…Also, misappropriated funds placed in the custody of another for a definite purpose may be subject to a suit for conversion.

Id. (internal citations and quotation marks omitted, emphasis added.)

In the case at bar, the USDA payments were for an amount that can be verified through records and were for a definite purpose. If there was a lease for the use of the farm and equipment as the Defendant alleges, then that lease would have specified the amount of money that was due for the use of the property. Each payment would be for a definite amount which could be identifiable as deposited or not deposited into the appropriate accounts. Defendants exerted control over the USDA farm payments by their own admission as far back as 1986. Tr. 486-488. Fry Grain Enterprises received $10,834 in USDA payments and Fry Grain did not pay rent each year for the use of the land over which Vincil and Willa had a life estate. Exhs. 43 and 43A.

ii. The Court overlooked the tangible personal property that was converted by Fry Grain

Defendants admit that farm equipment in question is subject to a conversion claim, but at trial attempted to minimize the value of the equipment. In addition to the USDA payments which were converted, Defendant also converted the farm equipment which was on the real property which it was "renting" from Vincil and Willa Fry. Defendants exerted control over the farm equipment by taking possession of the real property on which the equipment is located and making use of the equipment. Tr. 525. The Court overlooked this evidence in directing a verdict in favor of Defendant on the conversion claim against Fry Grain.

IV. The Circuit Court erred in directing a verdict in favor of Defendant Delbert Fry because Plaintiffs presented sufficient evidence such that a reasonable juror could have concluded that Delbert Fry was a part of the undue influence which lead to the 1990 Wills and conveyances.

The trial court granted directed verdict in favor of Defendant Delbert Fry for all claims against him in part because the court had directed verdict against all of Arthur Fry's claims and also because it ruled there was no evidence that Delbert was involved in the 1990 Wills and conveyances. App. A7.

A. Standard of Review

As this is an appeal of a directed verdict, the standard of review is the same as was briefed for point I, *supra*. Most importantly: when reviewing a trial court's grant of a directed verdict, an appellate court must view the evidence and all permissible inferences derived therefrom in a light most favorable to the plaintiff. *D.R. Sherry Const., Ltd.* 316 S.W.3d at 905 (Mo. banc 2010). "If the facts are such that reasonable minds could draw differing conclusions, the issue becomes a question for the jury, and a directed verdict is improper." *Spry,* 144 S.W.3d at 366-67.

B. Plaintiffs presented a submissible case against Delbert Fry

Undue influence is often proved with circumstantial evidence. The Court of Appeals, Southern District noted, "Persons exerting undue influence will do so in as subtle, furtive, indirect and elusive a manner as possible and such influence may therefore be shown indirectly by the reasonable and natural inferences drawn from the facts and circumstances proved." *In re Estate of Hock*, 322 S.W.3d 574, 579 (Mo. App. S.D. 2010), *citing Duerbusch v. Karas*, 267 S.W.3d 700, 708 (Mo. App. E.D. 2008). Evidence showing that a party actively procured a personally beneficial conveyance may establish an inference of undue influence. *In re Estate of Hock*, 322 S.W.3d at 581. "[A]ctive procurement will be inferred" where there is evidence that the fiduciary had some power to influence the grantor, where the opportunity to

do so is present, and where the disposition of the property was a changed course of action or a departure from the estate plan. *Estate of Gross v. Gross,* 840 S.W.2d 253, 258 (Mo. App. E.D. 1992).

Delbert Fry was involved fraudulently altering a contract to divert subsidy and deficiency payments that were to have been paid from the USDA to Arthur as far back as 1986. The original contract was signed by Vincil in March of 1986 to divide the payments between himself and Arthur. Tr. 486:15-20. However, on April 14, 1986, Delbert went to the USDA office and had the contract altered, so that Arthur's name was crossed out and replaced with Fry Farms, which was a partnership between Delbert and his father J.D. Tr. 486-488.

In addition to the fact that Delbert had the USDA contract altered in 1986, Delbert was the only of Vincil and Willa's 12 grandchildren to receive any property in the 1990 conveyances and Wills. Tr. 341:13-342:11; 518. Based on the evidence presented at trial, a reasonable juror could have concluded that Delbert was liable for the 1990 deeds that were obtained through undue influence, especially in the conveyance of the 160 acre tract of land to himself. The fact that Delbert received a tax bill for the land early on and took it to his grandmother Willa shows he knew of the conveyance to him. Tr. 990:1-10. Delbert also knew rent was being paid that Vincil and Willa, who had retained a life interest in the land. Tr. 516-517.

V. The Circuit Court erred in not granting Plaintiff Mary Ellison an Order requiring the return of tangible personal property items because the division of Vincil and Willa's personal property between Arthur, Mary, and J.D. was inequitable.

The court below failed to grant Plaintiff Mary Ellison's Motion for an equitable Order, which was against the weight of evidence. App. A17.

A. Standard of Review

The standard of review of a trial court sitting in equity is that the trial court's judgment will be sustained unless there is no substantial evidence to support it, it is against the weight of the evidence, it erroneously declares the law, or unless it erroneously applies the law." *Citizens for Ground Water Prot. v. Porter,* 275 S.W.3d 329, 347 (Mo. App. S.D. 2008) (citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976)). Equitable remedies are available when remedies at law are not sufficient. *Matthey v. St. Louis County*, 298 S.W.3d 903, 907 (Mo. App. E.D. 2009).

B. The trial court should have entered an equitable Order for Mary Ellison

In the present case, there is no evidence to support the Court's decision to not enter an equitable order for return of property. Lf. 286. Mary Ellison began investigating the circumstances surrounding her parent's

testamentary intent when she found it difficult to get some personal, sentimental items that were in her mother and father's home which J.D. and Linda Fry were exerting control over and which sat on the 160 acres which had been conveyed to Delbert as part of the 1990 Conveyances. The list of property she was and is seeking is short and of only sentimental value. App. A17.

In closing arguments, Plaintiff's counsel told the jury, "If you make a finding that Mary is entitled to a third of the tangible personal property, then I'm gonna ask Judge Jaynes to enter an order that those items be returned by Linda to Mary." Tr. 1451. The jury made its finding that 1/3 of the personal property is rightfully Mary Ellison's. During their deliberations, the jury sent a question out, "Should the personal property be assigned as cash value?" Tr. 1491:4,5. The court below answered, "Please be guided by the evidence as presented." *Id*. at 10,11. Accordingly, they entered their verdict in favor of Mary but assigned no cash value to the sentimental personal property. Tr. 279. Following the reading of the verdict, Plaintiffs' counsel orally motioned the court for an order returning the tangible personal property. Tr. 1500:23-1501:1. A written motion was filed June 8, 2012, movie the court for an order for the return of the property. L.F. 284. The court filed an amended judgment on June 12, 2012, but did not address the tangible personal property. LF. 287.

The jury found that 1/3 of Vincil and Willa's tangible personal property had been wrongfully withheld from Mary, but could not assign a dollar value to the property, because the property was sentimental in nature. As such, the fact that the trial court did not enter an equitable order for the return of this personal property to Mary is against the weight of evidence presented in this case.

CONCLUSION

The tiral court erred in entering directed verdicts in favor of Defendants as detailed in points I-IV. On each of those issues, Plaintiffs presented sufficient evidence for a reasonable juror to have found in favor of Plaintiffs on those points. As such, Plaintiff Mary Ellison and Plaintiff Arthur Fry should be granted a new trial on those points.

The trial court erred in failing to grant Plaintiff Mary Ellison's equitable motion for return of tangible personal property of Vincil and Willa Fry. All evidence presented shows that Vincil and Willa's testamentary intent was to have their children, Plaintiff Arthur, Plaintiff Mary, and Defendant J.D. divide personal property evenly. However the evidence showed that J.D. took possession of all of his parents' personal property and gave out only that which he was willing to part with. The jury found in favor of Mary Ellison on the issue of tangible personal property, but could not award her damages since the property was of sentimental value, not market

value. As such, the trial court should be directed to enter an equitable order for the return of tangible personal property to Mary Ellison.

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

I certify the following:

1. The foregoing Brief complies with the type and volume limitation of Rule 84.06. The typefaces are size 13 Century Schoolbook.

2. The signature block of the foregoing Brief contains the information required by Rule 55.03(a). To the extent that Rule 84.06(c)(1) may require inclusion of the representations appearing in Rule 55.03(b), those representations are incorporated herein by reference.

3. The foregoing Brief, excluding the cover, certificate of service, this certificate, the signature block, and appendix contains 10,092 words as counted by Microsoft Word 2010.

/s/ Joshua K. Friel

Joshua K. Friel, # 64857

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the Appellants' Substitute Brief and its appendix to Defendants' attorneys Dan Simon and Thomas Harrison electronically via Missouri's eFile system this 13th day of January, 2014.

/s/ Joshua K. Friel
Joshua K. Friel