Case No. SC93760

SUPREME COURT OF MISSOURI

MARY ELLISON, et al.,
Appellants/Cross-Respondents/Plaintiffs

v.

LINDA FRY, TRUSTEE OF THE JOHN DELBERT FRY REVOCABLE INTER VIVOS TRUST, et al.,
Respondents/Cross-Appellants/Defendants.

Appeal from the Circuit Court Of Camden County, Missouri
26th Judicial Circuit

Honorable Ralph Jaynes, Judge
Case No. 08CM-CC00244

RESPONDENTS'/CROSS-APPELLANTS' SUBSTITUTE REPLY BRIEF

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DEFENDANTS' RESPONSE TO PLAINTIFFS' FACTS AND OTHER CLARIFICATIONS[1]

In Plaintiffs' Response to Defendants' Statement of Facts, they confuse two separate issues. J.D. paid himself, Arthur, and Mary equally the balance of Willa's checking accounts, which had been combined into one account. *Tr*. at 325 and 852. This is further reflected by Plaintiffs' Exhibit No. 27, described in the transcript at "Checks for $9,930.87 to Mary Ellison, Arthur Fry, and J.D. Fry, dated 5/17/06." *Tr. Index* at 9. J.D. did not recall how much of all of Willa's property he received, not just the proceeds of the checking account. *Tr*. 339.

Next, Plaintiffs argue that footnotes. 8, 11, 17, 23, 28, and 29 did not appear in Defendants' brief in the Southern District Court of Appeals and is a new basis for a claim. Footnotes 8, 9, 14, 21, 23, and 24 of Defendants' Brief in the Court of Appeals all stated very similar language as the footnotes Plaintiffs complain of in their Substitute Response Brief.

Finally, Plaintiffs' footnote 11 of their Substitute Response Brief is correct in acknowledging an error in Defendants' Initial Substitute Brief. The citation should have been to page 23 of Plaintiffs' Initial Substitute Brief and not page 14.

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[1] Because this case involves a cross-appeal, and to avoid confusion, Appellants are referred to as Plaintiffs and Respondents as Defendants. Capitalized terms not defined in this Substitute Reply Brief have the same meaning as used in Respondents' Initial Substitute Brief. First names are used for the parties. No disrespect is intended.

RESPONDENTS' REPLY TO APPELLANTS' RESPONSE BRIEF

POINTS RELIED ON

1. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper as against J.D. Fry are barred by the statute of limitations for bringing a claim against a dead person in that Plaintiffs David Fry and Susan Sleeper brought their claims against J.D. Fry, deceased, more than a year after J.D. Fry's death.

1. RSMo. § 473.444.
2. *Hatfield v. McCluney*, 892 S.W.2d 822 (Mo. 1995)

2. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper concerning the real property at issue are barred by the applicable statute of limitations (RSMo. § 516.120) for claims related to the conveyances of real property in that said Plaintiffs brought their claims against Defendants more than 15 years after those claims arose.

1. RSMo. § 516.120.
2. *Pemberton v. Reed*, 545 S.W.2d 698 (Mo.App. W.D. 1976).
3. *Southwestern Bell Telephone Co., v. Missouri Com'n on Human Rights*, 863 S.W.2d 682 (Mo.App. E.D. 1993).
4. *Womack v. Callaway County*, 159 S.W.2d 630 (Mo. 1942).

3. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs do not have standing to bring the claims alleged in the Third Amended Petition in that Plaintiff Mary Ellison is not the proper party to bring the claims contained in the Third Amended Petition and in that Plaintiffs David Fry and Susan Sleeper do not have a cognizable interest which can be asserted by the claims contained in the Third Amended Petition.

1. RSMo. § 537.010.
2. RSMO. § 537.021.
3. *Britton-Paige v. Am. Health & Life Ins. Co.*, 900 S.W.2d 7 (Mo.App. E.D. 1995).
4. *Carter v. Pottenger*, 888 S.W.2d 710 (Mo.App. S.D. 1994).

4. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the facts at trial did not establish a submissible case against the Trustee of the John Delbert Fry Revocable Trust for damages in that the Trust was not in existence during the conduct complained of and that the Trustee was improperly substituted for a deceased party.

1. Missouri Supreme Court Rule 52.13(a)(1).
2. RSMo. § 537.021.

5. The Trial Court erred in its assessment of costs because the assessment is ambiguous in that the assessment does not specify which Defendants and parties are responsible given certain parties were dismissed, certain Defendants were improperly substituted, certain Defendants had no claims submitted against them, and only one Defendant had a judgment entered against it.

1. *Jacobs v. Georgiou*, 922 S.W.2d 765 (Mo.App. E.D. 1996).
2. *Woodfill v. Shelter Mut. Ins. Co.*, 878 S.W.2d 101 (Mo.App. S.D. 1994).

6. The Trial Court erred in assessing significant costs against the Defendants because such an assessment is an abuse of the Trial Court's discretion in that the apportionment of costs must bear some relationship to the judgment on all the issues and Defendants were the prevailing parties on the principal issues litigated.

1. RSMo. § 514.090.
2. RSMo. § 514.100.
3. *Kopp v. Franks*, 792 S.W.2d 413 (Mo.App. S.D. 1990).
4. *Cox v. Crider*, 721 S.W.2d 220 (Mo.App. S.D. 1986).

ARGUMENT[2]

1. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper as against J.D. Fry are barred by the statute of limitations for bringing a claim against a dead person in that Plaintiffs David Fry and Susan Sleeper brought their claims against J.D. Fry, deceased, more than a year after J.D. Fry's death.

Section 473.444 bars all claims against the estate of a deceased person, if not filed in the probate court within one year of the deceased person's death.[3] The only way to toll the statue of limitation contained in § 473.444 is to file a claim in the probate court. *Hatfield v. McCluney*, 892 S.W.2d 822, 826 (Mo. 1995).

Plaintiffs did not file a claim against J.D. in the probate court and, as such, the one-year bar on claims against J.D. prohibits Arthur's, David's, and Susan's claims from being brought three years after his death. Plaintiffs have provided no authority which would support their proposition that the statute of limitations found in RSMo. § 473.444 is tolled for any reason other than those stated in the statute itself.

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[2] Plaintiffs address Defendants' Points Relied On out of order. For the Court's clarity, Defendants will follow the order of their Initial Substitute Brief. Further, certain of Plaintiffs' arguments related to the statute of limitations found in RSMo. § 516.120(5) are addressed in Defendants' Point 2 below.

[3] An exception relating to taxes exists, but would not apply in this instance.

2. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the claims made by Plaintiffs David Fry and Susan Sleeper concerning the real property at issue are barred by the applicable statute of limitation (RSMo. § 516.120) for claims related to the conveyances of real property in that said Plaintiffs brought their claims against Defendants more than 15 years after the claims arose.

Plaintiffs propose multiple reasons for why RSMo. § 516.120(5) should not apply to bar their claims, such as: 1) David's and Susan's claims did not arise until 2008 when they were "discovered"; 2) David's and Susan's claims relate back to Mary's original petition; 3) the claim against the Trust accrued in 2008, when the Trust was funded; and 4) there was fraudulent concealment which tolled the running of the statute of limitations.

2.1. The Claims Related to the 200 Acres Were "Discovered" in 1990.

Plaintiffs make the point that David and Susan did not discover they had claims until 2008 when the 1981 Joint Will was found and because of this they timely brought their claims in 2011. *Appls.' Substitute Response Brief* at 11-12. What Plaintiffs fail to understand is that the claims for undue influence and unjust enrichment, the claims which David and Susan made, originally belonged to Willa, as she would have been the injured party. Pursuant to *Turnmire* and *Pemberton* any claim which David and Susan could have received from Willa became barred, at the latest, by RSMo. § 516.120(5) in June 2005, while Willa was still alive. As the *Pemberton* Court put it, "if the grantor has no right to sue at his or her death, neither do the heirs." *Pemberton v. Reed*, 545 S.W.2d, 698, 702-03 (Mo.App. W.D. 1976). This reasoning also supports Defendants' position that David

and Susan's claims cannot relate back to Mary's original petition and that there was no fraudulent concealment because any claim Mary could have brought related to the 200 Acres (or any of the Deeds) expired in 2005 while Willa was still alive and able to bring the claims herself.

2.2. Plaintiffs David Fry and Susan Sleeper's claims against J.D. Fry do not relate back to the claims made by Plaintiff Mary Ellison.

Alleging a new cause of action which is subject to the bar of the statute of limitations cannot be considered a mere amendment and is not authorized by Rule 55.33. *Southwestern Bell Telephone Co., v. Missouri Com'n on Human Rights*, 863 S.W.2d 682, 685 (Mo.App. E.D. 1993). An amendment relates back to the original petition "only when the original plaintiff had the legal right to sue and stated a cause of action at the time the suit was filed." *Smith v. Tang*, 926 S.W.2d 716, 719 (Mo.App. E.D. 1996). David and Susan's claims related to the 200 Acres are based upon and are derived from the 1981 Joint Will. *LF* at 50, 55-56. Any claim Mary had to the 200 Acres was based upon the 1990 Wills. Defendants' position stated in Section 2.1 above that any claim to the 200 Acres belonged to Willa during her life and expired in June of 2005 so that Mary could not bring a claim for the 200 Acres in 2008. If Mary had no right to sue for the 200 Acres, because of a lack of standing or because of the statute of limitations imposed by RSMo. § 516.120(5), then David and Susan's claims in 2011 cannot relate back.

2.3. Subsequent Transfers of the 200 Acres Do Not Revive Barred Claims as Against the Trustee.

Plaintiffs argue their claims related to the 200 Acres as against the Trustee for unjust enrichment did not accrue until the transfer from J.D. to the Trustee occurred in 2008. *Appls.' Substitute Response Brief* at 14-15. Plaintiffs do not cite any authority to support this position. Such an argument directly contradicts the stated policy of having a statute of limitations, which is to "encourage citizens to seasonably file and to vigilantly prosecute their claims for relief … or, otherwise, find their claims proscribed by law." *State ex rel. Sisters of St. Mary v. Campbell*, 511 S.W.2d 141, 148 (Mo.App. E.D. 1974). Further, statutes of limitation "promote the peace and welfare of society and are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception." *Id.* Plaintiffs fail to show how they are within some exception to the statute of limitations which would allow them to revive a barred claim on a subsequent conveyance. In addition, Plaintiffs' claim for unjust enrichment against the Trustee is their attempt to hold the Trustee liable for the wrongful acts of another. As Defendants stated in Section 4.2 of their Initial Substitute Brief, Plaintiffs are unable to establish any type of theory for successor liability against the Trustee for J.D.'s bad acts.

2.4. There is no evidence of concealment to toll the statute of limitations.

"As a general rule, the statute of limitations begins to run in favor of a person who commits a fraud as soon as committed, unless it be concealed from the plaintiff or party complaining, or which is of such a character as necessarily implies concealment." *Womack v. Callaway County*, 159 S.W.2d 630, 632 (Mo. 1942). The burden of proving

concealment is on the party asserting it. *Id*. For concealment to toll the statute of limitations there must be something more than mere silence by the defendant. *Gilliam v. Gohn*, 303 S.W.2d 101, 107 (Mo. 1957). Concealment requires the employment of some means or device to prevent discovery. *Id*. "The plaintiff is deemed cognizant of facts which he could have discovered by exercising ordinary care." *Id.*

Plaintiffs claim that the statute of limitations was tolled because Defendants concealed material facts, such as the existence of the 1981 Joint Will, the Deeds, and the 1990 Wills. As discussed below in footnote 6, none of the parties were aware of the 1981 Joint Will until it was found during the course of this litigation. Without evidence sufficient to prove that Defendants knew of the 1981 Joint Will and its provisions for the benefit of David and Susan, Defendants could not have intended to defraud David and Susan by the claimed misconduct.

Plaintiffs claim that Defendants concealed the Deeds by failing to disclose the existence of the Deeds to Plaintiffs. Plaintiffs have cited no authority for the proposition that any of the Defendants had a duty or obligation to speak to Plaintiffs regarding the Deeds. The transfers were recorded and published in the appropriate newspapers and Arthur was aware of the transfers in 1990. *Tr*. at 738. David and Susan learned of the transfers from Arthur after Arthur had read about the transfers. *Tr*. at 238 and 476. Further, had any Plaintiff exercised ordinary care and looked in the appropriate deed

records, the Deeds would have been found.[4] Finally, neither the 1981 Joint Will nor the 1990 Wills were required for Plaintiffs to have opened an estate for Willa. *See* RSMo. §§ 473.017 and 473.020.

3. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs do not have standing to bring the claims alleged in the Third Amended Petition in that Plaintiff Mary Ellison is not the proper party to bring the claims contained in the Third Amended Petition and in that Plaintiffs David Fry and Susan Sleeper do not have a cognizable interest which can be asserted by the claims contained in the Third Amended Petition.

3.1. Mary's claims belong to Willa.

Mary's claims are based on the proposition that she did not receive as much as she was entitled to from Willa's property, after Willa's death. Each of the claims Mary brought at trial -- conversion (of Willa's personal property), breach of fiduciary duty (owed to Willa under the 1998 Powers of Attorney), fraudulent concealment (of Willa's assets), and unjust enrichment (at the expense of Willa) -- would have belonged to Willa, as she would have been the injured party. After Willa's death, should any of those claims survive, the personal representative of Willa's Estate would have been the proper party to

[4] As exhibited by Mary's daughter who, when searching for the Deeds in 2008, found them in the appropriate county Deed Records. *Tr*. at 770.

bring the claims. RSMo. § 537.010. Mary failed to take the steps required to open an estate and become the personal representative and therefore lacks standing to assert the claims as a representative of Willa's estate. *Carter v. Pottenger*, 888 S.W.2d 710, 713 (Mo.App. S.D. 1994).

3.2. David Fry and Susan Sleeper are prospective heirs and lack standing.

David and Susan claim standing under the 1981 Joint Will. Until the death of the testator, a devisee under a will is merely an "heir expectant" or "heir apparent" with only the expectancy of an inheritance. *In re Estate of Schulze*, 105 S.W.3d 548, 551 (Mo.App. E.D. 2003). Persons have no fixed or vested property interests as heirs at law before the death of the testator. *White v. Mulvania*, 573 S.W.2d 184, 189 (Mo. 1978). "A party which is neither a beneficiary under a presented will, nor an heir at law fails to demonstrate that they have standing to bring a claim for undue influence and unjust enrichment . . .." *Hawkins v. Lemasters*, 200 S.W.3d 57, 62 (Mo.App. W.D. 2006).

By operation of RSMo. § 474.400, the execution of the 1990 Wills revoked the 1981 Joint Will, as the 1990 Wills were subsequent wills in writing which canceled the 1981 Joint Will at Vincil and Willa's consent and direction.[5] The 1981 Joint Will and the 1990 Wills were never probated and have no legal effect. *LF* at 51. The fact that the 1981 Joint Will was not probated cannot be attributed to any of the Defendants, as none of the Defendants knew of the 1981 Joint Will until months after this suit was filed (and the

[5] Please note that Plaintiffs have not called into question the 1990 Wills, but have only argued that they were hidden by Defendants.

original was never found).[6] The judgments which David and Susan obtained from trial were for unjust enrichment, which is not within any exception Plaintiffs have mentioned in their brief. Any claim for undue influence or tortious interference with an inheritance expectancy were likewise barred by § 473.444, as Arthur, David, and Susan brought their claims against J.D. more than a year after his death.

4. The Trial Court erred in denying Defendants' Motion for Judgment Notwithstanding the Verdict because the facts at trial did not establish a submissible case against the Trustee of the John Delbert Fry Revocable Trust for damages in that the Trustee was not in existence during the conduct complained of and the Trustee was improperly substituted for a deceased party.

Opening an estate for J.D. would have been the only way for Plaintiffs to have been able to continue to pursue their claims against him. The substitution process, pursuant to the applicable rules, the survival statutes, and the probate code is perfectly clear. Rule 52.13(a)(1) requires the substitution of the proper party. The action against a deceased wrongdoer may be brought and maintained according to RSMo. § 537.021.

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[6] Plaintiffs attempt to call this fact into question in their Substitute Response Brief, when they say there is no evidence in the record that the Defendants did not know of the 1981 Joint Will. *Appls.' Substitute Response Brief* at 18, 19. The record demonstrates that the parties did not know of the 1981 Joint Will. See *Tr*. 394 (J.D.), 865 (Mary), 1029 (Linda), 234 (Susan), and 666 (Arthur).

RSMo. § 537.010. A personal representative of the wrongdoer's estate must be appointed. RSMo § 537.021. A personal representative is appointed only in a probate estate. RSMo. § 472.010.26

Plaintiffs believe that opening an estate for J.D. would have been an "exercise in futility," and because the 200 Acres had been transferred to the Trust the Trustee was properly substituted. *Appls*.' *Substitute Response Brief* at 28. They cite no authority for this position. Plaintiffs further argue that it would be unfair to them to find that the Trial Court's substitution of the Trustee for J.D. was improper. Both of these arguments are the direct result of Plaintiffs' conscious disregard to follow the proper procedure and request that the Trial Court substitute the personal representative. Had Plaintiffs followed the correct and well established statutory procedures, the estate could have been opened and funded and a personal representative appointed and substituted.[7] *See* RSMo. §§ 537.021; 461.300; and 456.5-505.

Plaintiffs' new assertion that the Trustee did not preserve this issue for trial because a writ for prohibition was never filed is also a novel proposition for which they cite no authority. After the Trustee's substitution, Defendants raised this issue multiple times, including without limitation, Defendants' Motion for Directed Verdict at the Close of Plaintiff's Evidence (*LF* at 183); Defendants' Motion for Directed Verdict at Close of All Evidence (*LF* at 199); Defendants' Motion for Judgment Notwithstanding the Verdict

[7] As Judge Jaynes put it, "if we had a little probate around here, we wouldn't be in the courtroom today." *Tr.* at 869.

(*Resps.' Supp. LF* at 32); and Defendants' Second Motion for Judgment Notwithstanding the Verdict (*Resps.' Supp. LF* at 39-40).[8]

Finally, Plaintiffs in their Substitute Response Brief state that they did submit claims against the Trustee that are independent from the Trustee's role as substitute for J.D. *Appls.' Substitute Response Brief* at 30. Plaintiffs' counsel expressly and unequivocally stated to the Trial Court that "[W]e're not submitting that the trustee is liable," during arguments about the Trustee's liability for wrongful acts during the hearing on Defendants' Motion for Directed Verdict at the Close of Plaintiffs' Evidence . *Tr*. at 1168-69. Further, Instructions 14 and 19, which are the verdict directors for David and Susan, respectively, for Unjust Enrichment against the Trustee, each state in paragraph third, "it would be unjust to allow defendant J.D. Fry, now substituted party Linda Fry, Trustee of the John Delbert Fry Revocable Inter Vivos Trust to retain the benefit," but each instruction says it is for Count VIII. *LF* at 231 and 238. No verdict director was given for unjust enrichment against the Trustee in its capacity as Trustee.

[8] Plaintiffs' counsel stated to the Trial Court that, "at least three judges have listened to this," with "this" meaning the substitution issue. *Tr*. at 1168.

5. The Trial Court erred in its assessment of costs because the assessment is ambiguous in that the assessment does not specify which Defendants and parties are responsible given certain parties were dismissed, certain defendants were improperly substituted, certain defendants had no claims submitted against them, and only one defendant had a judgment entered against it.

Plaintiffs allege in their brief that Defendants failed to preserve this issue for appeal. *Appls.' Substitute Response Brief* at 31.[9] Defendants included the issue for costs in their Second Motion for Judgment Notwithstanding the Verdict, filed on June 22, 2012, and which was included in the Supplemental Legal File filed in this appeal on February 1, 2013. Specifically, paragraph 27 of Defendants' Second Motion for Judgment Notwithstanding the Verdict, which states, "[t]he Court has assessed costs against 'defendants,' which is unreasonable given the Court's prior orders dismissing all counts against 2 defendants, 1 defendant was not found liable for damages and the final defendant is a trustee of a trust which the Court acknowledges was not involved in the conduct presented at trial." *Supp. L.F.* at 41. Defendants' Second Motion for Judgment Notwithstanding the Verdict was filed after the Amended Judgment was entered by the Trial Court on June 15, 2012. As Defendants' Second Motion for Judgment

[9] It should be noted that Plaintiffs made this same exact argument in the Court of Appeals and is an example of the type of conduct which has significantly increased the costs of this action.

Notwithstanding the Verdict was never ruled on by the Trial Court, it is deemed overruled after ninety days pursuant to Missouri Supreme Court Rule 78.06.

As Plaintiffs did not respond to the merits of Defendants' Point 5, Defendants ask the Court to consider Defendants' argument on this Point as stated in Defendants' Brief.

6. The Trial Court erred in assessing significant costs against the Defendants because such an assessment is an abuse of the Trial Court's discretion in that the apportionment of costs must bear some relationship to the judgment on all the issues and Defendants were the prevailing parties on the principal issues litigated.

"Where several persons are made defendants to any action, and any one or more of them shall have judgment in his favor, every person so having judgment shall recover his costs . . ., unless it shall appear to the court that there was reasonable cause for making such person a defendant to such action." RSMo. § 514.100. Apportionment of costs in equity, as well as in other cases where the trial court has discretion, must bear some relationship to the judgments on all of the issues and the principle issue litigated. *Kopp v. Franks*, 792 S.W.2d 413, 423 (Mo.App. S.D. 1990). Consideration should also be given to the verdicts on the issues that generated the costs. *Cox v. Crider*, 721 S.W.2d 220, 224 (Mo.App. S.D. 1986).

Plaintiffs argue they are the prevailing party because "the only verdicts which compel[ed] a judgment were those for Plaintiffs Mary Ellison, David Fry, and Susan Sleeper against the defendants." *Appls.' Substitute Response Brief* at 35. Plaintiffs'

approach does not take into account the directed verdicts issued by the Trial Court in which Plaintiff Arthur Fry and Defendants Delbert Fry and Fry Grain Enterprises, Inc. were dismissed from the suit. *LF* at 190, 195, and 206-07. Arthur's intervention into this case was a major source of costs incurred herein, and, although Defendants were successful in having Arthur dismissed in the middle of the trial for the same reasons Defendants objected to his intervention, Defendants are, under the Amended Judgment, responsible for the costs incurred by and as a result of Arthur. Plaintiffs received a judgment against one out of the five Defendants that they filed suit against and then only on half the claims submitted to the jury, constituting a sliver of the claims and dollar value contained within the Third Amended Petition.

CONCLUSION

Defendants pray this Court reverse the judgment entered against them for the reasons stated in Defendants' Substitute Brief and Substitute Reply, including the following:

1. Plaintiffs lacked standing to bring the claims as they are either not the proper party to bring these claims or they lack a cognizable interest in the claims for which judgment was entered;
2. Parties with standing would not prevail, as the statute of limitations found in § 516.120(5) bars any claims related to the 200 Acres, including subsequent transfers of the land to the Trustee;
3. Plaintiffs' burden of establishing the concealment exception to the 15 year statute of limitation relating to land transfers was not met and there was no tolling of that statute;
4. Any claims made by Arthur, David, and Susan against J.D. are barred by the statute of limitations contained in § 473.444, as they brought their claims more than a year after J.D.'s death and no tolling of that statute can apply;
5. The substitution of the Trustee for J.D. after J.D.'s death was improper and any judgment against the Trustee is void as a result of Plaintiffs' disregard for the proper procedure on who to substitute; and
6. Finally, whether or not this Court sets aside the judgment in this matter, the Trial Court's assessment of costs as set out in the Amended Judgment is an abuse of the Trial Court's discretion when considering the course of the litigation, the ultimate

disposition of the main issues, and the fact that only one Defendant had a judgment entered against it.

For the foregoing reasons and in the interest of justice, Defendants pray this Court rule accordingly.

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06, the undersigned certifies that:

1. This brief complies with the typeface and type style requirements of Supreme Court Rule 84.06 as this brief has been prepared in Times New Roman font, a proportionally spaced typeface, using Microsoft Office 2010 in 13 point.
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. This brief contains 5,174 words, excluding the parts of the Brief exempted by Rule 84.06(b), as counted by Microsoft Word 2010.

/s/
Daniel S. Simon
for Simon Law Offices

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document to Plaintiffs' attorneys, Beverly J. Figg and Joshua K. Friel, electronically via Missouri's eFile system this 3rd day of March, 2014.

/s/ Daniel S. Simon
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