No. SC93760

MISSOURI SUPREME COURT

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

APPELLANTS/CROSS-RESPONDENTS' SUBSTITUTE REPLY BRIEF

ANDERECK, EVANS, WIDGER, JOHNSON & LEWIS, L.L.C.

Beverly J. Figg, 32165
Joshua K. Friel, 64857
The Colonel Darwin Marmaduke House
700 East Capitol Ave.
Jefferson City, MO 65101
Telephone: 573-634-3422
Facsimile: 573-634-7822
bfigg@lawofficemo.com
jfriel@lawofficemo.com

ATTORNEYS FOR APPELLANTS/ CROSS-RESPONDENTS MARY ELLISON AND ARTHUR FRY

AND CROSS-RESPONDENTS SUSAN SLEEPER AND DAVID FRY

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RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

Respondents (hereinafter Defendants) state on page 14 of their brief "J.D. paid himself, Arthur and Mary equally the balance of these combined funds." Resp. Sub. Brief 14 (*citing* Tr. 325). However, J.D. later stated he did not recall how much he actually got. Tr. 339:2-18. When asked if Mary Ellison and Arthur Fry had received $133,000 and $125,000 respectively, J.D. assented that the numbers "seemed" right. Tr. 339.19-23. However, Defendant's own exhibit shows that the CDs were not divided evenly, and that JD got roughly a little over $40,000 more than Mary and just under $50,000 more than Arthur. *See* Resp. Exh. 38 (Exh. R)

POINTS RELIED ON FOR PLAINTIFFS' REPLY TO DEFENDANTS' BRIEF

I. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of the statute of limitations concerning real estate because Defendants did not meet their burden of proof for that affirmative defense.

Rule 55.08

All Am. Painting, LLC v. Fin. Solutions & Associates, Inc., 315 S.W.3d 719, 723 (Mo. 2010).

II. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of the statute of limitations concerning claims against deceased persons because Defendants did not meet their burden of proof for that affirmative defense.

Kansas City v. W.R. Grace & Co., 778 S.W.2d 264 (Mo. Ct. App. 1989)

Powell vs. Chaminade College Preparatory, Inc., 197 S.W.3d 576, 582 (Mo. 2006

III. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of standing because all Plaintiffs had standing to bring their respective claims.

Wilson v. Cramer, 317 S.W.3d 206, 208 (Mo. Ct. App. 2010)

Brown v. Kirkham, 926 S.W.2d 197, 200 (Mo. Ct. App. 1996)

IV. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs did present sufficient evidence to submit the case to the jury based on the conduct of the Trustee of the J.D. Fry Trust; the Trial Court property substituted the Trustee of the J.D. Fry Trust for J.D. Fry, deceased.

Griffin v. Miller, 899 S.W.2d 930, 934 (Mo. App. W.D. 1995).

Clark v. Fitzpatrick, 801 S.W.2d 426, 428 (Mo. App. W.D. 1990).

V. The Defendants did not preserve for appeal the issue of the Trial Court's assessment of costs.

Kleim v. Sansone, 248 S.W.3d 599, 603 (Mo. 2008).

Rule 84.13.

VI. Defendants failed to preserve the issue of the allocation of costs among parties for appeal, but to the extent that this Court will consider their argument, the Trial Court did not abuse its discretion in its allocation of costs which took into consideration the entire course of the litigation, not only which parties were allowed to submit claims to the jury.

Sadowski v. Brewer, 693 S.W.2d 891, 894 (Mo. Ct. App. 1985)

Ozias v. Haley, 141 Mo. App. 637, 125 S.W. 556, 557 (1910).

ARGUMENT

I. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of the statute of limitations concerning real estate because Defendants did not meet their burden of proof for that affirmative defense.[1]

A. Standard of Review

The statute of limitations is an affirmative defense and the party which seeks to employ such a defense has the burden of proof. Rule 55.08. The party that bears the burden of proof on an issue before the trial court is generally not entitled to a directed verdict. *All Am. Painting, LLC v. Fin. Solutions & Associates, Inc.*, 315 S.W.3d 719, 723 (Mo. 2010). "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). "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

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[1] Defendants suggest in their substitute brief that Point Replied On I would also apply to Arthur Fry's claims. Resp. Sub. Brief, 23 fn. 8. It should be noted that this argument did not appear in their Court of Appeals brief and should not be considered since under Rule 83.08(b) it is a new basis for the claim. Defendants make similar arguments regarding their points II, III, IV, V, and VI. *Id*. at fns. 11, 17, 23, 28, and 29.

improper." *Spry v. Dir. of Revenue, State of Mo.*, 144 S.W.3d 362, 366-67 (Mo. App. S.D. 2004) *citing Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. banc 1998).

B. The Jury verdict shows that the Defendants did not meet their burden of proof for the affirmative defense of the statute of limitations.

Jury Instructions 16 and 21[2] directed the jury that they must find for the Defendants if they believed that Plaintiffs David Fry and Susan Sleeper did not become involved until more than ten years after they knew or reasonably should have known of the Defendants' fraud and undue influence. LF 228 & 242. The Trial Court below properly followed the general rule that a party with the burden of proof is not entitled to a directed verdict. The factual issue of when David and Susan filed their action in relation to when they knew or should have known of their claims was submitted to the jury at the request of the Defendants and decided in favor of the Plaintiffs. Thus, the Defendants did not in fact meet their burden of proof for their affirmative defense of the statute of limitations.

C. Plaintiff David Fry's and Plaintiff Susan Sleeper's causes of action concerning the 200 acres did not accrue until sometime in 2008 when the 1981 Will in which they had been named as beneficiaries was discovered.

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[2] Instructions 16 and 21 were submitted by Defendants over the objection of the Plaintiffs.

As discussed in further detail, *infra*, in Point II (B), any statute of limitations concerning the 1990 Deeds was tolled due to J.D. Fry's active concealment of the facts concerning his fraud. In fact, it was not until discovery in this case had commenced in 2008 that the 1981 Will naming David Fry and Susan Sleeper as beneficiaries of the 200 acres was uncovered.[3] Tr. 867:11-17. (It should be noted that the 1981 Will would likely have been kept by Vincil and Willa either in their safe deposit box or in their home, both of which J.D. had control over.) Since the 1981 Will was not uncovered until 2008 and J.D. Fry had actively concealed the material facts of his fraud until that point, Plaintiffs' cause of action accrued in 2008 and was timely filed in 2011, well within the statute of limitations Defendants argue applies.

D. Plaintiff David Fry's and Plaintiff Susan Sleeper's claims against J.D. Fry related back to when Mary Ellison first filed her action in 2008.

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[3] Defendants suggest in their brief that David and Susan knew of J.D.'s fraud back when they first learned of the 1990 land transfers. Resp. Sub. Brief, 29 fn 13. Even if David and Susan knew of the land transfers earlier, at issue is when they learned of the fraudulent concealment. It was not until this case had commenced that David and Susan learned that they had been beneficiaries under the 1981 Joint Will and that J.D. had obtained the 1990 deeds without consideration by undue influence. J.D.'s fraudulent concealment was not discovered until the course of discovery in this case, which commenced in 2008.

First, it should be noted that the Defendants' argument that David and Susan's claims do not relate back is a new basis for the claim which was not found in their brief filed with the Court of Appeals. *See* Defendants' Court of Appeals Brief. However, even if Plaintiffs David Fry and Susan Sleeper's claims are not viewed as accruing in 2008, they do relate back to Mary Ellison's filing in 2008. "When an amended pleading arises 'out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading,' the amended pleading relates back." *Koerper & Co., Inc. v. Unitel Int'l., Inc.*, 739 S.W.2d 705, 706 (Mo. 1987). "An amendment will relate back to the original petition so as to save the action from the statute of limitations 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.1996).

Mary Ellison's claims against J.D. Fry were filed on April 10, 2008, when J.D. Fry was still alive and within two years of when Mary learned of the 1990 Wills. David Fry and Susan Sleeper intervened in the lawsuit, joining with Mary Ellison in her claims against J.D. Fry, then deceased, and against Linda Fry, Delbert Fry, Fry Grain Enterprises, and the Trustee of J.D.'s Trust. Since their claims against J.D. Fry are the same as those claimed by Mary Ellison and arise out of the same conduct and transactions, their claims relate back to when Mary filed her initial suit.

David and Susan's claims are derived from J.D. Fry's undue influence upon his parents in 1990 in regard to the procurement of the 1990 Deeds and 1990 Wills. The 1981 Joint Will is evidence that J.D. Fry's undue influence produced results which were

contrary to Vincil and Willa's testamentary intent. Simply put, Mary, David, and Susan's claims all related to the 1990 Wills and Deeds.

E. Plaintiff David Fry's and Plaintiff Susan Sleeper's Judgment against the Trust is not implicated since the Statute of Limitations did not begin to run until March, 2008, when the J.D. Fry Trust was created.

Any argument about the statute of limitations for claims on land does not implicate Plaintiff David Fry or Plaintiff Susan Sleeper's Judgments against the Trust. The Trust did not come into existence until March, 2008, and was funded with real estate that was conveyed by J.D. Fry and Linda Fry also in March, 2008. Tr. 1216-1217.[4] It was upon receiving the ill-gotten 200 acres that J.D. Fry and Linda Fry had obtained through undue influence of Willa and Vincil that the Trust was unjustly enriched and the claim accrued. David Fry and Susan Sleeper joined this suit in November, 2011. Even if their claims against J.D. Fry do not relate back to when Mary Ellison originally filed suit, the claims were brought within the five year statute of limitations that Defendants argue applies.

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[4] Defendants admitted in Statement of Uncontroverted Facts that the J.D. Fry Trust was funded with the 200 acres in question. *See* Tr. 1216-1217. The Statement was admitted at trial as Exhibit 80. *See* Tr. 1137. It was omitted from the exhibits submitted as part of the record on appeal since the conveyance of the 200 acres to the trust appeared to be a fact that was not in controversy.

II. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of the statute of limitations concerning claims against deceased persons because Defendants did not meet their burden of proof for that affirmative defense.[5]

A. Standard of Review

As noted *supra*, the statute of limitations is an affirmative defense and the party which seeks to employ such a defense has the burden of proof. Rule 55.08. The party that bears the burden of proof on an issue before the trial court is generally not entitled to a directed verdict. *All Am. Painting, LLC v. Fin. Solutions & Associates, Inc.*, 315 S.W.3d 719, 723 (Mo. 2010).

B. J.D. Fry actively concealed his fraud from Plaintiffs, thus tolling the statute of limitations.

Defendants rely upon RSMo. § 516.120(5) for their assertion that Plaintiffs' claims are time barred. Defendants argue that the statute sets a 15 year maximum on any claims for fraud. Resp. Sub. Brief 28. However, this Court has found that, "The statute of limitations begins to run when the evidence was such to place a reasonably prudent person on notice of a potentially actionable injury." *Powell vs. Chaminade College Preparatory, Inc., 197* S.W.3d 576, 582 (Mo. Banc 2006), *quoting Business Men's*

[5] *See infra*, fn 1.

Assurance vs. Graham, 984 S.W.2d 501 (Mo. 1999). The Western District Court of Appeals has interpreted § 516.120(5) as follows:

> This rule is interpreted to mean that when facts constituting fraud are not discovered within the prescribed ten years, the cause of action is deemed to accrue at the termination of this ten-year period and a plaintiff has an additional five years from the end of the ten year period to bring his action. If a party takes affirmative action to conceal the fraud, the statute is tolled until the fraud is discovered.

Kansas City v. W.R. Grace & Co., 778 S.W.2d 264, 273 (Mo. Ct. App. 1989) (emphasis added, internal citations omitted). In a fraudulent concealment case, "a party's silence amounts to a representation where the law imposes a duty to speak." *Pollard v. Remington Arms Co., LLC*, 2013 WL 3039797 (U.S. W.D. 2013) slip copy, *citing Hess v. Chase Manhattan Bank*, USA, N.A., 220 S.W.3d 758, 765 (Mo. banc.2007). "A duty to speak arises where one party has superior knowledge or information that is not reasonably available to the other." *Id*. "Silence can be an act of fraud where matters are not what they appear to be and the true state of affairs is not discoverable by ordinary diligence." *Id*. Thus, to state a claim for fraudulent concealment, Plaintiff must allege (1) Defendants had knowledge of undisclosed material information, which (2) Plaintiff would not have discovered through ordinary diligence. *Id*.

In supporting their "15 year" theory of limitations, Defendants failed to cite to a single case where both fraudulent concealment and RSMo. § 516.120(5) were at issue.

This is why *W.R. Grace & Co.* is instructive. In *W.R. Grace & Co.*, Defendant contractors were alleged to have used an asbestos insulation even though the building specifications called for non-asbestos insulation. *Id.* The construction in question occurred in two periods between 1958 to 1964 and then from 1969 to 1972. *Id.* The suit was not filed until 1986. *Id.* The Court of Appeals found that the issue of whether the defendant had actively concealed its fraud was an issue for the jury and that the Defendants were not due summary judgment on the issue. *Id.* at 273.

In their Brief, Defendants parrot only the general rule concerning time limits for fraud claims and neglect to discuss the exception for when a defendant actively conceals his fraud. Likewise, Defendants' reliance upon *Graf v. Michaels* is misplaced since there was no active concealment involved in that case, and thus the court had no need to discuss the concealment exception. *Graf v. Michaels*, 900 S.W.2d 659, 660 (Mo. Ct. App. 1995).

Defendants suggest the facts concerning the 1981 Joint Will are integral to the Plaintiffs' argument concerning fraudulent concealment. Resp. Sub. Brief, 30. Defendants argue that since they claim to not have known about the 1981 Joint Will before this suit was filed, the statute of limitations could not have been tolled for fraudulent concealment. *Id.* Defendants fail to cite to the record to support the factual assertion that none of the defendants knew of the 1981 Joint Will before this action commenced. *Id.* at 30, 31; *see also* Rule 84.04(e). Further, much of the argument contained on pages 30 and 31 of Defendants' Initial Substitute Brief appear to be in response to Plaintiffs' Reply Brief filed in the Court of Appeals. As this Court knows,

with the filing of the instant brief, Plaintiffs' Reply Brief filed with the Court of Appeals is substituted and abandoned. Rule 83.08(b).

It is not known from the record whether J.D. or any of the other defendants knew of the 1981 Joint Will's existence before discovery during this case. What is known is that J.D. concealed the existence of the 1990 Wills until after the time for filing a probate estate for Willa had lapsed. Tr. 769-770. It is also known that J.D. and Linda had control of Vincil and Willa's house and J.D. had control of Vincil and Willa's safe deposit box, the two locations where most Wills would be kept. *See generally* Exhs. p. 1, 2, 12, 13; Tr. 207-210, 242-244.

In the case at bar, Plaintiff Mary Ellison's earliest opportunity to ascertain an actionable injury regarding J.D. Fry's fraud, undue influence, and unjust enrichment was in 2006 when J.D. gave Mary a check which he said represented a third of the remaining funds in Willa Fry's bank account. Tr. 778:2-11. It was not until late December, 2006, that Mary Ellison and Plaintiff Arthur Fry were then given a copy of the 1990 Wills and Vincil and Willa's 1998 Powers of Attorney naming J. D. Fry as agent, which was a little more than a year after Willa's death on November 10, 2005. Tr. 769-770. Plaintiff Mary Ellison later learned about the 1990 deeds when her daughter found them in the Recorder of Deeds office in early 2007. Tr. 770:7-11. It was not until 2008 after discovery in the case progressed and J.D. was deposed that the extent of J.D. and Linda Fry's fraudulent conduct became apparent. Plaintiff Mary Ellison filed this suit on April 10, 2008, well within the statute of limitations.

C. All Plaintiffs timely filed their claims after J.D. Fry's fraud was uncovered and no longer concealed.

Defendants rely on *Turnmire v. Claybrook* and *Pemberton v. Reed* to support their argument that David and Susan's claims are time barred. Resp. Sub. Brief, 28, 29; *Turnmire*, 204 S.W. 178 (Mo. 1918), *Pemberton*, 55 S.W.2d 698 (Mo. App. W.D. 1976). Their reliance is misplaced as both cases involved Plaintiffs who were attempting to set aside a deed or to recover land. In the instant case, no Plaintiff was asking for either remedy at trial. (Plaintiffs' Petitions contained alternative requests for relief; Plaintiffs did not seek either remedy at trial.) In addition, neither case involved allegations of fraudulent concealment.

Willa Fry died on November 10, 2005. Plaintiff Mary Ellison filed her original Petition on April 10, 2008, well within the five year statute of limitations that the Defendants argue applies. Plaintiff David Fry and Plaintiff Susan Sleeper moved to intervene and were allowed to intervene in Plaintiff's Third Amended Petition on November 14, 2011. *See* L.F. 46-105. David and Susan joined in Mary Ellison's Count I, which alleged Fraud and Undue Influence in the 1990 Deeds. L.F. 49. David and Susan's claims arose out of the exact same conduct and transaction that Mary's original claim did and thus they relate back. At the time David and Susan intervened, Plaintiffs also added a separate count against the Trustee of the J.D.'s Trust. L.F. 74. The Trust was funded with the ill-gotten 200 Acres in 2008, thus at the time the Count was filed as part of the Third Amended Petition in 2011, it was within the five year statute of limitations.

III. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict on the grounds of standing because all Plaintiffs had standing to bring their respective claims.[6]

A. Standard of Review

The question of whether a party has standing is a question of law that the Courts of Appeal will review *de novo*. *Wilson v. Cramer*, 317 S.W.3d 206, 208 (Mo. Ct. App. 2010).

B. Mary Ellison did have standing to bring her claims.

In Defendants' first attack on Mary Ellison's standing to bring her claims, Defendants create a straw man and then knock the straw man down. First, they create the straw man by averring that claims that Mary brought really belonged to Willa Fry. Second, Defendants argue that only a personal representative may bring the claims on the behalf of a deceased person and since Mary Ellison was not Willa's personal representative, then she could not possibly bring such claims,

The second standing argument that Defendants bring is levied against Mary, David, and Susan. Defendants argue that since Plaintiffs were not beneficiaries under a Will which was presented to probate, nor were David and Susan "heirs at law," then they do not have standing to bring a claim for undue influence. If this were the rule of law, then those who exert undue influence over a decedent could merely hide the Will, as was

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[6] *See infra*, fn 1.

done in this case, and forever destroy the standing of those whose property interests were harmed by the undue influence.

i. All of the claims for which the Jury rendered verdicts in favor of Mary Ellison were asserted by Mary on her own behalf.

The two verdicts the jury rendered in favor of Mary Ellison were under the theories of breach of fiduciary duty, fraudulent concealment, conversion and/or unjust enrichment, against Linda Fry, Trustee of the Trust (Verdict E), and breach of fiduciary duty, fraudulent concealment, conversion and/or unjust enrichment against Linda Fry (Verdict F). L.F. 278 & 279. The jury assessed damages of $35,000 on Verdict E and damages of $0 on Verdict F. The claims against Linda Fry herself arose in 2005 with the death of Willa Fry. The claims against the Trust based on unjust enrichment did not arise until after the Trust was formed and funded in 2008, three years after the death of Willa Fry in 2005.

One case cited by Defendants does not deal with undue influence. In *In re estate of Schulze*, 105 SW3d 548 (Mo. App. E.D. 2003), the niece of the decedent was attempting to block the purchase of land by an optionee. *Id*. No undue influence was alleged. *See generally*, *id*. The optionee prevailed because there was no bad act on the part of the optionee which led to his procurement of the option to purchase the subject land. *Id*. at 551.

J.D. Fry's gifts of the CDs to himself and his wife, Defendant Linda, were made out of CDs which J.D. intended to divide evenly among Arthur, Mary, and J.D. after Willa's death. As a result of J.D.'s unauthorized gifts to himself and to his wife, Mary's

and Arthur's portion of the assets remaining at Willa's death were smaller than they would have been if J.D. had not made the unauthorized gifts.

Mary Ellison's verdicts against Linda Fry are based, in part, on Linda Fry's fraudulent use of the checking account which held the funds of Willa Fry (Verdict F). Mary has an interest in these claims since in both the 1981 Joint Will and Willa's 1990 Will, the personal property of Willa Fry, upon her death, was to be divided evenly between Arthur, J.D. and Mary. Since Linda Fry was unjustly enriched at Mary's expense, Mary's claims are based upon her own rights, not those of her parents.

ii. Missouri courts, in recognizing a cause of action such as undue influence and tortious interference with inheritance expectancy, have long recognized that expectant heirs have standing to sue to assert their rights as prospective heirs.

Defendants argue that Plaintiffs David Fry and Susan Sleeper lack standing to bring their claims for undue influence since they had no "cognizable interest sufficient to confer standing." Resp. Sub. Brief 23. Missouri Courts have recognized the torts of undue influence and tortious interference with an inheritance expectancy. *Brown v. Kirkham*, 926 S.W.2d 197, 200 (Mo. Ct. App. 1996). It is a restricted cause of action that cannot be brought while the prospective decedent is still alive, nor can it be brought when the claimant has other remedies under the probate code. *Id*. The current action was not filed until after Willa Fry had passed away and as Defendants so often point out, after the time for filing a probate estate had passed.

Defendants argue that a party does not have standing to bring an undue influence case unless they are a beneficiary under a will or are an heir at law. Resp. Sub. Brief 25,

citing Hawkins v. Lemasters, 200 S.W.3d 57, 62 (Mo. App. W.D. 2006). However, Defendants gloss over the fact that J.D. Fry, who had the 1990 Wills executed under his undue influence, also held the documents along with any knowledge of their existence from the Plaintiffs until after the time for filing a probate estate had lapsed. *See* Resp. Sub. Brief 9, 14, 26. Now, Defendants seek to point to the fact that no Will was ever presented for probate as a fact that destroys the standing of David and Susan. However, the fact that it was never presented points to J.D. Fry's own wrongdoing.

It should also be pointed out that in *Hawkins v. Lemasters*, there (1) was a probate estate opened, (2) the Plaintiff received notice of the estate, and (3) Plaintiff failed to bring an actionable challenge of the presented will while the estate was open. *Id*. at 58. None of the preceding facts are present in the current case. Here, (1) no probate estate was ever opened, (2) Plaintiffs did not know of the 1990 Wills' existence because J.D. Fry hid them until after the period for filing a claim had expired, and (3) Plaintiffs did not know that they had any claims until after the time for filing an estate had run. In addition, the action in Hawkins was brought by the niece of the decedent, who the Court noted was not an heir under a will or under the law. *Id*. at 61, 62. J.D. Fry had his children deliver a copy of the 1990 Wills to Mary Ellison thirteen months after the death of Willa Fry, one month after the time for presenting the Will for probate had passed. *See* Tr. 952:13-25. If the Defendants' arguments are to be followed and David and Susan are not heirs under a Will, the only reason they are not is because of J.D. Fry's wrongdoing. The irony in this argument seems to be lost on the Defendants. If J.D. Fry had not procured the 1990 Deeds by undue influence, then when Willa passed away,

there would have been 360 acres of land which would have necessitated a probate estate. There would have been an incentive for any family member to find a Will that would have given them a share of the land. However, due to J.D.'s undue influence, the land was not owned by Willa at her death, and the cash and CDs were divvied out in a way in which J.D. pretended to have gotten the short end of the stick. And thus, if the Defendants' argument is to be followed, J.D. had not only concealed his wrong-doing, he also destroyed the standing of David and Susan to have any recourse.

IV. The Trial Court properly denied Defendants' Motion for Judgment Notwithstanding the Verdict because Plaintiffs did present sufficient evidence to submit the case to the jury based on the conduct of the Trustee of the J.D. Fry Trust; the Trial Court properly substituted the Trustee of the J.D. Fry Trust for J.D. Fry, deceased.[7]

A. Standard of Review

As noted *supra*, "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). "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

[7] *See infra*, fn 1.

improper." *Spry v. Dir. of Revenue, State of Mo.*, 144 S.W.3d 362, 366-67 (Mo. App. S.D. 2004) *citing Crabtree v. Bugby*, 967 S.W.2d 66, 70 (Mo. banc 1998).

B. Plaintiffs relied upon the Trial Court's substitution of Linda Fry, Trustee of the J.D. Fry Trust in prosecuting their case.

Respondents rely upon *Griffin v. Miller* to support their contention that a personal representative of a probate estate is the proper party to be substituted for a decedent in litigation. *Griffin v. Miller*, 899 S.W.2d 930, 934 (Mo. App. W.D. 1995). However, the court in *Griffin v. Miller* was referring to appointment of a personal representative for a deceased plaintiff, not a deceased defendant. Likewise, respondents rely upon *Clark v. Fitzpatrick* to support their proposition that the non-existent personal representative of the non-existent Estate of J.D. Fry was an indispensable party to this action. *Clark v. Fitzpatrick*, 801 S.W.2d 426, 428 (Mo. App. W.D. 1990). However, *Clark v. Fitzpatrick* is immediately distinguishable since in that case, the deceased defendant's family actually did open a probate estate but the Plaintiff failed to join the personal representative. No probate estate for J.D. Fry was ever opened.

It would have been an exercise in futility to open an estate for J.D. Fry since the information available to Plaintiffs was that any theoretical estate would have held no assets. J.D. Fry transferred all his real estate holdings to his Trust about a month before Plaintiff Mary Ellison filed her suit, after he had failed to respond to Mary's questions about his activities as attorney in fact. J.D.'s manipulation of the CDs held by his parents demonstrated that he was familiar with payable on death non-probate transfers. The hypothetical estate would have had no assets with which to defend such a suit as well.

So, opening a probate estate and naming a personal representative to defend such an estate against suit would have essentially been asking a straw man to guard an empty room. No estate was opened for J.D. Fry by his wife or children which shows that there were no assets to probate. In addition, if Defendants were truly concerned that a probate estate had not been opened so that the personal representative could be substituted for J.D., nothing prevented Defendants from opening an estate. Lastly, the substitution of the Trustee of J.D. Fry's Trust in place of J.D., deceased, by the trial court was proper. Judge Hayden knew at the time the substitution was made that the subject real estate had been transferred to J.D.'s Trust.

C. The Trustee and other Defendants failed to preserve this issue for appeal.

Defendants argue that the Trial Court's substitution of the Trustee in place of J.D. Fry was not done according to applicable statute. Whether or not this is accurate, Defendants failed to file a Writ action so that the matter could have been timely addressed. Defendants attempt to impute the Trial Court's mistake, if it was a mistake, upon the Plaintiffs. Plaintiffs did not motion for the Trial Court to substitute J.D. Fry with the Trustee, it was an action taken by the court *sua sponte*. However, since it was the Trustee that Defendants argue was improperly substituted, the Trustee should have filed a Writ in Prohibition to prevent the Trial Court from proceeding and from continuing with the Trustee as the substituted party. No action was filed. The Defendants instead waited until they had an unfavorable jury verdict, and now attempt to raise this issue to undo the jury verdicts and judgment.

D. Plaintiff's money judgments for undue influence against Linda Fry, Trustee of the J.D. Fry Trust are based upon claims against the Trustee that are independent from the Trustee's role as substitute for J.D. Fry (deceased).

Defendants contend in their Brief, "There is no claim that the Trustee, acting in the capacity of Trustee, is the wrongdoer." Resp. Sub. Brief. 27. This is not true. The Trustee was named as defendant in Count VIII of Plaintiff's Third Amended Petition, which was asserted by all Plaintiffs. L.F. 74. The Jury awarded money damages against the Trustee and for Plaintiffs Mary Ellison, David Fry, and Susan Sleeper under a theory of unjust enrichment, Count VIII, which was brought only against the Trust. L.F. 294.[8] Less than a month before Plaintiff Mary Ellison filed her suit, J.D. Fry transferred all his known real estate holdings, including the 200 acre farm at issue, into the J.D. Fry Trust. Tr. 1217-1216. J.D. Fry acquired the 200 acres as the fruit of his wrongdoing, and thus the Trust was unjustly enriched by J.D Fry's wrongdoing. As such, Linda Fry as Trustee was the proper party against whom to bring claims of unjust enrichment that stem from J.D. Fry's wrongdoing. Judge Hayden knew that the real estate had been transferred to the Trust when he substituted the Trustee for J.D., deceased.

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[8] Verdicts A and C contain only the theory of unjust enrichment, while Verdicts E and F include it with other theories

Defendants also substantially change the basis for this point of appeal in an argument that commences in paragraph 2 on page 40 of their brief and ends on the following page. In short, the argument contends that there are statutory processes whereby the Trustee could have been liable for J.D.'s bad acts. *Id.* However, this argument is deficient on many levels. First, Defendants fail to cite to a single page of the nearly 2,200 page record to support their arguments. Second, Defendants fail to cite to a statute or case that would suggest that the remedies provided in the statutes cited by Defendants are exclusive and would preclude the claims brought by the Plaintiffs.

V. The Defendants did not preserve for appeal the issue of the Trial Court's assessment of costs.[9]

A. Standard of Review

Issues that have been raised on appeal for the first time and were not put before the trial court preserve nothing for appeal. *Kleim v. Sansone*, 248 S.W.3d 599, 603 (Mo. 2008). However, some issues not properly preserved for review may be reviewed by an appellate court at its discretion. Rule 84.13. In order to initiate a discretionary review for plain error, this Court must find that "manifest injustice or miscarriage of justice" has resulted from the lower court's ruling. *Id.*

B. The issue of the taxation of costs was not preserved for appeal.

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[9] *See infra*, fn 1.

Defendants failed to include within their legal file any motions or references to the transcript to show they have preserved this issue for appeal as required by Rule 81.12. In fact, Defendants failed to raise their objections to the taxation of costs to the Trial Court. After the Judgment was entered by the Trial Court, Defendants raised several objections and moved the Circuit Court to amend the judgment. However, the Defendants failed to move the Circuit Court to address the issue of costs it now raises. The Defendants had the opportunity to move the Circuit Court to amend or modify the Judgment for more clarity if they did not sufficiently understand the Court's order. As such, this point has not been preserved for appeal and is not reviewable by this court.

C. Defendants have failed to demonstrate to this court that the issue of taxation of costs merits a review for plain error.

Defendants do not include any facts or arguments to suggest that the taxation of costs as is contained in the Amended Judgment are a "manifest injustice or miscarriage of justice." As such they have failed to demonstrate that this Court should exercise its discretion in taxing costs. Even if this Court were to consider the issue of how costs are taxed, the Defendants have failed to present the Court with a sufficient record upon which to base its decision. For this reason, the Defendants' points concerning the taxation of costs should not be considered by this Court.

VI. Defendants failed to preserve the issue of the allocation of costs among parties for appeal, but to the extent that this Court will consider their argument, the Trial Court did not abuse its discretion in its allocation of costs which took into

consideration the entire course of the litigation, not only which parties were allowed to submit claims to the jury.[10]

Defendants argue that they prevailed on most of the issues, despite a collective six jury verdicts against them. Further, they argue the Trial Court abused its discretion in how costs were taxed. However, Defendants arguments do not evidence an abuse of discretion, but rather an unhappiness on the part of the Defendants in how the Trial Court chose to exercise its discretion.

A. Standard of Review

Plaintiffs agree that the proper standard of review for reviewing the taxing of costs associated with a civil case is abuse of discretion by the trial court. *See Sadowski v. Brewer*, 693 S.W.2d 891, 894 (Mo. Ct. App. 1985). "An abuse of discretion occurs when the trial court's ruling is so arbitrary and unreasonable that it shocks this court's sense of justice and it is clearly against the logic of the surrounding circumstances." *Matter of Estate of Dean*, 967 S.W.2d 219, 224 (Mo. App. W.D. 1998).

B. Plaintiffs are the prevailing party

Even in cases with multiple claims in which some claims are decided for the plaintiffs and some are decided for the defendants, for purposes of allocating the costs, there is only one prevailing party. *Birdsong v. Bydalek*, 953 S.W.2d 103, 124 (Mo. App. S.D. 1997) *citing Ozias v. Haley*, 141 Mo. App. 637, 125 S.W. 556, 557 (1910). A

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[10] *See infra*, fn 1.

discretionary apportionment of costs may be overturned when there is "nothing in the record justifying the taxing of costs" in the manner done by the Trial Court. *Sadowski v. Brewer*, 693 S.W.2d 891, 894 (Mo. App. S.D. 1985).

In *Birdsong*, this Court quoted the earlier Western District case of *Ozias v. Haley* in noting:

> It transpires frequently that in the verdict each party wins on some of the issues and as to such issues he prevails, but the party in whose favor the verdict compels a judgment is the prevailing party. Each side may score, but the one with the most points at the end of the contest is the winner....

953 S.W.2d at 124. This instant case is even more straight-forward than the *Ozias* Court contemplated. Here, the only verdicts which "compel[ed] a judgment" were those of Plaintiffs Mary Ellison, David Fry, and Susan Sleeper against the defendants. *See* L.F. 289-294.

To support their argument that they are the prevailing party and thus the Trial Court's discretionary taxation of costs was an abuse of discretion, Defendants contort the record. First, Defendants attempt to define three issues as the "principle issues litigated." Resp. Sub. Brief 49. The standard under the law is to determine who is the prevailing party, which is based on which party received verdicts compelling a judgment. *Ozias*, 953 S.W.2d at 124. Second, Defendants complain that the verdict form for the verdicts in favor of Mary were "flawed" and therefore were unable to determine the theory of recovery. Resp. Sub. Brief 49. Even if the verdict director is flawed, that issue was not

presented as a point on appeal. In addition, for purposes of determining who the prevailing party is for the purpose of apportioning costs, Defendants fail to explain why this is important.

Mary Ellison received a verdict in her favor, which compelled a judgment, and therefore is the prevailing party. Likewise, David and Susan had four verdict directors that were submitted to the jury and received verdicts back in their favor on all four of them.

The verdicts were rendered against multiple Defendants. Verdicts A and B were rendered in favor of David Fry against Linda Fry as Trustee of the J.D. Fry Trust. Verdicts C and D were rendered in favor of Susan Sleeper also against Linda Fry as Trustee of the J.D. Fry Trust. Verdict E was rendered in favor of Plaintiff Mary Ellison against Linda Fry as Trustee of the J.D. Fry Trust and Verdict F was rendered in favor of Plaintiff Mary Ellison against Linda Fry in her individual capacity. Clearly Plaintiffs are the prevailing party and there was no abuse of discretion by the Trial Court in assessing costs against the Defendants.

C. The Court exercised its discretion in taxing costs based upon the entirety of the litigation, not merely which parties were allowed to submit claims to the jury.

Although Plaintiffs prevailed on all of their claims that were submitted to the jury, Defendants argue "[T]o assess costs against the Defendants is an abuse of discretion and should be reversed […]" with costs assessed against Plaintiffs. Resp. Sub. Brief, 51. However, the Defendants neglect to inform the Court of the costs that were incurred by

the Plaintiffs because of Defendants' counsel's conduct during the litigation. Defendants brought malicious prosecution counterclaims against Plaintiffs which were dismissed or severed. *See* L.F. 21. The Trial Court, Judge Barnes, ordered that the Defendants were not to conduct discovery concerning the counterclaims within the primary litigation. *See id*. at 23. Nonetheless, Defendants attempted to question Plaintiffs concerning the counterclaims at their deposition, in violation of Court order. *Id*. Defendants' attorney would not allow Plaintiffs' expert real estate appraiser on the subject land, short of a Motion, two trips to Camdenton to argue the Motion, and a Court order requiring Defendants to allow the appraiser onto the land. *See* L.F. at 09, 10, & 13. Defendants filed numerous Motions to Dismiss and Motions for Summary Judgment, making the same arguments they make in their briefs in this Court, which were ruled against them by Judges Hayden, Hutcherson, Barnes and Jaynes. Some Defendants brought a 28 page wrongful death lawsuit seeking actual and punitive damages against Plaintiff Mary Ellison, her daughter, who is not a party to this case, and Plaintiffs' attorney, Beverly J. Figg, alleging that the filing and prosecution of this lawsuit hastened the death of J.D. Fry, with no evidence to support the allegations. The wrongful death case was voluntarily dismissed after the jury returned verdicts in this case.

Defendants' statements that "No judgment was entered in favor of any Plaintiff for claims of undue influence or fraud with regard to Vincil and Willa" and "No judgment was entered against Linda, individually" are incorrect. Resp. Sub. Brief, 49, 51. Judgment was entered in accordance with the Verdicts. Verdict B was in favor of Plaintiff David Fry for claim of undue influence for conduct of J.D. Fry (against the

Trustee as substituted party). Verdict D was in favor of Plaintiff Susan Sleeper for claim of undue influence for conduct of J.D. (against the Trustee as substituted party). The evidence of undue influence pertained only with regard to Vincil and Willa. Damages were not awarded on Verdicts B and D because they were awarded to David on Verdict A and they were awarded to Susan on Verdict C. Verdict F was in favor of Plaintiff Mary Ellison and against Defendant Linda Fry, individually.

The Trial Court's apportionment of costs was well within its discretionary power. Nothing cited by the Defendants points to an abuse of discretion or circumstances that would "shock…justice." As such, this Court should .affirm the Trial Court's taxing of costs against Defendants.

PLAINTIFFS' REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFFS' APPEAL

Argument

I. Defendants misstate the standard for awarding punitive damages, misstate key facts in cited cases, and do not accurately represent the Plaintiffs' Brief or the Transcript.

In their Initial Substitute Brief, Plaintiffs cited to *Ries v. Shoemake*, as a source for the rule concerning punitive damages. *Ries v. Shoemake*, 359 S.W.3d 137, 145 (Mo. App. S.D. 2012). Defendants attempted to distinguish the facts in *Ries* from those in the instant case. While the basis for the Plaintiffs' claims may have been different in the two cases, *Ries* serves as an example of a Defendant whose "conduct was outrageous because

of the defendant's evil motive or reckless indifference to the rights of others." While the species of "outrageous conduct" may have been different in the two cases, *Ries* continues to stand for the proposition that when a defendant acts in reckless indifference to the rights of others, the Plaintiff is entitled to punitive damages.

Defendants are incorrect in stating that Plaintiffs failed to cite to the record to support their claim that Delbert had the USDA contracts modified to divert the payments from Arthur Fry to Fry Farms, the partnership between J.D. and Delbert. Resp. Sub. Brief, 59. In fact, the factual assertions were extensively cited in Plaintiffs' Brief. *See* Plaintiffs' Initial Substitute Brief, 8, 9, 21, 31.

Plaintiffs do not "ignore" the fact that the Jury did not award money damages along with their verdicts for David Fry and Susan Sleeper on the issue of undue influence.[11] *See* L.F. 290-292 (Verdicts B and D). The jury, in granting those verdicts, recognize J.D.'s wrongdoing, but awarded money damages against the Trust for unjust enrichment since the Trust was the holder of J.D.'s assets. *See* L.F. 289-291 (Verdicts A and C). It would have been a double recovery for David and Susan to recover from both J.D. Fry and from the Trust.

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[11] Defendants state that "Plaintiffs have continued to argue that David and Susan have not received anything from Vincil and Willa [.]," while citing to page 14 of Plaintiffs' Initial Substitute Brief. *See* Resp. Sub. Brief 60, fn. 34. Nothing on page 14 of Plaintiffs' brief appears to support Defendants' statement.

Regarding the division of CDs, Defendants argue that Mary Ellison was actually benefited by J.D.'s wrongdoing since she received $39,000 that was left over from Willa's checking account. Resp. Sub. Brief 61. However, Defendants fail to link J.D.'s illegal act of cashing in a CD that was in Willa's name, with a payable on death to Arthur, to any proceeds in the checking account. In fact, the evidence at trial was that after J.D. cashed in the CD which was payable on death to Arthur, he issued a new CD to Arthur for about $19,000 of the original $48,000. Tr. 936. The remaining money went into CDs in Willa's name which were payable on death to J.D. Fry. Tr. 601:8-603:25.

II. It is undisputed that Arthur did not have all the material facts necessary to make an informed decision about whether to execute the "Release."

Defendants claim that Arthur admits to signing the purported "Release." Resp. Sub. Brief, 64. This is simply not true. What is being called the "Release" was delivered to Plaintiffs' counsel as a three page document, two pages of "substance" and a signature page with notary clause. Arthur identified his signature on the third page. Tr. 659. However, there was never any evidence that the third page was a part of the complete "Release" when Arthur signed the third page. There was no evidence presented that the first two pages of the purported Release were part of the document that Arthur signed. There are no page numbers on the document, no text from the second page that spills over onto the third to show continuity, and the blank line for initials in the bottom right corner is blank on all the pages. Exhs. 191-193. There is simply no evidence that Arthur was mailed a three page release, saw a three page release, or executed a three page

release. As such, the Defendants do not have the benefit of the presumption in favor of the validity of a release.

In response to Plaintiff Arthur Fry's argument that he was induced by fraud into signing the Release since J.D. Fry had superior knowledge of material facts that J.D. alone had, Defendants argue that J.D. only had a duty to inform Arthur that Mary had filed claims against J.D. However, Defendants do not support this argument with authority in case law or statute.

Defendants do not dispute that J.D. Fry alone held the material facts at the time that Arthur Fry was induced to sign the Release. Since the material facts were not disclosed, Arthur was not fully aware of what rights he may have been giving up in executing a release.

There remains a factual issue of whether Arthur executed the Release with the first two pages attached, which should have been submitted to the jury. However, even if Arthur did execute the full three-page Release, it was induced by fraud and therefore is unenforceable.

III. Mary Ellison brought both equitable and legal claims against Defendants; she was due equitable relief for her equitable claims and money damages for her legal claims.

Mary Ellison brought multiple claims against Defendants, some of which were legal claims and some of which were equitable claims. The Jury awarded Mary Ellison damages for her legal claims, and found in her favor against Linda Fry for her equitable

claims. The Trial Court below failed to issue an equitable order for the return of the tangible, personal property held by Linda Fry. The equitable and legal remedies requested by Mary are not inconsistent. She is due equitable relief for her equitable claims and money damages for her legal claims.

Mary Ellison's legal claims in part relate to the fact that before and after the death of Willa, J.D. divided the financial assets owned by Willa, in such a way that J.D. ended up with over $41,000 more. *See* Defendants' Exh. R, p 38. The Jury awarded Mary $35,000 on this claim. L.F. 216. However, Mary Ellison also brought claims related to tangible personal property that had sentimental value to Mary, including her father's corn shucking peg. Appendix A17. The jury entered a verdict in favor of Mary on this issue. L.F. 217. However, they entered $0 in damages since the property had no market value, and they were told by Mary's counsel that if they found in favor of Mary, the judge would be asked to enter an order for a return of the property. Tr. 1451.; L.F. 293, 294. Unfortunately, the Trial Court (Judge Jaynes) did not follow through with the jury's finding of fact and issue an Order for the return of the property. The jury found in Mary's favor on both of the Verdicts submitted on her claims. She is due equitable relief (an Order requiring Defendant Linda Fry to deliver to Mary the tangible personal property listed on Appendix A17) in addition to the money damages awarded by the jury for her legal claims ($35,000 on Verdict E). The jury did its job and found that J.D. and Linda had breached fiduciary duty, fraudulently concealed, converted and/or were unjustly enriched and assessed Mary's damages at $35,000 (Verdicts E and F). Mary will be awarded complete relief, after six years of litigation contested at every turn, only if

this Court enters an equitable Order requiring the delivery to Mary, Vincil and Willa's daughter, of a few items of tangible personal property now in the possession of Linda, Vincil and Willa's daughter-in-law, which was Mary's main goal at the beginning of this litigation.

CONCLUSION

For the reasons stated above, Defendants are not due the relief they are seeking. The Trial Court properly denied Defendant's JNOV related to their statute of limitations arguments because Defendants failed to meet their burden of proof related to those affirmative defenses. Plaintiffs do have standing to assert the claims brought to trial and upon which the Jury entered verdicts in favor of Mary, David and Susan. Defendants failed to preserve for appeal their complaints concerning the taxation of costs and their confusion as to the Trial Courts' Judgment. To the extent this Court finds Defendants did preserve the issue for appeal, the Trial Court did not abuse its discretion in how it apportioned costs among the parties. The Plaintiffs won. The Defendants lost. Defendants pay the court costs.

For the reasons stated in their Brief, and defended above, Plaintiff Arthur Fry should be awarded the value of his life estate in the 200 acres, undisputed to be $68,286. Arthur should be awarded $24,235, the amount necessary to even up the amount of CDs that ultimately went to J.D. and Arthur, and any other relief this Court deems is proper. The money damages should be awarded against Linda Fry, Trustee of J.D.'s Trust, as the jury found against the Trust on identical claims of Mary Ellison, David Fry and Susan

Sleeper. Alternatively, Arthur Fry is due a new trial to assert his claims against Defendants.

Mary Ellison is due an equitable order for the delivery of the tangible personal property listed on Appendix A17 that is being held by Defendants and any other relief this Court deems is proper. All Plaintiffs are due a new trial on the issue of punitive damages and any other relief this Court deems proper.

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 Times New Roman.

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, and the signature block, contains 9,797 words as counted by Microsoft Word 2010.

/s/ Joshua K. Friel

Joshua K. Friel

Respectfully submitted,

ANDERECK, EVANS, WIDGER,
JOHNSON & LEWIS, L.L.C.

_____/s/__Joshua K. Friel_____

Beverly J. Figg, #32165
Joshua K. Friel, #64857
The Colonel Darwin Marmaduke House
700 East Capitol Ave.
Jefferson City, MO 65101
Telephone: 573-634-3422
Facsimile: 573-634-7822

ATTORNEYS FOR APPELLANTS/ CROSS-RESPONDENTS
MARY ELLISON AND ARTHUR FRY

AND CROSS-RESPONDENTS
SUSAN SLEEPER AND DAVID FRY

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document to Defendants' attorneys, Daniel Simon and Thomas Harrison, electronically via Missouri's eFile system this 24th day of February, 2014.

_____/s/__Joshua K. Friel_____

Joshua K. Friel