IN THE MISSOURI SUPREME COURT

ERIC D. BURNS,	)	
	)	
Respondent,	)	
	)	
v.	)	S.C. No. 87789
	)	S.D. No. 26889
LYNN M. SMITH,	)	
	)	
Appellant.	)	
	)	

Appeal from the Honorable William Roberts
Circuit Court of St. Clair County
Case No. 02-CV-205824

APPELLANT'S SUBSTITUTE REPLY BRIEF

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TABLE OF CONTENTS

Pages

TABLE OF CONTENTS....1

TABLE OF AUTHORITIES....6

STATEMENT OF FACTS....7

I. INTRODUCTION....7

II. UNCONTROVERTED FACTS....7

POINTS RELIED ON....9

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT....9

A. Standard of Review....9

B. No Reasonable Person Would Recognize the Affirmative Acts, as Found by the Circuit Court, as Hazardous and Beyond the Usual Requirements of Employment 9

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER 10

A. Standard of Review 10

B. No Substantial Evidence Shows That a Reasonable Person Would Have Recognized That Following Common Industry Practice To Repair a Leaking Water Tank Was Hazardous Beyond the Usual Requirements of Working for Kennon 10

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED

FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION 10-11

A. Standard of Review 11

B. Smith Was Entitled to Rely on Burns' Pleadings and Was Not Required to Guess What Else Burns Might Ask For After Trial 11

ARGUMENT 12

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT 12

A. Standard of Review 12

B. No Reasonable Person Would Recognize the Affirmative Acts, as Found by the Circuit Court, as Hazardous and Beyond the Usual Requirements of Employment 12

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER 16

A. Standard of Review 17

B. No Substantial Evidence Shows That a Reasonable Person Would Have Recognized That Following Common Industry Practice To Repair a Leaking Water Tank Was Hazardous Beyond the Usual Requirements of Working for Kennon 10

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED

FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION 19

A. Standard of Review 19

B. Smith Was Entitled to Rely on Burns' Pleadings and Was Not Required to Guess What Else Burns Might Ask For After Trial

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 23

CERTIFICATE OF SERVICE 24

TABLE OF AUTHORITIES

Cases **Page**

Arnwine v. Trebel, 195 S.W.3d 467
(Mo. App. W.D. 2006) 9, 10, 12, 15, 16, 18

Burns v. Smith, 2006 WL 1459956 (Mo App. S.D. 2006) 18

Call v. Heard, 925 S.W. 2d 840 (Mo. Banc 1996) 11, 20

Groh v. Kohler, 148 S.W.3d 11, 15, 16 (Mo. App. W.D. 2004) 15

Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670

(Mo. App. S.D. 2003) 9, 10, 14, 16, 18

Lyon v. McLaughlin, 960 S.W.2d 522 (Mo. App. W.D. 1998) 14, 15

Nowlin v. Nichols, 163 S.W.3d 575 (Mo. App. W.D. 2005) 9, 14

State ex rel. Larkin v. Oxenhandler, 159 S.W.3d 417, 423

(Mo. App. W.D. 2005) 15

State ex rel Taylor v. Wallace, 73 S.W.3d 620

(Mo. Banc 2002 ..... 9, 10, 13, 17, 18

Statutes

§408.040 RSMo. 2000 20

Rules

Rule 83.09 7

Rule 84.04(f) 5

STATEMENT OF FACTS

I. INTRODUCTION

Respondent claims, without citation to the record or to appellant's substitute brief, that appellant's brief fails to comply with Rule 84.04(f). The facts therein are set forth with citations to the record, in accord with the relevant standard of review, and set forth both evidence supporting the trial court's judgment and uncontroverted evidence. As such, the Court should ignore the unsupported allegation that Smith failed to comply with the applicable rule and should ignore Burns' totally unnecessary statement of purported facts.

II. UNCONTROVERTED FACTS

The following facts are uncontroverted.

Burns, the only person who claimed to have heard Smith state "run it 'til it blows,"[1] knew that Smith meant "use it 'til you can't use it no more." (Tr. 430, ln 21 to 431, ln 8).

Smith drove the truck with the welded water tank, as did his brother and at least one other Kennon employee. (Tr. 95, ln 2-9; 476, ln 14-18).

[1] Again, Smith does not admit making this statement in terms of an admission that may be used in any further proceedings. Instead, he concedes that the trial court found that this statement was made, and that he his bound by that finding of fact for purposes of this appeal.

At the time of trial, Smith's brother Larry Smith was driving a tank with a welded water tank by his own choice. (Tr. 450, ln 12-18; 479, ln 19-24). Larry Smith had also watched the professional welder perform the weld on his tank, and that professional welder did exactly what Smith had done to the tank on Burns' truck. (Tr. 478, ln 15 to 479, ln 2; 452, ln 17 to 454, ln 18).

It was common practice in the industry, as evidenced by Mr. Fischer's testimony and experience, to weld water tanks on cement mixer trucks. (Tr. 350, ln 15-23; 312, ln 12-20; 308, ln 8-12; 313, ln 9-12). The test used to determine if the weld was good was to pressurize the tank. (Tr. 435, ln 8-18; 476, ln 9-13). Mr. Fischer testified without contradiction that he would not have let his employees use welded tanks if he thought they were unsafe. (Tr. 314, ln 9-12).

Neither Fischer nor the professional welder used any of the tests identified by Professor Hamilton, Burns' engineering expert. (Tr. 452, ln 17 to 454, ln 18; 313, ln 13-24).

Although requested to do so, the trial court did not find what affirmative acts a reasonable person would have known to be unreasonably hazardous. (L.F. 62-67).

POINT RELIED ON

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT

A. Standard of Review

B. No Reasonable Person Would Recognize the Affirmative Acts, as Found by the Circuit Court, as Hazardous and Beyond the Usual Requirements of Employment

State ex rel Taylor v. Wallace, 73 S.W.3d 620 (Mo. Banc 2002)

Arnwine v. Trebel, 195 S.W.3d 467 (Mo. App. W.D. 2006)

Nowlin v. Nichols, 163 S.W.3d 575 (Mo. App. W.D. 2005)

Logan v. Sho-Me Power Elec. Coop., 122 S.W.3d 670 (Mo. App. S.D. 2003)

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER

A. Standard of Review

B. No Substantial Evidence Shows That a Reasonable Person Would Have Recognized That Following Common Industry Practice To Repair a Leaking Water Tank Was Hazardous Beyond the Usual Requirements of Working for Kennon

State ex rel Taylor v. Wallace, 73 S.W.3d 620 (Mo. Banc 2002)

Arnwine v. Trebel, 195 S.W.3d 467 (Mo. App. W.D. 2006)

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH

THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION

A. Standard of Review

B. Smith Was Entitled to Rely on Burns' Pleadings and Was Not Required to Guess What Else Burns Might Ask For After Trial

Call v. Heard, 925 S.W. 2d 840 (Mo. Banc 1996)

Mo.Rev.Stat §408.040

ARGUMENT

I. THE TRIAL COURT ERRED IN ENTERING JUDGMENT INSTEAD OF DISMISSING THE CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT, AS A MATER OF LAW, THE AFFIRMATIVE ACTS FOUND BY THE TRIAL COURT DO NOT MEET THE LEGAL STANDARD REQUIRED THAT A REASONABLE PERSON WOULD RECOGNIZE THEM AS HAZARDOUS AND BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT

A. Standard of Review

Smith incorporates the standard of review as set forth in his substitute appellant's brief at pp. 29-30. In addition, as Burns admits in his substitute brief, "this [C]ourt need not defer to the trial court's resolution of legal issues" when reviewing the determination of whether Burns met the case-by-case burden of proving "something more" under a *de novo* standard. (Subt. Resp. Brief at p. 22).

B. No Reasonable Person Would Recognize the Affirmative Acts, as Found by the Circuit Court, as Hazardous and Beyond the Usual Requirements of Employment

Respondent engages in a classic "straw man" argument in the argument section of his brief, a clear admission that he cannot meet the main thrust of

Smith's arguments. The main thrust of Smith's argument under Point I – set forth at pp. 29-36 – was that *Taylor* compelled a dismissal of this action in favor of the exclusive jurisdiction of the Labor & Industrial Relations Commission. Instead of meeting this showing head on, Burns instead prefers first to address Smith's argument that the Court could clarify its ruling in *Taylor* in light of nearly four and one-half years of application by the courts of this state, made at pp. 36-38 of his substitute brief.

Put simply, under the rule announced by this Court in *State ex rel Taylor v. Wallace*, 73 S.W.3d 620 (Mo. Banc 2002), Smith has no liability to Burns because Burns' sole remedy – one he actually received – was under Workers' Compensation. However, as Smith demonstrated in his substitute brief, since this Court's case-by-case rule in *Taylor* was set forth, numerous appellate cases on this exact issue have demonstrated the extent of uncertainty surrounding application of that rule. This case itself is an example of that uncertainty; the trial court applied the rule to reach one result, but the Court of Appeals for the Southern District applied the same rule to reach the opposite result, not only after the parties had litigated the case through trial but, also after Burns had filed two separate

garnishment actions – in other words, after a large expenditure of legal and judicial resources.[2]

The heart of the dispute between Smith and Burns as to the application of the *Taylor* rule does not appear until p. 29 of Burns' substitute brief where he characterizes the cases applying *Taylor* as requiring an affirmative act by the fellow employee that "changes the work environment from its expected or normal risk of injury to a more hazardous requirement." Smith, however, cited below and in this Court cases establishing the requirement that a reasonable person must know that the risk is increased to be hazardous beyond the scope of the employment. *See Nowlin v. Nichols*, 163 S.W.3d 575 (Mo. App. W.D. 2005) (exclusive remedy where supervisor directed worker to assist in extricating a stuck bulldozer and then left a running bulldozer uphill from that worker unattended); *Logan v. Sho-Me Power Elec. Coop.*, 122 S.W.3d 670 (Mo. App. S.D. 2003) (no liability for directing employee to work near an energized power line); *and Lyon v. McLaughlin*, 960 S.W.2d 522 (Mo. App. W.D. 1998) (exclusive remedy where defendant instructed employee with previous back injury to move bent cover from conveyor belt).

[2] Smith understands that both of those garnishment actions are currently stayed, pending resolution of the exclusive-remedy issue in this Court.

After this case was decided by the Southern District, the Western District issued an opinion in *Arnwine v. Trebel*, 195 S.W.2d 467 (Mo. App. W.D. June 30, 2006). In *Arnwine*, the Western District attempted to summarize the case law since *Taylor* on exactly this issue as follows:

> the courts have recognized the following general rule: "In cases that have recognized the `something more' element has been met, the supervisor had personally participated in the `something more' by directing the employees to engage in dangerous conditions ***that a reasonable person would recognize as hazardous and beyond the usual requirements of the employment***." *Lyon*, 960 S.W.2d at 526; *State ex rel. Larkin v. Oxenhandler*, 159 S.W.3d 417, 423 (Mo. App. W.D. 2005); *see also Groh v. Kohler*, 148 S.W.3d 11, 15, 16 (Mo. App. W.D. 2004).

Arnwine, 196 S.W.3d at 477 (emphasis added).

In other words, Burns' characterization of how courts have resolved the case-by-case analysis of facts in these exclusive-remedy cases is too limited, and in fact inadequate, in that it completely ignores the requirement that the affirmative act must be one that a ***reasonable person*** would recognize unduly hazardous. That is the heart of the dispute before this Court in this case – the trial court could not find any affirmative act that a reasonable person would have recognized as

hazardous, and thus Burns' sole remedy was the Workers' Compensation benefits he had received, and as of the time of trial continued to receive.

If this Court agrees with the summary of case law set forth by the Western District in *Arnwine*, and in the Southern District's most recent published opinion in *Logan*,[3] , then this Court must find that Missouri's workers' compensation law and process provided Burns' sole remedy. That is the result that would have occurred in all of the surrounding states, as Burns apparently concedes (by failing to address that argument in his brief). The Court should reverse the trial court's determination that Smith could have any liability to Burns for his workplace injury and should remand with an order to dismiss this case for lack of subject matter jurisdiction.

II. THE TRIAL COURT ERRED IN AWARDING JUDGMENT INSTEAD OF DISMISSING THIS CASE FOR LACK OF JURISDICTION BECAUSE WORKERS' COMPENSATION IS THE SOLE REMEDY IN THAT NO SUBSTANTIAL EVIDENCE SHOWS THAT A REASONABLE PERSON WOULD HAVE RECOGNIZED

[3] The Southern District's opinion in this case is neither final nor published and, in fact, is of no effect under Rule 83.09, which provides that this Court makes the final determination "as an original appeal" unless this Court chooses to retransfer the case back to the Southern District.

THE "AFFIRMATIVE ACTS" OF WELDING A RUSTED WATER TANK AND CONTINUING TO USE IT WERE HAZARDOUS BEYOND THE USUAL REQUIREMENTS OF EMPLOYMENT AS A CEMENT-TRUCK DRIVER

A. Standard of Review

Smith incorporates the standard of review as set forth in his substitute appellant's brief at pp. 29-30 and at Argument I A, *supra*.

B. No Substantial Evidence Shows That a Reasonable Person Would Have Recognized That Following Common Industry Practice To Repair a Leaking Water Tank Was Hazardous Beyond the Usual Requirements of Working for Kennon

The trial court did not find what acts a reasonable person would or could have appreciated as creating such risk beyond the usual hazards of employment, because there was no evidence to support such a finding.[4] Respondent's attempts

[4] Interestingly enough, it is in Point II of his brief that Burns directly acknowledges that the Southern District in this case – while still finding against him – rejected the rule drawn from a summary of case law applying *State ex rel. Taylor v. Wallace*, 73 S.W.3d 620 (Mo. Banc 2002) as summarized by the Western District in *Arnwine* by finding that the "reasonable person" standard, while used in at least 5 (pre-*Arnwine)* decisions, was not in this Court's prior decisions.

to argue to the contrary are unavailing under a plain reading of the trial court's exact ruling. (L.F. pp. 63-64).

The evidence that welding water tanks was common in the industry; that Smith, his brother and at least one other employee drove the truck after the tank was welded; and that Burns himself believed that Smith told him to "use it until you can't use it no more" (Tr. 430, ln 21 to 431, ln. 8) was uncontroverted. It was also uncontroverted that Larry Smith, Smith's brother, chose to have the tank on his truck welded and was driving with it at the time of trial. (Tr. 450, ln 12-18; 479, ln 19-24). Obviously, none of these drivers presented credentials at trial as

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Compare Burns v. Smith, 2006 WL 1459956 at *6 with *Arnwine v. Trebel*, 195 S.W.3d 467 (Mo. App. W.D. 2006) Of course, the Southern District's opinion is null as the case was transferred to this Court, while the Western District's opinion in *Arnwine* is now final and published, leaving *Logan v. Sho-Me Power Elec. Coop*, 122 S.W.3d 670 (Mo. App. S.D. 2003), is the final decision on this issue. In other words, two of the districts of the Court of Appeals in this state, in nearly simultaneous attempts to apply the rule of *Taylor*, disagreed over whether a reasonable person had to appreciate the increased risk of hazard in order to exclude him- or herself from the protection of the Workers' Compensation exclusive-remedy rule while still reaching a result that would leave Smith free from Burns' claims under the exclusive remedy provision.

licensed engineers or certified welders, but clearly none of them foresaw a welded water tank as unreasonably hazardous.

All throughout this case, Burns argued that a professional engineer who was, in fact, a professor of engineering, appreciated the risk from this particular weld, and from the common practice identified by Smith and Mr. Fischer. In other words, Burns always wanted Smith to know what Professor Hamilton said he knew. The issue is not whether an expert such as Professor Hamilton might have known the increased risk from welding this particular tank – or the weld on Larry Smith's tank performed by a professional welder prior to trial – but whether a reasonable person would have. As shown in Smith's substitute brief, there was no substantial evidence to support such a finding, and the case should have been dismissed as a matter of law for lack of subject matter jurisdiction. The Court should reverse the trial court's judgment and remand with instructions to dismiss.

III. THE TRIAL COURT ERRED IN AWARDING PRE-JUDGMENT INTEREST IN THAT BURNS DID NOT SEEK SUCH RELIEF UNTIL AFTER TRIAL BECAUSE SMITH WAS PREJUDICED FROM HIS RELIANCE ON THE PLEADINGS AS SETTING FORTH THE REMEDIES SOUGHT BY PLAINTIFF AND THE ISSUES RIPE FOR DECISION

A. Standard of Review

Smith incorporates the standard of review set forth in his Substitute Appellant's brief at pp. 54-55. Smith is asking this Court to change the law regarding whether or not a plaintiff must plead a claim for prejudgment interest, or whether a defendant may rely upon the claims actually raised in a pleading prior to trial. That is an issue of law for this Court to determine.

B. Smith Was Entitled to Rely on Burns' Pleadings and Was Not Required to Guess What Else Burns Might Ask For After Trial

As Burns notes in his substitute brief at pages 60-61, Smith has acknowledged the current rule on this issue as set forth by this Court in *Call v. Heard*, 925 S.W. 2d 840 (Mo. Banc 1996). Burns then argues that it was enough for him to comply with §408.040 by sending a letter prior to trial "setting out the amount of the demand." (Subs. Resp's Brief at 61). He argues that this letter was somehow sufficient to put a defendant on notice that the plaintiff would assert a claim if litigation proceeded.

This argument is faulty. It is the equivalent of saying that a defendant must assume that every possible claim a plaintiff might make is actually being made even if it is not included in a petition or other pleading. In other words, no matter what claims a plaintiff or his or her lawyer decides to raise in a formal pleading, a defendant should treat the pleading as raising all such claims under Burns' interpretation. Such a rule would hinder plaintiffs' attorneys' efforts at clever

pleading just as much as it hinders defense attorneys from evaluating claims actually being made by reviewing the pleadings.

Further, Burns does not contest that requiring a plaintiff to plead a claim for pre-judgment interest prior to trial if that plaintiff intends to make such a claim in the litigation is somehow an undue burden. Surely the plaintiff who knows to send a letter under §408.040 can also allege a claim under that statute when drafting a petition?

Should the Court reach this issue, Smith asks the Court to enforce the requirement that a plaintiff put a defendant on notice of all claims alleged by including them in a formal pleading.

CONCLUSION

WHEREFORE, because the judgment of the court below fails to make the necessary finding that a reasonable person knew or would have known that the patched water tank was hazardous beyond the usual scope of the work environment, or in the alternative that any such implied finding (if one is deemed to exist) is an abuse of discretion and not supported by substantial evidence, the Court should reverse the judgment and order the Circuit Court to dismiss the case for lack of jurisdiction. Further, in the event the Court allows the judgment below to stand, the Court should reverse the award of prejudgment interest because plaintiff failed to request such relief prior to trial, thus prejudicing defendant.

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RULE 84.06(C) CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's Substitute Reply Brief complies with Rule 84.06(b) in that it does not exceed 7,750 words because, exclusive of cover, certificate of service, this certificate, signature block and appendix, it contains 3,707 words as counted by Microsoft Word. In addition, the disk accompanying this Brief has been scanned , and is virus-free, according to Symantec Anti-Virus.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and nine copies of the above and foregoing Appellant's Substitute Reply Brief, together with a disk containing such brief pursuant to Rule 84.06(g), was filed in the Missouri Supreme Court, Missouri Supreme Court Building, 207 W. High Street, P.O. Box 150, Jefferson City, MO 65102 and that two true and correct copies of the above foregoing Appellant's Substitute Reply Brief, including the brief on disk, was mailed, U. S. Mail, first class postage prepaid, on this 25th day of September, 2006, to:

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