

LACKS & NEWMAN

An Association of Attorneys

130 South Bemiston
8th Floor
Saint Louis (Clayton), Missouri 63105

DAVID B. LACKS, P.C.
BURTON NEWMAN, P.C.

JEANNE M. FOX, P.C.
SCOTT E. SHERMAN
Of Counsel

Maureen McCann Billy
Shari M. Cooper
Legal Assistants

TELEPHONE (314) 863-4100

Facsimile (314) 863-4340

FACSIMILE COVER SHEET

Message To: Peter von Gontard

Fax Number: (314)241-7604

Message From: Burton Newman

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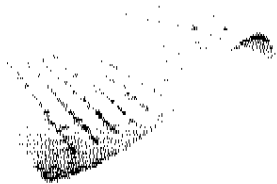
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(314) 863-4100

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IN THE MISSOURI SUPREME COURT

ALVIN BROOKS, et al.,)
)
 Respondents,)
)
 v.) **Case No. 85674**
)
 STATE OF MISSOURI, et al.)
)
 Appellants.)

**MOTION FOR CLARIFICATION OR MODIFICATION OF
BRIEFING SCHEDULE**

Respondents are in a unique position. Their counsel do not seek to delay this case unnecessarily, but are scheduled to file a brief in this Court on December 19, 2004, long before the Trial Court judgment becomes final. If Respondents file their initial brief before the trial court judgment becomes final, Appellants can argue that Respondents have waived the Trial Court's jurisdiction over their motion for a new trial or, in the alternative, to amend judgment. (Exhibit 1) If Respondents file their notices of cross appeal, which typically precedes briefing, the Trial Court may lose jurisdiction and in turn, Respondents would lose their legal rights to post-trial relief from the Trial Court. Perhaps most importantly, until the Trial Court rules on the post-trial motions, there is no way to know who must take the laboring oar on appeal of certain issues, as explained below.

On November 7, 2003, the Honorable Steven R. Ohmer issued his Judgment and Order enjoining the Conceal and Carry Legislation. (Legal file

376-397). Less than two weeks later on November 20, 2003, Respondents, as Plaintiffs in the Trial Court, filed their motion for new trial, or in the alternative, to amend judgment seeking relief on the following limited grounds: (1) the Concealed and Carry Law violates the Hancock Amendment; (2) no injunction bond is authorized after entry of final judgment by the trial court; and (3) Plaintiffs' Petition should be amended to conform to the evidence presented at trial. (Exhibit 1). Appellants, as Defendants in the Trial Court, filed their responses to this motion and the matter is now properly briefed and pending before Judge Ohmer. (Exhibits 2,3 and 4)

On November 19, 2003, this Court issued its Order setting a briefing and argument schedule. The Trial Court issued an Order dated December 10, 2003 and post marked December 12, 2003, which Respondents received the following Monday, December 15, 2003. The Order set the post-trial motion for hearing on Thursday, December 18, 2003. Whether the Trial Court rules from the bench or later is unknown, but in any event, the current briefing schedule would require Respondents to file their brief in this Court on Friday December 19, 2003, the day following the Trial Court hearing. While Respondents are interested in expediting this case in a reasonable manner, this unexpected Trial Court hearing results in uncertainty. If the Trial Court finds that the Conceal and Carry Act violates the Hancock Amendment, then Appellants will have another issue to appeal and brief. Even if the Trial Court denies the post-trial motions, Respondents will not have sufficient time to consider and address whatever

ruling Judge Ohmer makes on December 18, 2003, or thereafter, before their brief is due the next day.

The post-trial motion was timely, pursuant to Rule 78.04, MRCP. Pursuant to Rule 81.05(a), MRCP, if a party timely files an authorized after-trial motion the judgment becomes final at the earlier of the following: "(A) Ninety days from the date of the last timely motion was filed, on which date all motions not ruled shall be deemed overruled; or (B) If all motions have been ruled, then the date of ruling of the last motion to be ruled or thirty days after entry of judgment, whichever is later." The Notices of Appeal filed by Appellants are premature and should be considered as filed immediately after the time the judgment becomes final for the purpose of appeal as set forth above. Rule 81.05(b), MRCP. In turn, Respondents have 10 days after the filing of Appellants' Notices of Appeal to file their Notice of Cross Appeal. Rule 81.04(b). Consequently, Respondents' Notice of Cross Appeal is not yet due. Appellants have already argued in Intervenor/Defendants memorandum in opposition to the post-trial motion that the Trial Court is "likely divested of jurisdiction by virtue of the Supreme Courts action" in ordering a briefing schedule for all issues. (Exhibit 3) Certainly if Respondents were to file notices of cross appeal, Appellants would claim that Respondents waived their right to a final decision by Judge Ohmer.

Appellants also seem to argue that because this Court considers all issues *de novo*, a final decision by the trial court is of no consequence. In

addition to flying in the face of this Court's efforts to require final judgments for purposes of appeal, this position wholly ignores Respondents' rights. Taken to its logical extreme, Appellants' argument would mean that there is no need to present legal issues to a trial court when there is *de novo* review on appeal. It is easy for the Appellants to take such a cavalier position, as they do not have \$250,000.00 tied up in a court ordered bond. Apparently, appellants have taken this position because they want to prevent release of the preliminary injunction bond, despite the fact that Appellants presented the Trial Court no authority justifying the retention of a preliminary injunction bond after the injunction becomes final. (Exhibit 4) Rather than admitting this lack of authority, Appellants simply try to avoid the issue by claiming that the trial court has lost jurisdiction and the matter can be handled on appeal. But that does not address the real and substantial harm to the individuals who have posted the bond that will result from their loss of use of these funds since October 10, 2003 while the case is briefed, argued and finally decided. Those individuals are entitled to a ruling by the Trial Court on this issue as part of the final judgment. A Trial Court ruling on the issue of the bond could avoid yet another issue on appeal.

Any delay occasioned by loss of the Trial Court's jurisdiction over this matter will cause significant harm to Respondents and others. If the trial court cannot rule on this motion because it has lost jurisdiction, the persons who posted the bond will suffer significant financial harm. In addition, Respondents, as Plaintiffs below, moved the Trial Court to reconsider its denial of relief on

