

**IN THE STATE OF MISSOURI
WESTERN DISTRICT COURT OF APPEALS
AT KANSAS CITY, MISSOURI**

Case No. WD70001 (16th Cir. Case No. 0816-04217)

SAMUEL K. LIPARI
Appellant

vs.

NOVATION, LLC; NEOFORMA, INC; GHX, LLC; VOLUNTEER HOSPITAL
ASSOCIATION; VHA MID-AMERICA, LLC; CURT NONOMAQUE;
THOMAS F. SPINDLER; ROBERT H. BEZANSON; GARY DUNCAN;
MAYNARD OLIVERIUS; SANDRA VAN TREASE; CHARLES V. ROBB;
MICHEAL TERRY; UNIVERSITY HEALTHSYSTEM CONSORTIUM;
ROBERT J. BAKER; JERRY A. GRUNDHOFER; RICHARD K. DAVIS;
ANDREW CECERE; COX HEALTH CARE SERVICES OF THE OZARKS,
INC.; SAINT LUKE'S HEALTH SYSTEM, INC.; STORMONT-VAIL
HEALTHCARE, INC.; SHUGHART THOMSON & KILROY, P.C.;
HUSCH BLACKWELL SANDERS LLP¹

**APPELLANT'S APPLICATION FOR TRANSFER PRIOR TO
DISPOSITION OF THE ABOVE PENDING APPEAL TO THE MISSOURI
SUPREME COURT UNDER RULE 83.01**

Prepared by

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¹ Two parties in the trial court action, ROBERT J. ZOLLARS and LATHROP & GAGE L.C. have not been dismissed and are not party to this appeal.

TABLE OF CONTENTS

Authorities	i
A. Table of cases	i
B. Table of statutes and treatises	ii
Related cases	ii
Application for transfer	1
Statement of facts	1
Suggestion in support	3
Certificate of service	4
Attachment 1. Western District of Missouri Order to Show Cause included as an order required for application of transfer under 83.05 (e)(1)	

AUTHORITIES

A. TABLE OF CASES

<i>Committee for Educational Equality v. State</i> , 878 S.W.2d 446 (Mo., 1994)	1
<i>Committee for Educational Equality v. State</i> , 878 S.W.2d 446 (Mo., 1994)	3
<i>Curtiss-Wright Corp. v. General Electric Co.</i> , 446 U.S. 1, 8, 100 S.Ct. 1460, 1465, 64 L.Ed.2d 1 (1980)	3
<i>E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.</i> , 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961)	2
<i>Eagleburger v. Emerson Elec. Co.</i> , 794 S.W.2d 210 (Mo. App. S.D., 1990)	3
<i>Lawlor v. National Screen Service Corp.</i> , 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955)	2
<i>Nash v. Plaza Electric, Inc.</i> , 363 S.W.2d 637, (Mo.1962)	3

Noll v. Noll, 286 S.W.2d 58 (Mo.App.1956) 1

Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971) 2

B. TABLE OF STATUTES AND TREATISES

Rule 74.01 (b) 1

Restatement (Second) of Judgments § 13 (1982) 1

Rule 74.01(b) 3

Rule 74.01(b) 4

RELATED CASES

Medical Supply Chain, Inc. v. Novation, et al, KS Dist. Court case no:05-2299

Medical Supply Chain, Inc. v. Novation, et al, 10th Cir. USCA case no:

Medical Supply Chain, Inc. v. Novation, et al, 10th Cir. USCA case no: 08-3187

Samuel Lipari v. US Bancorp, NA, et al, KS. Dist. Case No. 2:07-cv-02146-CM (formerly *Samuel Lipari v. US Bancorp, NA, et al*, 16th Cir Mo. case no. 0616-CV32307)

Samuel Lipari v. General Electric et al. W. D. of MO. Case No. 07-0849-CV-W-FJG (formerly *Samuel Lipari v. General Electric et al*. 16th Cir. Mo. case no. 0616-CV-07421 and before that *Medical Supply Chain, Inc. v. General Electric Company, et al.*, KS Dist. case number 03-2324-CM

State of Mo ex rel v. Matthew R Blunt et al. 19th Cir. Case no. 08AC-CC00370

Scott Eckersley v Matthew Roy Blunt et al 16th Cir. Case no. 0816-CV00118

Ex Rel Samuel Lipari, v. Hon. Michael Manners WD of Mo. Case no. 68703

Ex Rel Samuel Lipari, v. Hon. Michael Manners Mo. Sup. Ct. Case no. SC88756

Ex Rel Matthew R Blunt, et al, v. Hon. Michael Manners Mo. Sup. Ct. Case no. SC88756

APPLICATION FOR TRANSFER

Comes now, the appellant Samuel K. Lipari appearing *pro se* and respectfully requests transfer of his case to the Missouri Supreme Court prior to disposition by the Western District Court of Appeals under rule 83.01. The appellant seeks transfer while his appeal is pending because the Western District Appellate Court has *sua sponte* sought relief that would require altering or reversing this court's ruling in *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo., 1994).

STATEMENT OF FACTS

1. The appellant informed the parties and the appellate court via his Aug. 13th, 2008 Notice of Appeal that the trial court had entered judgment on some but not all parties and claims.
2. The appellant's Notice of Appeal apprised the parties and appellate court of this fact in the notice's opening on page 1, the notice's statement of facts paragraphs 1 and 2 on page 2 and in the notice's accompanying suggestion of law stating the applicability of Rule 74.01 (b).
3. The appellant has sought review of the trial court's dismissal of parties for the petition's failure to state a claim due to defendants assertion of *res judicata* preclusion over prior state law claims expressly dismissed by a federal court without prejudice and preclusion of claims on subsequent antitrust conducts contradicting the requirement for a final judgment under *Noll v. Noll*, 286 S.W.2d 58, 60-61 (Mo.App.1956); and Restatement (Second) of Judgments § 13 (1982)

and contradicting the rule of no preclusion of liability for subsequent antitrust conduct under *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S.Ct. 795, 28 L.Ed.2d 77 (1971).

4. The appellant has also sought review of the trial court's dismissal of some claims based on a new legal theory expanding *Noerr-Pennington* doctrine from *E.R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 136, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) to immunize unlawful acts to influence government for the purpose of monopolization, an issue not previously addressed by Missouri courts.

5. In an extra-judicial communication to the Western District Court of Appeals dated August 21, 2008, Peter F. Daniel an attorney for the defendant Lathrop & Gage L.C. sent a letter on Lathrop & Gage L.C.'s business correspondence stationary addressed to the clerk of the appellate court informing him that the trial court had entered judgment on some but not all parties and claims.

6. The Western District Court then entered an order prior to any brief or suggestions being filed by the appellant or appellees requiring the parties to provide suggestions of support and opposition to the appellate jurisdiction of the court on the finding that the trial court did not dismiss all of the claims and parties. See Attachment 1 Order of the Western District Court.

SUGGESTION IN SUPPORT

The Western District Court of Appeals has on its own motion directed the *pro se* appellant to provide a suggestion of law to support appellate jurisdiction over the trial court's dismissal of claims and parties under Rule 74.01(b). The appellant's position was further complicated by the unusual circumstances of having to refute a presumption of error against the trial court's exercise of clearly established discretion to dismiss one or more judicial units:

“An appellant ordinarily has the burden of establishing prejudicial error on appeal; a respondent does not have the burden of establishing the correctness of the trial court's ruling. *Nash v. Plaza Electric, Inc.*, 363 S.W.2d 637, 641 (Mo.1962).”

Eagleburger v. Emerson Elec. Co., 794 S.W.2d 210 at 235 (Mo. App. S.D., 1990).

Under the current controlling precedent of this court, the Hon. Judge Michael W. Manners as the trial court judge has the discretion to determine if some parties or claims are to enjoy a final judgment without delaying that resolution until the end of the litigation: “The circuit judge, in exercising that discretion, is granted broad latitude to act as a "dispatcher" of the case. *Curtiss-Wright Corp. v. General Electric Co.*, 446 U.S. 1, 8, 100 S.Ct. 1460, 1465, 64 L.Ed.2d 1 (1980).” *Committee for Educational Equality v. State*, 878 S.W.2d 446 at 453 (Mo., 1994).

The appellant believes that the Western District of Missouri Court is unable to rule on the Court's *sua sponte* motion for relief that contradicts *Committee for Educational Equality v. State*, 878 S.W.2d 446 (Mo., 1994) and that if the relief

from this court's *stare decisis* ruling on the point of law¹ regarding the trial court's discretion to dismiss with prejudice or otherwise make final judgments on complete judicial units is warranted or that the Missouri State Legislature's provision for providing an early resolution to litigation under Rule 74.01(b) is not a constitutionally valid public policy, jurisdiction over the appeal is solely within the Missouri Supreme Court.

Respectively submitted,

S/Samuel K. Lipari

Samuel K. Lipari

Pro se

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing instrument was forwarded this 11th day of September, 2008, by first class mail postage prepaid to:

John K. Power, Esq. Husch Blackwell Sanders LLP, 1200 Main Street, Suite 2300
Kansas City , MO 64105

Jay E. Heidrick, Shughart Thomson & Kilroy, P.C. 32 Corporate Woods, Suite
1100 , 9225 Indian Creek Parkway Overland Park, Kansas 66210

William G. Beck, Peter F. Daniel, J. Alison Auxter, Lathrop & Gage LC, 2345
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¹ “We recognize that generally, when a point of law has been settled by decision, it forms a precedent which is not afterwards to be departed from...” *Porter v. Erickson Transport Corp.*, 851 S.W.2d 725 at 736 (Mo. App. S.D., 1993)

And in person by hand delivery to the Clerk of the Western District Court of Appeals.

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Missouri Court of Appeals

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August 27, 2008

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RE: Samuel K. Lipari, Appellant vs. Novation, LLC, et al., Respondents.
WD# 70001

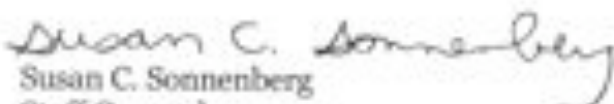
Gentlemen:

A review of the notice of appeal in the above-referenced case indicates the absence of a final, appealable judgment. It appears the judgment dated August 8, 2008 may not have disposed of all claims or parties to the action, and if so, is not final and appealable pursuant to Rule 74.01(b); Jensen v. Howard, 926 S.W.2d 77 (Mo. Ct. App. W.D. 1996).

The court requests that appellant file suggestions as to why this appeal should not be dismissed on or before September 10, 2008. Respondents may file suggestions on or before September 17, 2008.

If there are any questions, please feel free to call me.

Sincerely,


Susan C. Sonnenberg
Staff Counsel

SCS/ksj