IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THE WEITZ COMPANY, LLC, Appellant, vs. MACKENZIE HOUSE, LLC, *et alia*, Appellees.	)	Case No. 10-3713 On Appeal from the United States District Court for the Western District of Missouri Case No. 07-0103-CV-W-ODS

PETITION FOR REHEARING EN BANC

Appellant The Weitz Company, LLC, hereby requests the Court, pursuant to Fed. R. App. P. 35 and 8th Cir. R. 35A, to rehear this case en banc.[1]

Ground for Rehearing En Banc

The Panel's decision to cast aside and overrule the Supreme Court of Missouri's decision in *Moore v. Bd. of Regents*, 115 S.W. 6 (Mo. 1908), conflicts with basic *Erie* doctrine, as announced and applied by the Supreme Court in *Gooding v. Wilson*, 405 U.S. 518, 525-26 (1972), *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967), *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940), *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940), and *Six Cos. of Cal. v. Jt. Highway Dist. No. 13*, 311 U.S. 180, 187-88 (1940), and by this Court in *Gilstrap v. Amtrak*, 998 F.2d 559, 560-62 (8th Cir. 1993). Consideration of this issue by the full Court is necessary to maintain uniformity of the Court's decisions.

[1] This petition also automatically requests panel rehearing. 8th Cir. R. 40A(b).

A. This Court must follow the latest pronouncement on an issue of state law by the state's highest court, regardless of whether it is old or rarely cited.

When a diversity case such as this presents substantive issues of state law, "decisions of the state's highest court are to be accepted as defining state law unless the state court 'has later given clear and persuasive indication that its pronouncement will be modified, limited, or restricted.'" *Gilstrap v. Amtrak*, 998 F.2d 559, 560 (8th Cir. 1993) (citation omitted).

This concept, commonly known as the *Erie* doctrine (after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)), "is basic to the federalism system developed for diversity cases …." Childress & Davies, FED. STANDARDS OF REVIEW § 2.15 (3d ed. 1999). Generally, its operation is simple: "The latest and most authoritative expression of state law applicable to the facts of the case controls." *Id.*

Under the *Erie* doctrine, "state law as announced by the highest court of the State is to be followed" by all federal courts. *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967). This is because "the State's highest court is the best authority on its own law." *Id.* Conversely, *only* "If there be no decision by that court" may "federal authorities" then "apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.*

Thus, federal courts

> are bound to follow state law, whether or not we agree with the reasoning upon which it is based or the outcome which it dictates. This is the ultimate significance of the *Erie* decision. [If there are no]

> subsequent [state] decisions criticizing, distinguishing, or modifying [a given state decision, it] remains the latest, most authoritative expression of [state] law … [and] is controlling for our purposes.

Delta Air Lines v. McDonnell Douglas Corp., 503 F.2d 239, 245 (5th Cir. 1974).

That a state high court decision is "old" and "has been rarely cited" does not lessen this effect: unless there is "clear evidence" the state court "would overrule it," this Court must "consider it binding precedent." *Gilstrap*, 793 F.2d at 560-61 (applying never-cited, 80-year-old Washington decision to reverse district court); *In re Ryan*, 851 F.2d 502, 509 (1st Cir. 1988) (applying 120-year-old Vermont decision to reverse bankruptcy court); *Gooding v. Wilson*, 405 U.S. 518, 525-26 (1972) (applying 60-year-old Georgia decisions to reverse lower court).

In this case, Appellee MH Metropolitan accused Appellant Weitz under Missouri law of breaching their contract by delaying work on apartments Weitz was constructing for MH (Opinion 2). Weitz stopped work in December 2006, when the project's first building was four months late and the entire project two months late (Opinion 2). On January 18, 2007, MH terminated Weitz, ultimately finishing the project between June and November 2007 (Opinion 2). A jury awarded MH $3,022,520 against Weitz in liquidated delay damages (Opinion 3).

The majority of those damages were for the period *after* the January 2007 termination date through as late as November 2007, when MH completed the project. On appeal, Weitz explained to the Panel that, in *Moore v. Bd. of Regents*,

115 S.W. 6, 12-13 (Mo. 1908), the Supreme Court of Missouri limited liquidated damages for construction delay to the time before the contract terminated (Opinion 7). Thus, Weitz explained, under Missouri law the liquidated damages against it for the period after January 2007 were improper and must be reversed (Opinion 7).

The Panel admitted the only other Missouri decision on this issue expressly followed *Moore*, which has never been overruled (Opinion 7-8). Nonetheless, citing no other Missouri cases and with mere lip service to the *Erie* doctrine,[2] the Panel held flatly that, "if faced with this case, the Missouri Supreme Court would not follow *Moore*," but "would allow liquidated damages for a reasonable time after abandonment by the contractor or termination by the owner" (Opinion 7-8).

This Panel's decision to cast aside the plain and unambiguous law of Missouri in favor of what it *wished* the law of Missouri were radically departs from and misapplies well-established *Erie* doctrine precedent. *Moore* and its progeny are on point and controlling. They are binding on this Court.

B. Under *Moore* and its progeny, the award of liquidated damages against Weitz attributable to the period after January 18, 2007, was error.

In *Moore*, a contractor agreed to construct a gymnasium building for a school. 115 S.W. at 6-7. The contract provided that, "upon [the contractor's]

[2] The opinion issued on January 5, 2012, replaced an earlier one issued December 8, 2011, which the panel vacated after granting a similar rehearing petition to this. The January 5 opinion merely adds in the lip service to *Erie* mentioned above: two citations to *Gilstrap* and a parenthetical (Opinion 7-8). The earlier opinion had no *Erie* analysis at all. The new opinion's empty gestures to *Erie* are insufficient.

failure to so complete [the building] at the above mentioned time they shall pay [the school] the sum of [$20.00] per day for each week day intervening after said date until the completion of the work." *Id.* at 7 and 12. The contract also provided that, if the contractor failed "to proceed with the work and furnish proper labor and material," the school could terminate the contract, take possession of and complete the building, and hold the contractor liable for certain costs specified in the contract. *Id.* at 7. Those costs did not include the liquidated delay damages. *Id.*

When the contractor delayed construction,[3] the school terminated the contract and proceeded to complete the building itself. *Id.* The contractor sued, claiming the school had prevented it from completing the building and demanding a balance due. *Id.* at 6. In response, the school sought to set off from any liability $20 per day for 313 days under the liquidated delay damages clause – that is, all the time from the date it terminated the contract until it completed the building. *Id.* at 7. The trial court instructed the jury it could not award the school any liquidated delay damages for the time after the scheduled contract completion date. *Id.*

The Supreme Court of Missouri approved. *Id.* at 12-13. It held the liquidated delay damages provision was to compensate the school "only on

[3] The panel suggests "the facts in *Moore* were different from those here" because, in *Moore*, "the project was not yet late when the owner terminated the contract" (Opinion 7). This is incorrect: the *Moore* contractor admitted it did not "proceed with the construction of the building until the spring of 1904, thereby causing much delay," blaming this, like Weitz, on outside conditions. 115 S.W. at 7.

condition that [the contractor] completed the contract but failed to finish it in the time specified." *Id.* at 13. While the parties could have contracted specifically otherwise, absent such a provision it was "obvious" the liquidated delay damages provision "was not the measure of damages" of the cost to complete the project. *Id.* Thus, the trial "court was unquestionably right in refusing the" school liquidated delay damages for the period after the contract terminated. *Id.*

As the District Court observed, this case is "eerily similar" to *Moore*. The liquidated delay damages provision at issue is virtually identical: "[Weitz] agrees that [it] shall pay to the Owner liquidated damages in accordance with the following schedule for each calendar day that Completion of a Building is delayed beyond the Scheduled Completion Date for such Building. …" Also, as in *Moore*, the contract's termination provision specified the damages recoverable by MH upon termination for cause, of which liquidated damages were not part.

The timeline and procedure, too, mirror *Moore*. After Weitz stopped work on the project, MH terminated the contract for cause (Opinion 2). Ultimately, MH independently completed the project (Opinion 2-3). Weitz sued MH for a balance due (Opinion 2-3). MH answered Weitz was responsible for the delay, and counterclaimed for various damages, including liquidated delay damages all the way through the date it ultimately completed the project (Opinion 2-3).

Only then, however, do the two cases diverge. In *Moore*, the trial court correctly refused to allow the school any liquidated delay damages after the contract terminated. Conversely, here, under a virtually identical clause, the District Court held MH *could* recover liquidated delay damages long after the date the contract terminated. Under *Moore*, this would be error.

In the 104 years since *Moore*, this question – whether, absent a specific provision, a general liquidated delay damages clause in a construction contract allows for such damages to continue after the contract terminates – has arisen in Missouri only one other time, in *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682 (Mo. App. 1983). There, the Missouri Court of Appeals expressly followed *Moore* to reverse precisely the sort of post-termination liquidated delay damages at issue in this case, holding it was "not disposed to depart from [*Moore*] until a contrary rule is declared by our Supreme Court." 653 S.W.2d at 694.

In *Twin River*, a contractor agreed to construct a water main extension for a water district; the contract contained nearly the same liquidated delay damages clause as *Moore* and this case. *Id.* at 687. Construction was delayed. *Id* at 688. Then, when the contractor informed the water district it had completed the project, the water district disagreed and demanded the contractor perform 26 items it asserted were incomplete. *Id.* at 688. When the contractor refused, the water

district terminated the contract. *Id.* By then, the project was past its agreed completion date. *Id.* The water district completed the project itself. *Id.*

The contractor sued, demanding a balance due. *Id.* at 684. The water district countered it was entitled to a set-off of liquidated delay damages for the 369-day period from the date the project should have been completed to the date it ultimately completed the work itself. *Id.* at 689. The trial court agreed. *Id.*

Following *Moore*, the Missouri Court of Appeals reversed the portion of these damages attributable to the period after the date the water district terminated the contract. *Id.* at 693-94. It held *Moore* "appears to be the sole Missouri case addressing this question. That case refused to allow liquidated damages after the date on which the owner took charge of the work." *Id.* at 693. The court observed a nationwide split over this question: some states, like Missouri, hold "liquidated damages are no longer available after abandonment of the work, reasoning that the contractor should not be responsible once he loses his ability to control the date of completion." *Id.* at 694. Others allow liquidated damages "for a 'reasonable' time after abandonment by the contractor or termination by the owner." *Id.*

But the Supreme Court of Missouri never had overruled *Moore*. *Id.* Thus, the Missouri Court of Appeals, bound just as this Court to follow *Moore*, vacated the liquidated delay damages attributable to the period after the contract terminated. *Id.*

That *Moore* and *Twin River* are the only Missouri decisions on this topic are unsurprising. It seems unlikely this situation often would arise. Doubtless, very few owners hiring contractors would have the chutzpah to ask for liquidated delay damages for the period while the owner, itself, controlled the work's completion date. The owner then could delay as long as it wanted to "rack up" more damages.

Under *Moore* and its progeny, the law of Missouri is that this is inappropriate. Absent some specific provision stating otherwise, general liquidated delay damages in a construction contract cannot accrue during the period after the contract has terminated. Applying that clear and simple rule to this case, Weitz could not be liable to MH for any liquidated delay damages after January 18, 2007.

C. The Court is bound to follow *Moore* and *Twin River* in this case.

Moore is a decision of Missouri's highest court defining its state law. The Supreme Court of Missouri never has "given clear and persuasive indication that its pronouncement" in *Moore* "will be modified, limited or restricted;" thus, in this Court, it must be "accepted as defining state law …." *Gilstrap,* 998 F.2d at 560. As the "latest and most authoritative expression of state law applicable to the facts of th[is] case," it "controls." FED. STANDARDS OF REVIEW at § 2.15.

For, "[state law as announced by the highest court of the State is to be followed" by all federal courts. *Bosch*, 387 U.S. at 465. Missouri's highest court "is the best authority on [its] own law." *Id.* Only if "there be *no decision* by that

court" may this Court "apply what [it] find[s] to be the state law after giving 'proper regard' to relevant rulings of other courts of the State." *Id.* (emphasis added).

The Panel cites two cases, *Pa. Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 952 (8th Cir. 2004), and *Maschka v. Genuine Parts Co.*, 122 F.3d 566, 573 (8th Cir. 1997), for the proposition that, "In the absence of guidance from the highest state court (or a statute on point), the federal court's task is to predict how the Missouri Supreme Court would rule if confronted with the issue today" (Opinion 8). But *Pa. Nat'l* and *Maschka* are inapposite: in both, *no* state court decision addressed the question at issue. *Pa. Nat'l*, 354 F.3d at 952 ("no Arkansas decision covers these precise facts"); *Maschka*, 122 F.3d at 573 (the "Nebraska Supreme Court has not ruled one way or the other on the issue").

Plainly, in those situations, this Court must "predict what [the state's highest court] would hold if the issue were presented to it." *Id.* But that is not so here, where the Supreme Court of Missouri *has* decided the issue. The "highest court of the state" "has spoken;" "unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted" (and it has not), "its pronouncement *is to be accepted by federal courts as defining state law* …." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 236 (1940) (emphasis added). Otherwise, there would be "two divergent or conflicting systems of law, one to be applied in

the state courts, the other to be availed of in the federal courts" in diversity cases. *Id.* Federalism cannot tolerate that. *Id.*

In *Twin River*, the Missouri Court of Appeals reaffirmed that *Moore* controls the single system of Missouri law on this point – and in Weitz's favor. The Panel disparages *Twin River* as being merely "a Missouri intermediate appellate case," stating that "intermediate court decisions … are not dispositive as to how a state's highest court would resolve a matter" (Opinion 7).

For this proposition, the Panel cites *Bogan v. Gen. Motors Corp.*, 500 F.3d 828, 831 (8th Cir. 2007), and *Six Cos. of Cal. v. Jt. Highway Dist. No. 13*, 311 U.S. 180, 188 (1940) (Opinion 8). Again, both cases are inapposite. In *Bogan*, this Court refused to follow a string of Missouri Court of Appeals decisions that the Supreme Court of Missouri later had criticized. 500 F.3d at 830-32. And *Six Cos.* holds the opposite of the Panel's conclusion, as the Panel seems to acknowledge (Opinion 8). There, the United States Supreme Court held that, where the Supreme Court of California had not overruled or disapproved of a California Court of Appeal decision, that intermediate decision binds federal appellate courts, directing the Ninth Circuit to follow it. 311 U.S. at 187-88.

The Panel departed from the *Erie* doctrine in disregarding *Twin River* simply because it came from an intermediate appellate court. Instead, as an intermediate

state appellate court decision expressly following *Moore*, an earlier high court decision, it is proof the earlier decision remains good law. *Bosch*, 387 U.S. at 465.

For, when a state intermediate appellate court is one "of statewide jurisdiction, the decisions of which are binding on all trial courts in the absence of a conflicting decision of the [state high court], federal courts follow these holdings …." *Gooding*, 405 U.S. at 525 n.3. That such a case may be "more than 50 years" old does not make it any less "authoritative" as to state law. *Id.* at 526 n.4.

When the question is whether a state high court decision remains good law, an intermediate appellate court decision following it "is a datum for ascertaining" this and cannot "be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *Bosch*, 387 U.S. at 465. Federal courts "must follow" intermediate state appellate court decisions "in the absence of convincing evidence that the highest court of the state would decide differently." *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 467 (1940).

Twin River is a datum showing *Moore* remains good law. It cannot be disregarded unless more "persuasive" data shows the Supreme Court of Missouri would overrule it. *Bosch*, 387 U.S. at 465; *Stoner*, 311 U.S. at 467; *Six Cos.*, 311 U.S. at 187-88. The Missouri Court of Appeals is a court of statewide jurisdiction whose decisions bind all lower courts unless overruled by the state supreme court.

Akins v. Dir. of Revenue, 303 S.W.3d 563, 567 n.3 (Mo. banc 2010). As such, this Court must follow its holdings as to Missouri law. *Gooding*, 405 U.S. at 525 n.3.

The Panel parrots the requirements necessary under *Erie* to reject a state high court opinion: "clear evidence" and "other persuasive data" showing "the highest court of the state would [now] decide otherwise" (Opinion 7-8). But it offers none of the required "evidence" or "persuasive data" – e.g. other, later, contrary Missouri decisions – showing *Moore* and *Twin River* no longer are the law of Missouri. *Stoner*, 311 U.S. at 467. Instead, it simply *assumes*, without analysis, that, today, *Moore* would be overruled (Opinion 7-8). This conflicts with the *Erie* doctrine. In *Moore*, Missouri chose one side of the jurisdictional split over the question at issue. *Nothing* indicates it now would switch to the other.

"[W]hether or not" this Court "agree[s] with the reasoning upon which" *Moore* and *Twin River* are "based or the outcome" they dictate, it "is bound to follow" them. *Delta*, 503 F.2d at 245. "This is the ultimate significance of" *Erie*. *Id.* There is no "subsequent" Missouri "decision criticizing, distinguishing, or modifying" *Moore* or *Twin River*. *Id.* Thus, they remain "the latest, most authoritative expression of" Missouri law, and are "controlling" in this Court. *Id.*

The Panel cites no other opinion casting aside a state high court decision consistently applied in that state. Undoubtedly, this is because *Erie* does not allow for such a result. *West*, 311 U.S. at 236. And indeed, until this case, this Court

always has applied *Erie* faithfully and correctly. *Gilstrap*, *supra*, which the Panel cites but which reached exactly the opposite conclusion from the Panel, is a perfect example. It involved "a narrow question of Washington state law: is a common carrier liable for tortious acts committed by its employee against a passenger when the employee acts outside the scope of his or her employment?" 998 F.2d at 560. The trial court answered "no" and dismissed the plaintiff's claims. *Id.*

Apparently, the Washington Supreme Court had explored this question only once, in *Marks v. Alaska S.S. Co.*, 127 P. 1101 (Wash. 1912), holding a steamship company owed its passengers an "absolute duty of protection from the assaults and aggressions of its servants." *Id.* at 561. Because *Marks* was "an eighty-year-old case that has been rarely cited (not at all by the Washington appellate courts)" and was "out of step with modern tort law," the Court was urged to reject it. *Id.*

The Court disagreed and reversed the district court. *Id.* at 561-62. It held it only could disregard *Marks* if there were "clear evidence that the Washington Supreme Court would not uphold" the decision. *Id.* at 561. But the *Erie* doctrine commanded there could not be "real doubt on the current validity of" *Marks*. *Id.* For, a Washington intermediate appellate court had recognized a similar principle as *Marks* in 1988, the Ninth Circuit twice had cited *Marks* over the years, and other jurisdictions agreed with the holding *Marks* announced. *Id.* at 561-62.

As such, there was no "clear evidence that the Washington Supreme Court would overrule *Marks* if given the opportunity," and *Marks* had to remain "good law." *Id.* at 562. While "the age of the decision and the absence of recent citation to it suggest that the Washington Supreme Court might well reconsider" *Marks* if given the opportunity, it was not *clear* this would happen. *Id.* A federal court is not bound by an old state decision "if it 'is convinced by other persuasive data that the highest court of the state would [now] decide otherwise,'" but "'the 'data' needed … must be more 'persuasive' than exists here.'" *Id.* (citation omitted).

The *Erie* doctrine, as exemplified by *Gilstrap*, commands the Court to follow *Moore* here. There is no clear evidence – let alone identifiable, persuasive evidence – that the Supreme Court of Missouri would not uphold *Moore* if faced with it today. The Panel's opinion "fails to cast any real doubt on the current validity of the [*Moore*] holding." *Gilstrap*, 998 F.2d at 561.

Just as in *Gilstrap*, an intermediate Missouri appellate court has followed *Moore* in more recent years and other jurisdictions agree with *Moore* in their law. The Supreme Court of Missouri has given no indication it would deviate from *Moore* if presented with the issue now. While it naturally *could* overrule *Moore* someday, this truism alone does not allow this Court proactively to do so for it. *Ford Motor Co. v. Mathis*, 322 F.2d 267, 269 (5th Cir. 1963).

Wherefore, Appellant Weitz prays the Court to rehear this case en banc.

Respectfully submitted,

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by /s/Jonathan Sternberg

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Certificate of Service

I hereby certify that, on January 19, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that some of the participants in the case are not CM/ECF users. I have mailed the foregoing by First-Class Mail, postage prepaid, to the following non-CM/ECF participants: Mr. Jarrod Goff, Baker Sterchi Cowden & Rice L.L.C., 2400 Pershing Road, Suite 500, Kansas City, Missouri 64108, counsel for Appellees Mackenzie House, LLC, and MH Metropolitan, LLC; and Mr. Robert Tormohlen, Lewis, Rice & Fingersh, L.C., 1010 Walnut, 500 One Petticoat Lane Building, Kansas City, Missouri 64106, counsel for Appellee Concorde Construction Company, Inc.

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