705 S.W.2d 565, 78 A.L.R.4th 557
(Cite as: 705 S.W.2d 565)

Missouri Court of Appeals,
Eastern District,
Division Four.

LIPTON REALTY, INC., Appellant and Respondent,
v.
ST. LOUIS HOUSING AUTHORITY, Respondent and Appellant.
Nos. 49261, 49265.

Jan. 14, 1986.
Motion for Rehearing and/or Transfer Denied Feb. 11, 1986.
Application to Transfer Denied March 25, 1986.

Lessor brought action for damages against lessee for lessee's failure to make allegedly required repairs to leased realty. The Circuit Court of the City of St. Louis, James L. Sanders, J., entered judgment in favor of lessee on count seeking diminution of fair market value of realty caused by lessee's alleged failure to make repairs, and in favor of lessor on count for unpaid rent allegedly due under extension of lease agreement. Lessor appealed from judgment, as well as from earlier dismissal of count seeking damages in amount of cost of repairs. The Court of Appeals, Crandall, P.J., held that: (1) cost of repair recovery for lessor would be improper where, by lessor's own admission in its pleadings, expense involved in repairing or restoring realty to its original condition would greatly exceed the before-and-after value of the realty; (2) it was unnecessary to admit evidence of cost of repairs where lessor's own pleadings established that cost of repair was substantially more than diminution in fair market value of property, and thus an inappropriate measure of damages, and where evidence was not required to prove appropriate before-and-after damages; (3) letter written by attorney for lessee to lessee was privileged; (4) lessee had option to converse only damage element of lessor's verdict director in action for waste; and (5) where arguments to jury were not included in transcript, there could be no appellate review as to complaints concerning statements made during arguments.

Affirmed.

West Headnotes

[1] Appeal and Error 30 863

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k862 Extent of Review Dependent on Nature of Decision Appealed from
30k863 k. In General. Most Cited Cases

Appeal and Error 30 919

30 Appeal and Error
30XVI Review
30XVI(G) Presumptions
30k915 Pleading
30k919 k. Striking Out or Dismissal. Most Cited Cases
Scope of review for a motion to dismiss requires an examination of pleadings, allowing them their broadest intendment, treating facts as alleged as true, construing allegations favorably to plaintiff and determining whether petition invokes principles of substantive law.

[2] Appeal and Error 30 854(3)

30 Appeal and Error
30XVI Review
30XVI(A) Scope, Standards, and Extent, in General
30k851 Theory and Grounds of Decision of Lower Court
30k854 Reasons for Decision
30k854(3) k. Rulings on Pleadings. Most Cited Cases
If trial court does not specify theory upon which it based its ruling in granting a motion to dismiss, Court of Appeals will presume it was on grounds specified in motion.

[3] Landlord and Tenant 233 55(2)

233 Landlord and Tenant
233III Landlord's Title and Reversion
233III(A) Rights and Powers of Landlord
233k55 Injuries to Reversion
233k55(2) k. Liability of Tenant for Waste. Most Cited Cases
Recovery for waste of leased premises based upon cost of repairs is subject to absolute ceiling of diminution in fair market value of realty.

[4] Waste 404 18

404 Waste
404k14 Actions for Waste
404k18 k. Damages. Most Cited Cases
In an action for waste, measure of damages is generally difference between market value of realty prior to being damaged and value immediately thereafter. V.A.M.S. § 537.420.

[5] Waste 404 18

404 Waste
404k14 Actions for Waste
404k18 k. Damages. Most Cited Cases
In an action for waste, damages based on diminution in market value of realty are used where damage to realty is permanent, or where damage is not expressed well in specific terms of injury, but is so extensive that it substantially effects value of property in its entirety. V.A.M.S. § 537.420.

[6] Waste 404 18

404 Waste
404k14 Actions for Waste
404k18 k. Damages. Most Cited Cases
In an action for waste, where damage to realty is small in comparison to total value of property and is readily ascertainable, amount of such damage is determined by cost necessary to restore property to its former condition. V.A.M.S. § 537.420.

[7] Landlord and Tenant 233 55(2)

233 Landlord and Tenant
233III Landlord's Title and Reversion
233III(A) Rights and Powers of Landlord
233k55 Injuries to Reversion
233k55(2) k. Liability of Tenant for Waste. Most Cited Cases
Cost of repair recovery for lessor in action for waste would be improper where, by owner's own admission in its pleadings, expense involved in repairing or restoring realty to its original condition would greatly exceed the before-and-after value of the realty. V.A.M.S. § 537.420.

[8] Damages 115 117

115 Damages
115VI Measure of Damages
115VI(C) Breach of Contract
115k117 k. Mode of Estimating Damages in General. Most Cited Cases
Purpose of damages in a contract action is to restore a plaintiff to position he would have been in had contract not been breached, rather than to place him in a better position.

[9] Landlord and Tenant 233 154(4)

233 Landlord and Tenant
233VII Premises, and Enjoyment and Use Thereof
233VII(D) Repairs, Insurance, and Improvements
233k154 Remedies for Failure to Make Repairs and Alterations
233k154(4) k. Damages. Most Cited Cases
Lessor's recovery for damage to realty, even if properly construed as an action for breach of contract because of lessee's continual breach of its covenant to repair or maintain, rather than as one for waste, would be no greater than diminution in fair market value.

[10] Waste 404 18

404 Waste
404k14 Actions for Waste
404k18 k. Damages. Most Cited Cases
In action for waste, evidence both as to cost of repair and as to diminution in fair market value of property is essential only to establish which measure of damages results in a smaller recovery, for property owners are awarded only lower amount.

[11] Landlord and Tenant 233 55(3)

233 Landlord and Tenant
233III Landlord's Title and Reversion
233III(A) Rights and Powers of Landlord
233k55 Injuries to Reversion
233k55(3) k. Actions for Injuries in General. Most Cited Cases
It was unnecessary to admit evidence of cost of repair in action for waste where property owner's own pleadings established that cost of repair was substantially more than diminution in fair market value of property, and thus an inappropriate measure of damages, and where evidence was not required to prove appropriate before-and-after damages. V.A.M.S. § 537.420.

[12] Prohibition 314 4

314 Prohibition
314I Nature and Grounds
314k4 k. Discretion as to Grant of Writ. Most Cited Cases
Granting or denial of a writ of prohibition is discretionary with appellate court.

[13] Prohibition 314 4

314 Prohibition
314I Nature and Grounds
314k4 k. Discretion as to Grant of Writ. Most Cited Cases
In exercise of its discretion in granting or denying writ of prohibition, an appellate court may deny application without ever passing on merits of issues involved.

[14] Courts 106 107

106 Courts
106II Establishment, Organization, and Procedure
106II(K) Opinions
106k107 k. Operation and Effect in General. Most Cited Cases
Denial of an application for a writ of prohibition has no precedential value.

[15] Prohibition 314 31

314 Prohibition
314II Procedure
314k31 k. Judgment or Order. Most Cited Cases
Denial of lessee's application for a writ of prohibition against a trial judge who had ordered letter written by an attorney representing lessee to be produced in action for waste did not implicitly determine that letter was unprotected by either attorney-client or work-product privilege.

[16] Privileged Communications and Confidentiality 311H 139

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk135 Mode or Form of Communications
311Hk139 k. Letters and Correspondence. Most Cited Cases
(Formerly 410k201(1))
Letter written to lessee by attorney representing lessee in action for waste, in which attorney detailed his observations of condition of individual apartments and building in general and recommended settlement negotiations up to a specified amount, pertained to a matter on which attorney was consulted for his professional advice in course of his employment by lessee, and was therefore protected by the attorney-client privilege.

[17] Privileged Communications and Confidentiality 311H 168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
A client waives attorney-client privilege when he voluntarily shares communication with a third party.

[18] Privileged Communications and Confidentiality 311H 122

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk120 Parties and Interests Represented by Attorney

311Hk122 k. Common Interest Doctrine; Joint Clients or Joint Defense. Most Cited Cases
(Formerly 410k219(3))

Privileged Communications and Confidentiality 311H 168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Client does not waive attorney-client privilege by voluntarily sharing communication with a third party where third party shares common interest in outcome of litigation and where communication in question was made in confidence.

[19] Privileged Communications and Confidentiality 311H 122

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk120 Parties and Interests Represented by Attorney
311Hk122 k. Common Interest Doctrine; Joint Clients or Joint Defense. Most Cited Cases
(Formerly 410k219(3))

Privileged Communications and Confidentiality 311H 168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Lessee, a public housing authority, did not waive attorney-client privilege with respect to letter written to it by attorney representing it when it voluntarily shared contents of letter with federal agency which provided a substantial portion of financing for housing project in question; federal agency had a shared interest in outcome of waste litigation brought by lessor, and letter was sent in confidence for limited and restricted purpose of safeguarding shared interests of lessee and federal agency in litigation.

[20] Privileged Communications and Confidentiality 311H 145

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk144 Subject Matter; Particular Cases
311Hk145 k. In General. Most Cited Cases
(Formerly 410k198(2))
Attorney's testimony regarding subjects covered in letter that was a privileged communication between attorney and his client was inadmissible in action for waste brought against attorney's client, a public housing authority that had leased apartment complex that was subject of suit.

[21] Trial 388 122

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k122 k. Comments on Failure to Produce Evidence or Call Witness. Most Cited Cases
Counsel from opposing party is entitled to comment upon a failure to produce evidence peculiarly within other party's knowledge or under his control and which he would be expected to produce if favorable to him, and then to draw inference that such evidence would be unfavorable to other party if produced.

[22] Trial 388 122

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k122 k. Comments on Failure to Produce Evidence or Call Witness. Most Cited Cases
Ability to comment during closing argument upon other party's failure to elicit testimony from a witness whose ability to testify was peculiarly within other party's control, as well as to draw unfavorable inference that any such testimony would be unfavorable to other party if produced, is predicated upon admissibility of that testimony.

[23] Trial 388 122

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments
388k122 k. Comments on Failure to Produce Evidence or Call Witness. Most Cited Cases
Where attorney-client privilege rendered inadmissible testimony of attorney for lessee in action for waste concerning condition of apartments in question at termination of leasing period or about any other matter covered in letter written by attorney to lessee, lessor was not entitled to comment to jury in closing argument about lessee's failure to call attorney as a witness.

[24] Trial 388 203(3)

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k203 Issues and Theories of Case in General
388k203(3) k. Affirmative and Negative of Issues. Most Cited Cases
A defendant has option to converse either all parts of verdict director in its entirety or any one of single elements essential to plaintiff's case. V.A.M.R. 70.02(f).

[25] Trial 388 203(3)

388 Trial
388VII Instructions to Jury
388VII(B) Necessity and Subject-Matter
388k203 Issues and Theories of Case in General
388k203(3) k. Affirmative and Negative of Issues. Most Cited Cases
Lessee had option to converse only damage element of lessor's verdict director in action for waste. V.A.M.S. § 537.420; V.A.M.R. 70.02(f).

[26] Appeal and Error 30 688(2)

30 Appeal and Error
30X Record
30X(M) Questions Presented for Review
30k688 Conduct of Trial or Hearing
30k688(2) k. Arguments and Conduct of Counsel. Most Cited Cases
Where arguments to jury were not included in transcript, there could be no appellate review as to complaints concerning statements made during arguments.

***567** P. Terence Crebs, St. Louis, for Lipton Realty, Inc.

Edward C. Cody, Mark S. Howenstein, St. Louis, for St. Louis Housing.

CRANDALL, Presiding Judge.

Plaintiff, Lipton Realty, Inc. (Lipton), in a jury-tried case, appeals from the trial court's dismissal of Count I of its petition against defendant, St. Louis Housing Authority (Housing Authority), and from the judgment in favor of Housing Authority on Count II of its petition. Housing Authority cross-appeals from the judgment in favor of Lipton on Count III of Lipton's petition. We affirm.

***568** Housing Authority by written consent leased an apartment complex in St. Louis, Missouri, from Lipton. After the term of the lease expired, Lipton filed a three-count petition for damages against Housing Authority. Count I sought $397,481 in damages for the cost of repairs which Housing Authority was required but failed to make under the lease agreement. Count II sought “in the alternative” $152,100 which represented the diminution of the fair market value of the property caused by Housing Authority's failure to make repairs as alleged in Count I. Count III was for unpaid rent allegedly due under an extension of the lease agreement.

On Lipton's motion, the trial court ordered a separate trial of Count I, the cost of repair claim, pursuant to Rule 66.02. The trial court then sustained Housing Authority's motion to dismiss Count I and designated the order a final judgment for purposes of appeal under Rule 81.06. We dismissed the appeal without prejudice as premature for the reason that Counts I and II constituted one claim with alternative theories of recovery. The dismissal of Count I was only a partial disposition of a single claim and therefore not a final judgment. *Lipton Realty, Inc. v. St. Louis Housing Authority*, 655 S.W.2d 792 (Mo.App.1983).

At trial, the jury found for Housing Authority on Lipton's diminution of fair market value claim (Count II) and for Lipton in the amount of $18,100 on its unpaid

rent claim (Count III). On appeal we view the evidence in the light most favorable to the verdict, considering only that which supports it, and disregarding contrary evidence and inferences. *Lane v. Cape Mut. Ins. Co.*, 674 S.W.2d 644, 645 (Mo.App.1984).

Lipton's first point challenges the trial court's dismissal of Count I of its petition.[FN1] Count I sought damages for Housing Authority's failure to repair and maintain the apartment building. Lipton asserts that cost of repair is the proper measure of damages for breach of an express covenant to repair and maintain.[FN2]

> FN1. We decline to address the procedural issue raised in this appeal regarding the necessity of Lipton's including the trial court's dismissal of Count I as a point of error in its motion for new trial. Accordingly, we consider Lipton's first point on the merits. A prudent course of conduct, however, would be to include all allegations of error in a motion for new trial.
>
> FN2. The lease provided in pertinent part:
>
> 6. The Authority agrees to:
>
> A. Repair any damage caused to the Premises by Authority or Tenants beyond normal usage, normal deterioration and normal wear and tear....
>
> B. Maintain the Premises ... keep the Premises clean and free of nuisance and not to permit any illegal use of the Premises or any part thereof.

[1][2] The scope of review for a motion to dismiss requires an examination of the pleadings, allowing them their broadest intendment, treating all facts alleged as true, construing allegations favorably to plaintiff, and determining whether the petition invokes principles of substantive law. *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 263 (Mo.App.1984). If the trial court does not specify the theory upon which it based its ruling in granting a motion to dismiss, we presume it was on the grounds specified in defendant's motion. *Johnson v. Great Heritage Life Ins. Co.*, 490 S.W.2d 686, 690 (Mo.App.1973). Housing Authority's motion alleged that the cost of repair sought in Count I was the improper measure of damages.

[3] Count I of Lipton's petition sought the cost of repairs. Count II sought, in the alternative, diminution in value which represented the difference between the fair market value of the apartment complex before and the value after it was leased by Housing Authority. Lipton's petition alleged that the cost of repair was $397,481, which was substantially more than the diminution in fair market value of $152,100. Recovery based upon cost of repairs is subject to an absolute ceiling of diminution in value. *Missouri Baptist Hospital v. United States*, 555 F.2d 290, 296, 213 Ct.Cl. 505 (1977). Lipton's petition, on its face, ***569** compels the use of diminution in fair market value to measure damages.

[4][5][6] The facts of the case indicate that Lipton's action is essentially one for waste. § 537.420, RSMo (1969). It was characterized as such in Lipton's own pleadings. In an action for waste the measure of damages is generally the difference between the market value of the realty prior to being damaged and the value immediately thereafter. *Helton v. City of St. Joseph*, 340 S.W.2d 198, 199 (Mo.App.1960). Damages based upon diminution of value are used where the damage to the realty is permanent, or where the damage is not expressed well in specific items of injury, but is so extensive that it substantially affects the value of the property in its entirety. *Smith v. Norman*, 586 S.W.2d 84, 86 (Mo.App.1979). In contrast, when the damage is small in comparison to the total value of the property and is readily ascertainable, the amount of such damage is determined by the cost necessary to restore the property to its former condition. *Lustig v. U.M.C. Industries, Inc.*, 637 S.W.2d 55, 58 (Mo.App.1982).

[7] In the present case, Lipton, together with representatives of Housing Authority, inspected the 22 apartments in the complex at the end of the leasing period. Although the list is not all-inclusive, the following items of damages were discovered: holes in the walls; broken windows; missing electrical fixtures; raised hardwood flooring; missing floor and wall tiles; deteriorating wall plaster; rubbish-blocked stairways; inoperative plumbing; missing door and window hardware; damaged exterior doors; and graffiti on the walls. The damage to the individual apart-

ments and to the apartment building as a whole was extensive and permanent. *Compare* *Smith v. Norman*, 586 S.W.2d at 85-87 (damage to one apartment in a six-unit building). By Lipton's own admission in its pleadings, the expense involved in repairing or restoring the apartments to their original condition would greatly exceed the before-and-after value of the real estate. *Missouri Baptist Hospital*, 555 F.2d at 295. Given these facts, a cost of repair recovery for Lipton would be improper.

[8][9] In its brief, Lipton contends that its action is not one for waste but one for breach of contract because of Housing Authority's continual breach of its covenant to repair or maintain. The purpose of damages in a contract action is to restore a plaintiff to the position he would have been in had the contract not been breached, rather then to place him in a better position. *Missouri Baptist Hospital*, 555 F.2d at 294. In the present case, damages based upon diminution in value accomplishes this end, because Lipton did not attempt to restore the property upon termination of the lease but rather sold the real estate pursuant to an "as is" sales contract. A diminution in value award makes Lipton whole, because it reflects the amount by which the property was reduced in value at the time of sale. Whether the action was one for waste or for breach of contract, the court was correct to submit diminution in fair market value as the proper measure of damages. The trial court properly dismissed Lipton's cost of repair claim in Count I. Lipton's first point is denied.

[10][11] In its second point Lipton asserts that, even if the proper standard for damages is diminution in value, the trial court erred in refusing to admit evidence of cost of repairs. Evidence both as to cost of repairs and as to diminution in value of the property is essential only to establish which measure of damages results in a smaller recovery, for plaintiff is awarded only the lower amount. *See* *Reutner v. Vouga*, 367 S.W.2d 34, 41-42 (Mo.App.1963). The particular facts of each case determine which measure of damages is to be used. *Hensic v. Afshari Enterprises, Inc.*, 599 S.W.2d 522, 524 (Mo.App.1980). In the present case, Lipton's own petition specified the exact amounts for both cost of repair and diminution in value and further established that the cost of repair was substantially more than diminution in value. Lipton's own pleadings therefore settled that the cost of repair was not the proper measure of damages. It is not necessary to admit ***570** evidence of cost of repairs where cost of repair is obviously not the appropriate measure of damages and where such evidence is not required to prove the appropriate before-and-after damages. Lipton's second point is denied.

Lipton's third point actually consists of three allegations of error. The first alleges error in the trial court's refusal to admit into evidence all or any portion of a letter written by an attorney representing Housing Authority. At trial, Housing Authority objected to the admission of the letter on the basis of attorney-client and work-product privileges and because of references to settlement contained therein. The judge sustained the objection.

[12][13][14] In its brief Lipton advances the argument that the Missouri Supreme Court implicitly ruled the letter was admissible when it denied a writ of prohibition against a trial judge who had ordered the letter to be produced in discovery. The granting or denial of a writ of prohibition is discretionary with an appellate court. *State ex rel. City of St. Louis v. Sartorius*, 340 Mo. 832, 102 S.W.2d 890, 895 (1937). In the exercise of its discretion, an appellate court may deny the application without ever passing on the merits of the issues involved. *Id.* The denial of an application for a writ therefore has no precedential value.

[15] In the present case the writ of prohibition was denied without a written opinion. It is impossible to determine if the merits of the issues were addressed by the Supreme Court. The denial of Housing Authority's application for a writ therefore did not implicitly determine that the letter was unprotected by either the attorney-client or work-product privilege.

One basis upon which the trial court relied in refusing to admit the letter was the attorney-client privilege. Confidentiality of communications between attorney and client is essential for an effective attorney-client relationship because confidentiality fosters candor on the part of a client who is seeking advice and guidance from his chosen representative. *State ex rel. Great Am. Ins. Co. v. Smith*, 340 Mo. 832, 574 S.W.2d 379, 383 (Mo.banc 1978). Generally all of what the client says to the lawyer *and* what the lawyer says to the client is protected by the attorney-client privilege. *Id.*

[16] In the present case, Housing Authority's attorney had been present at the inspection of the apartment complex on the day Housing Authority turned the property back over to Lipton. After that inspection, he sent a letter to the executive director of Housing Authority in which he detailed his observations of the condition of the individual apartments and the building in general and recommended settlement negotiations up to a specified amount. There is no question but that this letter pertains to a matter on which the attorney was consulted for his professional advice in the course of his employment by Housing Authority. *See, e.g.*, *Bussen v. Del Commune*, 239 Mo.App. 859, 199 S.W.2d 13, 21 (1947); Rule 56.01(b)(3). The letter therefore is privileged.

[17][18] Lipton asserts that any attorney-client privilege that existed was waived when the executive director of Housing Authority forwarded the attorney's letter to the U.S. Department of Housing and Urban Development (HUD). A client waives the attorney-client privilege when he voluntarily shares the communication with a third party. *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1369 (D.C.Cir.1984). There is no waiver, however, where the third party shares a common interest in the outcome of the litigation and where the communication in question was made in confidence. *See, e.g.*, *Transmirra Products Corp. v. Monsanto Chemical Co.*, 26 F.R.D. 572, 577 (S.D.N.Y.1960).

[19] In the present situation, the litigation focused upon a joint project of Housing Authority and HUD, the federal agency which provided a substantial portion of the financing for the project. The attorney's letter, which was mailed to HUD by Housing Authority, was sent in confidence for ***571** the limited and restricted purpose of safeguarding their shared interests in the litigation. HUD, as the recipient of the letter, then stood under the same restraints arising from the privileged character of the document as the person who furnished it and, consequently, could not be compelled to produce it. *Id.* Under these circumstances the attorney-client privilege was not waived by Housing Authority's mailing the letter to HUD.

[20] Lipton next challenges the trial court's refusal to permit Lipton to call the attorney who authored the letter as a witness to testify about its contents, particularly about the condition of the apartments on the day of inspection. Section 491.060(3), RSMo (1978) makes an attorney incompetent to testify "concerning any communication made to him by his client in that relation, or *his advice thereon*, without the consent of such client." (Emphasis added.) *State v. Carter*, 641 S.W.2d 54, 57 (Mo.banc 1982); *see also* Rule 4, DR 4-101. Since the letter was privileged communication between attorney and client, the attorney's testimony regarding subjects covered in that letter was inadmissible. *See, e.g.*, *McCaffrey v. Estate of Brennan*, 533 S.W.2d 264, 266-267 (Mo.App.1976).

[21][22][23] Lipton next asserts error in the trial court's refusal to permit its attorney to comment to the jury in closing argument about Housing Authority's failure to call the attorney as a witness. Counsel from the opposing party is entitled first to comment upon a failure to produce evidence peculiarly within the other party's knowledge or under his control and which he would be expected to produce if favorable to him, and then to draw the inference that such evidence would be unfavorable to the opposing party if produced. *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291, 306 (Mo.banc 1978). The ability to comment upon the failure to elicit testimony from a witness as well as to draw the unfavorable inference is predicated upon the admissibility of that testimony. In the present case the attorney-client privilege barred the admission of the attorney's testimony about the condition of the apartments at the termination of the leasing period or about any other matter covered in the letter. Under these circumstances, it would be improper to allow a negative inference to be drawn about Housing Authority's failure to call its attorney to testify. Lipton's third point is denied in its entirety.

In the fourth point Lipton argues that the court erred in giving Instruction No. 9 because it was the improper converse of Lipton's verdict director, Instruction No. 8,[FN3] and because it permitted Housing Authority to make an improper closing argument with regard to damages suffered by Lipton.

> FN3. Plaintiff's verdict director (Instruction No. 8), which was based on M.A.I. 26.02, was as follows:
>
> Your verdict must be for the Plaintiff in Count II of its Petition if you believe:
>
> First, Defendant did not return the prop-

> erty located at 501-525 Clara to the Plaintiff in the condition in which Defendant had received such property, less normal usage, normal deterioration, and normal wear and tear, and
>
> Second, because of such failure, Defendant's contract obligations were not performed, and
>
> Third, Plaintiff was thereby damaged.
>
> Defendant's converse instruction (Instruction No. 9), modeled after M.A.I. 33.03(3) and 33.04(2) was as follows:
>
> Your verdict must be for Defendant in Count II unless you believe Plaintiff sustained damage.

Preliminarily, we note that Lipton did not make a specific objection to Instruction No. 9 at the instruction conference. Although apparently sanctioned by Rule 70.03, the practice of withholding specific objections at the instruction conference and saving them for a post-trial motion has been criticized. *See* *Hudson v. Carr*, 668 S.W.2d 68, 71-72 (Mo.banc 1984); *Fowler v. Park*, 673 S.W.2d 749, 756 (Mo.banc 1984). The present trend is away from reversal for instructional error unless there is a substantial indication of prejudice. *Lawton v. Jewish Hospital of St. Louis*, 679 S.W.2d 370, 374 (Mo.App.1984). "If a defect [in the instruction] is not readily apparent to alert counsel preparing to argue the case, ***572** there is very little likelihood that the jury will be confused or misled." *Hudson v. Carr*, 668 S.W.2d at 72.

[24][25] Lipton contends that Housing Authority's Instruction No. 9 was improper because it only conversed the damage section of Instruction No. 8. A defendant has the option to converse either all parts of the verdict director in its entirety or any one of the single elements essential to a plaintiff's case. *Cole v. Plummer*, 661 S.W.2d 828, 830 (Mo.App.1983); *see also* Rule 70.02(f). Housing Authority properly could choose to converse only the damage element of Lipton's verdict director. There was no error in giving Instruction No. 9.

[26] Lipton further argues that the allegedly improper converse permitted counsel for Housing Authority to argue improperly to the jury that selling the property "as is" nullified Lipton's damages. Although Lipton alleges it was prejudiced by these remarks, no transcript containing the closing arguments has been furnished to this court. Where arguments to the jury are not included in the transcript, there can be no appellate review as to complaints concerning statements made during those arguments. *Ellis v. Farmers Ins. Group*, 659 S.W.2d 3, 4 (Mo.App.1983); *see also* Rule 81.12. Lipton's fourth point is denied.

Housing Authority cross-appeals from a jury verdict awarding damages to Lipton for additional rent due. Housing Authority terminated its rental agreement with Lipton effective as of October 30, 1978. Later, Housing Authority requested a continuation of its occupancy until January 31, 1979. Lipton agreed to the extension but at an increased monthly rental. This agreement was evidenced by letters written by Lipton to Housing Authority. After vacating the premises, Housing Authority refused to pay the increased rent, claiming it was required to pay only the rent specified in the original rental agreement. Housing Authority appeals from judgment in the amount of $18,100 for rent due.

We have considered the points raised by Housing Authority in its cross-appeal. An extended opinion would be of no precedential value. The judgment is affirmed in accordance with Rule 84.16(b).

Judgment in favor of Housing Authority on Lipton's claims in Counts I and II and in favor of Lipton on its claim in Count III is affirmed.

SATZ and PUDLOWSKI, JJ., concur.
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