

**IN THE SUPREME COURT
OF THE STATE OF MISSOURI**

NO. SC83719

DAVID BRIZENDINE,

Plaintiff/Respondent,

v.

NORA LEE CONRAD

Defendant/Appellant

SUBSTITUTE BRIEF OF RESPONDENT DAVID BRIZENDINE

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II. The Trial Court properly denied Conrad’s Motion for Judgment on the Pleadings and awarded damages pursuant to Section 537.420, RSMo. 2000 because the Trial Court only awarded one recovery under one cause of action at trial and the evidence shows Wanton, Willful and Reckless conduct.

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JURISDICTIONAL STATEMENT

Plaintiff/Respondent David Brizendine brought an action against the Defendant/Respondent Nora Lee Conrad in the Cole County Circuit Court alleging that Defendant breached a lease/purchase agreement between the two parties and that Defendant committed waste on the property during her tenancy. Plaintiff dismissed all claims on November 5, 1999 except for his statutory Action for Waste, pursuant to §§ 537.420, 537.480, and 537.490 RSMo. (1994). The case went to trial in circuit court before the Honorable Thomas J. Brown III. The trial court found in favor of Plaintiff, awarding him treble damages totaling \$33,760.35. The judgment became final February 2, 2000, after which, Defendant filed her timely appeal to the Missouri Court of Appeals, Western District. The subject matter of this case involves the contract and statutory law of this state.

The Missouri Court of Appeals, Western District, entered its opinion in this case, April 10, 2001, reversing the decision of the Trial Court. *Brizendine v. Conrad*, -- S.W.3d--,2001 WL 339471 (Mo. App. W.D. April 10, 2001). The Supreme Court of Missouri entered its Order transferring the cause to the Missouri Supreme Court on August 21, 2001, pursuant to Mo.R.Civ.P. 83.06.

STATEMENT OF FACTS

In September 1997, David Brizendine (hereinafter “Brizendine”) entered into a lease purchase agreement on a piece of rental property containing nine apartments and storage space, 301-303 Ash (hereinafter “the property” or “property”) in Jefferson City, with Nora Lee Conrad (hereinafter “Conrad”). (L.F. 6-10). Conrad was to lease the property from Brizendine for one year, and then purchase the property for \$140,000. (L.F. 6-10). During that lease year, Conrad was contractually obligated to manage the property by collecting rent from sub-tenants, making repairs, and anything else a typical landlord would do. (L.F. 6-10). Following the end of her lease, Conrad refused to buy the property, noting that it was “too much maintenance, too much upkeep.” (L.F. 231; Tr. 141). Brizendine contends that the property was basically trashed during the lease year. (L.F. 199-205; Tr. 16-40).

During the year Conrad was contractually obligated to manage the property, there was excessive damage done to the property as a whole. This damage included: damage to the carpets in all apartment units and in the common areas, including burn holes and significant soiling to make replacement, instead of cleaning, the only option; damages to the walls in all units and the common areas; damage to the all bathrooms; damage to all kitchens; torn screens throughout the property; torn and missing blinds throughout the property; damage to doors;

changed locks on many units making Brizendine's pass key obsolete and requiring a new master lock system to be installed; damage to the hot water heater; damage to the plumbing in various parts of the property; damage to the tiles and vinyl flooring in some units; damage to some ceilings; damage to some showers; damage to the basement walls; damage to the office space; damage to the door stops in all units and the common area; and many units were now infested with roaches. (L.F. 74-79; L.F. 200-05; Tr. 17-40). Several photographs were taken showing the damages described above. (L.F. 137-42).

There is also evidence that during the year in which the Conrad was to manage the property, she did not do so in a reasonable way so as to protect the property from waste. Deborah Wymbbs (spelled incorrectly (Wiabs) in transcript), the director of the Ash Street Block Association and president of Central East Side Neighborhood Association, testified that Conrad mismanaged the property by not screening for good sub-tenants and by allowing drug dealing and drug use to run rampant on the property. (L.F. 219; Tr. 93-96). She also testified that she saw the property in its entirety before Conrad entered into the Lease Purchase Agreement with Brizendine and that the property at that time was "very clean." (L.F. 218; Tr. 91).

A sub-tenant, Ms. Amber Neal, who lived on the property before and during Conrad's management, testified that Conrad did not actively manage the property,

failed to fix things, failed to keep the property clean, and did a poor job of screening sub-tenants. (L.F. 220; Tr. 99-100). This mismanagement, Ms. Neal testified, created a problem with drug dealing and drug usage which led to apartments looking like a “war zone.” (L.F. 222; Tr. 105). She testified that these problems were not rampant before Conrad took over the property. (L.F. 220; Tr. 98-99).

After learning of Conrad’s hesitancy to perform on the purchase part of the Lease Purchase Agreement, Brizendine informed Conrad that he would take the property back in September 1998 if it was in the same condition it was in as of September 1997. (L.F. 199; Tr. 13). Upon seeing the property, Brizendine informed Conrad that he could not take it back. (L.F. 200; Tr. 17-18). In January 1999, Conrad relinquished possession of the property by dropping the keys off at Brizendine’s attorney’s offices. (L.F. 200; Tr. 17). Instead of spending the great deal of money to put the property back in good condition, Brizendine sold it to a new buyer for \$90,000. (L.F. 209; Tr. 55).

Brizendine filed a lawsuit against Conrad on December 4, 1998 seeking specific performance of the Purchase Agreement or for damages and rent. (L.F. 1). Conrad then made a timely answer to the petition and filed a counterclaim. (L.F. 12). On July 23, 1999, Brizendine filed a motion for leave to file an amended petition. (L.F. 28). In this first amended petition, Brizendine sought damages in

lieu of specific performance, rent, waste damages, and quasi contract damages.

(L.F. 39-46). Before trial, on November 5, 1999, Brizendine voluntarily withdrew all counts except for his action for waste. (L.F. 69).

The trial court heard this case on December 3, 1999. (L.F. 196; Tr. 1). The trial court, after hearing all the evidence, found in favor of Brizendine and awarded waste damages in the amount of \$11,253.45, which it then trebled pursuant to § 537.420 RSMo.; totaling \$33,760.35. (L.F. 182). The court also ruled in favor of Brizendine and against Conrad on Conrad's Counterclaim. (L.F. 182). Neither party requested findings of fact and conclusions of law although permitted to request the same under Mo. R. Civ. P. 73.01. Appeal followed and the Missouri Court of Appeals, Western Division, reversed the Trial Court's judgment. This Court entered its Order transferring the cause to the Missouri Supreme Court on August 21, 2001, pursuant to Mo. R. Civ. P. 83.06.

POINTS RELIED ON

I. The trial Court properly denied Conrad’s Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to Section 537.420, RSMo. 2000 because the evidence supports the award, and the Trial Court enforced the law, in awarding damages for Conrad’s violation of a public duty to refrain from committing waste.

Authorities Relied On:

Section 537.420, RSMo. 2000.

Grus v. Patton, 790 S.W.2d 936 (Mo.App.E.D. 1990).

American Mortgage v. Hardin-Stockton, 671 S.W.2d 283 (Mo.App. W.D. 1984).

State v. Eversole, 332 S.W.2d 53, 57-58 (Mo.App.E.D. 1960).

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II. The Trial Court properly denied Conrad’s Motion for Judgment on the Pleadings and awarded damages pursuant to Section 537.420, RSMo. 2000 because the Trial Court only awarded one recovery under one cause of action at trial and the evidence shows Wanton, Willful and Reckless conduct.

Authorities Relied On:

Section 537.420 RSMo. 2000.

Whittom v. Alexander-Richardson, 851 S.W.2d 504, 506 (Mo. banc 1993)

Rudnitski v. Seely, 452 N.W.2d 664 (Minn. 1990).

Harris v. Disisto, 932 S.W.2d 435, 447 (Mo.App. W.D. 1996).

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ARGUMENT

I. The trial Court properly denied Conrad’s Motion for Judgment on the Pleadings and in awarding Brizendine statutory waste damages pursuant to Section 537.420, RSMo. 2000 because the evidence supports the award, and the Trial Court enforced the law, in awarding damages for Conrad’s violation of a public duty to refrain from committing waste.

A. Standard of Review

In a court tried case, the Court is required to affirm the judgement unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). In determining the sufficiency of the evidence, this Court must accept as true all evidence and inferences favorable to the trial court’s judgment, disregarding all contrary evidence. *T.B.G. v. C.A.G.*, 772 S.W.2d 653, 654 (Mo. banc 1989); *Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996).

B. Enforcement of a liquidated damages clause, operates as a defense against a breach of contract action only, and does not present any valid defense to a cause of action sounding in tort.

Missouri law provides that plaintiffs may sue for both contract and tort remedies where a single act violates both public and private duties. *Grus v. Patton*, 790 S.W.2d 936 (Mo. App. E.D. 1990); *American Mortgage v. Hardin-Stockton*, 671 S.W.2d 283 (Mo. App. W.D. 1984). The Missouri Court of Appeals, Western District states this rule as follows:

“In contract, however, the complained of act or omission which breaches a contract may also be a negligent act which would give rise to a liability in tort...The negligent failure to observe and perform any portion of that duty gives rise to an action in tort as well as an action for breach of contract.” *American*, 671 S.W.2d at 293.

In *Grus*, the Court of Appeals of Missouri, Eastern District, reviewed the trial court’s dismissal of “negligent repair” and “implied warranty of merchantability” claims. The trial court found that the plaintiff failed to state a claim for negligent repair, and the warranty claim was time barred. *Grus*, 790 S.W.2d at 938. The plaintiff claimed that defendant’s repeated attempts to repair resulted in a new violation such that the cause was not time barred. *Id.* The Court, in discussing this

theory, acknowledged the existence of claims in both contract and tort for the same act. *Id.* The court noted this distinction by reference to *State v. Eversole*, 332 S.W.2d 53, 57-58 (Mo. App. E.D. 1960). *Id.* at 942. The court quoted the case for the following language from *Eversole*:

““In order to determine the character of the action, whether *ex contractu*, or *ex delicto*, it is necessary to ascertain the source of the duty claimed to have been violated. If this duty is not imposed merely by the contract, then any action for the breach thereof is necessary *ex contractu*...On the other hand, if a party sues for a breach of duty prescribed by law as an incident of the relation or status which the parties have created by their agreement, the action may be one in tort, even though the breach of duty may also be a violation of the terms of the contract.”” *Id.*, citing *Eversole*, 332 S.W.2d at 57-58.

In finding that plaintiff’s “negligent repair” count failed to state a claim, the court reasoned that the contract did not cause a waiver, rather, the duty to repair arose strictly by contract and therefore was a private, not public duty. *Id.* Outside the

contract, plaintiff would not have a claim because there is no public duty against negligent repair. *Id.*

In contrast, there is no question that statutory waste is a public duty. The duty is not “imposed merely by the contract” because Section 537.420, RSMo. 2000, states a cause of action, *ex delicto*. Therefore, the fact that the same duty is mentioned in the contract does not alter Defendant’s duty to the public. As Section 537.420, RSMo. 2000 represents, it is the public policy of Missouri, that tenants for a term of years should not commit waste. The agreement between plaintiff and defendant only sets out the relationship of the parties such that Section 537.420, RSMo. 2000, applies. Therefore, the duty to refrain from acts constituting waste exists independent from the agreement.

Moreover, the Court of Appeals of Missouri, Western District, recites the same reasoning discussed above. *American Mortgage*, 671 S.W.2d at 293. In *American Mortgage*, the court reviewed a plaintiff’s appeal of a directed verdict in favor of the defendant. *Id.* Defendant argued that plaintiff’s only claim was in contract, not tort. *Id.* Plaintiff’s claim involved breach of contract, breach of fiduciary duty, general negligence, and negligence *per se*. *Id.* The court only affirmed directed verdict as to negligence *per se*. *American Mortgage*, 671 S.W.2d at 294. In reversing defendant’s directed verdict, the court quoted the same language noted above from the *Eversole* court. *Id.* at 293. The court furthered its

holding stating, “[t]he negligent failure to observe and perform any portion of that [contractual] duty gives rise to an action in tort as well as an action for breach of contract.” *Id.* In fact, the court stated, “the instant case supports a submissible case upon the theories of breach of contract, breach of fiduciary duty and general negligence.” *American*, 671 S.W.2d at 295. Therefore, a mere contract cannot foreclose any parallel rights to a tort remedy where an act violates both public and private duties.

Accordingly, Plaintiff in this case, Brizendine, has merely exercised a right to proceed in tort instead of proceeding in contract. Defendant, Conrad, claims that Brizendine’s acceptance of liquidated damages forecloses Conrad’s public duty to refrain from the commission of waste. This however, is not logically correct. Brizendine’s sole cause of action at trial is in tort. Conrad’s sole defense is in contract. Conrad fails to provide any defense to the statutory action for waste.

Moreover, the policy objectives, which support this rule of law, as applied in this case, are substantial. In reviewing Missouri’s statutory waste action, one can see that the legislature identified a public duty to maintain property values. The commission of waste not only affects the property value on which it is committed, but that of surrounding properties as well. Therefore, the importance of this legislation to the public is its promotion of property value. Thus, this Court must affirm the rule of law as it has existed for over 40 years.

C. Conrad never requested for the return of, or set-off for \$15,000 paid to Brizendine, therefore, there is no basis for the assertion that said failure affects Brizendine's cause of action under Section 527.420, RSMo. 2000.

Conrad tries to convince this Court that Conrad's defense to Brizendine's dismissed breach of contract claims operates to preclude any recovery in favor of Brizendine in a court of law against Conrad. Conrad fails to address the fact that Brizendine did not sue for breach of contract, and never received any judgment for such. It appears that Conrad makes the same argument as that asserted in the first point, and alludes to an election of remedies defense which Conrad takes up under point 2 of Conrad's brief.

II. The Trial Court properly denied Conrad's Motion for Judgment on the Pleadings and awarded damages pursuant to Section 537.420, RSMo. 2000 because the Trial Court only awarded one recovery under one cause of action at trial and the evidence shows Wanton, Willful and Reckless conduct.

A. Standard of Review

In a court tried case, the Court is required to affirm the judgement unless there is no substantial evidence to support it, it is

against the weight of the evidence, or it erroneously declares or applies the law. *Murphy*, 536 S.W.2d at 32. In determining the sufficiency of the evidence, this Court must accept as true all evidence and inferences favorable to the trial court's judgment, disregarding all contrary evidence. *T.B.G.*, 772 S.W.2d at 645; *Harris*, 932 S.W.2d at 443.

B. Statutory Waste Damages Are Not Barred by Contract Language Concerning Liquidated Damages; Conrad Never Requested Return, or Set-Off of Any Amount She Paid Under the Contract.

1. Election of Remedies

Conrad attempts to make an argument that contract language regarding liquidated damages appearing in a contract operates as an election of remedies. However, this result is impossible as Brizendine chose only one remedy at trial. Election of Remedies is an affirmative defense, which prevents the pursuit of two inconsistent theories in a court of law. *Whittom v. Alexander-Richardson*, 851 S.W.2d 504, 506, (Mo. banc 1993). This Court set out the elements of this affirmative defense as follows:

“where a party has the right to pursue one of two inconsistent remedies and he makes his election, institutes suit, and prosecutes it to final judgment, he

cannot thereafter pursue another and inconsistent remedy.” *Id.* (citation omitted).

Brizendine made his election to sue in tort, prosecuted that remedy to a final judgment, and Conrad never asserted, requested, demanded or otherwise expressed any interest in the \$15,000 paid as money down for the sale of the property.

Brizendine's choice of remedy could not be more clear and unequivocal.

Notwithstanding this election, Conrad wanted to make this choice for Brizendine because it suited her interests best. Election of remedies cannot apply in this case as there was no conflicting or inconsistent remedies prosecuted at trial.

In support of her election of remedies argument, Conrad cites *Rudnitski v. Seely*, 452 N.W.2d 664 (Minn. 1990). This case, however, is inapposite to her position. *Id.* at 667. *Seely* concerns a contract for deed, and the seller's reliance upon a statutory procedure, which cancels the contract and bars the vendee's defenses at law and equity after vendor complies with the statute's requirements. *Id.* at 667-68; Minn. Stat. §559.21 (2000). The Supreme Court of Minnesota acknowledged the factual limitations of their holding by specific reference to alternative scenarios where a vendee had the opportunity to litigate and present defenses as Conrad had in this case. *Seely*, 452 S.W.2d at 667-68. The court noted that the *Seely* holding was not in conflict with a case concerning an action for judicial rescission where vendee had the opportunity to raise equitable defenses. *Id.*

(discussing *Meyer v. Hansen*, 373 N.S.2d 392 (N.D. 1985)). The court makes this distinction because the vendee in *Seely* did not have access to the court to exercise the opportunity to raise defenses, such as set-off, which Conrad never raised. *Id.* Moreover, the *Seely* court notes that election of remedies doctrine is not applicable to the facts of that case, rather, the court bases its decision on “concepts of fairness.” *Id.*

In contrast to Conrad’s cited authority from a foreign jurisdiction, Brizendine’s use of Section 537.420, RSMo. 2000, never foreclosed the assertion of any defense that Conrad had to the Trial Court’s award of damages. Conrad has had her opportunity to present equitable defenses, and she failed to present the law and evidence to avoid the Trial Court’s award of damages. Brizendine never availed himself of another proceeding, or theory for recovery of waste damages. The \$15,000 was paid before the action had arisen, and was never a choice of remedy. Conrad does not follow choice of remedy doctrine; actually, she requests this Court to choose a remedy for Brizendine. However, he already chose one remedy at trial. Conrad’s argument is an improper use of the choice of remedy doctrine.

Paradoxically, Conrad’s choice of defense, unlike Brizendine’s, is inconsistent. Conrad requests this Court to enforce a single provision of the contract so that she can avoid the rest of the contract’s obligations. This however,

is not a choice for Conrad or this Court to make. The record in this case indicates a single cause of action, and one recovery, awarded after compelling evidence of Conrad's reckless and wanton disregard to the property rights of Brizendine and the surrounding property.

In further argument, Conrad suggests that Brizendine cannot "retain the \$15,000, and then obtain statutory damages for waste..." In support, Conrad cites *Harris v. Desisto*, 932 S.W.2d 435, 447 (Mo. App. W.D. 1996). *Harris*, however, concerns the logical inconsistency of proceeding in court with evidence to affirm and disaffirm the same contract. *Id.* As stated earlier, the only party wishing to simultaneously affirm and disaffirm the contract is Conrad. Brizendine has only one theory, followed throughout the trial with logically consistent evidence of Conrad's careless disregard for the property which resulted in the Trial Court's award of waste damages.

2. Equitable Estoppel

In addition to the election of remedies argument, Conrad suggests that Brizendine waived the statutory cause of action by choosing liquidated damages. This argument is also misguided as there was no choice of remedy or waiver of a cause of action before such facts had arisen. Conrad seems to argue one of two possible scenarios. The first would rely upon the equitable doctrine of equitable estoppel. The second would assert that the contract contained a waiver of the

rights to proceed under Section 537.420, RSMo. 2000. Neither argument withstands the application of the law to the facts of this case.

First, Conrad fails to identify any evidence in the record to support the elements of equitable estoppel. This Court set out the elements of equitable estoppel as follows:

“(1) There must be conduct, acts, language, silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or, at least, the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by him. (4) The conduct must be done with the intention, or, at least, with the expectation, that it will be acted upon. (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse.”

Here, Conrad created the circumstances upon which she would rely for an estoppel argument. In short, estoppel would require that Brizendine knew that Conrad would commit waste, refuse to purchase the property as agreed, and that a suit for statutory waste would work to Conrad's detriment. *See Link v. Kroenke*, 909 S.W.2d 740, 747 (Mo. App. W.D. 1995). In this case, Brizendine had no such knowledge as the waste had not yet occurred, and he fully expected that Conrad would perform with tender of the purchase price as agreed. Only Conrad knew of the extent of the waste before her own breach, and it was her own failure to properly manage the property which lead to the judgment in this case.

Additionally, even if Brizendine had such knowledge, there is no evidence that Brizendine induced Conrad to commit waste so that he could pursue damages under Section 537.420, RSMo. 2000. It is well settled law that "estoppel cannot be founded upon facts equally within the knowledge of both parties or where they have equal means of knowledge." *Id.* Here, Brizendine was in no better position to know of the action for statutory waste than Conrad was.

As a result, there is no evidence that Brizendine induced Conrad's detrimental reliance. In this case, the cause of Conrad's loss is her failure to maintain the property in accordance with Missouri law. Regardless, she could have escape liability from this illegal act by either purchasing the property or maintaining the same. The only detriment which Conrad can assert is the

judgment in this case, however, “[a]n adverse judgment in the case in which equitable estoppel is being asserted does not satisfy the injury element [of estoppel].” *State ex rel. Woytus v. Ryun*, 776 S.W.2d 389 (Mo. banc 1999); *Pinell v. Jacobs*, 873 S.W.2d 925, 928 (Mo. App. E.D. 1994). On such facts, equitable estoppel will not stand because neither Brizendine, nor the contract is the basis for any alleged injury.

3. Waiver

Second, the waiver argument fails because the Brizendine did not expressly waive any rights to statutory provisions, and Conrad fails to provide any evidence of conduct that establishes intent to waive tort remedies. The affirmative defense of waiver is a question of fact, which requires evidence showing the intentional relinquishment of a known right. *Brown v. State Farm Mut. Auto Ins. Co.*, 776 S.W.2d 384, 386-87 (Mo banc 1989); *Pennsylvania Cas. Co. v. Suburban Serv. Bus Co.*, 211 S.W.2d 524, 530 (Mo. App. E.D. 1948). Waiver can be express or implied. *Shahan v. Shahan*, 988 S.W.2d 529, 534 (Mo. banc 1999). Absent express waiver, this doctrine requires proof of conduct that clearly and unequivocally shows the purpose to relinquish the right. *Brown*, 776 S.W.2d at 386-87. There is nothing in the contract that establishes an express waiver of any right, much less the specific statutory authority to sue for waste damages. As stated earlier, a valid liquidated damages clause operates as a defense to a breach

of contract action. This case, however, does not involve a breach of contract claim.

Accordingly, Conrad alleges that her duty per agreement, to refrain from committing waste and the liquidated damages provision coupled with Brizendine's retention of the \$15,000 down payment, constitutes an implied waiver. This, however, is a factual determination, which the Trial Court resolved in Brizendine's favor. The record discloses no evidence to show that the parties had a meeting of the minds regarding tort remedies. Conrad offered no evidence regarding this issue. The mere retention of the \$15,000 is not sufficient evidence of intent to relinquish a known right. The right to statutory waste damages had not arisen when Conrad made the down payment. At the time of payment, Brizendine believed that the \$15,000 was a down payment, which he accepted as a down payment of the purchase price to be credited at closing. (Tr. 14.)

Finally, even if this Court determines that Brizendine expressly waived his statutory rights, or that he exhibited conduct which clearly indicates that Brizendine intentionally relinquished his right to statutory relief for waste, such waiver would violate Missouri public policy. *Alack v. Vic Tanny Intern. of Mo. Inc.*, 923 S.W.2d 330, 337 (Mo.banc 1996). “[There] is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.” *Alack*, 923 S.W.2d at

337. In the absence of findings of fact and conclusions of law, this Court must presume that the Trial Court found all issues in accordance with the result. *See Harris*, 932 S.W.2d at 443. In determining the sufficiency of the evidence, this Court must accept as true all evidence and inferences favorable to the trial court's judgment, disregarding all contrary evidence. *T.B.G.*, 772 S.W.2d at 654; *Harris*, 932 S.W.2d at 443. The evidence in this case supports grossly negligent, reckless, and even intentional conduct. The evidence admitted at trial supports the conclusion that the Trial Court found intentional, reckless, or gross negligence. Such conduct cannot be the basis of any waiver or release, therefore, this Court must affirm the Trial Court's judgement.

4. Equity Jurisdiction and Unclean Hands

Moreover, waiver and estoppel are equitable defenses which invoke the equity jurisdiction of the court. *Ryan v. Ford*, 16 S.W.3d 644 (Mo. App. W.D. 2000). Waiver and estoppel allow a court sitting in equity, to prevent a wrongful act's commission as against an innocent party. *Farley v. St. Charles Ins. Agency, Inc.*, 807 S.W.2d 168, 171 (Mo. App. E.D. 1991). Conrad is not an innocent party because she violated both public and private duties. Therefore, she cannot employ estoppel to promote the benefit of her own unlawful conduct. *Id.* One cannot use estoppel to claim benefit from an act that is illegal and void..." *Frisch v. Schergens*, 295 S.W.2d 84, 87 (Mo. 1956); *Lillo v. Thee*, 676 S.W.2d 77, 80 (Mo.

App. S.D. 1984); *Mora v. Hastings*, 416 S.W.2d 642, 646 (Mo. App. W.D. 1967).

Therefore, this Court must reject Conrad's argument regarding estoppel and waiver.

5. Set-Off

Furthermore, Conrad bases her arguments upon the theory that Brizendine's action in court stands for the proposition that "[Brizendine] is entitled to keep the \$15,000 as contract damages, and then sue under a tort theory." This however, is not an element of statutory waste actions. Entitlement to the \$15,000 is a matter concerning set-off. Conrad, realizing this, now attempts to insert this matter of pleading into this appeal. Conrad neither asserted this defense, nor requested findings of fact and conclusions of law to determine if the court, *sua sponte*, reduced damages to reflect set-off of the \$15,000 paid under the contract.

Interestingly, the evidence admitted at trial indicates costs to repair of \$30,335. (L.F. 79.) The judgment indicates \$11,253.45 awarded as the costs of repair, the then trebled to \$33,760.35. Therefore, the Trial Court may have disregarded the evidence of some costs, off-set the amount already received as liquidated damages, and arrived at the amount indicated in the judgment. Conrad cannot assume that the Trial Court did not reduce damages to account for damages paid under the contract. Therefore, this Court must not engage in Conrad's untimely request to off set the judgment.

Assuming, however, that the Trial Court did not account for the \$15,000, *sua sponte*, Conrad fails to illustrate the appearance of this defense in the pleadings or at trial. Set-off is an independent action by the defendant against the plaintiff which Conrad never raised in the Trial Court. *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 129 (Mo.banc 1985). Because the claim arises out of the same transaction or occurrence, Conrad waived rights to set-off through her failure to affirmatively plead the same in the Trial Court. *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 129 (Mo.banc 198). Therefore, this Court must reject Conrad's request for set-off as untimely.

CONCLUSION

Brizendine has the option, upon Conrad's breach of contract, to choose either a tort or a contract remedy. Liquidated damages is a defense to damages in a breach of contract case, not a separate, parallel tort action. There is no election of remedies defense where Brizendine only pursued one cause of action to a final judgment. Brizendine neither concealed facts from Conrad, nor induced detrimental reliance in accepting \$15,000 as a down payment. Brizendine never expressly waived rights to §537.420, RSMo. 2000. Brizendine never implied that he waived his rights to §537.420, RSMo. 2000 through his conduct. Mere retention of Conrad's down payment as agreed at the signing of the contract, does not support implied waiver. Conrad cannot avail herself of estoppel and waiver

because these equitable doctrines protect innocent persons from unavoidable loss. Conrad is not innocent; her loss at trial was the result of her unlawful conduct and avoidable through performance on the closing date. Conrad cannot rely on waiver to avoid intentional, reckless, or grossly negligent conduct. Reasonable inferences from the evidence support a finding of intentional, reckless, or gross negligence. Therefore, this Court must affirm the judgment of the Trial Court.

Respectfully Submitted,

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Certificate

I hereby certify that the above and foregoing document was mailed, via U.S. mail, first class postage paid, on October 16, 2001 to the following:

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