

IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC92072

**AMERICAN EAGLE WASTE INDUSTRIES LLC, *et al.*,
Respondents/Cross-Appellants,**

v.

**ST. LOUIS COUNTY, MISSOURI,
Appellant/Cross-Respondent.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 13
HON. BARBARA WALLACE**

**Reply Brief and Response to Cross-Appeal
of Appellant/Cross-Respondent St. Louis County, Missouri**

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REPLY ARGUMENT

I. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMO (2007) UPON WHICH COUNT II WAS PREMISED IS INAPPLICABLE TO COUNTY DUE TO COUNTY'S SUPERIOR CONSTITUTIONAL GRANT OF LEGISLATIVE POWER WITH RESPECT TO THE MUNICIPAL FUNCTION OF WASTE COLLECTION.

“Law Of The Case” Does Not Preclude Supreme Court Review Of The Applicability Of Section 260.247 RSMo To County’s Waste Collection Program.

Before addressing County’s substantive argument, Haulers have asserted a procedural bar to this Court’s consideration of County’s legislative superiority. Haulers contend that the question of County’s legislative superiority with respect to implementation of its waste collection program (“Program”) has been adjudicated and rejected by the Eastern District in *State ex rel. American Eagle Waste Industries LLC v. St. Louis County*, 272 S.W.3d 336 (Mo.App. 2008), and that “law of the case” doctrine now “precludes relitigation of the issue on remand and subsequent appeal.” *Resp. Brief p. 11, citing Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007).

Law of the case is inapplicable to this Court’s review of the trial court’s final judgment. No appellate court has yet ruled in this case on the question whether County’s

constitutional authority to legislate with respect to municipal functions can be suspended by act of the General Assembly. To date, the only appellate determination that has been made is that Haulers were entitled to receive a declaration of their rights under Section 260.247 RSMo:

We first take up the ground relied upon by the trial court: failure to state a claim. The trial court's sole question to consider was whether the petition alleges facts which entitle Haulers to a declaration of their rights. *Haulers need not prove they will prevail under their interpretation of the statutory scheme, or even that their interpretation is correct*; they simply must show they are entitled to an interpretation at all. Haulers made this showing

State ex rel. American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 340 (Mo. App. 2008) (emphasis added).

The only issue before the appellate court was whether Haulers had stated a claim for declaratory judgment. The Eastern District reversed the trial court's dismissal after finding that the trial court had erred "by engaging in a determination of the merits . . . ," because "[t]he trial court's statutory interpretation was procedurally inconsistent with a dismissal for failure to state a claim. . . ." *Id.* at 341. Yet immediately after stating that the trial court had erred by construing the effect of Section 260.247 RSMo, the appellate court went on to do just that by providing its own statutory interpretation of Section 260.247 RSMo. The court's interpretation was admittedly dicta, as the court explained that its statements were provided merely "in order to guide the court's determination on remand." *Id.* at 341.

The Eastern District's self-acknowledged advisory construction of Section 260.247 RSMo, being mere dicta, law of the case is inapplicable. Law of the case applies to a previous "holding," *Walton v. City of Berkeley*, 223 S.W.3d at 128-29, not to extraneous comments or advisory opinions. *See Adair v. N. W. Electric Power Cooperative, Inc.*, 351 S.W.2d 218, 220 (Mo.App. 1961) (rule applies to an opinion "on an issue necessarily involved in the case and the disposition of which was necessary to the proper disposition of the appeal"). Here, no holding exists on the issue in question, so there is no arguable basis for application of law of the case doctrine.

Further, law of the case "is a rule of policy and convenience; a concept that involves discretion." *Walton v. City of Berkeley, id.* at 130. Clearly it does not supersede this Court's authority under Mo. Const. Art. IV, Section 4, to exercise superintending control over all lower courts. Nor should it be applied when the previous court's decision would result in "manifest injustice," *id.*, as would be the case if County's constitutional authority were improperly allowed to be curtailed by the General Assembly; the Eastern District was palpably wrong in suggesting that the General Assembly's purported suspension for two years of County's right to regulate waste collection services was not incompatible with the Missouri Constitution's grant of authority to County in Art. VI, Section 18(c), to regulate such services. *See infra, pp. 13-15.* Law of the case should not be used to prevent this Court from considering County's constitutional authority to implement its Program in the face of Section 260.247 RSMo.

County Was Not Bound By Statute Purporting to Impair County's Authority To Implement Its Program.

In implementing its waste collection program without regard to the time constraints of Section 260.247 RSMo, County has relied on its authority under Mo. Const. Art. VI Section 18(c) to regulate municipal functions. Haulers “fully acknowledge” County’s constitutional authority to regulate municipal functions but contend that Section 260.247 RSMo does not impinge upon County’s constitutional power because Section 260.247 is a “market regulation of statewide concern” and does not regulate municipal functions. *Haulers’ Brief* p. 16. Accordingly, Haulers contend, County’s authority is derived from Mo. Const. Art. VI Section 18(b) rather than Section 18(c), and must yield to the General Assembly’s authority in keeping with the more limited authority granted to counties under Section 18(b) pertaining to matters of statewide concern.

Haulers’ reliance on cases construing the strength of County’s authority under Mo. Const. Art. VI Section 18(b) provides no guidance for the issues herein.¹ A plethora of

¹ Haulers rely upon *Jackson County v. State*, 207 S.W.3d 608 (Mo. banc 2006), which addressed the General Assembly’s authority under Section 18(b) to prescribe duties for county officers; *Flower Valley Shopping Center v. St. Louis County*, 528 S.W.2d 749 (Mo. banc 1975), which addressed County’s authority under Section 18(b) to require shopping center owners to provide police protection to their customers; and *Information Technologies, Inc. v. St. Louis County*, 14 S.W.3d 60 (Mo.App. 2000), which addressed

cases and statutes confirms that regulation of waste is a municipal function (and thus subject to County's superior legislative authority under Section 18(c)). *See County's original brief at 31-34*. Indeed, this Court very recently referenced Section 18(c) as the authority for County to engage in the business of trash collection. *Weber v. St. Louis County*, 342 S.W.3d 318, 322 (Mo. banc 2011). And contrary to the Eastern District's assertion that Section 260.247 RSMo "has nothing to do with the process of an entity's collection of trash," *American Eagle*, 272 S.W.3d at 343, the notice provisions of Section 260.247 RSMo have *everything* to do with the process of trash collection. In fact, the notice provisions have *only* to do with the process of trash collection, by requiring that the process of trash collection be postponed for two years in contravention of a charter county's constitutional authority to control that very process.

Haulers' bald assertion that "Section 260.247 Does Not Regulate Municipal Functions," *Haulers' Brief p. 18*, is followed with nothing but rhetoric about the alleged **purpose** of Section 260.247. Over and over, Haulers assert that "the overarching objective," the "fundamental purpose" or the "clear intent" of Section 260.247 is to give waste haulers time to make business adjustments. *Haulers' Brief p. 19*. But the word "purpose" is not a synonym for "effect." Regardless of its putative purpose, the effect of Section 260.247 is unquestionably to impair County's right to exercise control over the

County's authority under Section 18(b) to disregard statewide competitive bidding procedures.

municipal function of trash collection, and this impairment is not permissible.²

The General Assembly cannot impair County's constitutional grant of authority under Section 18(c), *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 641 (Mo. banc 1962), even under the guise of protecting businesses. The argument that the General Assembly was focused on protecting businesses rather than impairing County's constitutional right is irrelevant. "Once a law has been adopted through legislative enactment and its provisions are express and unambiguous, a court must enforce the law according to its terms, not by what may have been intended by the enactment." *Mo. Natl. Educ. Assoc v. Mo. State Bd. of Education*, 34 S.W.3d 266, 279 (Mo. App. 2000), citing *Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983). Haulers' inability to articulate any reason for disregarding this rule of statutory construction is fatal to their argument that the General Assembly can impinge on County's authority to provide for waste collection. Given that even good intentions by the General Assembly are insufficient to vitiate County's constitutional grant of power, Haulers cannot prevail

² Haulers implicitly concede that the real purpose of S.B. 54 amending Section 260.247 RSMo was to impair County's exercise of its authority to regulate trash collection; they state that "County's passage of the authorizing legislation for its waste collection program in 2006 prompted the Missouri General Assembly to amend §260.247 to include County in 2007." *Haulers' Brief* p.3 (emphasis added).

and judgment should be entered for County.³

³ Further, the interpretation advanced by Haulers would necessitate a finding that enactment of S.B. 54 pertaining to “business protection” was unconstitutional because its title stated that the bill pertained to “environmental regulation.” *See Point II, infra*. And as County noted in its opening brief, courts are required to interpret statutes in a manner consistent with the Constitution rather than in derogation of it. *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006).

II. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED IS VOID FOR VIOLATION OF MO. CONST. ART. III §23 IF IT PERTAINS TO BUSINESS PROTECTION AND NOT TO ENVIRONMENTAL REGULATION AS STATED IN THE TITLE OF S.B. 54 (2007) AMENDING IT.

County Is Not Procedurally Barred From Challenging Constitutionality Of Section 260.247 RSMo As Amended By S.B. 54 (2007).

Remarkably, Haulers have filed no substantive response to County's assertion that S.B. 54, which amended Section 260.247 RSMo to include counties, violated the single-subject requirement of Mo. Const. Art. III, Section 23. Instead, Haulers have merely asserted three procedural bars to consideration of County's constitutional challenge: first, "law of the case;" second, failure to raise this issue at the earliest available opportunity; and third, the time constraints of Section 516.500 RSMo. None of these procedural bars is applicable.

1) Law of the case is not applicable

Apart from the fact that law of the case is purely discretionary, *supra p. 12*, it bars at most only reconsideration of those points which were "presented and decided" or which "arose prior to the first adjudication and might have been raised but were not."

Walton v. City of Berkeley, 223 S.W.3d 126, 129 (Mo. banc 2007). Here, the Eastern District made no mention of the constitutionality of S.B. 54 when it reversed the trial court's dismissal of Haulers' petition, *see American Eagle*, 272 S.W.3d 336, and so there is no law of the case to follow on this point. Moreover, the issue of S.B. 54's constitutionality could not have been raised by motion to dismiss because that would have required going outside the record to introduce the bill itself into evidence. *See Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 211 (Mo.App. 2011) (matters outside the pleadings are not considered in reviewing motions to dismiss). Because the Eastern District did not pass on the constitutionality of S.B. 54, law of the case is inapposite.

2. Constitutional issue was raised at first available opportunity.

The general rule is that defenses are properly raised by answer and not by motion to dismiss. *Roberts v. Epicure Foods Co.*, 330 S.W.2d 838, 839 (Mo. 1960). County timely raised the constitutionality of S.B. 54 as an affirmative defense at the earliest available opportunity: that is, when its motion to dismiss was overruled and it was required to respond to Haulers' original petition.⁴ L.F. 3, *Defts. Exh. F*, p.5. At that time, County asserted that:

To the extent Section 260.247 RSMo is interpreted as pertaining to a matter

⁴ Haulers mistakenly advised the Court that County did not raise this defense until responding to Haulers' First Amended Petition some eighteen months later in August of 2010. *Haulers' Brief* p. 25. Haulers' factual error is fatal to its argument of untimeliness, as County raised the defense in answering the original petition.

of statewide policy and not to “environmental regulation” as stated in the title of S.B.54 (2007), its enactment violated Art. III, Section 23 of the Missouri Constitution in that the bill contained more than one subject which subject was not clearly expressed in the title of the bill, and the purported amendment of Section 260.247 RSMo was therefore void and of no effect. . .

Haulers’ suggestion that an affirmative defense raised in the original answer to the original petition might be untimely, is devoid of support and not worthy of consideration.

Equally unsupported is Haulers’ contention that County “should have either filed a timely petition challenging the enactment of S.B. 54 or counterclaimed for declaratory judgment in the trial court.” *Haulers’ Brief* p. 27. Haulers offered no case law to support this contention and no reason why this should be so. Reason does not dictate the preemptive challenge of a law to which one does not claim to be subject.

3. Section 516.500 RSMo does not bar County’s affirmative defense.

Haulers contend that County’s affirmative defense asserting the unconstitutionality of S.B. 54 is barred by Section 516.500 RSMo, which provides that:

No **action** alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law, unless it can be shown that there was no party aggrieved who could have raised the claim within that time. . . . In no event shall **an action** alleging a procedural defect in the enactment of a bill into law be allowed later than five years after the bill or the pertinent section of the bill which is challenged

becomes effective.

(Emphasis added). Because the assertion of an affirmative defense is not the equivalent of maintaining an action, Haulers' argument based on Section 516.500 lacks merit.

In *Boone National Savings & Loan Ass'n v. Crouch*, 47 S.W.3d 371, 375 (Mo. banc 2001), this Court held that the applicable two-year statute of limitations barred raising the Equal Opportunity Credit Act ("Act") as a counterclaim, but did *not* bar raising it as an affirmative defense. Defendant was sued after her husband defaulted on a loan which claimed the defendant was a loan guarantor. *Id.* at 373. Defendant denied liability, counterclaimed based on the Act, and raised various affirmative defenses including the lender's purported violations of the Act. The trial court barred the defendant from using the Act either as a counterclaim or as an affirmative defense, but was reversed as to the latter ruling:

The assertion of Ms. Crouch's affirmative defenses is not "an action" that is being "brought." Under Missouri's pleading rules, an affirmative defense is a matter that is asserted to avoid liability, even if the facts pleaded in the petition are proved. . . . Under Missouri law, **even though a claim may be barred by the applicable statute of limitations, the essence of the claim may be raised as a defense.**

Id. at 375 (emphasis added).

The statement of law asserted by the Supreme Court is longstanding. See *State ex rel. Mo. State Highway Comm'n v. Fitton*, 180 S.W.2d 245 (Mo.App. 1944) ("sole purpose of the statute of limitations, by its very language, is to bar actions, and not to

suppress or deny matters of defense, whether equitable or legal. . . . The statute of limitations may be used by a defendant as a shield for his protection or defense, but is never to be turned upon him as a sword. . . .”); *Williamson v. Brown*, 93 S.W. 791 (Mo. 1906) (defendant in ejectment action prayed for affirmative relief of reformation of a deed, and court found the defense was not barred by the statute of limitations). *See also Mo. Practice Series*, “Jurisdiction Venue Limitations” §7:352 (2010) (Statutes of limitation are intended to bar actions and not to suppress or deny matters of defense, so defense may be raised at any time).

This Court has specifically recognized that Section 516.500 “does not apply to a criminal defendant who raises a challenge to the statute as a defense in the criminal case.” *Schaefer v. Koster*, 342 S.W.3d 299, 301 n. 1 (Mo. banc 2011). The status of a case as criminal or civil is irrelevant to the fact that an affirmative defense is distinct from an “action” that would be prohibited by Section 516.500 RSMo, thus the Supreme Court’s observation in *Schaefer* is equally valid in the case at hand.

Further, County filed its affirmative defense of unconstitutionality on February 26, 2009, *Defts. Exh. F*. This falls within the Section 516.500 limitation of “the adjournment of the next full regular legislative session following the effective date of the bill as law,” because S.B. 54 was enacted by the **94th** General Assembly and became effective on January 1, 2008. *Defts. Exh. B, p.57*. The **95th** General Assembly convened on the first

Monday in January following the 2008 general election,⁵ in January of 2009, so that County's February 2009 answer asserting unconstitutionality satisfied any time restriction arguably imposed by Section 516.500 RSMo.

Finally, it is evident that County falls within the exception which permits subsequent challenges if "there was no party aggrieved who could have raised the claim within that time." County had no reason to assume initially that S.B. 54, which purported in its title to concern "environmental regulations," might actually pertain to "business protection." It was only when the Eastern District provided such "guidance" in its October 2008 opinion that a constitutional challenge became necessary. Accordingly, there is no basis for finding County's constitutional argument to be barred by Section 516.500 RSMo.

S.B. 54 As Interpreted By The Eastern District Violated Mo. Const. Art. III, §23.

Haulers have provided no substantive response to County's argument that S.B. 54, as interpreted by the Eastern District in its *American Eagle* opinion, was enacted in violation of Mo. Const. Art. III, §23 requiring that all bills relate to a single subject which is clearly expressed in the title of the bill. To the contrary, their vigorous and repeated argument that Section 260.247 RSMo "is a statewide market regulation" and not a trash regulation, *see Haulers' Brief p. 15*, precludes any credible argument they could make in support of S.B. 54's constitutionality. *See Haulers' Brief p. 16* ("Section 260.247 . . . is a

⁵ Pursuant to Mo. Const. Art. III § 20, "[t]he general assembly shall meet on the first Wednesday after the first Monday in January following each general election."

market regulation. . .”); *p.19* (“the purpose of §260.247 is to regulate how a political subdivision, including the County, may impact private entities. . .”); *pp. 19-20* (“the clear intent of the statute is to proscribe how and when a political subdivision, including the County, may impact participants in the free market . . .”); *p. 21* (“statute’s purpose . . . is quite simple - private entities must be afforded adequate notice to properly wind down . . . business before government takes over the market and puts them out of business”).

Haulers’ concession of S.B. 54’s unconstitutionality (if their interpretation of its applicability to County is accepted) is most evident when they state that:

§260.247 does not regulate the health and safety aspects of waste collection but rather when and how a governmental body may disrupt the waste collection market. Market regulation is clearly a matter of statewide concern

This statement is totally incompatible with a finding that Section 260.247 pertains to “environmental regulation” as proclaimed by the title of S.B. 54. If Haulers prevail on their claim that Section 260.247 is a market regulation, they must then fail on the argument that it is an “environmental regulation” for the reasons set forth in County’s original brief. *County Brief pp. 41-43.*

III. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED BECAME EFFECTIVE ONLY ON JANUARY 1, 2008 AND DID NOT OPERATE RETROSPECTIVELY TO BAR COUNTY FROM CONTINUED IMPLEMENTATION OF ITS WASTE COLLECTION PROGRAM AS ADOPTED IN 2006.

County Is Not Procedurally Barred From Challenging Retrospective Application Of Section 260.247 RSMo As Amended By S.B. 54 (2007).

Just as law of the case does not preclude consideration of County's constitutional argument, *supra pp. 10-11*, law of the case does not preclude consideration of County's challenge to the retrospective application of amended Section 260.247 RSMo to Program. This issue was neither before nor decided by the appellate court in *American Eagle*, which was reviewing a motion to dismiss; County's retrospectivity argument would have required review of matters outside the pleadings. This issue was timely asserted as an affirmative defense when County first responded to Haulers' original petition:

To the extent that Section 260.247 RSMo as amended by H.B. 54 (2007) purports to interfere with St. Louis County's implementation of a waste collection services program that was initiated prior to enactment of said statute, the statute should not be applied retrospectively to prevent St. Louis County's

continuation of said program. . . .

LF 3; Defts. Exh. F, p.5.

Section 260.247 RSMo Should Not Be Applied Retrospectively To County's Program.

Prior to the amendment of Section 260.247 RSMo, County had passed an ordinance in December of 2006 calling for the establishment of waste collection districts, *Deft. Exh. A*, and had taken steps to implement its waste collection program. *Defts. Statement of Uncontested Facts, Exh. B., LF 90-91.* At that time, County possessed both the right to implement its waste collection program (without any notice requirements), and the right to abandon its Program. To the extent that application of Section 260.247 RSMo would prevent County from exercising its then-existing right to continue with implementation of its Program, its application would be retrospective and should not be allowed.

Contrary to Haulers' erroneous assertion, County has not suggested that its Program was "implemented" or "set in stone" in 2006. *See Haulers' Brief p.32.* Rather, County has argued only that the relevant moment in time for assessing County's notice requirement under Section 260.247 RSMo was December of 2006, when County announced its intent to provide for waste collection by passing an ordinance authorizing the Program and requiring the establishment of collection areas. Had Section 260.247 as amended been in effect and applicable to County, that is the moment at which County would have incurred an obligation to provide notice and then wait for two years. No such obligation having then existed, Section 260.247 should not be allowed to reach back and impair County's then-existing right to continue with its Program.

The fact that waste collection contracts had not yet been awarded when S.B. 54 became effective in 2008 is irrelevant in analyzing application of S.B. 54 to the Program which had been authorized in 2006. It is undisputed that County spent the year 2007 establishing collection areas and criteria for bid invitations, *Defts. Statement of Uncontested Facts, Exh. B., LF 90-91*, prior to which contracts for service obviously could not have been executed. The fact that the contracts had not yet been executed, nor the Program yet fully implemented, did not eviscerate County's right to proceed with the Program free from subsequent legislation intended, according to Haulers, to impair that right. The fact that County retained the *discretion* to abandon the Program did not vitiate County's *right* to go forward if it so chose.

Haulers' assertion that County could only have given the requisite two-year notice after selecting the new Program haulers and awarding the contracts is insupportable. *See Haulers' Brief p. 34*. The statute requires notice of "intent," not notice of "contractual commitment." Haulers have argued that it would have been "ridiculous" to have "all waste haulers in unincorporated St. Louis County winding down their businesses before bids were solicited or awarded . . ." *Id.* But Section 260.247 RSMo does not require that Haulers "wind down" their businesses, it requires only that they have the opportunity to make whatever adjustments they choose in light of a coming program. All haulers would be free to continue operating at full speed until the last moment prior to implementation - which is just what Haulers did, according to their accountant witness who testified that their businesses would have expanded to include more customers during the two-year notice period. *See Pltfs' Exh. 3, Schedules 3, 4 ;Pltfs' Exh. 4, Schedules 5, 7, 11, 13;*

Pltfs' Exh. 5, Schedules 5, 13.

County will not reiterate the numerous cases previously cited in support of its position. *See County's original brief, pp. 44-49.* Adding to that support, however, is the case of *State ex rel. Hensley v. Young*, SC91632 (Mo. banc 3/6/12), wherein this Court examined the difference between a statute which merely relates to prior facts without changing their legal effect, and one which does change the legal effect of prior actions. In *Young*, a statute enacted subsequent to the appellant's criminal conviction precluded him from running for office because of that conviction. But, the statute in question did not "impose any new obligation or duty on Young because he [had] no affirmative obligation to take any action whatsoever to comply with [the statute]." *Opinion p. 6.*

Here, amended Section 260.247 did impose upon County the affirmative obligations of (1) re-publishing, by certified mail, the notice it had given when it enacted its Program ordinance in 2006, and (2) abandoning its Program for two years following notice by certified mail. The amended statute purported to change the legal effect of County's announced intent to implement a waste collection program, rendering it void and foreclosing County's ability to go forward with the Program at that time. *See also Good Hope Missionary Baptist Church v. St. Louis Alarm Monitoring Co., Inc.*, ED 96409 (Mo.App. 1/24/12) (where right to recover prejudgment interest had accrued prior to amendment of statute, statutory portions pertaining to prejudgment interest could not be applied retroactively). Application of Section 260.247 RSMo to County's Program would be retrospective and should not be permitted.

IV. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT RECOVERY FOR BREACH OF IMPLIED-IN-LAW CONTRACT, IN THAT THEY DID NOT PROVE THAT THEY CONFERRED A BENEFIT UPON COUNTY THAT WAS ACCEPTED AND UNJUSTLY RETAINED BY COUNTY.

Haulers Failed to Prove Implied-In-Law Contract.

In its original brief, County argued that Haulers had provided no evidence of any of the three elements required for imposition of an implied-in-law contract: a benefit conferred upon the defendant by plaintiff, Defendant's appreciation of that benefit, and retention of the benefit by defendant under circumstances that would render such retention unjust. *County's Brief*, pp. 51-58. In response, Haulers have asserted that County was benefitted by ignoring the notice requirements of Section 260.247 RSMo, *Haulers' Brief* p. 38; that case law supports the finding of implied-in-law contract based upon failure to follow statutory requirements, *Haulers' Brief* pp. 39-40; and that County's acceptance of the "benefit" was unjust. *Haulers' Brief* p. 38. Haulers' assertions are without merit.

As to County being benefitted by ignoring statutory notice requirements, Haulers have identified no money or other tangible benefit to support the conferral of a benefit. They have also failed to identify how this "benefit" was conferred *by them*, which would be a necessary prerequisite for recovery under implied-in-law contract. *See Wausau v.*

Crane Co., 904 S.W.2d 460, 462 (Mo.App. 1995). County's implementation of its Program, if deemed a benefit, was no more conferred upon County by Haulers than it was conferred by anyone else in St. Louis County.

Nor does the case law cited by Haulers support their novel argument that a non-tangible benefit could support recovery under an implied-in-law contract theory.

Karpierz v. Easley, 68 S.W.3d 565 (Mo.App. 2002), involved the receipt of money that had been seized in violation of statutory procedures, and *Investors Title Co. v.*

Hammonds, 217 S.W.3d 288 (Mo. banc 2007), involved the receipt of money in excess of statutory fees for the recording of deeds. Absent a tangible benefit received by a defendant, there is nothing to be restored to a plaintiff in order to prevent unjust enrichment to the defendant.

Finally, Haulers' refusal to concede that County has not "unjustly" retained any benefit, is without foundation. County set forth a clear timeline of events which demonstrated Haulers' ability to have timely sought a delay in Program implementation, had Haulers not been so eager simultaneously to pursue business as Program haulers. Haulers' unsupported assertion that "Haulers were not dilatory in prosecuting their claim," *Haulers' Brief* p. 40, hardly refutes the facts that were set forth at length by County. *County's Brief* pp. 55-56. Haulers simply did not prove the elements of implied-in-law contract and their judgment for same cannot be affirmed.

Haulers' Failure To Prove Implied-In-Law Contract Bars Recovery Against County.

Haulers obtained judgment only upon their count for "Breach of Contract," in which they alleged that the requirements of Section 260.247 RSMo "constitute an

implied in law contract between the County and the Plaintiffs for providing waste collection services” and that County “breached the implied in law contract with Plaintiffs.” *LF pp. 13-14*. When County sought dismissal of this count for the reason that Haulers had not sufficiently pled the elements for implied-in-law contract, the trial court denied County’s motion; the court determined that “Plaintiffs have stated a claim for breach of implied contract” in that a benefit had been conferred upon County when County implemented its Program without providing two-year notice to Haulers. *LF pp. 109-110*. This finding was made without the benefit of any evidence, after which the court then entered summary judgment for Haulers for breach of contract implied in law, based on that previous “finding” that “County was in fact benefitted” as required for a cause of action based on implied-in-law contract.⁶ *LF pp. 115-121*.

On appeal, however, Haulers have sought to add an alternative theory of recovery. Now, Haulers are asking that their judgment be upheld regardless of whether they actually proved an implied contract. In response to County’s argument that the trial court erred in entering judgment for implied-in-law contract, Haulers have offered a different theory for affirming the trial court’s judgment; they assert that “the trial court properly

⁶ The trial court’s finding that a benefit had been conferred upon County based only upon Haulers’ pleading was contrary to the rule that “[a] trial court judgment based solely on the pleadings is not supported by sufficient competent evidence in the record if material issues of fact are raised by the pleadings.” *King-Willman v. Webster Groves School District*, No. SC92125 (Mo. banc 3/6/12).

found the County liable to Haulers on Count II of Haulers' First Amended Petition *because Haulers have properly stated a claim for payment under §260.247.*" *Haulers' Brief, Point V, p.36* (emphasis added). Instead of relying on their pled theory of implied-in-law contract, Haulers now wish to prevail based on an unpled theory, claiming that Section 260.247 creates a private cause of action for damages:

A private cause of action may be created by express terms or when it is clearly implied to have been the legislature's intent Here, §260.247 clearly sets forth a cause of action for violation of its provision.

Haulers' Brief p.37 (citation omitted).

Haulers' post-judgment attempt to inject a new claim for relief should be rejected. Haulers had ample opportunity to plead an additional or alternative cause of action after County pointed out the deficiencies in their cause of action for implied contract in separate motions to dismiss filed in both federal and state court. *LF pp. 66, 108*. Haulers chose not to do so, and are now in the same situation as were the plaintiffs in *Brown v. Adams*, 715 S.W.2d 940 (Mo.App. 1986). In *Brown*, the plaintiff obtained a jury verdict based on a complaint that was determined on appeal to have been inadequate. Plaintiff's effort to sustain the verdict despite the deficient complaint was firmly rejected:

Defendant before trial by motion to dismiss, and throughout the trial by objections to testimony and by motion for directed verdict, continued to stress the deficiency of the petition in failing to specify the alleged words of slander. . . . [T]here was no express or implied consent to the trial of the issue [as pled].

Id. at 942.

Haulers argue that “[r]egardless of what title Haulers placed on their cause of action for violation of the statute, Haulers have properly pled a cause of action against the County.” *Haulers’ Brief* pp. 36-37. That argument may be sufficient to defend against a motion to dismiss, but it will not save a defective judgment on a mispleaded claim:

Cases must be submitted and considered on the same theory upon which they were tried below. We will not review a case upon a theory different from that upon which it was tried in the circuit court. Litigants are not permitted to blow both hot and cold in the same case, even in different courts.

Smithpeter v. Wabash Railroad Co., 231 S.W.2d 135, 146 (Mo. banc 1950).

Haulers did not simply title their cause of action as an implied-in-law contract; the facts they pled were intended to support that cause of action and they sought and obtained summary judgment on that cause of action. They cannot now refute their pleadings and seek recovery on whatever theory they hope this Court might find appealing. *See, i.e., Voelker v. Saint Louis Mercantile Library Ass’n*, 359 S.W.2d 689, 693 (Mo. 1962) (“[I]t is not enough that plaintiff ‘alleges a cause of action existing in favor of someone; he must show that it exists in favor of himself, and that it accrued to him in the capacity in which he sues.’”).

Haulers resisted County’s motion to dismiss and they ignored County’s specific warning at the start of trial that “County is not consenting to try the case as a statutory tort. We believe it’s been pled as an implied contract and so that -- the only testimony that would be relevant would be what benefits were conferred by the Plaintiffs on St.

Louis County. . . .” *Tr. p. 5*. They cannot now convert their cause of action to one for statutory tort.

Section 260.247 RSMo Does Not Authorize A Private Cause Of Action For Damages Against County, Which Has Sovereign Immunity.

Even were this Court willing to disregard the theory of recovery pled by Haulers and upon which Haulers obtained judgment, and to construe Count II as a request for tort relief instead, Haulers’ claims would still fail. This is because Section 260.247 RSMo does not explicitly or by implication create a private right of action for damages based on violation of its provisions.

1) Breach of a statute generally does not give rise to a private cause of action.

It is a longstanding rule of law in Missouri that the legislature should not be presumed to have intended to create a private right of action for damages for violation of a statute unless it **explicitly** does so. “The creation of a private right of action by implication is not favored, and the trend is away from judicial inferences that a statute’s violation is personally actionable.” *Shqeir v. Equifax Industry*, 636 S.W.2d 944, 947 (Mo. banc 1982); *Champ v. Poelker*, 755 S.W.2d 383 (Mo.App. 1988).

In *Shqeir*, the trial court directed a verdict against plaintiffs on their claim for damages based on violation of a Missouri notice statute. That statute required that insurers give thirty days notice, by certified mail, of both the insurer’s intent to cancel coverage and the reason for cancellation. The purpose of the notice provision was so that insureds could mitigate the effects of the proposed cancellation (such as by persuading the insurer not to cancel, or by obtaining coverage elsewhere), just as the appellate court

herein has suggested that the purpose of the Section 260.247 RSMo notice provision is to “mitigat[e] the effects of a government's takeover of trash collection on that entity's business.” *American Eagle*, 272 S.W.3d at 336.

Notwithstanding the statute’s purpose to protect insureds, this Court in *Shqeir* concluded that an insurer’s failure to comply with the required notice provision did not give rise to a private cause of action for damages - even by an insured within the class of persons the legislation was obviously intended to protect. In so finding, the *Shqeir* court relied on the fact that the notice statute in question was “but a small part of a comprehensive statutory scheme designed to regulate the insurance industry.” *Shqeir v. Equifax Industry*, 636 S.W.2d at 948. The court noted the many enforcement provisions of the statute -- including the ability of the Director of Insurance both to impose an administrative penalty and to revoke an insurer’s license for failure to comply with the law – before finding that “[w]hen the Legislature has established other means of enforcement, we will not recognize a private civil action unless such appears by clear implication to have been the legislative intent.” *Id.* The court then found that the absence of an express creation of a private right of action was good evidence of legislative intent not to do so. *Id.*

Similarly, the Solid Waste Management Code (Sections 260.230-.345 RSMo) in which the notice/postponement requirements of Section 260.247 RSMo are contained, is also comprehensive. It extensively regulates solid waste and likewise provides for enforcement of its provisions by the State and not by private lawsuits. Section 260.249 provides for enforcement of the Solid Waste Management Code by the issuance of

administrative penalties by the Director of Natural Resources, or prosecution by the Attorney General. Some of the Code's particular provisions are enforceable by actions for injunctive relief, *see* Sections 260.230 and 260.240, and/or criminal prosecution, *see* Section 260.211. Haulers are therefore identically situated to the plaintiffs both in *Shqeir* and in *Johnson v. Kraft General Foods, Inc.*, 885 S.W.2d 334, 336 (Mo. banc 1994).

In *Johnson*, the Supreme Court declined to imply a private cause of action based on an alleged statutory violation by an employer. The plaintiff employee in *Johnson* claimed that he had been discharged in violation of a statute which prohibited the discharge of employees due to the existence of a withholding order for child support payments, and the trial court dismissed the petition for failure to state a claim. On appeal, the trial court's dismissal was sustained.

In sustaining the dismissal, the Court noted the critical fact that the Director of Child Support Enforcement was already authorized to enforce the statute:

The statute contains no express provision either establishing or prohibiting a private cause of action. There is, however, an express provision authorizing the Director of the Division of Child Support Enforcement to enforce the statute. . .

[L]egislative intent to create a cause of action exclusively in favor of the Division Director is implicit in the statute. The legislature manifested its intent to create such a cause of action by setting out expressly that particular means of enforcement. It follows that the legislature would have manifested its intent in like manner had it intended to create additional or alternative

means of enforcement. The failure to do so gives rise to the implication that the Division Director has the exclusive right to bring suit.

Id. at 336.

Over and over, the Missouri Supreme Court has rejected the creation of a private right of action for violation of a statute, absent an *express* creation of such a right by the legislature. In *R.J. Nichols Insurance Inc. v. The Home Insurance Co.*, 865 S.W.2d 665 (Mo. banc 1993), the statute required one-year notice prior to cancellation of an independent insurance contract, and also provided for enforcement of the notice provision by the Director of Insurance. The Supreme Court rejected a private cause of action for an independent insurance agency which did not receive the requisite notice:

Section 375.037 provides a remedy for the violation of §375.035 and there is no clear implication that the legislature intended to create a private cause of action for the violation of §375.035. Because the legislature has provided a means of enforcement for a violation of §375.035 and has not created a private cause of action for the violation of that section, the court properly sustained the motion for judgment on the pleadings.

Id. at 667. The *R.J. Nichols Insurance Inc.* plaintiff was identically situated to Haulers, who are also complaining about a lack of statutory notice that was enforceable by a state official (here, the Director of Natural Resources rather than the Director of Insurance).

And in *Dierkes v. Blue Cross and Blue Shield of Mo.*, 991 S.W.2d 662 (Mo. banc 1999), the plaintiffs charged the defendant insurer with, *inter alia*, breach of a statutory duty to notify the Division of Insurance and obtain approval prior to raising its premiums.

The trial court's dismissal of the plaintiff's causes of action based solely on the statutory violation was affirmed, with the Court noting that "this Court generally does not interpret a statute to establish a private cause of action." *Id.* at 668. Again, as it has consistently done in the past, this Court noted that the legislature had created "other means" of enforcing its statutes and stated that "[w]hen the legislature has established other means of enforcing its statutes, this Court will not recognize a private civil action for a violation unless such appears by clear implication to have been the legislative intent." *Id.* at 667.

2) Section 260.247 RSMo does not show legislative intent to create a private cause of action for damages.

In referring to "clear implication of legislative intent," the court is referring to clear implication of intent to create a private cause of action for damages, as opposed to clear intent to protect a particular group of persons. Thus in *Johnson v. Kraft General Foods, Inc.*, 885 S.W.2d at 336, the court found that "[e]ven if Johnson is a member of the protected class of persons under the statute, the legislature has not, by establishing that class, manifested any intention to provide protection to class members by means of a private cause of action." *See also Bradley v. Ray*, 904 S.W.2d 302 (Mo.App. 1995) (no private cause of action for failure to report child abuse as required by statute, even though child victim was "no doubt" within the class of people intended to be protected).

In *Wise v. Crump*, 978 S.W.2d 1 (Mo.App. 1998), the court likewise rejected the idea that a clear legislative intent to mandate a particular activity equated to a clear intent to create a private cause of action against those who failed to fulfill their statutory obligations. In considering the possibility of a private cause of action based on failure to

obtain insurance as required by the Motor Vehicle Financial Responsibility Law, the court found no legislative intent to create one because “instead of subjecting the vehicle owner to civil liability, the General Assembly has chosen to criminalize the failure to maintain financial responsibility. On this basis, we see no clear implication of legislative intent to create a private cause of action.” *Id.* at 3.

The reluctance to recognize a private cause of action for damages based on implied legislative intent has resulted in almost universal rejection of such claims. On the one occasion that this Court has recognized an implied cause of action, for employees who suffered retaliation for reporting violations of the Omnibus Nursing Home Act, the Court prefaced its analysis with the fact that the Act already did **expressly** create a private right of action for nursing home *residents*. *Bachtel v. Miller County Nursing Home District*, 110 S.W.3d 799, 800 (Mo. banc 2003). In *Bachtel*, employees filed suit claiming that they had been discharged in retaliation for reporting violations of the Omnibus Nursing Home Act. That Act expressly created a private cause of action for nursing home residents who suffered retaliation for exercising their rights under the act, against State providers as well as private ones. In recognizing a private cause of action for employees as well as for residents, the Court found an implied right of action for employees was “necessary to effectuate the purpose of the Act and to prevent the very evils the Act was designed to ameliorate.” *Id.* at 803.

In the case at hand, the appellate court’s suggestion that County was subject to the notice and postponement provisions of Section 260.247 RSMo does not require, or even permit, a finding that Haulers need or have a private cause of action for damages based

on County's alleged failure to provide statutory notice. The notice provisions of Section 260.247 RSMo call for a political subdivision to give two-year notice of an intent to provide for trash collection or, alternatively, for a two-year contract with the existing haulers. Failure to comply with the statute, if applicable, would subject County to numerous and varied potential consequences, such as: the imposition of administrative penalties by the Director of Natural Resources, *see* Section 260.249.1 RSMo; prosecution by the Attorney General and the imposition of civil penalties, *see* Section 260.249.4 RSMo; declaratory relief upon timely request by an existing hauler, *see Christian Disposal, Inc. v. City of Eolia*, 895 S.W.2d 632 (Mo.App. 1995) (requiring city to give notice to existing trash haulers); or the granting of injunctive relief if timely requested either by the Director of Natural Resources, *see* Section 260.249.1 (permitting the Director to seek "any other remedy provided by law") or by an affected party, *see Egan v. St. Anthony's Medical Center*, 244 S.W.3d 169, 173 (Mo. banc 2008) (finding that the general rule against a private right of action to enforce a state statute pertains to *damages* and does not preclude injunctive relief).

But a private right of action for damages, not having been expressly created by the very same legislature which did create a right of action for the Director of Natural Resources, simply does not exist. When the legislature intends to create a private right of action for damages, it obviously knows how to do so and the courts will defer to that decision. Thus in *Stiffelman v. Abrams*, 655 S.W.2d 522 (Mo. banc 1983), the court allowed a private cause of action for damages to go forward based on a nursing home's failure to comply with provisions of the Omnibus Nursing Home Act, because the Act

specifically established a cause of action for violations of the Act. The court observed that:

It is a key feature of the Act, adopting the “private attorney general” concept, with the inducement of recoverable actual damages, and in some instances, punitive damages and attorney's fees, all to the end of securing maintenance of nursing home standards. The legislature well could have included it upon the rationale “that government cannot do everything and that some requirements of the Act can best be enforced by those most directly involved.”

Id. at 530 (citation omitted).

In enacting Section 260.247 RSMo the legislature “well could have” included a private cause of action for violation of Section 260.247 RSMo but did not choose to do so. The legislature *did* require that two-year notice be given, and *did* provide as an alternative to notice by certified mail the option of allowing existing haulers to provide their services for two more years under contract with the political subdivision . . . but the legislature did not give existing haulers a private right of action for damages should the political subdivision not select either option.

Interestingly, the legislature amended Section 260.249 RSMo at the same time it amended Section 260.247 RSMo to include political subdivisions in the notice requirements.⁷ Section 260.249 RSMo immediately follows Section 260.247 RSMo and

⁷ Section 260.247 RSMo was also amended via S.B. 54. *See S.B. 54 (2007), Exh. B.*

sets out the various methods for enforcement of Section 260.247 RSMo, but despite being under review simultaneously with Section 260.247 RSMo, the legislature chose not to include the possibility of private damage claims as an enforcement tool. Instead of creating a private cause of action for damages, the legislature continued to commit enforcement of the Solid Waste Management Code to the Director of Natural Resources and to the Attorney General. The courts should not interfere with that decision.

3) Creation of private cause of action would not further the goals of Section 260.247 RSMo.

Apart from the absence of either express language or a clear indication of legislative intent to create a private right of action, an additional reason for rejecting a private cause of action under Section 260.247 RSMo is the fact that permitting such a lawsuit to go forward would not promote the primary goal of that section. “A private remedy will not be implied when it does not promote or accomplish the primary goals of the statute.” *Shqeir v. Equifax Industry*, 636 S.W.2d at 948 (finding that the creation of a private right of action for damages for plaintiffs who were not given adequate notice of insurance cancellation was not necessary to accomplish the legislative purpose of giving the insured an opportunity to appeal or find insurance elsewhere); *Hartsfield v. Barkley*, 856 S.W.2d 342, 345 n.3 (Mo.App. 1993) (finding that creation of a private right of action for damages for plaintiffs who claimed violation of car dealer licensing requirements would not promote or accomplish the statute’s goals).

Haulers herein are similarly situated to the plaintiffs in *Dept. of Social Services v. Brundage*, 85 S.W.3d 43 (Mo.App. W.D. 2002), wherein an estate’s creditors sought

relief from the estate's distributor for failure to comply with statutory requirements concerning liquidation of the estate. In rejecting the creditors' efforts to enforce their rights through a separate cause of action (rather than by proactive participation in the probate process), the court found that the creation of a private cause of action would "encourage creditors to be less than diligent in pursuing their claims." *Id.* at 48.

Allowing Haulers to pursue a private cause of action for damages based on failure to give notice would not serve the attributed purpose of Section 260.247 RSMo, which is to mitigate the effects of County's trash collection program. As in *Brundage*, Haulers were dilatory in pursuing their claimed rights. Rather than promptly seeking injunctive relief as they could have done, *see Egan v. St. Anthony's Medical Center*, 244 S.W.3d at 173, or seeking timely declaratory relief, Haulers chose to wait nearly a year after the expanded requirements of Section 260.247 RSMo were enacted to file suit, and only after they had unsuccessfully submitted bids to participate in the very program which they now decry.

Haulers' decision to forego seeking timely declaratory or injunctive relief, in favor of trying to secure business under the new program, does not reflect any genuine interest in enforcing the notice requirements which they now so passionately advocate. Creating a cause of action for the purpose of accommodating Haulers' maneuvers would not further the purpose of helping them adjust to an altered business situation. Nor would the award of the windfall damages they seek, far in excess of any profits Haulers might have earned had they performed services under a contract with County, serve to mitigate the effects of County's Program but would instead serve only to punish the taxpayers of St.

Louis County. Permitting Haulers to proceed with a private cause of action in lieu of relying on the enforcement mechanisms provided in the statute, or on Haulers' own ability to seek timely declaratory or injunctive relief, would detract from rather than promote the stated goal of the statutory notice requirement.

4) County would have sovereign immunity from tort claim for damages.

As noted *supra*, Haulers have not pled a claim for statutory tort, and even if they had there is no private cause of action for damages for violation of Section 260.247 RSMo. Yet even were the court to find by implication the existence of a private cause of action for damages based on violation of Section 260.247 RSMo, this would still be insufficient to prevent the entry of judgment for County on Haulers' claims.

St. Louis County is a political subdivision of the State of Missouri and, as such, is generally protected by sovereign immunity from damages for claims such as Haulers'. See *Fischer v. Steward*, 2010 WL 147865, slip opn. p. 11 (E.D. Mo. 1/11/10) (stating that counties are entitled to complete common law immunity). This is the case unless sovereign immunity is waived, and "[t]he waiver of sovereign immunity . . . must be by express consent to be sued." *Krasney v. Curators of the University of Mo.*, 765 S.W.2d 646, 650 (Mo.App. 1989). "The intent of the legislature to waive sovereign immunity must be express rather than implied." *Bachtel v. Miller County Nursing District*, 110 S.W.3d at 804 (finding that "the express statement of legislative intent to allow suits against the State is provided by the terms . . . expressly giving residents who are retaliated against the right to sue nursing home facilities").

Additionally, "[w]hen a state consents to be sued, it may be sued only in the

manner and to the extent provided by the statute; and the state may prescribe the procedure to be followed and such other terms and conditions as it sees fit.” *Charles v. Spradling*, 524 S.W.2d 820, 823 (Mo. banc 1975). Sovereign immunity need not be pled as an affirmative defense but rather “the plaintiff bears the burden of pleading with specificity facts giving rise to an exception to sovereign immunity when suing a public entity.” *Richardson v. City of St. Louis*, 293 S.W.3d 133, 137 (Mo.App. E.D. 2009).

Here, Haulers have pled no facts suggesting any exception to the rule of sovereign immunity and County does have sovereign immunity from damages. Just as the State’s Solid Waste Management Code lacks any language expressly creating a private right of action for damages, so, too, does it lack any express waiver of sovereign immunity.

Haulers’ labeling of their claim as one for breach of implied-in-law contract, rather than as one for statutory damages, does not entitle them to relief from the shield of sovereign immunity if they are in fact seeking recovery for a statutory tort. While breach of implied-in-law contract may be actionable notwithstanding sovereign immunity, it is not actionable for recovery of *tort* damages such as the \$23 million sought by Haulers; it is actionable only for equitably based relief. Accordingly, the plaintiff in *Investors Title v. St. Louis County*, 217 S.W.3d 288, was able to force the return of its excess recording fees, and the plaintiff in *Karpierz v. Easley*, 68 S.W.3d 565 (Mo.App. 2002), was permitted to recover the money which had been wrongfully seized from him; neither case involved the recovery of tort damages in derogation of the law of sovereign immunity.

Kubley v. Brooks, 141 S.W.3d 21 (Mo. 2004), illustrates perfectly why it would be erroneous to permit Haulers to go forward on the claim they characterize as one for

breach of a contract implied in law. In *Kubley*, a mother was wrongfully ordered by the State Department of Child and Family Services (“State”) to pay child support. When she failed to do so, she was jailed for five days. She then began making payments, but also filed suit against the State for return of her money under an implied-in-law contract theory of recovery.⁸ And in addition to asking that her money be returned, the mother also requested the payment of actual and punitive damages.

The court found in favor of the mother on her implied-in-law contract, holding that there was no sovereign immunity for an implied-in-law contract claim and that the State should not be allowed to *keep* the money it had wrongfully obtained from her. But the court ruled against the mother on her claim for actual and punitive damages, finding that the State’s sovereign immunity protected it from such tort claims:

Ms. Brooks claims that the court erred in failing to award her actual damages against DCSE because a contract exists between the State and its citizens “whereby the State agrees with the parents and children to assure the financial support of the children in a fair and equitable manner and in return saves the State considerable expense for child care.” **Despite her assertion to the contrary, Ms. Brooks’ claim here clearly sounds in tort.** She seeks actual damages against DCSE for the injury caused by her incarceration and the loss of time with her children. These are not contract damages. . . . Ms.

⁸ The father was receiving Aid for Dependent Children and had assigned his right of collection to the State.

Brooks' claim for actual damages against DCSE is barred by sovereign immunity.

Id. at 32-33 (emphasis added).

Haulers' attempt to obtain some \$23 million in damages for alleged violation of Section 260.247 RSMo makes it abundantly clear that they are seeking windfall tort damages and not the disgorgement by County of funds wrongfully obtained and retained by breach of an implied-in-law contract. Haulers have failed to plead facts to nullify County's sovereign immunity, and County is therefore entitled to judgment even if their pleadings are ignored and they are allowed to seek recovery for a statutory tort.

V. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT A CLAIM FOR EITHER RESTITUTION OR DAMAGES, IN THAT THE TESTIMONY AND EXHIBITS SUPPORTING THEIR CLAIM ALL WERE PROVIDED BY A HIRED ACCOUNTANT WHO RELIED ONLY ON HEARSAY DATA THAT WAS NOT REASONABLY RELIABLE SO THAT THE TESTIMONY AND EXHIBITS SHOULD HAVE BEEN EXCLUDED PURSUANT TO SECTION 490.065 RSMo.

The entirety of Haulers' evidence on damages consisted of the testimony and attendant reports of a single witness, an accountant ("Accountant") who was retained by Haulers for the purpose of testifying at trial. Although qualified by the trial court as an expert, little if any of Accountant's testimony could be described as "expert" in nature. Instead, the bulk of Accountant's testimony consisted of Accountant parroting to the court out-of-court information which he testified had been provided to him by Haulers.⁹ Thus, Accountant testified that Haulers had told him they had "x" number of customers

⁹ Haulers insist that Accountant "relied upon the actual databases maintained by the Haulers in the normal course of business. . . ." *Haulers' Brief* p. 46. But there is no evidence in the record that this was so; again, Accountant was simply testifying to the hearsay statements allegedly made by the Haulers who provided those databases.

when County began its Program and that Haulers had told him they charged their customers “y” amount of money each month. Accountant’s proffered expertise consisted of multiplying those unverified numbers together to obtain a calculation of claimed lost revenue. While Accountant was surely qualified to perform this mathematical calculation, no expertise was required to do so. The fact that the calculations were made by a person qualified as an expert in some capacity does not make the underlying hearsay any more reliable or admissible.

Haulers insist that Accountant’s hearsay testimony was admissible and reliable because his “*uncontroverted and repeated* testimony was that the information upon which he relied in calculating Haulers’ damages is of the kind reasonably relied upon by experts in the field.” *Haulers’ Brief* p. 47 (emphasis in original). What Haulers ignore is that it is the prerogative of the court, not the witness, to assess the reliability of the underlying facts and data. Section 490.065.3 RSMo permits expert testimony only to the extent it is based on facts and data that are “reasonably reliable,” and it is the duty of **the court** to make an independent assessment of that reliability. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 310-11 (Mo. banc 2011). *See also State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003):

[S]ection 490.065.3 goes on to require that the facts or data on which an expert bases an opinion or inference “must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject” and that these facts and data “must be otherwise reasonably reliable.” . . . *The court must also independently assess their reliability.*

Id. at 156 (emphasis added).¹⁰ Here, the unreliability of the information used by Accountant is palpable.

Given Accountant's explicit statement that he was not attesting to the accuracy of the information upon which he based his testimony, *Tr. p. 70*, and that Haulers even prevented him from verifying the accuracy of certain information upon which he relied, *Tr. 73-74*, his testimony should have been excluded. There was no basis for the trial court to accept into evidence unreliable hearsay facts and data for which **no one** claimed accountability. Haulers offered no testimony by anyone with personal knowledge as to any of the information that would have supported Accountant's calculation of damages, such as the revenues Haulers had historically achieved from the areas in question, the number of customers they historically had served in those areas, the number of customers they projected to have over the period in question (and the basis for such projections), their billing or collection history, their financial records or any other information about their business that would have provided a basis to project lost revenue into the future. Nor did Haulers offer into evidence a single business record from which any such information could have been derived. Because Haulers offered only inadmissible hearsay testimony to support their claim for damages, there is no foundation to support the entry

¹⁰ Haulers mistakenly informed the Court that County had not supported its position with any case law subsequent to enactment of the current version of Section 490.065.

Haulers' Brief pp. 48-49. Both these cases, as well as other post-amendment cases, were cited in County's original brief.

of a judgment for damages in their favor.

In attempting to prop up Accountant's testimony, Haulers disparage County's citation to case law calling for the exclusion of hearsay testimony by lay witnesses, *Haulers' Brief* pp. 48-49, suggesting that general restrictions on hearsay evidence do not apply to experts. But Haulers are wrong; expert testimony must be based upon competent evidence, *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W. 3d 573, 592 (Mo. App. 2004) , and "an expert witness 'may not under the guise of giving the basis of his opinion lug into evidence that which otherwise is incompetent.'" *Stallings v. Washington University*, 794 S.W.2d 264, 271 (Mo. App. 1990) (citation omitted). It was an abuse of discretion for the trial court to allow Accountant to "lug into evidence" unverified, unreliable information provided to him by those very persons who, Accountant even acknowledged, stood to gain by exaggerating their losses:

Q. All three Plaintiffs have a financial stake in your opinion of lost revenues don't they?

A. They do.

Q. The higher your opinion of lost revenues based on the information they give you the more they stand to gain, is that right?

A. Yes.

Tr. p. 91. The evidence admitted by the court was inherently unreliable and the court should have excluded it and entered judgment for County.

VI. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS WAIVED AND WERE ESTOPPED FROM ASSERTING THEIR RIGHT TO CHALLENGE COUNTY'S WASTE COLLECTION PROGRAM IN THAT HAULERS VOLUNTARILY PARTICIPATED IN THE PROGRAM AND CANNOT CHALLENGE THE PROGRAM'S VALIDITY AFTER HAVING ACCEPTED BENEFITS FROM IT.

Haulers' challenge to County's Program followed many months of their participation in implementing the Program. Both by public comment and through private meetings with County officials, Haulers sought to shape the Program in ways favorable to their own interests. They took these actions well after the notice provision in Section 260.247 RSMo had been enacted. Haulers then submitted multiple bids in their efforts to become selected as Program haulers. Only after fully participating in the process and learning that their bids were unsuccessful did Haulers file suit to stop the Program on the basis that its implementation was not lawful. Haulers' full participation in the process constituted a waiver of their right to challenge the Program, and County is therefore entitled to judgment on their claim.

Haulers acknowledge that rights can be waived, but contend that waiver is only an equitable defense which cannot bar their action for damages. *Haulers' Brief* p. 51. Haulers are wrong, however. Waiver arises in many situations and is not limited to equitable cases - affirmative defenses, for instance, are waived if not raised in a timely

manner, *see McCracken v. Wal-Mart Stores East, LP*, 298 S.W.3d 473, 476 (Mo. 2009); *Brown v. State Farm Mutual Automobile Insurance Agency*, 776 S.W.2d 384 (Mo. banc 1989) (pertaining to a vexatious refusal to pay case). Haulers' purposeful and strategic decision to participate in County's Program precludes them from thereafter challenging the Program once they learned that their participation was to no avail.

VII. TRIAL COURT ERRED IN ENTERING JUDGMENT IN THE AMOUNT OF \$1,156,903.90 FOR HAULERS BECAUSE EVIDENCE OF ALLEGED DAMAGES SUBSEQUENT TO DECEMBER 12, 2008 SHOULD HAVE BEEN EXCLUDED, IN THAT HAULERS HAD ACTUAL NOTICE OF COUNTY'S INTENT TO IMPLEMENT A WASTE COLLECTION PROGRAM ON DECEMBER 12, 2006 AND THE TWO-YEAR NOTICE PERIOD ESTABLISHED IN SECTION 260.247 RSMo BEGAN TO RUN ON THAT DATE.

It is undisputed that Haulers were notified on December 12, 2006, that County intended to establish a waste collection program which would involve the division of unincorporated County into multiple collection areas to be served by designated haulers who were the most responsible bidders to perform those services. *Exh. A p. 56; Exhs. D-1, D-2, D-3 (Answer #13)*. It is also undisputed that Haulers received further notice of County's intent to implement its Program by letters dated January 8, 2007, which informed them that "[t]rash collection districts for unincorporated St. Louis County are to be established and contracts in place by January 15, 2008." *Exhs. G-1, G-2, G-3*. Nowhere in their brief have Haulers denied these facts.

Instead, Haulers argue that notice under Section 260.247 RSMo is mandatory and not directory. *Haulers' Brief pp. 54-55*. Haulers' argument again misses the mark. Even assuming that to be the case, the fact remains that Haulers *did* receive notice, and that the notice they received was superior to that required by the statute. While Section 260.247 RSMo calls only for notice by certified mail, which permits the *presumption* of

actual notice, *see Walkenhorst-Neman v. Montgomery Elevator*, 37 S.W.3d 283, 286-87 (Mo.App. 2000), County gave and Haulers admit they received *actual* notice to the Haulers of its impending Program.

Unable to refute that they received actual notice in 2006 of County's intent to begin a waste collection program, Haulers also challenged the sufficiency of their notice based upon the unstated (and unfounded) assumption that Section 260.247 RSMo requires notice not of "intent," as the statute actually states, but rather of "unequivocal intent." Thus, Haulers argue, enactment of an ordinance directing the establishment of collection areas and authorizing the bidding and execution of collection contracts could not have given them actual notice "that the County **unequivocally** intended to implement its Program in December of 2006, as the County claims." *Haulers' Brief* p. 55 (emphasis added).

Although language requiring "unequivocal" intent is nowhere to be found in the statute, Haulers persuaded the trial court that notice of "unequivocal" intent was required. So instead of assessing damages for the three months by which County's Program preceded the end of the two-year notice period (that is, from the date the Program began in October of 2008 until the two-year notice period ended in December of 2008), the court awarded damages for the two-year period beginning only when the court determined that County's intent became unequivocal: when the contracts were awarded in 2008. Haulers thereby became the beneficiaries of a nearly two-year damages period, ending in 2010, instead of getting damages for the three months by which their notice was arguably curtailed.

County has never claimed, and never had reason to claim, that its intent to implement a waste collection program became “unequivocal” when the Program was authorized in 2006. To the contrary, County stated the exact opposite in its opening brief when it argued that “[t]he statute requires only notice of ‘intent’ to provide for trash collection; it does not require a firm commitment.” *County Brief p. 81*. Although the trial court accepted Haulers insupportable rewriting of Section 260.247 RSMo to require notice of “unequivocal intent,” Haulers have offered no reason for this Court to do so in derogation of the actual language used in the statute. In fact, the statute clearly does *not* require that intent be unequivocal when the two-year notice is given, in that the statute also provides for the possibility that a program will not begin despite two-year notice having been given:

If for any reason the city or political subdivision does not exercise its option to provide for or contract for the provision of services within an affected area within three years from the effective date of the notice, then the city or political subdivision shall renotify under subsection 1 of this section.

Section 260.247.2. The General Assembly affirmatively permitted abandonment of an announced program, which would be inconsistent with also requiring that intent to begin the program be “unequivocal.”

Nor should this Court be swayed by Haulers’ argument that it would have been unreasonable for Haulers to begin “winding down” their businesses before contracts for collection had been awarded. While courts have spoken of giving an existing hauler time “to make necessary business adjustments prior to having its services terminated in a

given area,” *Weber v. St. Louis County*, 342 S.W.3d 318, 323 (Mo. banc 2011), quoting *American Eagle*, 272 S.W.3d at 342–43, such “business adjustments” do not necessarily imply “wind[ing] down” or “selling equipment, firing employees, etc. . . .” *Haulers’ Brief* pp. 53-54. Instead, existing haulers could more profitably use the adjustment period to streamline their operations and be ready to make a competitive bid to provide services, or to re-allocate their resources to areas outside the Program area. The fact that Haulers chose not to use the notice period effectively is not a reason for extending it at County’s expense, and the trial court’s judgment should be reversed.

CROSS-RESPONDENT ARGUMENT

I. TRIAL COURT DID NOT ERR IN REDUCING THE AMOUNT OF DAMAGES SOUGHT BY HAULERS TO AVOID A WINDFALL JUDGMENT WHICH WOULD HAVE BORNE NO RELATIONSHIP TO ANY PUTATIVE DAMAGES SUSTAINED BY HAULERS (POINTS I, II AND III).

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed 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.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

HAULERS NOT ENTITLED TO \$23 MILLION JUDGMENT

Contrary to the express language of the relevant statute, to case law and to common reason, Haulers have sought recovery of \$23 million in damages on their implied-in-law contract claim. Haulers' claim for \$23 million represents the amount of gross revenues they claim they would have billed to existing and anticipated future customers during the two-year period following County's award of waste collection contracts to the successful bidders in County's Program. Although County does agree with Haulers that the trial court's judgment against County “is *entirely* unsupported by any evidence,” *Haulers' Brief* p. 70 (Haulers' emphasis), County does not agree that this Court should disturb the trial court's decision “not . . . to give an inflated or exaggerated measure of damages, or to award a windfall judgment.” *Findings of Fact, Conclusions of*

Law and Judgment, LF p. 159. If the trial court's judgment is not reversed for the reasons set forth in County's appeal, it should not be reversed for having denied Haulers the windfall recovery they requested.

Haulers' argument is premised upon their misconstruction of Section 260.247 RSMo. Contrary to Haulers' assertions, that statute does not establish a measure of damages for breach thereof. Rather, Section 260.247.3 RSMo provides that **if** a political subdivision enters into a contract for waste collection services with an existing provider, **then** "the amount paid by the city shall be at least equal to the amount the private entity or entities would have received for providing such services during that period." So, Section 260.247 RSMo establishes a rate of payment for haulers who enter into contracts with political subdivisions for waste collection services, and requires that such haulers continue *while under contract* to the political subdivision to be paid the amounts they would otherwise have received. But Section 260.247 RSMo does not set forth a measure of damages where, as here, haulers do not enter into contracts to continue providing services for the two-year notice period and do not perform those services.¹¹

Accordingly, the trial court appropriately reconsidered her pretrial decision to award damages based only on Haulers' anticipated gross revenues without deducting the business expenses that Haulers would have incurred in generating those revenues. In having stated that pretrial damages would be awarded based on gross revenues only, the

¹¹ County of course believes that its activities are not governed by Section 260.247 RSMo, and that no private cause of action for damages would exist even if it did.

court had misconstrued the plain words of Section 260.247 RSMo. Although the statute calls for payment to contracted haulers of the amounts they “would have received for providing such services,” the trial court originally concluded that existing haulers were entitled to that amount from County regardless of whether they contracted for and provided any waste collection services. The trial court’s final judgment, however, properly recognized that awarding Haulers the revenues they would have received without deducting the expenses they would have incurred would indeed be a windfall, contrary to the established law for the award of damages.

“The goal of awarding damages is to compensate a party for a legally recognized loss ... [and a] party should be fully compensated for its loss, but not recover a windfall.” *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting*, 279 S.W.3d 179, 184 (Mo. banc 2009) (citation omitted). When it comes to redressing business losses, “[i]n general, in calculating lost profits damages, lost revenue is estimated, and overhead expenses tied to the production of that income are deducted from the estimated lost revenue.” *Ameristar Jet Charter, Inc. v. Dodson Internat’l Parts, Inc.*, 155 S.W.3d 50, 55 (Mo. banc 2005). The obvious reason for deducting expenses is to prevent the very type of windfall argued for by Haulers. “[T]he law will not place plaintiff in a better position than he would have been had the contract been completed on both sides.” *Boten v. Brecklein*, 452 S.W.2d 86, 93 (Mo. 1970) (citation omitted). Thus:

General rules applying to the measure of damages for breach of contract are stated as ‘the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it

has entailed * * *. Compensation is the value of the performance of the contract; the person injured is, as far as it is possible to do so by a monetary award, to be placed in the position he would have been in had the contract been performed. He is entitled to the benefit of his bargain, that is, whatever net gain he would have made under the contract.

Id. See also Overcast v. Billings Mutual Insurance Co., 11 S.W.3d 62, 67 (Mo. banc 2000) (“The damage amount should place the insured in the position he would have been in had the contract been performed”).

At least in their First Amended Petition, Haulers spoke in terms of their lost “profits” rather than just lost revenues, *see LF p. 60*, which signifies their initial recognition that expenses would be deducted in the calculation of any damages. This recognition was appropriate, as there is simply no room for doubt that expenses must be reflected in any award of damages pertaining to lost business.

To base an award of damages on revenues only would have been grossly excessive; Haulers’ own Accountant conceded that it was unheard of and that it would have been impossible for Haulers to have generated revenues without incurring expenses:

Q. Other than this case, you've never used gross revenues as a measure of business losses, is that correct?

A. No, I've not.

Q. Okay. And it would have been impossible for these Plaintiffs to generate revenues for waste collection services without paying for labor and equipment, is that right?

A. That's outside my scope of what my report is for here. . . .

Q. I'm saying whether they could have provided them without paying for labor and equipment?

A. Oh. No.

Tr. 108.

Further underscoring the absurd overreach of Haulers' request is the fact that, by not being under contract to County, they retained the use of their equipment and labor and were therefore able to generate elsewhere some or all of the revenues they now seek to obtain from County. The court's ultimate determination that Haulers should not be allowed a recovery of total lost revenues - an amount many multiples in excess of their likely net profits - was justified, and no less reasonable than Haulers' apparent belief that the accuracy of their unverified revenue numbers should be accepted. "Because lost profits are of a character that defies exact proof, the trial court had a greater degree of discretion to weigh the lost-profits award *based on common experience*" *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting*, 279 S.W.3d at 186 (emphasis added). The trial court's judgment reflected the common experience that business revenues cannot be created without the expenditure of money to do so.

Had the trial court determined otherwise and permitted Haulers to recover total lost revenue, the judgment would have violated Mo. Const. Art. VI §25, which prohibits

counties from granting public money to private persons or corporations.¹² County cannot simply give Haulers unearned money, and could not do so even if the statute were construed as permitting it. *See St. Louis Children's Hospital v. Conway*, 582 S.W.2d 687, 690 (Mo. 1979) (although city's charter permitted granting air rights over its street, city could not do so gratis for the benefit of a private hospital in violation of Mo. Const. Art. VI §25). There would be no public purpose in paying these Haulers sums far in excess of and unrelated to any damages they could possibly claim to have sustained. *See State ex rel. Wagner v. St. Louis County Port Authority*, 604 S.W.2d 592, 597 (Mo. banc 1980) (expenditures which have a public purpose are those which are for "support of the government or for some of the recognized objects of government, or directly to promote the welfare of the community. . ."). Such an award, being far in excess of what would have compensated Haulers for any loss, would further be punitive rather than compensatory, and punitive damages against County are prohibited by Section 537.610.3 RSMo. To pay Haulers for services that were not provided, in amounts far in excess of any damages they could claim to have sustained, would violate the Missouri Constitution and Missouri statutes and should not be considered.

¹² This point was raised by County as an affirmative defense. *See Deft's Third Amended Answer, LF p.141.*

II. TRIAL COURT DID NOT ERR IN DISMISSING COUNT III ALLEGING VIOLATION OF MISSOURI'S ANTITRUST LAW, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED (POINT IV).

STANDARD OF REVIEW

Motions to dismiss for failure to state a claim address only the adequacy of the petition, *Bosch v. St. Louis Healthcare Network*, 41 S.W.3d 462, 463-64 (Mo. banc 2001), and issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

HAULERS DID NOT ALLEGE A CLAIM UNDER MISSOURI ANTITRUST LAW

In Count III of their First Amended Petition, Haulers alleged that County is liable to them for having “implemented exclusive or monopoly trash hauling districts in unincorporated St. Louis County.” *LF p. 61*. Haulers cited Section 416.031 RSMo of the Missouri Antitrust Law as authority for their allegation; Section 416.031 provides that “[e]very contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful” and that “[i]t is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state.” On August 5, 2010, the trial court granted County’s Count III for failure to state a claim.

Assuming *arguendo* that County’s Program could be construed as a monopoly, the trial court was nonetheless correct in dismissing Count III because County is immune from antitrust liability by reason of Section 416.041 RSMo. That section provides that “[n]othing contained in the Missouri antitrust law shall be construed to apply to activities

or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state.” This “state action” exemption eviscerates Haulers’ antitrust claims and requires affirmation of the trial court’s dismissal.

County’s Program is similar to the program addressed in *L&H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517 (8th Cir. 1985).¹³ In that case, the city awarded one waste hauler an exclusive franchise for solid waste disposal. An unsuccessful bidder filed a claim under the Sherman Act, alleging as do Haulers herein that the awarding of an exclusive solid waste disposal contract constituted a monopoly and restraint of trade.

The *L&H Sanitation* court rejected the losing hauler’s claim and instead found that the state action exemption to the Sherman Act shielded the municipality from antitrust liability where the municipality’s activities were authorized by the State pursuant to state policy to displace competition with regulation or monopoly public service. *Id.* at 520. The court noted that municipalities were not obligated to demonstrate active supervision by the state, but only that the alleged anticompetitive conduct was authorized by the state

¹³ The Missouri Antitrust Law (or Act) “closely parallels provisions of the Sherman Act of federal antitrust law,” *Defino v. Civic Center Corp.*, 718 S.W.2d 505, 510 (Mo.App. 1986), and Section 416.141 RSMo provides that the statutes comprising the Missouri Antitrust Law “shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes.” Thus, it is appropriate for this Court to be guided by federal cases addressing the question of state action immunity in comparable circumstances.

and that the state intended to displace competition. Because the Arkansas Solid Waste Management Act granted authority to regulate solid waste management and enter into agreements to provide solid waste management and disposal, no claim was stated against the city for antitrust violations.

Further interpreting the Arkansas statutes, the Eighth Circuit noted that while the Arkansas statutes did not expressly state that municipalities could grant exclusive franchises, the legislative intent to displace competition could be inferred from the statutory scheme because it was a “necessary and reasonable consequence of engaging in the authorized activity.” *Id.* at 521. *See also Superior-FCR Landfill, Inc. v. County of Wright*, 59 F.Supp.2d 929, 933 (D. Minn. 1999) (state action immunity found where the state statute granted authority to regulate, and the local government’s acts were the foreseeable result of the state authorization.); *Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County*, 867 F.Supp. 1430, 1436 (D. Minn. 1994) (where statute empowers a county to require that all or any portion of the solid waste generated within its boundaries be delivered to a designated facility, “[i]t is obvious that anti-competitive effects would result from such a broad grant of authority to regulate the disposal of solid waste”).

L&H Sanitation, Inc. has been cited and followed outside the Eighth Circuit as well as within. *See Southern Disposal, Inc. v. Texas Waste Management*, 161 F.3d 1259, 1263 (10th Cir. 1998) (finding that with respect to grant of an exclusive waste hauling franchise by an Oklahoma local government, “although the enabling statute does not expressly authorize exclusive contracts, such agreements are a foreseeable result of the general statutory authority to contract”). The *Southern Disposal, Inc.* court referred to

the facts of *L&H Sanitation* as “strikingly similar.”

Likewise, the facts at hand are strikingly similar to those in both *L&H Sanitation* and in *Southern Disposal, Inc.* Governmental contracts for the collection of waste have been generally authorized and anticipated by the Missouri General Assembly. See Section 71.680 RSMo (authorizing cities to “provide for the gathering, handling and disposition of garbage, trash . . . and municipal waste accumulating in such cities either by itself, or by contract with others . . .”); Section 260.215 RSMo (authorizing cities and counties to provide for the collection and disposal of solid wastes and to contract with any person to discharge the responsibilities for storing and transporting waste). Indeed, Section 260.215 RSMo has been explicitly recognized as being the clear source of authority for municipalities to award exclusive contracts for the collection without violation of Missouri antitrust law. *Massengale v. City of Jefferson*, 2011 WL 3320508 (W.D.Mo. 8/2/11), slip opn. at 9.

Haulers acknowledge that “the collection of waste is a state-regulated and even authorized activity which may fall under the state action exemption.” *Haulers’ Brief* p. 73. They argue, however, that County’s noncompliance with the notice requirements of Section 260.247 RSMo vitiates County’s state action exemption. Insofar as County did not violate the notice provisions of Section 260.247 RSMo because those provisions were inapplicable to County, see *County Brief Points I - III*, Haulers have failed to provide any basis for recovery under the Missouri Antitrust Act and dismissal of Count III was appropriate.

But even if the notice provisions were applicable to County, any missteps in

implementing its Program would not render County's underlying activities anticompetitive. County's method of entering into the business of waste collection does not alter the fact that "[s]tate action immunity shields municipalities from antitrust liability . . . when the municipality has the authority to regulate and to suppress competition." *Four T's, Inc. v. Little Rock Mun. Airport Com'n*, 108 F.3d 909, 913 (8th Cir. 1997), citing *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370 (1991). By virtue of Section 260.215 RSMo alone, County has clear authority to regulate waste collection and to suppress competition in that field.

In support of their argument, Haulers have cited the case of *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310 (8th Cir. 1991). *Haulers' Brief* p. 73. *Paragould Cablevision*, however, actually supports dismissal of Haulers' claim. In *Paragould Cablevision*, a city's entry into the cable television business was challenged as anticompetitive based in part upon "the method chosen to effectuate this entry." *Id.* at 1313. Yet dismissal of the plaintiff's claim was upheld on appeal even against the "searching antitrust scrutiny" which is defeated "only if the anticompetitive consequence necessarily and reasonably results from engaging in the authorized activity." *Id.* at 1312. This was because the authorizing statutes were - just as are the many statutes pertaining to waste collection in Missouri - deemed to be "broad," "sweeping," and "comprehensive," so that the city's actions were permissible "despite the anticompetitive implications of [the city's] particular conduct." *Id.* at 1313.

Nor are Haulers' antitrust claims saved by *Fischer, Spuhl, Herzwurm & Associates, Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310 (Mo. banc 1979). The

Fischer defendants were charged with “engaging in unlawful contracts, combinations, undertakings or conspiracies” in the insurance business. *Id.* at 311. They tried to escape potential antitrust liability for their actions by arguing that because the insurance industry was regulated by the state, its activities were therefore exempt under the “state action” exemption.

This Court rejected the defendants’ argument, noting that “[t]o say that certain activities, otherwise proscribed by the Act, are exempt because they are approved by the state or in compliance with the legislature’s regulatory scheme for a given industry, is quite a different matter from saying that because an industry is regulated, its activities are exempt from the Act. . . .” *Id.* at 313. Here, County’s regulation of waste collection activities is itself approved and authorized by the state, and it is the state approval of those specific activities which exempts County from antitrust liability. Haulers’ complaints about County’s method of entry into the waste collection business do not negate County’s authority to do so.¹⁴

Because Missouri’s statutes authorize regulation by County in the area of solid waste hauling, and grants of exclusive franchises for waste hauling by County are the

¹⁴ Haulers emphasized the Court’s statement in *Fischer* that anticompetitive activities are exempt if “compelled” by state regulations. *Haulers’ Brief* p. 73. But this Court specified that it is not just “compelled” activities that are protected, but also “activities or arrangements expressly *approved*’ by the state.” *Fischer*, 586 S.W.2d at 314 (emphasis added).

foreseeable result of the statutes that require solid waste collection and permit contracts for that purpose, County is immune from antitrust liability under the state action doctrine and Count III was properly dismissed.

III. COURT DID NOT ERR IN DECLINING TO AWARD PREJUDGMENT INTEREST TO HAULERS (POINT V).

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed 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.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

PREJUDGMENT INTEREST NOT AUTHORIZED

Even now, Haulers have refused to commit to a particular cause of action, arguing only that they have stated *some* kind of actionable claim “regardless of the title placed upon Haulers’ claim and the technical characterization of the benefit the County received” *Haulers’ Brief* pp. 38-39. But regardless of whether their claim is characterized as implied-in-law contract or as a private cause of action based on violation of a statute, they are not entitled to prejudgment interest under Section 408.020 RSMo.

Haulers acknowledge that Section 408.020 RSMo authorizes prejudgment interest only for claims which are liquidated or reasonably ascertainable. *Haulers’ Brief* p. 76. If construed as an implied-in-law contract, Haulers have asserted a claim which “is not a contract at all but an obligation to do justice” *Haulers’ Brief* p. 39, quoting *Karpierz v. Eastley*, 68 S.W.3d 565, 570 (Mo.App. 2002). An “obligation to do justice” is not a liquidated claim.

If construed as a private cause of action based on a statutory violation, Haulers’ lawsuit asserts a tort claim which is not subject to Section 408.020 RSMo. Haulers’

request for prejudgment interest is specious and the court did not err by failing *sua sponte* to add prejudgment interest to the award of damages.

CONCLUSION

Haulers have failed to refute any of the arguments presented in County's original brief, and their lawsuit should accordingly be dismissed or disposed of as urged by County in the original brief.

Haulers have also failed to demonstrate error by the trial court in reducing the award of damages, because Haulers failed to provide cogent proof of any damages at all.

Finally, Haulers' request for reversal of the trial court's order dismissing their antitrust claim should be denied and this case dismissed in its entirety, with prejudice.

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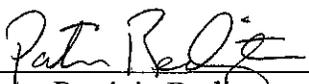
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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains 19,288 words. The font is Times New Roman, proportional spacing, 13-point type.

I certify that a copy of this brief was served electronically this 27th day of March, 2012, to Jane Dueker, Nicole S. Zellweger and Crystal K. Hall, Stinson Morrison Hecker LLP, 7700 Forsyth Blvd., Suite 1100, St. Louis, MO 63105.



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