

SC94115

IN THE SUPREME COURT OF MISSOURI

THE CITY OF HARRISONVILLE,

Appellant-Respondent,

v.

**McCALL SERVICE STATIONS d/b/a BIG TANK OIL, et al.; THE
MISSOURI PETROLEUM STORAGE TANK INSURANCE FUND,**

Respondents-Appellants.

**Appeal from the Circuit Court of Cass County
The Honorable Jacqueline A. Cook, Judge**

**SUBSTITUTE REPLY BRIEF OF RESPONDENT-APPELLANT
The Missouri Petroleum Storage Tank Insurance Fund**

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ARGUMENT

The Reply/Opposition Brief of the City of Harrisonville (“City Opp. Br.”) is as notable for what it does not say as for what it does. Here, we highlight three gaps in the City’s arguments—gaps that are the result of the lack of evidence ((1) regarding proof of fraud, the City’s sole basis for seeking punitive damages), statutory language ((2) regarding authority for punitive damages to be paid from the Fund), and precedent ((3) regarding when a due process claim must be asserted).

1. The City failed to prove detrimental reliance.

The City does not contest that detrimental reliance is an element of a fraud claim. The first gap we highlight is evidentiary: the City’s failure to identify *any* evidence that could support a finding of detrimental reliance.

Instead, the City attacks a straw man, characterizing the Fund’s argument as a claim that the jury should have been instructed on a breach of contract rather than on a fraud claim. But that is not the Fund’s argument. The Fund instead pointed out that what the City proved was not fraud, but breach of contract: failure to pay an amount agreed upon. That is a different claim—one that the City did not plead, nor present to the jury. The distinction between fraud and breach is important, but not because it shows that the jury was instructed on the wrong legal theory. The distinction is important because fraud and breach have different elements. And a plaintiff

that pleads and asks that the jury be instructed on a fraud claim obligates itself to prove each element of a fraud claim—including detrimental reliance.

The City presented evidence sufficient to take a breach claim to the jury, *i.e.*, that the Fund’s agent promised a particular payment, but that the Fund’s managers did not pay pursuant to that promise. But instead of addressing detrimental reliance, or responding to the deficiencies noted on pages 16 and 17 of the Fund’s opening brief, the City returns to its theme that the Fund “saved over \$300,000.” City Opp. Br. at 5. The City may believe that for the Fund to save money is some sort of substitute for the detrimental reliance element of a fraud count. But the City provides neither authority nor logic to support that proposition.

And the City continues to overstate its proof. The evidence may have showed that the Fund saved money in the short term by persuading the City to use an alternative approach. But the evidence did not show that the Fund’s liability was reduced at all. No one—not the Fund, not McCall, nor Fleming—asked for or received a release from the City with regard to the unremediated soil. On this record, we cannot and do not know whether the choice to remediate only part of the easement was, financially, a good one for any defendant. But the critical gap is the City’s failure to show that the choice harmed the City.

2. The Fund is not authorized to pay punitive damages.

The second gap we highlight is the absence in the City's brief of any language in any statute that authorizes punitive damages based on the actions of Fund managers to be paid out of the Fund. The City at least implicitly concedes that the Fund can be used only as authorized by statute. The City bases its claim that the Fund can pay punitive damages here on § 319.131.5. But that statute contains no such authorization.

Subsection 5 begins with the sole authorization for payment from the Fund: "The fund shall provide coverage for third-party claims involving property damage or bodily injury caused by leaking petroleum storage tanks whose owner or operator is participating in the fund at the time the release occurs or is discovered." *Id.* The section concludes with a list of exclusions—that is, types of "third-party claims" for "injury caused by leaking petroleum storage tanks" that the General Assembly ensured were still not paid out of the Fund:

The fund shall not compensate an owner or operator for repair of damages to property beyond that required to contain and clean up a release of a regulated substance or compensate an owner or operator or any third party for loss or damage to other property owned or belonging to the owner or

operator, or for any loss or damage of an intangible nature, including, but not limited to, loss or interruption of business, pain and suffering of any person, lost income, mental distress, loss of use of any benefit, or punitive damages.

Id. So even if the behavior that caused pollution was so egregious that it merited the award of punitive damages against the pollutor, the Fund could not cover those damages.

In the City's view, the bar in the closing sentence on payment of punitive damages awarded against those who pollute is an implicit legislative authorization for the Fund to pay punitive damages based on acts by those who administer the Fund. But there is no authority for the latter in the first sentence. And absent such authority, the Fund cannot be tapped for such damages.

The City chose not to sue the Trustees or Fund employees, which might have opened the door to payment under the Legal Expense Fund, § 105.711. The City sued only the Fund—in essence, an account in the State Treasury. So in this suit, the City could obtain payment only from the Fund, and thus only for injury “caused by leaking petroleum storage tanks.” But the City does not explain how its fraud claim based on the acts of Fund managers was a claim “involving *property damage or bodily injury caused by leaking*

petroleum storage tanks.” The City’s claim against the Fund was not for property damage, not for bodily injury, and not for injury caused by a leaking tank.

3. The Fund timely raised due process.

The third gap we highlight is precedential. Assuming that the Fund and the City have constitutional rights like the rights to due process or trial by jury, the City claims that the Fund had to anticipate a huge punitive damages award and assert at the outset of the case that there would be a punitive damages award large enough to implicate due process concerns. But the City is unable to cite even one comparable case.

In the meat of its argument, the City cites just *McCormack v. Capital Elec. Const. Co.*, 159 S.W.3d 387 (Mo. App. W.D. 2004). City Opp. Br. at 12-13. But there, the question was the constitutionality of prejudgment interest—not the amount of such interest, but the award of such interest. If the Fund were asserting that awarding punitive damages against it violated due process regardless of the amount awarded, *McCormack*—and many similar decisions—would be pertinent. But neither *McCormack*, nor any other case cited by the City, answers the question posed here.

CONCLUSION

For the reasons stated above and in the Fund's opening brief, the Court should reverse the Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via Missouri CaseNet e-filing system on the 31st day of December, 2014, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 1,242 words.

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