IN THE
SUPREME COURT OF MISSOURI

No. SC87669

INVESTORS TITLE COMPANY, INC.,
Plaintiff/Respondent/Cross-Appellant,

v.

JANICE HAMMONDS, *et al*.,
Defendants/Appellants/Cross-Respondents.

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
CAUSE NO. 01CC-004336
DIVISION NO. 9
HONORABLE DAVID LEE VINCENT, III.

Second Substitute Brief of Appellants/Cross Respondents Janice Hammonds and St. Louis County, Missouri

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TABLE OF CONTENTS

RESPONSE TO RESPONDENT'S POINTS ON APPEAL

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT OF FACTS

In their opening brief, Recorder and County set forth facts relevant to their points on appeal. Those facts are incorporated herein. The following facts supplement the Statement of Facts in Appellants' Substitute Brief:

The policy-making officials of St. Louis County, and other individuals and entities, were unaware of Ms. King's unlawful conduct until October 1, 2001. T 106, 139, 169, 206, 211, 213, 241-244, 246. County officials had no suspicion of any inappropriate behavior by Ms. King, other than that she had poor attendance and punctuality. T 193.

Prior to October 1, 2001, Defendant Recorder directly observed Ms. King's work performance and did not observe her failing to follow procedure; did not ignore her performance deficiencies; never received a complaint regarding Ms. King's handling of the books, never received a complaint regarding mistakes she made in totaling charges and never received any complaints about her by anybody who had business dealings with her. T 194-195. The Recorder inquired of Ms. King whether she and the subordinate cashier were following cash handling procedures, and Ms. King told the Recorder that the procedures were being followed. T 106. The Recorder had no reason to ignore any known misconduct by Ms. King. T 194.

A representative from Investors notified County on October 1, 2001, of an

error in the amount Investors was charged; the Recorder notified the Director of Revenue; the Recorder immediately and thoroughly investigated the allegation and subsequent inconsistencies that were discovered as a result of the notification; County participated in investigations by Investors Title, the St. Louis County Prosecuting Attorney's Office and the Clayton Police Department; the Director of Revenue placed Ms. King on investigative suspension as soon as her unlawful conduct was discovered which prohibited her from working; the Director of Revenue terminated Ms. King; and Recorder testified against Ms. King before the Grand Jury prior to Ms. King's plea of guilty. T 69, 205-207.

The Director of Revenue had a written cash handling procedure manual ("policy") that established procedures in the Recorder of Deeds office. Ex. 19, T 101, 102. The County's Cash Management Policy is a control to discover errors and prevent irregularity in the practices within the cashiers office. T 291 and 293.

Until October 1, 2001, County had no notice that its policy and procedures were inadequate and were not being followed by Ms. King. T 106, 128, 136-140, 183, 194-195.

The policy had an audit process that stated, "All departments in the office are subject to random audit. These audits should be performed by the Chief Deputy or Recorder. These audits should reflect the accuracy and the consistent reconciliation of monies and receipts." Ex. 19. The audit requirement was also a

control to discover errors and irregularities in the cashier's office. T 411. County conducted audits as set forth by the policy and in fact did so in a timely manner. Ex. 19, T 128 and T 138. County also employed an internal auditor who prepared audit reports for County. T 330. Investors' expert admitted that employing an internal auditor was another good control used by County. T 330. Investors' expert admitted that County had "quite a few" controls. T 331. Investors' expert admitted that County reviewed information to confirm that the monies collected were examined during the relevant time period in order to confirm deposits were accurate. T 312. Investors' expert also admitted that County's daily deposit into its Treasury matched the amounts that were taken in for the day's transactions. T 310.

There is no system of internal controls that is perfect for eliminating errors and preventing irregularities. T 293. Investors' expert and County's expert agreed that no internal control can ensure elimination of the risk of theft. T 332 and 415.

Investors' and County's experts agreed that the County's Cash Management Policy and the "blank check policy" did not cause Investors' injury, and Investors' expert also testified that there can be no policy that guarantees against theft. Cross-Appellant's Brief, p. 57, T 332, 334, 407 and 415.

The overcharges to Investors began in 1995 but Investors did not notify County of the overcharges and did not make a claim for overcharges until October 2001, six years after the first overcharge even though all the information necessary to ascertain an overpayment was available on a daily basis. T 52, 53, 56, 164, 206.

Investors demanded a refund of $727,215.00. T 61 and 210.

County did not provide a refund to Investors because the overpayment was a result of theft, not unintentional error by an innocent employee; Investors demanded a refund of hundreds of thousands of dollars; Defendants believed that Investors was responsible for its own losses because it did not reconcile its books after County had provided to Investors on a daily basis all of the documents necessary for such reconciliation; County did not deposit or retain any money greater than it was entitled based upon actual services rendered and therefore would suffer a financial loss if it met Investors' demand; County cannot reserve money in its Treasury for more than one year; the money demanded from County was for a period of payments over at least five years; and it was fiscally responsible to differentiate Investors' refund request from other refund requests County had previously received. T 375-381, 383-384, 443-444, 447-448, Ex. C, St. Louis County Charter, Section 8.010.

County had never before received a demand for more than a thousand dollars. T 210. County never paid a refund for more than a thousand dollars. Ex.

20. Investors never requested a refund for "the month or two immediately preceding the requested refund [;]" rather, Investors demanded a full refund for overpayments made that totaled hundreds of thousands of dollars covering a period at least partially tolled by the applicable statute of limitations. T 61-62. No other individual ever requested a refund for five years of overpayments. T 210, 359. County never received a request for a refund for a transaction that occurred three months prior to the refund request. T 360. Refunds that were made were based upon a day's overpayments, not one month, two months or five years' overpayments. T 209-210. County never previously received a request for a refund that addressed thousands of days of overpayments. T 209. County never received a request for a refund because an employee inflated the amount that was due for a day's recording. T 201. County never received a request for refund when it had not authorized the charging of that money. T 210.

A long-term employee, Pat Donohue, who had previously trained other employees regarding procedures to follow as a cashier and lead cashier, trained Ms. King. T 190-192. Recorder was confident in the manner Ms. Donohue trained Ms. King. T 192. Recorder observed and monitored Ms. King's performance for compliance with established policies subsequent to the training. T 106. Recorder observed Ms. King's work performance and saw Ms. King following the policy; Recorder asked Ms. King if the policy was followed and Ms. King answered in the

affirmative; Ms. King's work product made it appear that she was doing her job correctly; and no one ever complained about Ms. King or the procedures she used. T 194-196. Ms. King decided to steal and she covered her thefts by inflating the totals charged to Investors. T 296 and 298.

County did not have any liability insurance for tort claims, LF 66-67. However, County did have a commercial crime policy, LF 66, 68-116, which limits coverage to direct property losses of County, LF 74 at ¶ 14.

POINTS RELIED ON

RESPONSE TO RESPONDENT'S POINTS ON APPEAL

VI. The trial court correctly gave Jury Instruction No. 10 limiting Investors' recovery to three years prior to the date of filing suit in that Investors' requested relief in Count I going back more than 3 years is barred by the three year statute of limitations set out in Section 516.130 (1) RSMo 2000, which applies to actions against an officer, upon a liability incurred by doing an official act. [Response to Plaintiff's Point VI]

City of Ellisville v. Lohman, 972 S.W. 2d 527 (Mo. App. E.D. 1998)

Putnam County v. Johnson, 167 S.W. 1039 (Mo. 1914)

§516.130(1) RSMo 2000

VII. The Trial Court did not err in granting Defendants' motion for a directed verdict on Plaintiff's 42 U.S.C. § 1983 claim in Count V alleging violation of Plaintiff's due process rights, because there was no substantial evidence that the intentional theft by County's employee deprived Plaintiff of due process, and Defendants did not cause Plaintiff's loss either by its policies or by a failure to train or supervise. [Response to Plaintiff's Point VII]

City of Canton v. Harris, 489 U.S. 378, 389, 392 109 S.Ct. 1197 (1989)

Board Of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 117 S. Ct. 1382 (1997)

Hudson v. Palmer, 468 U.S. 517, 104 S. Ct. 3194 (1984)

VIII. The Trial Court did not err in granting Defendants' motion for a directed verdict on Count VII because Investors failed to make a submissible case for its claim brought under 42 U.S.C. § 1983 for violation of its rights guaranteed under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution when County refused to issue Investors a refund for overpayments made for County services, thereby allegedly treating Investors differently from other individuals and entities similarly entitled to a refund. [Response to Plaintiff's Point VIII]

Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073 (2000)

Keevan v. Smith, 100 F.3d 644 (8th Cir. 1996)

Police Retirement System of St. Louis v. City of St. Louis, 763 S.W.2d 298 (Mo. App. 1989)

IX. The trial court correctly granted Defendants' motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) because County's Crime Policy is not a liability policy that covers the tort claims asserted in Counts VIII and IX. [Response to Plaintiff's Point IX]

Lynch Properties v. Potomac Insurance Company of Illinois, 140 F. 3d 622 (5th Cir. 1998)

Vons Companies v. Federal Insurance Co., 212 F. 3d 489 (9th Cir. 2000)

City of Burlington v. Western Surety Co., 599 N. W. 2d 469 (Ia. 1999)

ARGUMENT

I. Investors has failed to rebut County's argument that Investors cannot recover under a theory of common law refund, insofar as Section 432.070 RSMo precludes contract recovery against a political subdivision absent a written, subscribed and dated contract and there was no written, subscribed and dated contract between Investors and County.

A. Section 432.070 RSMo precludes contract recovery against a political subdivision absent a written, subscribed and dated contract.

Common law refund, also known as money had and received, is "not a suit upon express contract but upon an implied contract created by law." *Fulton National Bank v. The Calloway Memorial Hospital*, 465 S.W.2d 549, 553 (Mo. 1971). County set forth in its opening brief, with numerous citations to Missouri precedent, the established law that Section 432.070 RSMo precludes recovery against political subdivisions "on any theory of implied contract."[1] *Mays-Maune &*

1 Defendants use "County" and "Defendants" interchangeably, since the lawsuit named Recorder in her official capacity and therefore is treated as a suit against the County. *Gas Service Co. v. Morris*, 353 S.W.2d 645, 647-648 (Mo. 1962). *See*

Associates, Inc. v. Werner Brothers, Inc., 139 S.W.3d 201, 208 (Mo.App.E.D. 2004) (pertaining to a school district).

County also noted the existence of one recent Western District Court of Appeals case, *Karpierz v. Easley*, 68 S.W.3d 565, 572-73 (Mo.App.W.D. 2002), which permitted recovery against a municipality under the theory of money had and received. County pointed out the flawed basis for the *Karpierz* decision: namely, its erroneous premise that prior cases had precluded only contracts implied in fact and had not addressed or precluded contracts implied in law. Substitute Brief of Appellants, pp. 30-31. County further pointed out that the law would not imply a contract when that contract had been strictly prohibited by statute, Substitute Brief of Appellants, pp. 20-23, since "[w]here a statute clearly defines the rights of parties, the statute may not be unsettled or ignored ." *Kuenzle v. Mo. State Highway Patrol*, 865 S.W.2d 667, 669 (Mo. banc 19930 (citation omitted).

Nonetheless, Investors has seized upon *Karpierz's* erroneous declaration of law and made it the linchpin of its argument for affirming a recovery that is expressly prohibited by Section 432.070. But Missouri law on the statutory requirement for written contracts is so clearly established to the contrary, there is

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also Liebe v. Norton, 157 F. 3d 574, 577 (8th Cir. 1998) (pertaining to §1983 claims against a defendant in the official capacity).

simply no room for doubt:

> The statute, in prescribing the mode by which alone a county can obligate itself by contract, negatives the idea of a promise on its part arising *by implication of law*. The defendant cannot be held as on an implied contract.

Carter v. Reynolds County, 288 S.W. 48, 50 (Mo. 1926) (emphasis added, citations omitted). *See also Donovan v. Kansas City*, 175 S.W.2d 874, 881 ("[N]o cause of action, *whether on quantum meruit*, or in damages, arises from a void contract; . . . the statute prescribed the manner for [exercise of its corporate authority] and it could not be exercised otherwise . . ."). Investors' repetition of the *Karpierz* rationale, without acknowledging or addressing County's argument that *Karpierz* made a false distinction, misses the mark. Likewise Investors' failure to address County's case law establishing that equity will not imply a contract which is prohibited by law; both failures suggest that Investors recognizes these points as unanswerable.

Finally, Investors suggests that its situation differs from that of all the other parties who have unsuccessfully sought to recover under implied contracts in that the County had control over the manner of documenting transactions. Substitute Brief of Respondents at 31-32. Investors does not explain why such control would vitiate the requirements of Section 432.070, nor could it do so. The courts'

pronouncements have been too clear and virtually universal; Investors cannot prevail consistently with those pronouncements.

Moreover, the statutes applicable to recorders of deeds reinforce the conclusion that the relationship between recorders and filers is non-contractual and no quasi-contractual remedy may be implied. The only obligation to filers imposed on recorders of deeds by the General Assembly is the duty to record certain documents that are tendered with the proper fee. *See* § 59.330 RSMo, providing that it shall be the duty of recorders of deeds to record certain documents, and §59.320 RSMo, providing that the recorder shall not be bound to record documents unless the "fee allowed by law" is tendered. The exclusive remedy created by the General Assembly for damages caused by neglect of a recorder's duties is an action on the official bond of the recorder. §59.650 RSMo. If the General Assembly had intended to allow a suit for refunds of overpayments of recording fees, it would have been easy enough to expressly provide for such a remedy.

B. There was no written, subscribed and dated contract between Investors and County.

Section 432.070 RSMo imposes multiple, particular requirements for contracts with counties; each such contract "shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by

law and duly appointed and authorized in writing." Investors asserts that "state law concerning the duties and obligations of the Recorder of Deeds clearly provides an adequate 'writing' for the establishment of a contract." Brief, p.33. However, Investors offers no case or statute in support of this novel proposition, nor does it suggest in what manner a state statute may be presumed to show that County either subscribed to or dated whatever contract is alleged to have been created.

In support of its position, Investors offers an aggressive, and erroneous, interpretation of *First National Bank of Stoutland v. Stoutland School District R2*, 319 S.W.2d 570 (Mo. 1958). In *Stoutland*, a school board met and passed a resolution, appropriately reflected in its official minutes, specifically authorizing school officers to borrow $6,000 from a particular bank and to repay it with 6% interest. The bank sued when the district refused to repay the loan authorized by its own board. The district not only defended the claim for repayment but also boldly filed a counterclaim to recover money previously repaid to the bank, asserting *inter alia* that there was no written contract as required by Section 432.070. The court rebuffed the district's effort to renounce the contract which it had specifically authorized and by which it had benefited, finding that the school board minutes and corresponding bank records were sufficient to satisfy the

statutory requirement of "writing."[2] *Id.* at 573.

Nothing in the record before this court, however, suggests any awareness by the County Council - much less authorization - of any kind of contractual relationship with Investors. The statutory requirements imposed on recorders do not give rise to a contractual relationship between County and persons whose documents are being recorded. *See Savannah R-III School District v. Public School Retirement System of Missouri,* 950 S.W.2d 854, 857 (Mo. 1994) (no contractual relationship found between school district and retirement system, where any legal obligation was purely statutory). And to the extent Investors is arguing that such a contract would have included a duty to reimburse Investors for a loss it sustained as the result of actions by a rogue County employee, such contract would have been prohibited by Mo. Const. Art. VI, Sections 23 and 25 (prohibiting the grant of public money to private individuals or corporations). Accordingly, there is no basis for the recovery awarded Investors in this lawsuit under Count I.

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2 It was not lost on the court that "the district accepted the benefits of the prior loan transactions, the funds were paid out for school purposes, [and] there is no offer or possibility of restitution. . . ." *Id.* at 574.

II. Investors has failed to rebut County's argument that the trial court erred when it held that the evidence established the essential elements for money had and received in that there was no evidence of a "benefit conferred" or "appreciation by the defendants of the fact of such benefit."

Investors acknowledges that, in order to make a submissible case for money had and received, substantial evidence is required for each of the following elements: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; and (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable. Substitute Brief of Respondents, p. 36.

With respect to the first two elements, Investors claims that King's theft of cash has nothing to do with whether Defendants received or kept any benefit. Substitute Brief of Respondents, p. 37. Investors ignores the authorities cited in County's Substitute Brief at p. 34, holding that restitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. *Dickey v. Royal Banks of Missouri*, 111 F. 3d 580, 583 (8th Cir. 1997), quoting 1 Dobbs, *Law of Remedies* § 4.1(1) at 555. In focusing exclusively on County's unwitting deposit of the checks provided by Investors, Investors fails to rebut County's argument that King's scheme to remove cash in the exact amount by which she inflated the checks was such that County never appreciated or retained any benefit that could

be disgorged. Given that County never deposited or retained more than the amounts of money that covered the costs of its services, the evidence did not establish "benefit conferred" or "appreciation by the defendant of the fact of such benefit."

III. Investors has failed to rebut County's argument that the trial court erred when it held that the evidence established the essential elements for money had and received in that the evidence did not establish that the enrichment of the County was unjust.

In attempting to rebut County's argument that the evidence did not establish that the enrichment of the County was unjust, Investors argues that, even if the evidence did establish that it was partially at fault for the overpayments, Defendants still owed a duty of restitution despite Investors' lack of care or inadvertence. Substitute Brief of Respondents, p. 41-43. In support of this argument, Investors relies on *Blue Cross Health Services, Inc. v. Sauer*, 800 S.W. 2d 72 (Mo. App. E.D. 1990); *Western Casualty and Surety Co. v. Kohm*, 638 S.W. 2d 798 (Mo. App. E.D. 1982); and *Dobson v. Winner*, 26 Mo. App. 329 (Mo. App. W.D. 1887). Those cases are not factually similar to the case at bar. Unlike the present case, the defendants in those cases each received a windfall. Moreover, the evidence in those cases did not establish any change of circumstances, such as theft by a rogue employee, which would cause the recipient entire loss if the claimant

were to obtain full restitution. In those contexts, the courts applied the general rule stated in *Restatement, Restitution* §59 that a payor's lack of care will not justify retention of a windfall by an unintended beneficiary. As noted in County's opening substitute brief at p. 43, change of circumstances is an exception to that rule.

Investors acknowledges that change of circumstances may be a defense or a partial defense if Defendants were no more at fault than Investors, Substitute Brief of Respondents, p. 39, but then goes on to argue that the evidence establishes that Defendants were more at fault. Substitute Brief of Respondents, p. 41. The evidence establishes no such thing. It is undisputed that Investors could have discovered King's stealing by spending a few minutes per day to check its receipts, T 434-435, and that the day that Investors notified County of a single day's overcharges, the overcharges stopped, T 68. In contrast, the evidence shows that, regardless of how much additional money County might have spent on accounting controls, it would not ensure that theft would not occur. T 415. As a result, the evidence establishes that Defendants were no more at fault than Investors.

Investors' claim that it was forced to acquiesce in the blank check procedures implemented by County, Substitute Brief of Respondents, p. 41, is a specious distraction. Investors' own expert testified that the blank check policy had nothing to do with the loss sustained by Investors as a result of King's scheme.

T 334. Regardless of who filled in the amount of the check, the problem was that Investors relied only on King's summary of charges instead of making sure that the check amount matched the total charges actually invoiced by the County. Investors could have stopped the overpayments by spending a few minutes per day to reconcile the total charges with the amount shown on the check it provided. T 434-435.[3]

Investors' assertion that it did not receive any documentation with which to reconcile the amount of the check until after the check had been completed, submitted, and processed is also contrary to the evidence. The evidence shows that the receipts and a copy of the completed check were available for pickup by Investors on the same day that the check was completed. T 164-165. Even if the check was completed and processed before Investors received all the documents needed to reconcile, Investors fails to explain how this would excuse its failure to reconcile the charges within a reasonable time after receiving the documentation.

Investors argues, based on *Williams v. Carroll County*, 66 S.W. 955, 957 (Mo. 1902), that Missouri law permits Investors to rely solely on Defendants to

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3 Moreover, the evidence shows that Investors voluntarily provided blank checks to King, T 389-391, and that the blank check procedure was never forced on anybody, T 178, 360-362.

accurately calculate the amounts owed for recording and other fees. Substitute Brief of Respondents, p. 42. In *Williams*, the county clerk made a mistake in the calculation of interest on a bond, and, as a result, the plaintiff paid too much interest to the county. The plaintiff sued to recover the excess interest payment. The trial court dismissed the petition for failure to state a claim. The Supreme Court reversed, finding that, according to the facts alleged in the petition, the plaintiff was entitled to a refund of the overpayment caused by the county clerk's mistake of fact.

Williams applies the general rule that, "where parties act under a mistake as to the fact, and one party gets an advantage by reason of such mistake, relief will be granted." *Id.* at 957 (emphasis added). The equities in this case are substantially different than the equities in *Williams*. It is undisputed that the receipts provided to Investors showed the correct amounts owed by Investors for services rendered, T 164-167. Accordingly, there was no mistake of fact as in *Williams*. Rather, County provided Investors with the correct statement of charges for recording services, but Investors did not review, reconcile or rely on those correct statements of charges. If Investors had examined the receipts, Investors would have known that King was inflating the amounts of both the daily charge summaries and checks. Whereas it was reasonable for the plaintiff in *Williams* to rely on the interest computation made by the county clerk, it was not reasonable for

Investors to ignore the receipts that County provided. More importantly, County did not get any advantage as a result of King's fraudulent conduct. Consequently, *Williams* provides no support for Investors' argument that it had no duty to reconcile its receipts against the check amounts.

Investors mistakenly argues that County owed a duty to Investors to follow its policies and procedures, oversee its employees, and run random audits. Substitute Brief of Respondents, p. 41. A similar argument was rejected in *State ex rel. Twiehaus v. Adolf*, 706 S.W. 2d 443, 445 (Mo. *banc* 1986), where the Court held that a wrongful death petition, filed against the superintendent of a state mental health facility, did not state a claim for breach of duty owed to a patient who jumped from a window, because "any duty imposed by [a state statute imposing a duty to make reports to the Department of Mental Health] runs in favor of the state as an entity and not toward individual patients or any other members of the public." *Id.* Here, any duty imposed by County's policies and procedures runs in favor of County and not toward Investors or any other member of the public. *Id.* Since the hypothesized duty to follow County's policies and procedures, oversee employees and conduct random audits fails to describe a particularized duty owed to Investors, Investors' argument fails. *See State ex rel. Howenstine v. Roper*, 155 S.W. 3d 747,755 (Mo. *banc* 2005).

Investors makes no attempt to discuss or distinguish *Oakley Building & Loan Company v. Murphy*, 84 N.E. 2d 749, 751-752 (Ohio App. 1948), discussed in County's brief at p. 39, holding that the theft of funds by a cashier who used a customer's deposits to conceal her embezzlement of funds from her employer was a change of circumstances that terminated the employer's duty of restitution to the customer. Likewise, Investors does not discuss or distinguish *Restatement of Restitution,* §142, comment b, illustration 10, discussed in County's brief at p.39-40, which illustrates that §142 applies to a rogue employee who uses his position to fraudulently obtain money from a third party. Investors acknowledges that King was a rogue employee who used her position to inflate Investors' checks and totals, which she used to conceal her theft from County's cash drawer in the exact amount of Investors' overpayments. It is undisputed that the cash was stolen before County became aware of Investors' overpayments. Consequently, *Oakley* and illustration 10 directly apply to King's ongoing scheme, and any duty of restitution owed by County should be diminished *pro tanto*. *Restatement, Restitution,* §142; *Oakley*, 84 N.E. 2d at 751-752; and *Fegan v. Great Northern Ry. Co.*, 81 N.W. 39 (N.D. 1899).

Policy considerations do not, as Investors suggests, weigh in favor of holding Defendants liable for restitution. No amount of training or supervision will prevent employees from deviating from the policies and procedures that

County puts into place. Investors' failure to reconcile checks against receipts made it possible for King to conceal her willful violation of County's written policies. Consequently, policy considerations weigh in favor of denying restitution rather than shifting the burden of Investors' loss to the general public.

Plaintiff did not make a submissible case for recovery under a theory of money had and received. Therefore, Defendants' motion for a directed verdict and motion for a judgment notwithstanding the verdict on Count I should have been granted.

IV. Investors has failed to rebut Defendants' argument that the trial court erred in giving Jury Instruction No. 8 (withdrawal instruction), because the jury should have been allowed to consider Investors' failure to check its receipts in deciding whether the payments were made under circumstances in which retention without refund would be unjust.

Investors repeats many of the arguments stated in Point III of its brief. For the reasons stated in Point III of this brief, those arguments are without merit.

In addition, Investors argues that its failure to reconcile checks against receipts did not enable King to remove cash from the cash drawer, in that Investors was not provided the necessary documentation until after it overpaid. Substitute Brief of Respondents, p. 46. Investors ignores the fact that King's scheme was ongoing. Each day that Investors failed to check its receipts was one more day that

King was able to remove cash. If Investors had spent a few minutes per day to reconcile, the theft would have stopped immediately, or would never have started in the first place.

In determining whose fault is greater, the circumstances both preceding and subsequent to the transaction are considered. *Restatement of Restitution*, §142, comment c. Assuming, *arguendo*, that Defendants were partially at fault for not discovering King's breach of County's cash management policy, the jury should have been allowed to consider the conduct of both parties in determining the allotment of the loss caused by King's stealing. *See Restatement of Restitution*, § 142(2); § 142, comments a, b and c; and §59, comment a, discussed more fully in County's opening brief at pp. 37-44. The evidence of Investors' failure to check receipts should not have been withdrawn from the jury.

Investors does not explain how the evidence regarding Investors' failure to check receipts could be prejudicial, misleading or confusing. Substitute Brief of Respondents, p. 46. Investors contends, without explanation, that the withdrawal instruction did not materially affect the merits of this action. As noted in County's opening brief, if the jury had been allowed to consider Investors' failure to check receipts, the verdict would likely have been different. Accordingly, if judgment is not entered in favor of Defendants for the reasons set forth in Points I through III, Defendants are entitled to a new trial.

V. Investors has failed to rebut Defendants' argument that the trial court erred in refusing to give proffered Jury Instruction No. C (change of circumstances defense) because there was sufficient evidence for the jury to decide that Margaret King stole cash in the exact amount of Investors' Overpayments and that County was no more at fault than Investors in failing to discover that King was inflating Investors' checks and totals.

Investors argues that the trial court correctly refused Jury Instruction No. C because Defendants failed to prove a change of circumstances warranting denial of restitution. Substitute Brief of Respondents, p. 49. This argument is directly contrary to *Restatement of Restitution*, §142, comment b and illustration 10 and to *Oakley Building & Loan Company*, 84 N.E. 2d 749, discussed in County's opening substitute brief at pp. 39-40. These authorities make it clear that King's ongoing embezzlement scheme, which resulted in no net gain to Defendants, is a change of circumstances warranting denial of restitution. *Id.*

Investors also argues that, even if a change of circumstances did exist, Defendants were not entitled to a jury instruction based on *Restatement of Restitution,* § 142, because County was more at fault than Investors. Substitute Brief of Respondents, p. 49. As more fully explained above in Points III and IV, there was sufficient evidence for the jury to decide that County was no more at fault than Investors. Consequently, Defendants met their burden to show a change

of circumstances, and were entitled to an instruction based on *Restatement of Restitution,* § 142.

Investors claims that County misleadingly states "the evidence shows that, regardless of how much additional money Defendants might have spent on accounting controls, it could not have eliminated the possibility of theft." Substitute Brief of Respondents, p. 50. There is nothing misleading about County's statement. Mark Burchyett, the County Auditor, testified "You could spend a lot of money on controls and that doesn't guarantee you are going to prevent fraud," T 415, lines 7 and 8. Investors' own expert agreed that there is no internal control that can ensure that the risk of theft is eliminated. T 332.

Investors distorts the testimony of its expert when it claims that "review of the DK08 and BL02 form would have established that Investors was overcharged for County services. T at 280-288. " Substitute Brief of Respondents, p. 50. In fact, the testimony of Investors' expert was just the opposite. Review of the DK08 and the BL02 "would merely put you on notice there was a problem concerning the deposits and checks and cash during the course of the day, " Testimony of Michael Prost, T 285, lines 8-11. "There is nothing about seeing a discrepancy there that would tell you that Investors Title was overcharged," Testimony of Michael Prost, T 315, lines 9-12. If you wanted to investigate the source of the discrepancy,

"you'd have to pull out every single invoice and transaction for the day and try to reconcile those." Testimony of Michael Prost, T 315, lines 17-21.

Investors claims that review of the DK08 and the BL02 was part of the random audit obligation as dictated by the cash handling procedures of the Recorder's office. Substitute Brief of Respondents, p. 50. However, there is nothing in the policy that dictates that random audits be performed in the manner suggested by Investors. County conducted audits as set forth by the policy and in fact did so in a timely manner. Ex. 19, T 128 and T 138. Further, as fully explained in Point VII below, County did not fail to properly supervise its employees.

The trial court's refusal of Instruction No. C requires reversal.

RESPONSE TO RESPONDENT'S POINTS ON APPEAL

VI. The trial court correctly gave Jury Instruction No. 10 limiting Investors' recovery to three years prior to the date of filing suit in that Investors' requested relief in Count I going back more than 3 years is barred by the three year-statute of limitations set out in Section 516.130 (1) RSMo 2000, which applies to actions against an officer, upon a liability incurred by doing an official act [Response to Plaintiff's Point VI].

The Court of Appeals will not reverse a verdict due to instructional error unless the instruction misdirected, misled or confused the jury, and the instruction

resulted in prejudicial error. *Burns National Lock Installation Co. v. American Family Mutual Insurance Co.*, 61 S.W. 3d 262, 270 (Mo. App. E.D. 2001).

Investors argues that the trial court erred in giving Jury Instruction No. 10 excluding damages that occurred more than three years before suit was filed, because the three-year statute of limitations set forth in §516.130(1) RSMo does not apply to Investors' claims against County.

Section 516.130 RSMo 2000 sets forth which actions must be commenced within three years. Subsection 1 includes:

> (1) An action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution or otherwise.

Id.

Investors argues, without support, that the three-year statute of limitations "cannot affect claims against the governing body itself." Substitute Brief of Respondents, p. 53. Investors ignores *City of Ellisville v. Lohman*, 972 S.W. 2d 527 (Mo. App. E.D. 1998), where the Eastern District held that the three-year statute of limitations barred claims against County and other governing bodies. *City of Ellisville* involved a dispute over the amount of motor vehicle sales tax and use tax distributed by the Missouri Department of Revenue to County and ninety

municipalities. *Id.* at 529. The Missouri Director of Revenue ("Director") was not sued as an individual, nor did the suit seek to impose any personal liability on her, yet the Eastern District decided that the three-year statute of limitations, rather than the five-year statute of limitations set out in 516.120 RSMo., barred the claims against Director, County and other governing bodies. *Id.* In reaching that conclusion, the Eastern District held that the three-year statute was the more specific statute in that factual situation, *id.* at 534, since Director is an "officer" within the meaning of § 516.130.1 and appellants pleaded that her failure to properly distribute taxes she collected was an omission of her duty to distribute taxes in accordance with Sections 66.620 and 66.630 RSMo, *id.* at 535.

In this case, as in *City of Ellisville*, the three-year statute is the more specific statute. Count I is an action upon a liability incurred by Recorder doing an act in her official capacity and in virtue of her office to impose and collect fees in conjunction with the recording of instruments. LF 42 at ¶¶6-10. Recorder falls squarely within the definition of "other officers" because she is invested by law with authority over the recording of instruments, LF 42 at ¶¶8-10, which is one of the sovereign functions of the government, exercised for the benefit of the public. *See City of Ellisville* at 535. Moreover, any payments received by Recorder were received "in virtue of [her] office." LF 46-47 at ¶29; *see Putnam County v. Johnson*, 167 S.W. 1039, 1042 (Mo. 1914), holding that money received by a

county clerk in excess of that due him for making out and computing tax books was received in virtue of his office, within the three years' statute of limitations. For these reasons, Count I is based "upon a liability incurred by the doing of an act in [Recorder's] official capacity and in virtue of [Recorder's] office, or by the omission of an official duty." *See City of Ellisville* at 535.

Investors relies on cases applying the five-year statute of limitations of §516.120 RSMo to contract claims and tort claims. Substitute Brief of Respondents, p. 53-54. As the Eastern District points out, "To apply the greater statute of limitations of section 516.120 would be to hold section 516.130(1) meaningless whenever a government official is sued for actions or omissions in her official capacity, as such a lawsuit can always include the governmental entity for which the official works." Slip Opinion, p. 17. For the reasons stated above, the three-year statute is the more specific statute, and it applies to the facts alleged in Count I.

The trial court correctly gave Jury Instruction No. 10.

Even assuming, *arguendo*, that the trial court erred in giving Jury Instruction No. 10, the trial court cannot weigh the evidence and enter judgment for five years worth of damages, as suggested by Investors. Substitute Brief of Respondents, p. 54. The jury must determine the amount of damages. Mo. R. Civ. P. 71.06. Consequently, if the five-year statute of limitation were deemed applicable to the

facts alleged in Count I, and if judgment is not entered for Defendants for the reasons stated in Points I through III, the case should be remanded for a new trial.

VII. The Trial Court did not err in granting Defendants' motion for a directed verdict on Plaintiff's 42 U.S.C. § 1983 claim in Count V alleging violation of Plaintiff's due process rights, because there was no substantial evidence that the intentional theft by County's employee deprived Plaintiff of due process, and Defendants did not cause Plaintiff's loss either by its policies or by a failure to train or supervise.

The standard of review of a trial court's granting of a motion for directed verdict is whether the plaintiff made a submissible case of a defendant's liability. *Ray v. Wisdom*, 166 S.W.3d 592, 595 (Mo. App. E.D. 2005). In order to make a submissible case, the record must demonstrate that each and every element essential to establish the liability of a defendant has been met by substantial evidence. *Id*. at 596. If one or more of the elements of a cause of action are not supported by substantial evidence, a directed verdict is proper. *Id.* In order to assess whether there is substantial evidence to establish that a case is submissible, the reviewing court presumes plaintiff's evidence is true and makes all reasonable inferences from that evidence; however, the reviewing court should not supply missing evidence nor should it give the plaintiff the benefit of unreasonable, speculative or forced inferences. *First State Bank of St. Charles v. Frankel*, 86

S.W.3d 161, 169 (Mo. App. E.D. 2002).

Claim

In Count V, Investors sought recovery under 42 U.S.C. § 1983 for alleged violations of its rights under the due process clause of the Constitution based upon County's policy, customs and practices and its alleged failure to train and supervise employees. Even Investors, however, has not asserted the existence of any evidence that King's inflated billing of Investors, and ultimate theft of the inflated amount, was actually authorized by County or any of its employees. That being the case, Investors failed to make a submissible due process claim.

In *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 3204 (1984), the Supreme Court held that "an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available."[4] Investors did not introduce any evidence suggesting that meaningful post-deprivation remedies were not available, and therefore failed to make a submissible claim for deprivation of procedural due

4 In *Hudson*, a prisoner claimed violation of his right to due process as the result of a guard's allegedly intentional destruction of property during search of the prisoner's cell.

process.[5] *See also Clark v. Kansas City School District*, 375 F. 3d 698, 702-03 (8th

5 One example of a tort action that Investors could have pursued would be an action against Ms. King for fraud. The elements of fraud in Missouri are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of the falsity or his ignorance of the truth; (5) the speaker's intent that his representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of the falsity of the representation; (7) the hearer's reliance on the truth of the representation; (8) the hearer's right to rely thereon; and, (9) the hearer's consequent and proximately caused injury. *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. banc 1988). The trial court took judicial notice of the court file in *State of Missouri v. Margaret M. King*, cause no. 01CR-5502. Ms. King pled guilty to stealing money from Investors for the amounts that Investors was overcharged in its payment to County. Ms. King's conduct, namely creating an adding machine tape that indicated totals owed by Investors; informing Investors of this total owed, and in some circumstances filling in this false total on Investors' check on their behalf; knowing the totals to be false; having knowledge and intent of her actions as evidence by her guilty plea for theft; Investors' asserted ignorance of Ms. King's actions; Investors' right, as asserted in this case, to rely on the

Cir. 2004)(holding that Missouri provided an adequate post-deprivation remedy of replevin, and that Missouri law also allowed for the recovery of damages for the injury, taking, or detention of property).

Nor can Investors assert that evidence was introduced which would show that its loss resulted from a violation of its substantive due process rights. In *Weimer v. Amen*, 870 F.2d 1400 (8th Cir. 1989), plaintiffs alleged violation of their due process rights by the state's banking director, by virtue of his alleged conspiracy with bank officers to induce depositors to place their assets in an insolvent bank. After rejecting plaintiffs' procedural due process claims based on *Hudson*, the court determined that *Hudson* precluded any claim of substantive due process violations as well. The court noted that a substantive due process violation could be predicated only on conduct that "shock[s] the conscience," and that "[o]ther circuits have considered deprivations of property as involving only procedural due process rights," *id.* at 1405-06 (citations omitted). The court went on to find that:

In situations where procedural due process claims alleging property

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information provided by Ms. King; and, Investors' injury from its overpayment, establish the elements of fraud. *See Id*.

> deprivation are prohibited in section 1983 actions by *Parratt*,[6] claims based on the same actions but alleging denial of substantive due process should be barred as well. To hold otherwise would be directly contrary to the concerns leading to the *Parratt* rule in the first place.

Id. at 1406. *See also Ali v. Ramsdell*, 423 F.3d 810, 814 (8th Cir. 2005) (finding that both procedural and substantive due process claims were barred by *Hudson* where target of search warrant alleged that police officer had taken and not returned her money, since state law remedy of conversion lawsuit was available); *Vennes v. An Unknown Number of Unidentified Agents of U.S.*, 26 F.3d 1448, 1452 (8th Cir. 1994).

Even assuming *arguendo* that Investors could point to evidence of a due process violation, more would be required in order to hold Defendants liable under § 1983. As Investors acknowledges in its Brief at p. 56, Defendants can only be held liable if County was the "moving force" behind the injury, either by its policies or customs, or by failure to train or supervise. The County cannot be liable under a theory of respondeat superior or vicarious liability. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1998), citing *Monell v. New York City Dept. of Social Services*,

6 *Parratt v. Taylor*, 451 U.S. 527 (1981).

436 U.S. 658, 690 (1978). Yet Investors has failed to point to evidence that County's policies or customs, or County's failure to train or supervise, directly caused its loss.

Investors' claim of injury as a result of a policy or custom wherein title companies provided blank checks to County employees (Substitute Brief of Respondents, p. 57), is specious. Indeed, after claiming injury as a result of "County's widespread practices, customs and policies," Investors then retreated by asserting only that Investors was overcharged "pursuant to" - not because of - the alleged blank check policy. *Id.* This retreat is not surprising given that Investors' own expert admitted that the blank check policy was not the cause of Investors' injury:

> Q. And, in fact, the blank checks in this case didn't have anything to do with what was going on at Investors Title, did it?
>
> A. I don't think it did, no.

Testimony of Michael Prost, T 334. Investors' unsupported allegation has utterly failed to provide any evidence suggesting that County policy or custom was the moving force behind its loss.

Investors' claim of injury as a result of County's failure to train or supervise is likewise specious. In asserting that Defendants' failure to follow established monitoring procedures caused its loss, Investors cites to page 425 of the transcript

as support for its claim that "The testimony of the County's own auditor said that if the numbers on the two documents did not match, it could be due to theft, but at the very least would alert County as to possible error." Substitute Brief of Respondents, pp. 59-60. County's auditor testified as follows in regard to the discrepancies referred to by Investors:

Q. And didn't you tell us in your deposition that there were only two reasons as to why those figures should be different?

A. I believe I did, yes.

Q. One of the reasons was that employees might be writing checks to get cash from the Recorder of Deeds office after the tills closed?

A. That could have been a --

Q. Again, you sat here the last two and a half days. Have you heard any testimony of that going on in the Recorder of Deeds office?

A. No.

Q. And is that the only other reason those figures won't match is because somebody was stealing?

A. I would add a third, and that is if there was an error in the input. And then the only other reason that I could possibly think of is that someone would be stealing. Those would be the three.

Testimony of Mark Burchyett, T 425.

Investors own expert likewise denied that the discrepancies revealed employee theft:

Q. Having them out of balance suggests there may be a discrepancy that needs to be investigated?

A. Suggests there is a discrepancy that needs to be investigated.

Q. It doesn't tell you there is a theft or any kind of dishonesty going on, does it?

A. No.

Testimony of Michael Prost, T 333.

The evidence in this case did not comprise a submissible case of failure to train, monitor or supervise. Every day between 1996 and 2001, the Recorder's books balanced, and the Recorder never received more money, or less money, than was due for the services rendered. T 195. The record also establishes that prior to October 1, 2001, Recorder directly observed Ms. King's work performance and did not observe her failing to follow procedure; did not ignore her performance deficiencies; never received a complaint regarding Ms. King's handling of the books, never received a complaint regarding mistakes she made in totaling charges and never received any complaints about her by anybody who had a business dealing with her. T 194-195. The record further establishes the Recorder inquired of Ms. King whether she and the subordinate cashier were following cash handling

procedures and that Ms. King told the Recorder that the procedures were being followed. T 106. The record also establishes that the Recorder had no reason to ignore any known misconduct by Ms. King. T 194.

Even if Investors were to argue that the Recorder or some other County official should have inquired or checked further, the failure to take such further action does not arise to deliberate indifference necessary for a due process violation. Rather, the failure to make such further inquiry or take such further action is, at most negligence; and negligent conduct does not violate the due process clause. *Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Davidson v. Cannon*, 474 U.S. 344, 347 (1986); *Russell v. Hennepin County*, 420 F. 3d 841, 849 (8th Cir. 2005); and *P.H. v. School District of Kansas City*, 265 F.3d 653, 659 (8th Cir. 2001). In order for a plaintiff to prevail under § 1983 based upon a failure to train or a failure to supervise claim, the plaintiff must prove that, pursuant to a policy or custom, the municipality was deliberately indifferent to the rights of persons with whom it comes in contact. *City of Canton v. Harris*, 489 U.S. 378, 389, 109 S.Ct. 1197 (1989).

In this case, the Director of Revenue had a written cash handling procedure manual ("policy") that established procedures in the Recorder of Deeds office. Ex. 19. Until October 1, 2001, County had no notice that its policy and procedures were inadequate and were not being followed by Ms. King. T 106, 128, 136-140,

183, 194-195. The policy was one of County's controls to discover errors and prevent irregularities in the cashier's office. T 291 and 293. The policy had an audit process that stated, "All departments in the office are subject to random audit. These audits should be performed by the Chief Deputy or Recorder. These audits should reflect the accuracy and the consistent reconciliation of monies and receipts." Ex. 19. The audit requirement was also a control to discover errors and irregularities in the cashier's office. T 411. Despite Investors' unsupported assertion in its brief, County conducted audits as set forth by the policy and in fact did so in a timely manner. Ex. 19, T 128 and T 138. County also employed an internal auditor who prepared audit reports for County. T 330. Investors' expert admitted that employing an internal auditor was another good control used by County. T 330. Investors' expert admitted that County had "quite a few" controls. T 331. Even Investors' expert admitted that County reviewed information to confirm that the monies collected were examined during the relevant time period in order to confirm deposits were accurate. T 312. Investors' expert also admitted that County's daily deposit into its Treasury matched the amounts that were taken in for the day's transactions. T 310.

However, there is no system of internal controls that is perfect for eliminating errors and preventing irregularities. T 293. Investors' expert and County's expert agree there is no internal control that can ensure that the risk of

theft is eliminated. T 332 and 415. Common sense dictates that an employee should not steal. Ms. King's acts make her a tortfeasor and a criminal. They do not make County liable - a governmental body may not be held liable under § 1983 solely because it employs a tortfeasor. *Board Of County Commissioners of Bryan County v. Brown,* 520 U.S. 397, 403, 406-07 (1997).

Failure to train and failure to supervise claims are not supported when a policy addresses the proper conduct and an employee chooses to ignore the policies as well as common sense. *P.H. v. School District of Kansas City*, 265 F.3d at 661. There is no evidence that Ms. King was inadequately trained or supervised. The evidence demonstrates that a long- term employee, Pat Donohue, who had previously trained other employees regarding procedures to follow as a cashier and lead cashier, trained Ms. King, that the Recorder was confident in the manner Ms. Donohue's trained Ms. King, and that the Recorder observed and monitored Ms. King's performance for compliance with established policies subsequent to the training. T 106, 190-195. Defendant Recorder observed Ms. King's work performance and saw Ms. King following the policy; Defendant Recorder asked Ms. King if the policy was followed and Ms. King answered in the affirmative; Ms. King's work product made it appear that she was doing her job correctly; and no one ever complained about Ms. King or the procedures she used. T 194-196.

A governmental entity may not be found to have been deliberately indifferent to or to have tacitly authorized conduct of which it was unaware. *Russell*, 420 F. 3d at 849. Ms. King decided to steal and she was able to do so by inflating the totals charged to Investors. T 296 and 298. County and the Director of Revenue were not indifferent to the procedures used in the Recorder of Deeds office; rather, they had a policy and maintained internal controls and monitored the employees in order to attempt to achieve compliance with that policy. The policy and procedures appeared to work.

Additionally, County cannot be held liable merely because more or better training might have prevented Ms. King's conduct. *See City of Canton v. Harris*, 489 U.S. at 391. Even if an employee is unsatisfactorily trained, that alone does not create liability for a municipality because the employee's actions may have been as a result of other factors. *Id*. Rather, the alleged deficiency must be closely related to the ultimate injury. *Id.*

To hold a municipality liable under §1983 for failure to train and supervise an employee, it is not enough to show that a situation will arise and that taking the wrong course in that situation will result in injuries to citizens; rather, there must be likelihood that failure to train and supervise will result in the employee making the wrong decision. *Sewell v. Town of Lake Hamilton*, 117 F. 3d 488, 490 (11th Cir. 1997).

Where the proper response is obvious to all without training or supervision, then failure to train or supervise in such circumstances will not lead to municipal liability under §1983. *City of Canton v Harris*, 489 U.S. at 390. Ms. King's actions violated the law. People are presumed to know the law. *State v. Hicks*, 535 S.W.2d 308, 312 (Mo. App. 1976), citing *Poe v. Illinois Cent. R. Co*. 99 S.W.2d 82, 89 (Mo. 1936). Therefore, it should have been obvious to Ms. King that her actions were not proper. County cannot be liable under §1983 for a failure to provide Ms. King with more training.

As set forth above, Investors failed to submit substantial evidence that County had notice of Ms. King's misconduct. Investors also failed to submit substantial evidence that County had notice that Ms. King deviated from the policy and procedures. Therefore, Investors cannot demonstrate deliberate indifference or tacit authorization based upon failure to train or failure to supervise its offending employee. *See City of Canton v. Harris*, 489 U.S. at 392.

Investors did not establish a submissible claim based upon substantial evidence against County for judgment under 42 U.S.C. § 1983 for alleged violations of its rights under the due process clause of the Constitution based upon County's policy, customs and practices and its alleged failures to train and supervise employees. Accordingly, the trial court did not err when it granted Defendants' motion for a directed verdict in Count V at the close of all evidence.

See Ray v. Wisdom, 166 S.W.3d at 595, 596.

VIII. The Trial Court did not err in granting Defendants' motion for a directed verdict on Count VII because Investors failed to make a submissible case for its claim brought under 42 U.S.C. § 1983 for violation of its rights guaranteed under the equal protection clause of the Fourteenth Amendment of the U.S. Constitution when County refused to issue Investors a refund for overpayments made for County services, thereby allegedly treating Investors differently from other individuals and entities similarly entitled to a refund.

The standard of review of a trial court's granting of a motion for directed verdict is whether the plaintiff made a submissible case of a defendant's liability. *Ray v. Wisdom*, 166 S.W.3d 592, 595 (Mo. App. E.D. 2005). In order to make a submissible case, the record must demonstrate that each and every element essential to establish the liability of a defendant has been met by substantial evidence. *Id*. at 596. If one or more of the elements of a cause of action are not supported by substantial evidence, a directed verdict is proper. *Id.* In order to assess whether there is substantial evidence to establish that a case is submissible, the reviewing court presumes plaintiff's evidence is true and makes all reasonable inferences from that evidence; however, the reviewing court should not supply missing evidence nor should it give the plaintiff the benefit of unreasonable, speculative or forced inferences. *First State Bank of St. Charles v. Frankel*, 86

S.W.3d 161, 169 (Mo. App. E.D. 2002).

Classification of Investors

County and Investors agree that Investors is not a member of a suspect class or otherwise entitled to heightened scrutiny. See Substitute Brief of Respondents, p. 63. If there is no suspect class involved, a plaintiff must establish that it was treated differently from others similarly situated and that the government had no rational reason for that difference in treatment. *Johnson v. City of Minneapolis*, 152 F.3d 859, 862 (8th Cir. 1998); *Weiler v. Purkett*, 137 F.3d 1047, 1051 (8th Cir. 1998). A plaintiff must establish that it was accorded treatment "invidiously dissimilar from that accorded to others, with no rational basis existing for the difference in treatment." *Sidebottom v. Schiriro*, 927 F.Supp. 1221 (E.D.Mo. 1996), citing *Flittie v. Solem*, 827 F.2d 276, 281 (8th Cir. 1987). An equal protection claim may be made by a "class of one" but only if the plaintiff "has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 120 S.Ct. 1073, 1074 (2000); *Barstad v. Murray County*, 420 F. 3d 880, 884 (8th Cir. 2005). Dissimilar treatment of dissimilarly situated individuals does not violate the Equal Protection Clause. *Anderson v. Cass County*, 367 F. 3d 741, 747-48 (8th Cir. 2004); *Keevan v. Smith*, 100 F.3d 644, 648 (8th Cir. 1996).

Investors asserts that it "is a member of a class consisting of that group of individuals and entities who had made payments that exceeded those properly charged fees for recording, filing, copying or other services of the Recorder's office and met the criterion for receiving refunds for such overpayments or overcharges in compliance with the County's established policies and procedures." Substitute Brief of Respondents, p. 62. Investors also asserts that, "unlike other individuals, and despite demand, Investors was not refunded the hundreds of thousands of dollars that were overcharged." *Id*. Investors correctly asserts it was not refunded the hundreds of thousands of dollars that it demanded. T 61 and 140-141. However, there is absolutely no evidence in the record that any other individual or group was similarly situated with Investors.

There are a multitude of reasons why Investors is not similarly situated with other persons and entities that requested and received refunds from County for overpayments to the Recorder. For instance, no person or entity ever demanded a refund of "hundreds of thousands of dollars." In fact, the record establishes that County had never before received a demand for more than a thousand dollars. T 210. County never paid a refund for more than a thousand dollars. Ex. 20. Accordingly, dissimilar treatment of Investors does not violate the Equal Protection Clause. *See Keevan v. Smith*, 100 F.3d at 648.

Investors argues that, "The only explanation given by the County for its failure to refund the monies was that Investors' request was too late. The County did not even refund money for the month or two immediately preceding the requested refund." Substitute Brief of Respondents, p. 63. Here again, however, there was no evidence that any other individual or entity ever requested a refund for "the month or two immediately preceding the requested refund" and then received the refund for that time period. Additionally, Investors ignores the fact that it never requested a refund for "the month or two immediately preceding the requested refund [;]" rather, Investors demanded a full refund for overpayments made that totaled hundreds of thousands of dollars covering a period at least partially tolled by the applicable statute of limitations. T 61-62. Similarly, the record clearly establishes that no other individual ever requested a refund for five years of payments. T 210, 359. In fact, the record clearly establishes that County never received a request for a refund for a transaction that occurred three months prior to the refund request. T 360. Nor was there even evidence in the record that any individual or group requested a refund for overpayments sustained over a period of one or two months. The record establishes that refunds that were made were based upon a day's overpayments, not one month, two months or five years' overpayments. T 209-210.

Additionally, Investors fails to recognize other differences between it and the other individuals and entities who had made overpayments and received refunds. County never previously received a request for a refund that addressed thousands of days of overpayments. T 209. County never received a request for a refund because an employee had inflated the amount that was due for a day's recording. T 201. County never received a request for refund when County had not authorized the charging of that money. T 210. For all these reasons, Investors is not similarly situated with other individuals or entities that received a refund from the Recorder for overcharges. Accordingly, dissimilar treatment of Investors does not violate the Equal Protection Clause. *See Keevan v. Smith*, 100 F.3d at 648.

Rational Relationship to Legitimate Government Purpose

When a difference in treatment is not based upon a suspect classification or does not impinge upon fundamental rights, the classification must be upheld against an equal protection attack when the means are rationally related to a legitimate governmental purpose. *Missourians for Tax Justice Educ. Project v. Holden*, 959 S.W.2d 100, 103 (Mo. 1997). The burden is on the challenging party to establish that the difference in treatment is not reasonable and is purely arbitrary. *Id*. When economic decisions are challenged as being violative of equal protection, a classification or distinction does not violate the Constitution if it has

some reasonable or rational basis. *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d 298 (Mo. App. 1989), citing *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166 (1980).

A court should not interfere with a government's varying treatment of different groups or individuals unless the reason for the difference is "so unrelated to the achievement of any combination of legitimate purposes" that the conclusion must be that the government action is irrational. *Kimel v. Bd. of Regents*, 528 U.S. 62, 120 S.Ct 631 (2000). Furthermore, the Equal Protection Clause does not demand that County "actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15, 112 S.Ct. 2326, 2334 (1992) citing *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980). If the court can ascertain a plausible policy reason for a classification, the classification withstands an Equal Protection Clause challenge. *Id*. In this case, County has articulated its rationale for supporting its classification; however, the court could also ascertain any other plausible reason for the decision to treat Investors differently from other individuals or groups and Investors would not be entitled to recovery for a claim under the Equal Protection Clause. *Id*.

Investors wrongly asserts that Defendants' only stated explanation for failing to give Investors a refund was because the request was untimely. Substitute Brief of Respondents, p. 63. However, even if Investors' assertion was correct, such a

basis for determining the appropriateness of a refund is rational. A government entity operates on a fiscal year and therefore timeliness requirements for refunds are rational, and failure to demand a refund in a timely manner is a rational basis for refusal to issue refunds. *See, e.g., Community Federal Savings and Loan v. Director of Revenue*, 752 S.W.2d 794 (Mo. banc 1988) (holding that it is lawful for state to deny a refund because the claim for the refund was not timely) and § 136.035 RSMo.

In the instant case, the overcharges began in 1995 but Investors did not notify County of the overcharges and did not make a claim for overcharges until October 2001, six years after the first overcharge even though all the information necessary to ascertain an overpayment was available on a daily basis. T 52, 53, 56, 164, 206.

Investors also asserts that Defendants treated Investors differently than other individuals and entities seeking refunds "solely based on the size of the requested refund." However, Investors again fails to recognize that budget constraints and fear of creating insolvency due to unfunded, unforeseen liability are rational bases for treating individuals differently without violating the Equal Protection Clause. *Police Retirement System of St. Louis v. City of St. Louis*, 763 S.W.2d at 301. In this case, Investors sought a refund that was more than seven hundred twenty-seven times the size of the next largest refund. In absolute terms, the refund

demand of $727,215 was huge, and there was absolutely no evidence that County had any funds budgeted to pay such a huge amount. T 61 and 210. That alone is a rational basis to deny Investor's belated request for a refund.

In this case, County did not provide a refund to Investors because the overpayment was a result of theft, not unintentional error by an innocent employee; Investors demanded a refund of hundreds of thousands of dollars; Defendants believed that Investors was responsible for their own losses because it did not reconcile its books after County had provided to Investors on a daily basis all of the documents necessary for such reconciliation; County did not deposit or retain any money greater than it was entitled based upon actual services rendered and therefore would suffer a financial loss if it met Investors' demand; County cannot reserve money in its Treasury for more than one year; the money demanded from County was for a period of payments over at least five years; and it was fiscally responsible to differentiate Investors' refund request from other refund requests County had previously received. T 375-381, 383-384, 443-444, 447-448, Ex. C, St. Louis County Charter, Section 8.010. Each of these reasons is itself a rational basis to deny the massive refund requested by Investors. Taken together, they clearly constitute a rational basis to deny the refund.

Defendants' reasons for not complying with Investors' demand were rational. Defendants' reasons for classifying Investors differently than the others

were rational. Investors failed to submit substantial evidence to meet its heavy burden that it was treated differently than others similarly situated and that the different treatment was arbitrary or irrational. Therefore, Investors cannot establish the essential elements necessary to make a submissible case under an Equal Protection action against Defendants. Accordingly, the trial court did not err when it granted Defendants' motion for a directed verdict in Count VII at the close of all evidence.

IX. The trial court correctly granted Defendants' motion for summary judgment on Count VIII (Negligence) and Count IX (Conversion) because County's Crime Policy is not a liability policy that covers the tort claims asserted in Counts VIII and IX [Response to Plaintiff's Point IX].

When considering appeals from summary judgments, this Court's review is essentially *de novo*. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W. 2d 371, 376 (Mo. banc 1993). The propriety of summary judgment is purely an issue of law. *Id.* An order of summary judgment may be affirmed under any theory that is supported by the record. *In re Estate of Blodgett*, 95 S.W. 3d 79, 81 (Mo. banc 2003).

Investors argues that the trial court erred in granting Defendants' motion for summary judgment on Counts VIII (negligence) and IX (conversion) because County's purchase of Commercial Crime Policy No. 873-99-87("Crime Policy"),

LF 68-116, waived its sovereign immunity to the torts asserted in those counts. Crime Policy is not a liability policy that covers Investors' tort claims, as required for a waiver of sovereign immunity pursuant to § 537.610.1 RSMo., which provides in relevant part:

> [T]he governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision . . . Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance . . . .

Id. (emphasis added).

Investors does not cite a single case holding that a commercial crime policy is liability insurance. Employee dishonesty policies, such as Crime Policy, insure against the risk of property loss to the named insured, in this case County, rather than to a third party, through employee dishonesty. *Lynch Properties v. Potomac Insurance Company of Illinois*, 140 F. 3d 622, 629 (5th Cir. 1998); *See also City of Burlington v. Western Surety Co.*, 599 N.W. 2d 469, 471-72 (Ia. 1999); *Vons Companies v. Federal Insurance Co.*, 212 F. 3d 489, 491 (9th Cir. 2000).

Liability policies, by contrast, require an insurer to discharge an obligation of the insured to a third party for some act of the insured or its employees. *Lynch*

Properties at 629. Although employee dishonesty policies may cover the loss of third-party property in the possession of the insured, these policies do not serve as liability insurance to protect employers against tortious acts committed against third parties by their employees. *Id.*

Where, as here, a policy limits loss coverage to "property that you own or hold[7]; or for which you are legally liable," LF 74 at ¶ 15, the policy is not liability insurance. *Lynch Properties* at 629. That being the case, Investors' reliance on language in Crime Policy concerning "conversion of property of other parties held by you," LF 91, and "failure to perform duties" including "failure to supervise," LF 108, is misplaced. *See City of Burlington* at 469.

For the reasons stated above, County's purchase of Crime Policy was not a purchase of liability insurance pursuant to § 537.610.1. Consequently, the trial court correctly held that County did not waive sovereign immunity to the tort claims alleged in Counts VIII and IX.

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7 Since County was not a bailee or trustee of the checks tendered to County by Investors or of the funds in Investors' checking account, it was not "holding" any property for Investors. *See Lynch Properties* at 629; and *Vons Companies* at 491 (9th Cir. 2000).

CONCLUSION

The judgment in favor of Defendants on Counts V, VII, VIII and IX should be affirmed. The judgment and amended judgment in favor of Plaintiff on Count I should be reversed, with instructions to set aside the verdict of the jury and to enter judgment in favor of Defendants. In the alternative, if judgment is not entered in favor of Defendants on Count I, the partial summary judgment with respect to Plaintiff's damages that occurred more than three years prior to Plaintiff's commencement of this action should be affirmed and the judgment in favor of Plaintiff should be set aside with instructions to grant Defendants a new trial on Count I.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of this brief and a 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief were mailed, postage prepaid, this 11th day of August, 2006 to:

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_____
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CERTIFICATE OF COMPLIANCE

I hereby 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 2000 and contains 13,329 words, excluding those portions of the brief listed in Rule 84.06(b) of the Missouri Rules of Civil Procedure. The font is Times New Roman, proportional spacing, 13-point type. A 3 ½ inch computer diskette (which has been scanned for viruses and is virus free) containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk.

_____
Cynthia L. Hoemann

APPENDIX TABLE OF CONTENTS

516.130. What actions within three years. --Within three years:

(1) An action against a sheriff, coroner or other officer, upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty, including the nonpayment of money collected upon an execution or otherwise;

(2) An action upon a statute for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the state;

(3) An action under section 290.300, RSMo.

(RSMo 1939 § 1015, A.L. 2005 S.B. 420 & 344)

Prior revisions: 1929 § 863; 1919 § 1318; 1909 § 1890

A1

537.610. Liability insurance for tort claims may be purchased by whom -- limitation on waiver of immunity--maximum amount payable for claims out of single occurrence--exception--apportionment of settlements --inflation-- penalties. --1. The commissioner of administration, through the purchasing division, and the governing body of each political subdivision of this state, notwithstanding any other provision of law, may purchase liability insurance for tort claims, made against the state or the political subdivision, but the maximum amount of such coverage shall not exceed two million dollars for all claims arising out of a single occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo, and no amount in excess of the above limits shall be awarded or settled upon. Sovereign immunity for the state of Missouri and its political subdivisions is waived only to the maximum amount of and only for the purposes covered by such policy of insurance purchased pursuant to the provisions of this section and in such amount and for such purposes provided in any self-insurance plan duly adopted by the governing body of any political subdivision of the state.

2. The liability of the state and its public entities on claims within the scope of sections 537.600 to 537.650, shall not exceed two million dollars for all claims arising out of a single accident or occurrence and shall not exceed three hundred thousand dollars for any one person in a single accident or occurrence, except for those claims governed by the provisions of the Missouri workers' compensation law, chapter 287, RSMo.

3. No award for damages on any claim against a public entity within the scope of sections 537.600 to 537.650, shall include punitive or exemplary damages.

4. If the amount awarded to or settled upon multiple claimants exceeds two million dollars, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection 1 of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the accident or occurrence, but the share shall not exceed three hundred thousand dollars.

A2

5. The limitation on awards for liability provided for in this section shall be increased or decreased on an annual basis effective January first of each year in accordance with the Implicit Price Deflator for Personal Consumption Expenditures as published by the Bureau of Economic Analysis of the United States Department of Commerce. The current value of the limitation shall be calculated by the director of the department of insurance, who shall furnish that value to the secretary of state, who shall publish such value in the Missouri Register as soon after each January first as practicable, but it shall otherwise be exempt from the provisions of section 536.021, RSMo.

6. Any claim filed against any public entity under this section shall be subject to the penalties provided by supreme court rule 55.03.

(L. 1978 H.B. 1650 § 2, A.L. 1989 H.B. 161, A.L. 1999 S.B. 295 & 46)