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**IN THE SUPREME COURT OF MISSOURI**

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ROBERT KAPLAN, et al.,            )  
  )  
          Plaintiffs/Respondents,    )            No. 85341  
  )  
vs.    )  
  )  
U.S. BANK, N.A., et al.,            )  
  )  
          Defendants/Appellants.      )

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**RESPONDENTS' SUBSTITUTE BRIEF**

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## **JURISDICTIONAL STATEMENT**

Plaintiffs filed a four count Petition in St. Charles County Circuit Court alleging claims for trespass and negligence against appellants U.S. Bank, N.A. (formerly known as Mercantile Bank, N.A.) and Avanti Marketing Group, Inc. d/b/a Southern Contractors generally arising out of the unauthorized dumping of 5,900 tons of PCB-contaminated concrete in Plaintiffs' creek. The jury returned a verdict for compensatory damages in the amount of \$650,000 against both appellants and for punitive damages against U.S. Bank and Southern Contractors in the amounts of \$7,000,000 and \$225,000 respectively. The defendants appealed. After the Court of Appeals issued an opinion, this Court granted Mercantile's application for transfer pursuant to Rule 83.04.

## **STATEMENT OF FACTS**

### **I. THE PARTIES**

Plaintiffs/Respondents are Robert Kaplan, as trustee of the Robert Kaplan Trust, and Leonard O'Brien d/b/a Cloverleaf Properties.

Defendant/Appellant U.S. Bank, N.A. f/k/a Firststar Bank, N.A. f/k/a Mercantile Bank, N.A. ("Mercantile") is a national banking association (Myers 1139).

Defendant/Appellant Avanti Marketing Group d/b/a Southern Contractors ("Southern") was a Missouri corporation. Gerald Winter was the principal of Southern actively involved in this case.

### **II. PROCEDURAL BACKGROUND**

Plaintiffs filed this case on October 15, 1998, alleging claims for trespass, nuisance, violation of a City of St. Charles zoning ordinance and negligence (LF 027). Following a three week jury trial in August 2001, Plaintiffs submitted the case on all claims with the exception of nuisance against Mercantile, Southern and Winter. The jury returned a verdict for compensatory damages in the amount of \$650,000 against both Appellants and for punitive damages against U.S. Bank and Southern in the amounts of \$7,000,000 and \$225,000, respectively. The jury returned a defense verdict in favor of Winter (LF 210). The defendants appealed. After the court of appeals issued an opinion, this Court granted Mercantile's application for transfer pursuant to Rule 83.04.

### **III. FACTUAL BACKGROUND**

#### **A. PCB Contamination Of The Lackland Property**

From 1976 to March 1993, Gusdorf Corporation ("Gusdorf") operated a furniture manufacturing plant at 11440 Lackland Road in St. Louis County, Missouri ("Lackland") (Petition ¶6, LF 028).

In the 1960s, Cooper Industries ("Cooper") used polychlorinated biphenyls ("PCBs") at Lackland to manufacture electrical transformers (Sweet 366-367; Ex. 73 at 2). In the 1960s and 1970s, PCBs often were used in the manufacture of heat-generating electrical equipment because of their heat resistant and nonflammable characteristics (Vajda 548). Because PCBs do not break down, they pose an environmental and health hazard, particularly once they leach into groundwater where they are toxic to fish, fauna and microbes (Vajda 548-549; James 2438; Kasper 1999-2000).

PCBs are measured in parts per million ("ppm") or parts per billion ("ppb"). Mercantile states that MDNR considers concrete containing PCBs in concentrations of 10 ppm or less "clean fill" (Merc. Br. at 9). That is true as a general statement. However, MDNR does not consider material containing PCB levels less than 10 ppm clean if there is a risk of ground water contamination (Ex. 249 at 3; Kasper 1960-61, 1978-79).

Mercantile violated the Clean Water Law when it dumped over 5,900 tons of PCB-contaminated concrete, including slabs "bigger than cars" with protruding rebar, into Plaintiffs' creek (Exs. 5, 6, 180, 181; Werre 1460; Winter 1723). Mercantile is correct that dumping the slabs of concrete alone would have constituted a violation of the Law,

regardless of the PCBs (Merc. Br. 16). However, the presence of PCBs created an independent problem under the Law:

PCBs are very toxic. And if they do leach or dissolve into water, they can have an affect on the fish, fauna, micros that live in the water. And any time you affect any aspect of the biota in water you are affecting it all, because everything feeds off of each other.

(Tr. at 1999-2000.) Edwin Knight, Director of the MDNR WPCP, and John Madras, WPCP Section Chief, each considered the presence of PCBs in Plaintiffs' creek to be a Clean Water Act violation (Eck 2540; Ex. 249 at 3):

Bob, from a water pollution perspective this appears to be a clear case of a water contaminant being in a location where it is reasonably certain to cause pollution. The water quality standards for PCBs is 0.000045 ug/l, which is a very low concentration.... The presence of easily detectable PCBs on the concrete is a clear indication that this material is readily available for uptake by biological organisms in the food chain.

(Ex. 249 at 3). Mercantile's toxicology expert agreed that the dumping was a clear violation of Missouri's Clean Water Law and indicated that he would not want PCBs on his property (James 2463-64, 2481-82).

## **B. Mercantile And Gusdorf**

In the fall of 1992, Gusdorf defaulted on a loan from Mercantile Bank (Myers at 21). In March 1993, Gusdorf went out of business and shut down its Lackland facility (Myers 971). At that time, Mercantile began selling off Gusdorf's assets that secured the loan (Myers 972). Mercantile placed Karen Myers, Vice President and Group Manager of Mercantile's Special Assets Division, in charge of the remediation and foreclosure of Lackland (Myers 967-968). Myers reported directly to John Arnold, Mercantile's Vice Chairman and Chief Financial Officer (Arnold 916, 925; Myers 967). Arnold and Myers devised a plan to capture as much financial value as possible from Lackland (Arnold 925-926).

Mercantile understood that the negative stigma associated with PCB contamination could "severely handicap the marketing of the property and greatly diminish its value" (Ex. 19 at 2). Mercantile also understood "that PCB's adhere, and then may leach into soil and water" (Ex. 19 at 4; Hutkin 619). Mercantile thus decided not to immediately foreclose (Myers 973, 1172, 1180). Instead, in 1993, Mercantile decided to maintain the Gusdorf entity to insulate Mercantile from environmental liability while Mercantile cleaned up Lackland (Myers 1185).

There is no doubt that Mercantile kept the Gusdorf Company alive as, in effect, a shell company. There is no doubt that Mercantile did that. There was good reasons for doing it....But having gotten in place a plan in 1994 to cleanup the site, it did not want to

foreclose and become the owner of a site that was still badly polluted. And the reason? Mr. Rosenfeld has alluded to it, is environmental liability. And what you are going to hear, **and the real reason for that is, if you become an owner, you are potentially liable for the environmental problem.**

(Merc. Opening Statement 272-273) (emphasis added).

From the outset of the Lackland cleanup, Mercantile was "in charge of the project and calling the shots" (Myers 1204). Mercantile hired Gusdorf's former Chief Financial Officer, Mark Wall, at a salary of \$1,000 per month to act as Gusdorf's "last standing officer" to sign documents presented to him from time to time by Mercantile (Wall 338-339; Myers 974). From 1993 on, Wall never participated in any discussions or negotiations regarding the environmental clean-up of Lackland and was never consulted or advised about the removal of any material from Lackland (Wall 343-347; Myers 975). Mercantile also hired Gusdorf's Controller, Don Duncan, to assist in Mercantile's liquidation of Gusdorf's assets (Myers 1001; Duncan 710-711). Duncan was a cost accountant who had kept Gusdorf's books prior to the shut down (Myers 1001; Duncan 703). Duncan had absolutely no experience whatsoever in environmental, demolition or waste disposal matters (Duncan 704). From 1993 forward, Duncan reported directly to Myers (Duncan 711).

Mercantile created a "zero-balance account" in Gusdorf's name (Duncan 709-710). Each week, Myers and Duncan would go over the bills for the clean-up

(Duncan 709-710). Myers would then release funds into the zero-balance account in the amount of the bills to be paid (Duncan 709-710). Duncan would then pay the bills on Gusdorf checks drawn on the account (Duncan 710).

### **C. Mercantile's Initial Evaluation Of Remediation Options**

In the fall of 1993, Mercantile began to assemble a team to evaluate options for the remediation and re-marketing of Lackland (Hutkin 615; Milster 799). In 1994, Mercantile hired Gerald Winter of Southern at a salary of \$5,000 per month to provide Mercantile with in-house construction expertise and to serve as Mercantile's "eyes and ears" at the Lackland clean-up (Myers 1004, 1013, 1024; Winter 1600-03; Ex. 58; Winter 1602-03; Myers 1024). As Mercantile told the jury in opening statement: "Southern Contractors actually has three different roles over this period of three or four years" (Merc. Opening Stmt. 275).

Mercantile also hired an environmental company, Abatement Management, Inc. ("AMI"), to test for PCBs (Sweet 363-346). AMI's March 1994 preliminary report identified widespread contamination in all areas tested (Exs. 32, 34, 50; Myers 1007). By letter dated April 6, 1994 to Karen Myers and Mercantile's counsel, Winter confirmed the team's conclusion that:

**All materials being removed from site shall be assumed to contain some levels of PCB contamination.** Testing will establish levels to determine which site is used for disposal, but all within the same disposal company waste stream.

(Ex. 41; Myers 1014; emphasis added).

Mercantile identified three remediation options:

1. to "scarify", or grind down, the wood and concrete flooring of the manufacturing building, leaving its shell (Myers 1015);
2. to "remove and replace" the flooring in the manufacturing building (Myers 1015); or
3. to demolish the building entirely (Myers 1015).

Mercantile was not satisfied that the first two options would leave the property sufficiently clean for re-marketing (Myers 1016-17). According to Myers, "detectable levels" of PCBs were "up the stairs... down the hall... in the overhead tanks.... It was everywhere" (Myers 1017).

#### **D. Mercantile's Settlement With Cooper**

By December 1994, Mercantile had received AMI's PCB Assessment Report which confirmed contamination throughout the property (Sweet 374, 377; Ex. 73; Myers 1039-40). Mercantile understood that the PCB contamination at Lackland "was a huge problem and a very expensive problem" (Myers 1189). Mercantile's goal was to pass on as much of the remediation costs as possible to Cooper and identified this as one of the three "Key Issues for Mercantile" in its meetings with Cooper (Exs. 33, 34). Mercantile's other goals were to limit Mercantile's environmental liability, and to complete the remediation as quickly as possible: "Time means money to the Bank" (Myers 1008-9).

On November 1, 1994, Mercantile and Cooper executed a Release and Settlement Agreement (the "Release") outlining the scope of the remediation and confirming their cost-sharing agreement (Ex. 69; Myers 1037-38). The Release contemplated that: (i) Cooper would remove all material contaminated at 10 ppm or greater at its sole cost (Ex. 69 at 1; Myers 1037-38, 1040); and (ii) what remained of the buildings and other structures would be demolished, with Cooper and Mercantile paying 75% and 25% of the demolition costs, respectively (Ex. 69 at 4; Myers 1041). Mercantile was solely responsible for the disposition of materials containing PCBs less than 10 ppm (Myers 1041, 1380).

At Mercantile's insistence, the parties engaged Winter as the project's non-PCB demolition contractor on a no-bid basis (Ex. 67 at 1; and Ex. 69 at 4; Myers 1367-68; Winter 1604-05). The non-PCB contractor's duties were to demolish the manufacturing building after the property had been remediated down to 10 ppm (Ex. 69 at 4; Winter 1605).

#### **E. The Work Plan**

Pursuant to the Release, Cooper hired Dames & Moore to prepare a work plan for the remediation (the "Work Plan") (Ex. 78; Vajda 549; Myers 1040). The primary purpose of the Work Plan was to protect against inappropriate handling and disposal of waste materials:

Waste segregation and handling procedures will be enforced **to preclude mixing or misdirection of materials that could result in illegal or**

**inappropriate disposal of wastes or on-site/off-site  
use of materials.**

(Ex. 78 at 14, 37, 44, emphasis added; Vadja 551-556; Sweet 379-381).

The Work Plan contained detailed procedures to reduce the PCB contamination on the Property to a level of 10 ppm and to ensure proper disposal of all contaminated materials (Ex. 78 at 13-14; Vadja 551-54). The Work Plan required that Cooper remove materials and soils having contamination levels over 10 ppm and, depending on the level of contamination, deliver the materials to a Toxic Substance Control Act landfill or a permitted landfill (Ex. 78 at 13-14; Vadja 551-554). The Work Plan required that all materials containing PCB levels of 10 ppm or less be: (i) disposed of as Special Waste demolition debris at a permitted landfill; or (ii) crushed and used on-site at the Property as backfill (Ex. 78 at 14, 33, 37; Vadja 554-557, 571-572, Myers 1043-44).

*Special waste demolition debris* includes various equipment, **wall materials, concrete**, etc. which are not reusable. After the demolition debris is randomly sampled for PCBs, the debris **will be transported and disposed as special waste demolition debris or will be crushed and used on site as backfill material.**

\* \* \*

Materials exhibiting levels of PCBs less than 10 ppm may be crushed and stockpiled on site and used for

backfill during final restoration of the site **if approved**  
**by Mercantile Bank, a lien holder.**

(Ex. 78 at 14, 37; emphasis added).

This decision was left up to Mercantile (Vajda 557; Myers 1043-44). According to Arnold and Myers, this decision was strictly a function of the "reward of additional contamination material being removed" (Arnold 928-929; Myers 1048-49). Once the remediation under the Work Plan was complete, Mercantile intended to apply to the EPA for an "unrestricted" designation for Lackland (Vajda 559, 589; Myers 1079-82).

In February 1995, Mercantile hired Soil Consultants, Inc. ("SCI") to make an analysis and recommendation (Exs. 89 and 98; Myers 1048-50). In April 1995, SCI reported that Mercantile could avoid increased regulatory compliance and increased risk of liability by landfilling the material (Ex. 98 at 2; Myers 1048-50, 1055-56).

burying the material on-site will most likely involve a permit of the burial site, installing a liner for the pit, and....**[i]n addition, local regulatory agencies may require additional monitoring of the material once buried to ensure the PCBs do not migrate during the life of the development.**

(Ex. 98 at 2; emphasis added).

#### **F. Cross-Contamination At Lackland**

The remediation began in April 1995 (Ex. 96). Mercantile hired AMI to monitor the daily remediation activities (Exs. 81 at 2; Sweet 378-79; Myers 1046).

Beginning in April 1995, AMI reported serious instances of cross-contamination at the site including, but not limited to: Failure to adequately segregate and mark "hot" zones, failure to use a truck wash to clean trucks carrying PCB-contaminated material, failure to use a boot wash to prevent tracking of PCB-contaminated mud and soil into clean areas, inadequate lighting, inadequate wetting during demolition, and stockpiling of high level PCB-contaminated wood flooring with and against concrete and walls (Exs. 3, 96 at 1-7; Sweet 381-390; Myers 1059-62). AMI provided Mercantile with photographs of the cross-contamination (Ex. 3; Myers 1062). Winter also reported cross-contamination to Mercantile (Winter 1612-1738).

As a result, Mercantile understood that areas previously believed to be clean, such as the exterior concrete walls of the building, were now contaminated (Myers 1058-60). Winter agreed that "when there's cross-contamination, you can't assume anything is clean" (Winter 1738).

In the summer of 1995, Steve Sweet, President of AMI, toured the Property with Myers and Mercantile's counsel, pointing out numerous violations of the Work Plan and cross-contamination at the Property (Ex. 3; Sweet 391-392; Myers 1062). In response to Sweet's warnings, Mercantile's counsel told Sweet to "shut up" (Sweet 391-392). When AMI's warnings persisted, Mercantile eliminated AMI's role as environmental monitor and placed AMI on-call for spot sampling (Ex. 113; Sweet 390-392).

By late 1995, Cooper had removed all material containing PCBs in excess of 10 ppm, disposing of all of it in licensed landfills (Myers 1073). The material

containing PCBs of 10 ppm or less remained stockpiled on site awaiting Mercantile's instructions (Myers 1084).

#### **G. The Southern/Gusdorf Contract**

In January 1996, at Mercantile's direction, Don Duncan and Winter executed a contract relating to "miscellaneous items" such as removing fencing, signage and doing other general site reclamation work at Lackland (the "Southern/Gusdorf Contract")(Exs. 136 and 137; Myers 1286; Duncan 724, 727-729). Gusdorf's last standing officer, Mark Wall, never saw or authorized the contract (Wall 343, 346).

Although the document contained boilerplate denominating Southern as an independent contractor, the contract's "Scope Of Work" specifically provided that the "Owner" retained the right to control the selection of the materials and the specific manner, method and location of disposal:

Compactible **materials, acceptable to the owner,**  
may be reused from materials available on the site to  
reduce disposal costs and maximize buildable areas  
above the flood plain elevation.... **With the written**  
**approval of Owner,** concrete elements from the  
demolition of the existing buildings may be **used** as fill  
in areas of backfill or regrading. The **method** of  
compaction of all placed materials **shall be approved**  
**in writing by Owner.**

\* \* \*

Note: When the word "storage" is used it shall mean storage on site of the removed concrete or paving elements to **an area approved by Owner.**

(Ex. 137 at Appendix B, Section A) (emphasis added).

The contract did not address the disposition of the stockpiled concrete (Ex. 137 at Appendix B; Myers 1085). That decision remained with Mercantile (Myers 1043-44, 1085, 1382-83).

#### **H. Mercantile's Decision To Haul The Concrete Off-Site**

Mercantile wanted to remove all material with any detectable levels of PCBs (Myers 1057, 1080-82). Mercantile also wanted to remove all concrete over 8" in diameter "because it was unsightly" and all concrete containing rebar "because it was dangerous" (Myers 1058). Mercantile believed that it was imperative to obtain an unrestricted designation from the EPA in order to increase the market value of Lackland (Myers 1080-82). In her comments to Cooper's proposed closure report to the EPA, Myers complained that:

This section does not mention the significant efforts of Gusdorf in removing materials with PCB concentration between 1 and 10 ppm. **We believe such a reference and inclusion of a descriptive of the activities with respect to the 1-10 material is a significant aspect of the remediation.**

(Ex. 126 at §2.3; emphasis added; Myers 1079).

In January 1996, Mercantile brought AMI back to spot sample at Lackland to make sure that no PCBs were being left behind (Ex. 129; Ex. 134 at 1-4; Sweet 393). AMI reported that Southern was breaking up contaminated concrete slabs and adding them to the stockpiles earmarked for removal (Ex. 143 at 16; Sweet 405-407). Mercantile asked AMI to test the ground where the slabs had been, but not the cross-contaminated stockpiles where the slabs were dumped (Ex. 177 at 8; Sweet 415-416; Myers 1438).

In February 1996, nearly a year after the remediation began, the cross-contaminated stockpiles remained awaiting Mercantile's direction (Myers 1084). On February 15, 1996, Winter commented in a Site Status report:

Building debris from demolition. Demo permit requires disposal of material. **Karen has refused to address this problem.**

....

**Bank is unwilling to commit any additional funds at this point.**

(Ex. 144 at 2, emphasis added; Myers 1083-85, Winter 1615-16).

By May 1996, the parties were operating under the assumption that all materials at the site were contaminated:

Q: You assume all things contaminated until proven clean; Is that right?

A: That's correct.

\* \* \*

**Q: That's correct. And that was still the assumption in May of '96?**

**A: Right.**

(Winter 1736-37; emphasis added).

On May 24, 1996, Winter faxed to Myers five options for disposal of the stockpiled concrete (Ex. 159):

1. Break to loadable or disposable size. Waste Management wants 1' x 1'. **Dispose in Landfill.**
2. Break to compactible fill size and **haul to alternate bank owned site** in need of fill (Terry Fischer or Hollister). **Additional testing would be required.**
3. Break to compactible fill size and **haul to third party site for fill. Additional testing would be required.**
4. Deed to Southern Contractors the small parcel by railroad tie in at Page, approximately 1.2 acres for installation of fill. Fair market value will be deducted from cost of concrete disposal

and Southern Contractors could sign hold harmless from any future liability.

5. Break up material to crusher size. Crush rock and install on site or stockpile for further use.

(Ex. 159, emphasis added). Mercantile was over budget and had missed several deadlines (Myers 1076-77; Duncan 766). Months earlier, in October 1995, Mercantile had exceeded its \$750,000 Credit Line on the clean-up by more than \$240,000, requiring Myers to "go crawling back" to John Arnold for additional funds (Myers 1076-77).

Due to cost considerations, Mercantile rejected option 1-- to crush and landfill the stockpiled material (Myers 1092, Winter 1621, 1645-46). When asked to run the numbers at trial, Myers estimated that it would have cost approximately \$400,000 to landfill the stockpiled material, exclusive of crushing the concrete and removing the rebar (Exs. 98 at 5; Ex. 135; Ex. 167; Ex. 173; Myers 1405-06, 1413-15; Winter 1623-27).

Mercantile did not want the concrete to remain at Lackland, or to be used as fill at any other Mercantile-owned property, thereby eliminating options 2, 4 and 5 (Myers 1090-1091, 1421-22). This left the third option, hauling to third party sites after additional testing, reduction and removal of rebar (Ex. 159). Mercantile decided, however, not to crush or test the stockpiles, or remove the rebar (Myers 1438; Sweet 537; Winter 1723).

Motivated solely by cost considerations, Mercantile chose a sixth, unstated option: Myers told Winter to "Just take it off" (Myers 1382-83; 1421).

**Q: Just take it off?**

A: **Right. I said, we just want all of the stockpiles removed. We're not going to take them to our site.** He and I spoke about the Fisher. I told him that I wasn't interested in deeding the property to Southern because of the railroad issue. I didn't want to give up any ground there. And he and I talked. And we said, we're not going to use it on the site for stockpiling. I think he probably told me there was an issue with St. Louis County and the demo permit which he was anxious to close out. **And we talked, and I just said, well, let--you know, we're just going to remove everything from the site.**

(Myers 1421; emphasis added).

In June 1996, Duncan forwarded to Myers a proposed "Change Order" to the Southern/Gusdorf Contract with the notation: "Karen, does this meet your requirements? Don." (Ex. 169). The proposed Change Order contemplated landfilling contaminated material and removal of clean material as follows:

2. Dispose of contaminated material at following sites:

\* \* \*

- b. PCBs at Waste Management (Milam) or St. Louis Auto Shredding (National City, Illinois)

\* \* \*

- 4. Clean material not used for backfill to be removed from premises.

(Ex. 169).

On June 14, 1996, Myers faxed her changes to the proposed Change Order back to Duncan stating that, with respect to the clean material, "want to know where it is going...documentation for files" (Ex. 170; Myers 1104, 1396-97). On June 17, 1996, at Mercantile's direction, Duncan and Winter signed the Change Order revised per Myers' instructions (Ex. 171; Duncan 759; Winter 1746). Paragraph 2 directed Southern to dispose of PCB contaminated material at the Milam or St. Louis Auto Shredding landfills (Ex. 171). Paragraph 4 dealt with the disposal of the clean material:

- 4. Clean material not used for backfill to be removed from premises. Gusdorf Corporation to be notified in advance of shipment all locations this material shipped to and estimated quantities.

(Ex. 171; Myers 1112, 1397; Winter 1642).

The Change Order did not address the ultimate destination of clean material (Ex. 171 at para. 4). Mercantile retained the authority to make that decision:

Q: Ms. Myers, where we left off yesterday,  
**Mercantile had the right to decide whether to  
remove this ten parts per million and under  
from the Lackland Road site or to leave it on  
site and crush it; is that correct?**

A: **Yes.**

Q: **Okay. And, in fact, it was Mercantile and  
you and Mr. Arnold who made that  
decision?**

A: **Yes.**

\* \* \*

Q: But this was a decision-- the decision whether  
to remove this material -- and for the purposes  
of the material, everything under ten, whether  
somebody thought it was clean or somebody  
thought it had two parts per million, **but  
everything under 10, that decision was a  
decision that Mercantile and Mercantile  
alone had the right to control; is that right?**

A: **Yes.**

Q: And it's also true that Mercantile could have  
told Mr. Winter with respect to all of this

concrete, whether clean under ten, just the  
concrete that was stockpiled out there,  
**Mercantile could have told Mr. Winter, take  
it all to a landfill? You had the right to tell  
him that?**

A: **Yes.**

Q: **That was a decision that was within  
Mercantile's control.**

A: **Yes.**

\* \* \*

Q: But you knew about Milam?

A: I knew about Milam.

Q: **And it was within Mercantile's control to  
say, Jerry, we're not going to take any  
chances, clean, not clean, take it all to  
Milam? That is something Mercantile could  
have done?**

A: **If I got that specific, yes.**

Q: **Okay. I mean, you had the right to do that?**

A: **Yes.**

\* \* \*

Q: You had the right to choose any of these options?

A: Yeah.

Q: The decision as to where to take the material was within Mercantile's control?

A: I did not decide where it was taken.

Q: I understand that. And it was--but you could have?

A: **I could have been very specific, yes.**

Q: You could have? You had the right to tell Mr. Winter, we want you to take it to one of our other sites Terry Fisher?

A: Yes.

Q: That was the decision within your control?

A: Yes, I said that.

Q: You could have told him to take it to the landfill? That was within your control?

A: Yes, I did.

Q: You could have told him, let's deed property over to you and let's put it right on site there? That was within Mercantile's control?

A: Yes.

Q: You could have said, let's break it up and use it? That was within your control?

A: Yes.

Q: You could have told them to take it to another site? That was – you could have told Mr. Winter? **You had the right to tell Mr. Winter** exactly where to take it?

MR. WILSON: Objection, asked and answered.

THE COURT: Overruled. Not quite but close, but overruled at this time.

A: **Yes.**

(Myers' 1389-1390, 1391, 1392-1393, 1394; emphasis added).

Mercantile retained the right to direct Southern to take all of the material, clean or contaminated, to a landfill:

Q: Okay. Okay. So you didn't specifically say with respect to clean, hey, that should go to a landfill, too?

A: No.

\* \* \*

Q: Okay. And you could have put in here, you had the right to write in here, just take out four and put dispose of **all** material at following sites?

You could have--you could have done that?

**You had the right to do that?**

**A: I had the right to do that.**

(Myers 1396, 1399; emphasis added).

### **I. The Dumping Of The Concrete In Plaintiffs' Creek**

In June 1996, prior to disposing of the stockpiled concrete, Myers toured the stockpiles (Myers 1298). Winter discussed with Myers and Mercantile's consultants the disposal at third party sites (Winter 1645-1646; Duncan 760-762). Duncan visited at least one of the sites (Duncan 760) and Winter was directed to another site by Mercantile's consultant, Paragon (Winter 1643-44).

From July 1, 1996 through August 2, 1996, Southern hauled 295 trailer loads of concrete into a creek located on the northern boundary of Plaintiffs' mobile home park and behind the residences at Nos. 7-9 Faye Avenue (the "Faye Creek") (Exs. 180, 181; Duncan 760-763; Myers 1121; Winter 1647). The 5,900 tons of material included concrete slabs the size of cars with protruding rebar and filled a creek bed approximately 315 feet long, 10 to 15 feet deep and 30 to 35 feet wide (Ex. 302 at 5; Werre 1460; Winter 1723).

As Southern disposed of the stockpiled concrete, Winter completed shipping tickets which were kept by Duncan at Lackland and available for inspection by Myers (Exs. 178, 181; Duncan 760-762; Winter 1646, 1722). When he finished, Winter completed a ledger detailing the destination of each truck load of concrete which Duncan passed on to Myers (Ex. 181; Duncan 762). Duncan also prepared a computer log for

Myers showing the destination and tonnage of each shipment of stockpiled material (Ex. 180; Duncan 762-763).

Q: And you provided this ledger to Ms. Myers?

A: Yes. I passed it along to her, yes.

Q: Okay. And let's go to 180. 180 is your--you got on your PC and you took the information and you created a computer log of the tonnage?

A: Correct, estimated tonnage.

....

Q: Did you send this computer log to Ms. Myers?

A: Yes, I would have.

(Duncan 762-763).

Mercantile paid Winter \$200,900 to dispose of the stockpiled concrete, approximately one-half of Mercantile's estimated cost to landfill the material (Exs. 98, 135; Myers 1413, 1415; Winter 1625-27).

On September 20, 1996, Mercantile foreclosed on Lackland (Ex. 189; Milster). Mercantile sold Lackland for \$7.4 million (Myers 1310-11).

Through the foreclosure and thereafter, Winter continued to work for Mercantile in a variety of tasks, including grading, seeding and weed-cutting (Exs 184, 185, 191, 199).

#### **J. Appellants' Refusal To Test The Concrete**

Plaintiffs discovered the dumping in December 1996, when water and snow runoff backed up in the culvert, blew off a drainage grate and flooded the rear of Plaintiffs' property (Ex. 192; Kaplan 2024-27). On January 7, 1997, Bruce Sokolik of Kaplan Real Estate contacted Winter and both Harry Mueller and Myers at Mercantile to schedule a meeting at the creek the following afternoon (Ex. 194; Myers 1126-27; Kaplan 2029-32, 2034-35; Winter 1658). The morning of the meeting, Myers reported that she was sick (Myers 1304). Mercantile did not send another representative (Myers 1428-29).

At the meeting, Kaplan expressed his concern to Winter that the material in the creek might be contaminated and told Winter that he wanted it tested (Ex. 197; Kaplan 2039-40; Winter 1659-60). Winter assured Kaplan that the material was not contaminated and offered to provide documentation to Kaplan's environmental consultant, ATC (Ex. 197; Kaplan 2040). Kaplan insisted that the waste be tested (Kaplan 2039-40). Winter agreed, but agreed to pay for the testing and removal only "if the tests were positive for contamination" (Ex. 197 at 2; Kaplan 2189-90). If the tests were negative, Winter reserved the right to leave some or all of the concrete in Plaintiffs' creek (Ex. 197 at 2).

On January 14, 1997, Winter sent a letter to ATC with copies to Myers and Kaplan (Exs. 200 and 201; Myers 1430; Kaplan 2041-42). Winter misrepresented that the concrete was clean:

Structural concrete came from three buildings, the original manufacturing area, a finishing building and

rear warehouse, **both of which were built in the 1980's and tested with no contamination.**

(Ex. 200 at para. 3; emphasis added). AMI had, in fact, previously reported that both the finishing building and rear warehouse had tested positive for PCBs (Ex. 73 at 18, 20; Myers 1434-1435). Winter also misrepresented that confirmation testing had been performed on the concrete:

All of the concrete generated by Southern Contractors was segregated into piles and identified on a map.

**Confirmation testing was performed on concrete by both AMI and Earth Services.**

(Exs. 200 and 201 at para. 4). Mercantile and Southern knew that no confirmation testing had been performed on the concrete (Myers 1438). Although Myers received and read Winter's letter, she made no effort to contact ATC or Kaplan to correct Winter's misstatements (Myers 1431, 1437-39).

Plaintiffs continued to request that Mercantile and Winter test the material (Kaplan 2042; Winter). On January 31, 1997, ATC sent out a testing proposal (Winter 1662). In response, Mercantile and Winter continued to try to convince Plaintiffs that the concrete was clean:

Q: So, January 31, you already knew that this stuff is going to be tested because we've got ATC sending out a report, a proposal to you right?

A: Well, I think we still thought at that time that we might be able to get them enough information to dissatisfy [sic] them **so there was little bit of negotiation going on as to whether or not we were going to actually have to physically test it or not.**

Q: **You and the bank weren't sure -- you were trying to tell ATC and the Kaplan people, to assure them that it was clean? That is what you were trying to do, right?**

A: **I was hoping, yeah. We thought it was clean.**

Q: **And it turns out it wasn't clean, right?**

A: **Correct.**

(Winter 1663-64; emphasis added).

On February 6, 1997, Sokolik wrote to Winter with a copy to Myers asking for a response to ATC's proposal (Ex. 207; Kaplan 2045-46). On February 10, 1997, Winter responded that he did not want "to sign the ATC proposal and later try to collect from Mercantile" (Ex. 208; Winter 1749-50; Kaplan 2046-47). Mercantile refused to help (Winter 1749-50, 1752).

Frustrated, Kaplan, who had been a long time customer of Mercantile, called Harry Mueller again, who told Kaplan that he had to deal with Myers (Kaplan 2048-49). Kaplan asked for another meeting in late February 1997 (Winter 1752). On

February 25, 1997, Winter wrote to Myers requesting that Mercantile send a representative to the meeting (Ex. 214; Winter 1752-1753; Kaplan 2049). Mercantile did not send anyone to the meeting (Winter 1753; Myers 1428; Kaplan 2050).

The following month, on March 12, 1997, Winter "as agent for and on behalf of" Mercantile, agreed to ATC's testing proposal (Ex. 216; Winter 1753-54). That day, Winter's attorney wrote to Mercantile, stating, "We assume from your lack of active participation in this matter that you have authorized Southern Contractors to proceed in your behalf with the execution of a contract with ATC for this testing" (Ex. 217; Winter 1754-55). In response, on March 17, Mercantile admonished ATC that Mercantile would not participate in the testing of the concrete:

Mercantile shall have no obligation on any contract entered into by your firm and Southern Contractors.

(Ex. 218; Milster 897-898; Kaplan 2053-54). Alan Milster of Mercantile's Special Asset Division conceded that Mercantile "didn't want to have anything to do with the testing" (Milster 898). Myers testified that Mercantile refused to pay "a penny" to test Plaintiffs' property.

In April 1997, ATC tested the concrete (Ex. 223; Kaplan 2056). The concrete in Faye Creek tested positive for PCBs and ATC recommended removal and disposal of the concrete in a licensed landfill (Ex. 227 at 7, 8; Winter 1668-69; Kaplan 2057-58). Mercantile and Winter did not pay ATC and, instead, argued over who was liable for the dumping:

Q: Okay. In the spring of 1997, when we were waiting patiently for you, for Mercantile, for Cooper, for whoever, when we don't even know what we had, there was blame being - - and responsibility being passed in a circle; is that right?

A: I guess you could say that.

(Winter 1765-66).

#### **K. Appellants' Refusal To Remove The Concrete**

In June 1997, after receiving the ATC test results, Kaplan again asked for a meeting with Mercantile, this time writing directly to Mercantile's CFO, John Arnold (Ex. 234; Kaplan 2063-65). Arnold would not meet with Plaintiffs or return their calls (Ex. 235; Arnold 961; Kaplan 2065-67). Instead, Mercantile sent its attorney and Alan Milster, who reported to Myers (Milster 794).

At this meeting, Kaplan requested that Mercantile: (i) remove the concrete; (ii) indemnify the property owners against future claims that might arise due to the presence of PCBs on the property; and (iii) reimburse Plaintiff's for their out-of-pocket costs (Ex. 236; Milster 860, 899; Kaplan 2067-68). Plaintiffs did not ask Mercantile to compensate Plaintiffs for the diminution in value of their property (Kaplan 2068-69; Milster 861).

Milster testified that Kaplan was respectful and that his requests were reasonable (Milster 862-863). Nonetheless, Mercantile was unwilling to either remove

the concrete or provide an indemnity (Milster 861, 864, 899). According to Milster, Mercantile would only commit to try to "stimulate the contractor who deposited the material to do the right thing and get it out of there" (Ex. 236 at 3; Milster 861, 864; Arnold 935; Kaplan 2071).

In early July 1997, Winter obtained a bid to dispose of the concrete at a landfill under a contract not to exceed \$85,000 (Ex. 241; Winter 1735). Neither Winter nor Mercantile conveyed this bid to Plaintiffs because Winter could not get Mercantile to contribute any money for the removal (Winter 1672, 1735).

Mercantile claims that "by mid-July, the Bank had offered to remove all the concrete from the site and have ATC supervise the clean-up" (Merc. Br. 18). Mercantile did not call any witness to testify to such an offer or produce any document authored by Mercantile reflecting an offer to remove the waste. There is a reference in a note made by one of Plaintiffs' employees regarding a telephone call in July 1997 between the parties' counsel (Ex. 245). The note states that Mercantile's attorney "indicated to [Plaintiffs' counsel] they would have the materials removed but did not indicate how soon" (Ex. 245; Kaplan 2310). Mercantile did not call either of the attorneys involved in the conversation or the employee who made the note. Instead, Mercantile asked Kaplan to confirm that the note said what it said and points to that testimony as its "offer" (Merc. Br. 44; Kaplan 2239).

Mercantile's corporate representative, Myers, testified that she didn't know of any offer ever being made by Mercantile to Plaintiffs to remove the waste (Myers

1444-45). Winter testified that Mercantile was not willing to contribute anything to remove the waste (Winter 1672).

Q: And the Bank wouldn't pony up the 85; is that right?

A: I don't remember talking to them about this proposal. I do remember talking to them about trying to get them to participate to give us money to clean this up.

Q: **And their reaction?**

A: **No.**

(Winter 1672; emphasis added).

#### **L. Mercantile Hires Litigation Counsel**

In late July 1997, Mercantile dismissed its environmental attorney and hired litigation counsel from another law firm (Ex. 246; Kaplan 2074-75). To Plaintiffs, the switch from an environmental to trial lawyer confirmed Mercantile's unwillingness to clean up the creek (Kaplan 2305).

Thereafter, Mercantile advised Plaintiff that the homeowners along Faye Avenue did not want the concrete removed and the creekbed exposed (Kaplan 2124-26). This turned out to be false--the neighbors told Mercantile, Winter and the MDNR that they wanted the concrete removed (Werre 1483-84, 1488; Roberts 2375; Eck 2541). Nevertheless, in order to facilitate removal, Plaintiffs sought and obtained the City's agreement that, if the waste was removed, the City would extend the culvert the length of

the creek and then grade over it to fill in the exposed creekbed (Kaplan 2126).

Mercantile then demanded that Plaintiffs obtain the Corps of Engineers' approval of the proposed extension of the culvert (Kaplan 2128). In September 1997, Plaintiffs met with representatives of the Corps, who approved of the City's proposal to extend the culvert once the waste was removed (Ex. 6; Kaplan 2128-29). Mercantile still refused to remove the concrete from the creek (Kaplan 2130).

From the time Myers received the first phone call from Sokolik in January 1997 through October 1997, Mercantile never sent a representative to Faye Creek (Myers 1428-29). In October 1997, fourteen months after the dumping, Mercantile's attorney met with the three of the homeowners whose backyards abutted the bank of the creek (Werre 1452, 1485). At this meeting, Mercantile's attorney advised the homeowners that the concrete in the creek was "clean and safe" (Werre 1509-1510). The homeowners told Mercantile's attorney that they wanted the concrete removed (Werre 1487-1489). Mercantile's counsel told the homeowners that Mercantile was considering removal of the concrete from Plaintiffs' side of the property line, but that Mercantile would not remove concrete on the homeowners' side because there was no issue of contamination (Werre 1487-88).

In November 1997, eleven months after learning of the dumping, Plaintiffs filed suit in federal court (RSLF 26). By stipulation, the parties dismissed all claims and cross claims in the federal case (RSLF 65)(Winter 1671). On October 15, 1998, Plaintiffs filed this action (LF 027).

#### **M. Notice Of Clean Water Law Violations**

Although MDNR's Hazardous Waste and Solid Waste divisions classified materials having PCBs under 10 ppm as "clean fill" (Eck 2510-11, 2528), MDNR's Water Pollution Control Program determined that the dumping of PCB-infected material constituted a violation of Missouri's Clean Water Law (Eck 2539-40; Ex. 249 at 2, 3; Exs. 251, 253, 259; Kasper 1960-61, 1978-79; James 2463-64, 2481-82).

On August 31, 1998, MDNR sent a letter to Winter and the homeowners notifying them that the contaminated concrete violated Missouri's Clean Water Law and demanding removal and disposal of the concrete at a permitted landfill:

[T]he placement of the contaminated material in the creek constitutes a violation of the Missouri Clean Water Law under Section 644.051.1(1) and(2) and 644.076.1,....The presence of detectable concentrations of PCBs on the concrete is a clear indication water contaminants have been placed in the creek, and is readily available for uptake by biological organisms in the food chain.

(Ex. 251 at 5; Kasper 1951). On November 23, 1998, MDNR sent out a second letter, this time with an accompanying Notice of Violation (Ex. 253 at 3). As a result of the failure to comply with the two prior notices, on February 3, 1999, MDNR sent out a third letter and referred the matter to the Enforcement Section of the Water Pollution Control Program ("WPCP") (Ex. 259; Kasper 1975-76). Mercantile received a copy of each of these letters (Exs. 251, 253, 259).

Winter never responded to the MDNR Notices (Kasper 1976).

**N. Mercantile's Disavowal Of The Southern/Gusdorf Contract And  
Of Its Role In The Lackland Clean-Up**

On May 4, 1999, Mercantile responded to Edwin Knight, Director of MDNR's Water Pollution Control Program, stating that it was Gusdorf, not Mercantile, that was responsible for the contaminated waste in Plaintiffs' creek:

We understand your concern about the material in this ditch, **however, Mercantile Bank had no involvement in the placement of the materials.... Gusdorf contracted with Southern to remove the rubble**, which was deemed clean, from the cleanup site and to haul it to an appropriate but unspecified location.

**In 1995 and 1996, Gusdorf and Cooper Industries** (the successor to the prior owner of the property) **undertook an environmental cleanup of the site.... Gusdorf contracted with Southern Contractors to remove that clean concrete rubble from the demolition site....**

**Mercantile did not contract with Southern Contractors to dispose of the rubble in any fashion.**

(Ex. 263 at 1, 2, emphasis added; Kasper 1982-88).

For four and one-half years, from 1997 up to Mercantile's opening statement in August 2001, Mercantile took this same position in its representations to the Missouri regulatory authorities, to the Attorney General and to the trial court. In its Answer to Plaintiffs' Petition, Mercantile denied that Gusdorf had ceased operations prior to 1994, and denied that Mercantile had ever hired AMI (RSLF 3 at ¶23; Myers 976-977; Kaplan 2131). In February 1999, Myers testified in her deposition that it was Gusdorf, not Mercantile, that had "independently engaged Southern Contractors" (Myers 979). In 1999, Mercantile filed a motion for summary judgment, representing to the court that "Southern was hired by Gusdorf," and that "There is no factual or legal basis for treating Mercantile and Gusdorf as one in the same" (Myers 984).

In November 2000, Myers filed an Affidavit in the Missouri Attorney General's statutory enforcement action against Mercantile and Southern,<sup>1</sup> averring as follows:

- "After a great deal of negotiations, **Gusdorf and Cooper entered into a Release and Settlement Agreement**, which named the Bank as a third party beneficiary to the Settlement Agreement."
- "**Gusdorf**, with financial assistance from the Bank, **assumed responsibility for remediation of any**

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<sup>1</sup> Although the Affidavit was allowed into evidence, the trial court excluded any reference to the enforcement action pursuant to Appellants' Motion in limine (RSLF 13).

**PCB materials under 10 ppm, and any other contamination."**

- "At the end of the cleanup process, **Gusdorf engaged Southern Contractors**, under a written Construction Contract and a Change Order, to **haul off and dispose of some remaining concrete rubble that was considered "clean" because it tested at less than 1 ppm PCBs.**"

(Ex. 335 at 2-3; emphasis added; Myers 986-987, 991-995).

In its opening statement at trial, Mercantile did an about-face:

Let me say just a little but more about that, about Gusdorf being still alive. **Make no mistake about it**, everybody at the job site knew that Gusdorf was a shell. Nobody was under any misapprehension that Gusdorf had an independent management or anything like that. **There is not a doubt in the world from the evidence that Gusdorf was in fact a shell, that Mercantile was paying the bills and that Mercantile or Karen Myers was -- had the final say on all matters of importance.** There is no doubt about that. **I'm not going to try to tell you anything different than that. It had no independent management of**

**its own.** By this period, in 1996, Gusdorf was essentially Don Duncan....But did he get direction from Karen Myers, you betcha he did. You betcha. And I have told you the reasons why.

\* \* \*

That's the contract that was signed. Here is Southern over here and here is Don Duncan signing for Gusdorf. Okay. **Again, I'm not going to kid you about Gusdorf. Karen Myers made the final decision on this contract.** You've already seen that she suggested changes in the language, and the bank was going to fund it. **There is no doubt about it. Okay.**

(Tr. 277, 294-295; emphasis added).

Myers explained her Affidavit to the jury as follows:

Q: Okay. And then going to paragraph nine again, "Gusdorf, with financial assistance from the bank, assumed responsibility for remediation of any materials under ten ppm and any other contamination." **Who at Gusdorf assumed responsibility for the remediation of the under 10? Was it Mr. Wall?**

A: **No.**

\* \* \*

Q: Who at Gusdorf did Mr. Duncan -- **Was it Don Duncan who assumed responsibility for remediation of the under ten out at the Lackland plant?**

A: **The bank made the decision to have the one to ten removed from the site.**

Q: So is that anywhere in this affidavit? You've got about -- this affidavit is some 13 pages -- 13 paragraphs long. **Do you say that anywhere to the Court?**

A: Can I read the whole thing?

Q: You certainly may. You may take your time.

A: Thank you. **Those specific words, no, sir.**

....

Q: **So why wouldn't you tell that to the Court?**

A: **I -- I don't know.**

Q: Okay.

A: **I'm saying that now, so--**

(Myers 987, 993-994, 995; emphasis added).

**O. Respondents' Lease To Lowe's**

In June 1999, Plaintiffs entered into a Lease of Plaintiffs' Property with Lowe's Home Centers, Inc. (Ex. 269; Kaplan 2139-40). The Lease provided for monthly payments by Lowe's, and granted Lowe's the option to purchase Plaintiffs' Property for \$6.7 million (Ex. 269 at 33; Kaplan 2170, 2289-90). As a condition of Lowe's not terminating the Lease and "walking away," however, the Lease and its Third Amendment, required that Plaintiffs:

1. completely remediate the creek of all concrete and PCBs, pursuant to a Remediation Work Plan approved by Lowe's and MDNR (Ex. 310 at 1,5; Kaplan 2141-42); and
2. indemnify Lowe's from and against any future claims or liabilities arising from, connected with or related to the concrete waste (Ex. 310 at 6-7; Kaplan 2141-2143).

To fulfill its obligations under the Lease, in June 1999, Plaintiffs contacted an environmental consulting and engineering firm, Geotechnology, Inc., regarding remediation of the creek (Kaplan 2143; Brenneke 1780-81, 1784). On August 3, 1999, Plaintiffs met with MDNR to discuss MDNR's requirements for the removal of the concrete (Kaplan 2144-45; Ex. 285). Plaintiffs advised Mercantile that they were moving forward with remediation plans (Kaplan 2143).

#### **P. The EOI Proposal**

On August 5, 1999, three years after the dumping and over two years after its first meeting with Kaplan, Mercantile's counsel delivered a proposal for removal of the concrete (the "EOI Proposal")(Ex. 286; Milster 905, 909; Kaplan 2145). Mercantile

set up the proposal as an agreement between an environmental firm, EOI, and neighboring homeowners, Leonard and Karla Werre, in order to insulate Mercantile from any liability (Milster 908-909). EOI did not consult with MDNR before submitting the proposal and the proposal did not provide for any regulatory approval or oversight by MDNR (Ex. 286; Hippensteel 2411; Brenneke 1823). The EOI Proposal contained no Work Plan or Sampling Plan (Ex. 286; Hippensteel 2412-14; Milster 910-911; Brenneke 1799, 1810, 1819; Kaplan 2146). Tim Hippensteel, author of the proposal, testified that this was because Mercantile would not pay EOI to prepare a Work Plan or Sampling Plan (Hippensteel 2413-14). The EOI Proposal did not provide for the removal of impacted sediment and, in fact, allowed PCBs at .6 ppm or under to remain in the creek (Ex. 286 at 006; Brenneke 1811-13).

The EOI Proposal grossly understated the volume of waste to be removed, establishing a \$250,000 cap on the project based on the "Assumption" that 3575 tons of concrete would be removed (Ex. 286 at 007; Hippensteel 2409-11; Milster 906-907). Hippensteel testified that Mercantile's counsel had directed him to reduce the estimated volume from 6000 tons down to 3500 tons, even though Mercantile knew that at least 5900 tons of concrete had been dumped in the creek (Hippensteel 2409-10; See Exs. 180 and 241; Milster 907; Kaplan 2146). Mercantile did not provide EOI with the documentation it had of the actual tonnage (Hippensteel 2409-11). The proposal made no provision in the event that the tonnage exceeded 3500 tons (Milster 912; Brenneke 1811; Kaplan 2146).

The EOI Proposal did not provide for any independent oversight of the remediation (Kaplan 2146-47; Brenneke 1823, 1946). Furthermore, the proposal precluded Kaplan from independently overseeing the clean-up to ensure that the work was properly performed (Ex. 286; Kaplan 2146-47; Brenneke 1799, 1946).

The Proposal provided EOI with a bonus for coming in under budget, thereby incentivizing EOI to "take shortcuts" (Ex. 286 at 4; Brenneke 1946).

Upon receiving the EOI Proposal, Plaintiffs engaged Geotechnology to review the Proposal (Exs. 287, 289, 290; Brenneke 1792, 1794-98; Kaplan 2145-46). Plaintiffs advised Geotechnology that it would be hired to oversee the removal whether the contractor was EOI or some other contractor (Exs. 287, 289, 290; Brenneke 1792, 1794-98; Kaplan 2145-46). On August 30, 1999, Geotechnology identified numerous deficiencies with the EOI Proposal including, but not limited to:

- no Sampling Plan;
- no pre-remedial testing;
- no MDNR oversight;
- underestimation of tonnage;
- cap on costs, with no provision if amount exceeded "assumed" tonnage of 3575;
- no removal of PCB impacted sediment;
- allowing low level PCBs to remain in creek;

- no identification of how and where material to be disposed of;
- Noninterference clause precluded oversight with ability to perform independent testing or to stop anything environmentally improper; and
- splitting of cost reductions improper in sensitive remediation project because "it gives the remedial contractor an incentive to do a less than thorough cleanup."

(Ex. 296; Brenneke 1810-1823).

By letter dated September 2, 1999, Plaintiffs conveyed their concerns to Mercantile (Ex. 298; Brenneke 1925-35). According to EOI's Tim Hippensteel, Mercantile never showed Plaintiffs' letter to EOI or discussed any of Plaintiffs' comments with EOI:

Q: In September, after we wrote this letter to Mr. Wilson, did Mr. Wilson or anybody from Mercantile, anybody show you this letter?

A: No.

Q: **They never told you what our comments were?**

A: **No.**

**Q: And in the custom of practice of the industry normally you would expect review and comment. Isn't that what you understood?**

**A: If we were going to do the work.**

**Q: Sure. And you never were asked to look at our comments and to say, you know, are they right or wrong?**

**A: No, we were never asked.**

(Hippensteel 2414; emphasis added). When finally asked at trial to comment on Plaintiffs' concerns, Hippensteel agreed that it was not unreasonable for Plaintiffs to require a Work Plan or Sampling Plan prior to signing the License Agreement (Hippensteel 2412).

Mercantile did not respond to Plaintiffs' September 2, 1999 letter for seven weeks (Kaplan 2152). On October 20, 1999, without discussing the matter with EOI, Mercantile responded, stating inter alia:

- "It is unnecessary and irrelevant that the EOI proposal does not identify a specific disposal site."
- "testing of the kind you propose is not applicable."
- "Indemnification is...irrelevant."
- "Given that the MDNR had found that the debris is not hazardous, such a sampling plan is not applicable."

- "Whether EOI's proposal underestimates or overestimates the volume of waste is irrelevant."
- "oversight is unnecessary."

(Ex. 311 at 2-3; Kaplan 2150-51).

#### **Q. Plaintiffs' Remediation Of The Site**

In October 1999, Plaintiffs moved forward their remediation efforts (Kaplan 2147-48; Brenneke 1824, 1833, 1835). Geotechnology and Plaintiffs contacted MDNR to develop a remediation work plan (Exs. 302, 303, 313; Kaplan 2147-48; Brenneke 1824, 1833, 1835; Kasper 1988-89). The Remediation Work Plan approved by MDNR was comprehensive and provided, among other things, for:

- independent oversight by Geotechnology (Brenneke 1856-57);
- downstream sampling to document any leaching of PCBs over the three years since the dumping of the concrete (Ex. 303 at plate 4; Brenneke at 1826-27);
- testing after every 30 feet of excavation on the side walls and creek bed to document removal of residual PCBs (Ex. 302 at §4.1; Ex. 303 at Plate 5; Brenneke 1833);
- daily sampling of the working face of the concrete to ensure that the PCB concentrations in the concrete did not exceed the "hazardous waste" threshold of 50 ppm (Ex. 302 at §3.5; Brenneke 1832);

- closure sampling at the completion of the removal activities (Ex. 302 at §4.1; Ex. 303 at Plate 6); and
- Disposal of all material as "special waste" at a landfill (Ex. 302 at §§2.3, 3.5).

In November and December 1999, at a cost of \$636,781.66, Plaintiffs removed 9,734.91 tons of PCB-impacted sediment, concrete and rubble from the Faye Creek (Exs. 327; Brenneke 1856; Kasper 1996-97). The significant additional tonnage removed resulted from large amounts of soil and sediment that had mixed in with the concrete over the prior three years or had leached downstream from the concrete (Brenneke 1843, 1858; Ex. 327 at Table 1, Samples GB-3, GB-5, GB-8, GB-9, GB-10). Testing of daily samples of the concrete working face evidenced PCB concentrations ranging from 1.9 ppm to 6.8 ppm (Ex. 327 at Table 1, Samples GB-24, GB-25, GB-29, GB-33, GB-37, GB-41, GB-48; Brenneke 1860-62).

According to the testimony of Mercantile's expert witness, Hippensteel, these sample results evidenced PCB concentrations in the concrete in Plaintiffs' creek 300 to 700 times greater than found to exist in any of the five neighboring sample areas tested by Hippensteel in the month prior to trial (Hippensteel 2398-2404).

Plaintiffs performed the remediation to the satisfaction of MDNR, Lowe's, the homeowners, and the City of St. Charles (Kaplan 2154-55). According to Martin Kasper, Unit Chief of the Enforcement Section of MDNR, all of the work performed by Kaplan was necessary and appropriate (Kasper 2003).

On July 25, 2000, MDNR issued a letter to Kaplan stating that no additional investigation or remedial action was required, but cautioned that Kaplan remained liable in the event of future environmental problems related to the PCB contamination:

In the event a further PCB-related environmental problem arises in the vicinity of this property, the department reserves the right to require responsible parties to conduct additional investigation or remedial action.

(Ex. 334; Kasper 2002).

**POINTS RELIED ON**

**ARGUMENT**

**I. THE TRIAL COURT'S JUDGMENT THAT MERCANTILE WAS LIABLE FOR SOUTHERN'S TRESPASS SHOULD BE AFFIRMED BECAUSE THE EVIDENCE PRESENTED AN ISSUE FOR THE JURY AS TO MERCANTILE'S RIGHT TO CONTROL SOUTHERN'S DISPOSAL OF THE WASTE**

**A. Agency Is A Question Of Fact For The Jury**

*Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. App. 2002);

*Johnson v. Bi-State Devel. Agency*, 793 S.W.2d 864, 867 (Mo. banc 1990);

*Coonrod v. Archer Daniels-Midland Co.*, 984 S.W.2d 529, 533 (Mo. App. 1998);

*Cline v. Carthage Crushed Limestone Co.*, 504 S.W.2d 102, 110 (Mo. 1973).

**B. The Southern/Gusdorf Contract Does Not Control The Issue of Mercantile's Relationship With Southern**

*Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 359 (Mo. 1954);

*Baker v. Scott County Milling Co.*, 20 S.W.2d 494, 498 (Mo. 1929);

*Hougland v. Pulitzer Publ. Co.*, 939 S.W.2d 31 (Mo.

App. 1997);

*Talley v. Bowen Constr. Co.*, 340 S.W.2d 701, 704 (Mo. 1960);

*Carter v. Wright*, 949 S.W.2d 157, 161 (Mo. App. 1997);

*Jones v. Violet Brashears and Butler County Publ'g, Inc.*, 2003 Mo.

App. LEXIS 572 (Mo. App. 2003);

*Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 559 (Mo. App.

2001);

*Empson v. Missouri Hwy & Transp. Co.*, 649 S.W.2d 517, 521 (Mo.

App. 1983);

*Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. App.

2002).

**C. Ample Evidence Supported The Jury's Finding That Mercantile Had The Right To Control Southern**

*Talley v. Bowen Constr. Co.*, 340 S.W.2d 701, 704 (Mo. 1960);

*Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. 2002);

*Shinuald v. Mound City Yellow Cab Co.*, 666 S.W. 2d 846, 849 (Mo.

App. 1984);

*Carter v. Wright*, 949 S.W.2d 157, 161 (Mo. App. 1997);

*Muckenthaler v. Ehinger*, 409 S.W.2d. 627 (Mo. 1966);

*Pratt v. Reed & Brown Hauling Co.*, 361 S.W.2d 57, 64 (Mo. App.

1962).

**II. THE TRIAL COURT'S JUDGMENT AGAINST MERCANTILE ON PLAINTIFF'S NEGLIGENCE CLAIM SHOULD BE AFFIRMED BECAUSE MERCANTILE OWED A DUTY TO PLAINTIFFS UNDER THE WORK PLAN AS A MATTER OF LAW**

*Westerhold, v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1967);

*L.A.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247, 263 (Mo. 2002);

*Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 834 (Mo. App. 993).

**A. The Policies Favoring Privity Are Not Satisfied**

*L.A.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247, 263 (Mo. 2002).

**B. Application Of The Fleischer Factors Supports The Imposition Of Liability In The Absence Of Privity**

*Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 834 (Mo. App. 1993);

*Westerhold, v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1967).

**III. THE TRIAL COURT'S JUDGMENT AGAINST BOTH MERCANTILE AND SOUTHERN FOR PUNITIVE DAMAGES IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED BECAUSE:**

**A. MERCANTILE DID NOT HAVE A CONSTITUTIONAL RIGHT TO ARGUE A LEGAL DEFENSE THAT IT KNEW TO BE FALSE**

*TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993);

*Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. banc 2001).

**B. NEITHER MERCANTILE NOR SOUTHERN MADE ANY TIMELY  
BONA FIDE OFFER TO REMOVE THE CONCRETE**

**1. The Legal Standard**

MAI 10.01;

*Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989);

*Shady Valley Park & Pool v. Weber, Inc.*, 913 S.W.2d 28 (Mo. App.  
1995);

*White v. James*, 848 S.W.2d 577, 579-580 (Mo. App. 1993).

**2. The Evidence**

(a) **The January 8 Meeting and Winter's "Offer"**

(b) **January-April 1997**

(c) **May-June 1997**

(d) **July 1997**

(e) **1997 - 2000**

(f) **The EOI Proposal**

**C. MERCANTILE AND SOUTHERN IGNORED REPEATED  
WARNINGS OF CROSS-CONTAMINATION, CONSCIOUSLY  
REFUSED TO TEST THE CONCRETE AND LIED TO PLAINTIFFS  
AND REGULATORY OFFICIALS AND THEREBY KNEW THAT  
THEIR CONDUCT CREATED A HIGH PROBABILITY OF**

**INJURY AND DEMONSTRATED A COMPLETE INDIFFERENCE  
TO OR CONSCIOUS DISREGARD OF PLAINTIFFS' RIGHTS**

**1. The Legal Standard**

*Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 247 (Mo. 2001);

*O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 69-70 (Mo. banc 1989);

*Arana v. Koerner*, 735 S.W.2d 729, 736-737 (Mo. App. 1987);

*Stephens v. Lever Bros. Co.*, 155 S.W.2d 540, 541, 543

(Mo. App. 1941);

*Haynam v. Laclede Elect. Coop.*, 889 S.W.2d 148, 154 (Mo. App.

1994) quoting *Chappell v. City of Springfield*, 423 S.W.2d 810, 812

(Mo. 1968);

*Lopez v. Three Rivers Elec. Corp.*, 26 S.W.3d 151 (Mo. 2000).

**2. Application Of The *Alcorn/Lopez* Factors**

**(a) Appellants Consistently Demonstrated A Conscious**

**Disregard For Regulatory And Contractual**

**Requirements Governing The Proper Disposal of Waste**

**(b) Mercantile Cannot Satisfy The Other *Alcorn/Lopez***

**Considerations**

**D. THE GORE REPREHENSIBILITY FACTORS ARE AMPLY MET  
IN THIS CASE**

*BMW Of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996);

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

**1. Gore and Campbell Dealt With Remittitur Rather Than Submissibility**

*BMW Of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996);

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003).

**2. Mercantile's Conduct Was Reprehensible**

*Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487 (1987);

*TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993);

*Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. 1993);

*Truck Ins. Exch. v. Pickering*, 642 S.W.2d 113, 116 (Mo. App. 1982).

**IV. THE TRIAL COURT PROPERLY DENIED MERCANTILE'S MOTION FOR REMITTITUR BASED ON: (A) THE EVIDENCE OF MERCANTILE'S REPREHENSIBILITY; (B) THE 11 TO 1 RATIO BETWEEN PUNITIVE DAMAGES TO ACTUAL DAMAGES; AND (C) THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND THE CIVIL PENALTIES SET FORTH IN §644.076.1**

*BMW of N. Am., Inc. v Gore*, 517 U. S. 559, 563, 576, 579 (1996);

*TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993).

**A. Mercantile's Conduct Was Reprehensible**

**B. The Ratio Between "Actual Or Potential Harm" And The Punitive Damage Award Does Not Offend Due Process**

**1. *Campbell* did not expand the substantive due process rule announced in *Gore***

*BMW of N. Am., Inc. v Gore*, 517 U. S. 559, 563, 576, 579 (1996);

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003);

*Washington v. Glucksberg*, 521 U. S. 702, 720 (1997).

**2. The ratio of actual or potential harm to punitive damages is not excessive**

*State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003);

*Werremeyer v. K.C. Auto Salvage Co., Inc.*, 2003 Mo. App. Lexis 1074 (Mo. App. 2003).

**3. The penalties available for Mercantile's misconduct exceeded the punitive damage award**

RSMo §664.076.1 (1994);

*Rochin v. California*, 342 U. S. 165, 172 (1952);

*Palko v. Connecticut*, 302 U. S. 319, 325-26 (1937).

**V. THE TRIAL COURT PROPERLY SUBMITTED INSTRUCTION NO. 24 BECAUSE THE EVIDENCE OF PLAINTIFFS' SALE TO LOWE'S**

**DEMONSTRATED THAT THE COST OF REPAIR WAS EQUAL TO OR  
LESS THAN THE DIMINUTION IN VALUE OF PLAINTIFFS'  
PROPERTY**

*Caples v. Earthgrains Co.*, 43 S.W.3d 444, 449 (Mo. App. 2001);

*Linton v. Missouri Highway and Transp. Comm'n*, 980 S.W.2d 4, 6 (Mo. App. 1998);

*McLane v. Wal-mart Stores*, 10 S.W.3d 602, 606 (Mo. App. 2000);

*Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500 (Mo. App. 1999);

*Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322 (Mo. App. 1998);

*City of St. Louis v. Vasquez*, 341 S.W.2d 839, 843-45 (Mo. 1960);

*Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 506 (Mo. App. 1999);

*State ex rel. State Highway Comm'n v. Langley*, 422 S.W.2d 309, 311-12 (Mo. 1967);

*State ex rel. State Highway Comm'n v. Rauscher Chevrolet Co.*, 291 S.W.2d 89, 92-93 (Mo. 1956).

**VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
AWARDING SOUTHERN \$1,000.00 IN ATTORNEYS' FEES WHERE  
SOUTHERN FAILED TO SEGREGATE ANY OF ITS FEES AND THE  
EVIDENCE DEMONSTRATED THAT SOUTHERN'S COUNSEL DID  
VIRTUALLY NO WORK ASSOCIATED WITH PLAINTIFFS' CITY  
ORDINANCE CLAIM**

*Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982);

*Brockman v. Soltysiak*, 49 S.W.3d 740, 745 (Mo. App. 2001);

*O'Brien v. B.L.C. Ins.*, 768 S.W.2d 64, 71 (Mo. banc. 1989);

*Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624, 637 (Mo. App. 1979);

*Schnucks Carrollton Corp. v. Bridgeton Health and Fitness, Inc.*, 884 S.W.2d 733, 740 (Mo. App. 1994);

*Bolivar Insulation Co. v. R. Logsdon Builders, Inc.*, 92 S.W.2d 232, 238 (Mo. App. 1996);

*Architectural Res., Inc. v. Rakey*, 912 S.W.2d 676 (Mo. App. 1995).

**VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
AWARDING TECHNOLOGY COSTS TO PLAINTIFFS BASED ON  
SOUTHERN'S USE OF THE TECHNOLOGY PROVIDED BY  
PLAINTIFFS AND THE JUDICIAL ECONOMIES AND EFFICIENCIES  
THE TECHNOLOGY PROVIDED TO THE COURT AND ALL PARTIES.**

*Architectural Res., Inc. v. Rakey*, 912 S.W.2d 676, 679 (Mo. App. 1995);

RSMo. § 514.060;

*Laubinger v. Laubinger*, 5 S.W. 3d 166, 181 (Mo. App. 1999).

## ARGUMENT

### **I. THE TRIAL COURT'S JUDGMENT THAT MERCANTILE WAS LIABLE FOR SOUTHERN'S TRESPASS SHOULD BE AFFIRMED BECAUSE THE EVIDENCE PRESENTED AN ISSUE FOR THE JURY AS TO MERCANTILE'S RIGHT TO CONTROL SOUTHERN'S DISPOSAL OF THE WASTE**

#### **A. Agency Is A Question Of Fact For The Jury**

Whether Southern was Mercantile's agent turns on whether Mercantile "either controlled or had the **right to control** [Southern's] physical conduct." MAI 13.06 (emphasis added). Agency is generally a question of fact for the jury: "[A] jury question is presented when the evidence is sufficiently conflicting that reasonable minds could differ as to whether agency existed." *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. App. 2002); *Johnson v. Bi-State Devel. Agency*, 793 S.W.2d 864, 867 (Mo. banc 1990). In particular, "on the ultimate test (right of control) if the facts and legitimate inferences to be drawn from the evidence are in dispute (as they are in this case) the issue is one for the jury." *Cline v. Carthage Crushed Limestone Co.*, 504 S.W.2d 102, 110 (Mo. 1973). In reviewing this factual issue, Missouri courts view the evidence in the light most favorable to Plaintiffs and gives them the benefit of all reasonable inferences. *Coonrod v. Archer Daniels-Midland Co.*, 984 S.W.2d 529, 533 (Mo. App. 1998).

**B. The Southern/Gusdorf Contract Does Not Control The Issue Of Mercantile's Relationship With Southern**

Mercantile's agency argument begins and ends with the Southern/Gusdorf Contract, a particularly disingenuous position because Mercantile, by its own design, was not a party to the contract and repeatedly went out of its way to disavow any connection with it (Ex. 263 at 1, 2). For four and one-half years, Mercantile told MDNR, the Missouri Attorney General, and the trial court that:

- Gusdorf, not Mercantile, had "assumed responsibility for the remediation" (Ex. 335 at 2, 3; Myers 986-87, 991-95);
- Gusdorf, not Mercantile, had "contracted with Southern Contractors" (Ex. 263 at 1, 2);
- "Mercantile did not contract with Southern Contractors to dispose of the rubble in any fashion" (Ex. 263 at 1,2); and
- "there is no factual or legal basis for treating Mercantile and Gusdorf as one in the same." (Myers 984).

At trial, Mercantile reversed field, taking the position in opening statement that Gusdorf was "a shell" and had no "independent management or anything like that." (T 277). When Plaintiffs asked Myers to explain why Mercantile had never before acknowledged its control of Gusdorf and the remediation, she responded only "I'm saying that now" (Myers 995).

Mercantile continues its unrepentant re-invention of the Southern/Gusdorf Contract in its current Brief. In Section I on agency, Mercantile adopts the contract as its

own and argues that the trial court improperly allowed the jury to consider agency because the contract unambiguously defines its relationship with Southern (Merc. Br. 26-27, 31-32). In Section III.D. relating to the constitutionality of the punitive damage award, Mercantile takes the position that it made no misstatements to MDNR, the Attorney General, or the trial court, and stands by its representations that Gusdorf, not Mercantile, contracted with Southern for disposal of the concrete, and that Gusdorf, not Mercantile, was responsible for the Lackland clean up (Merc. Br. 54).

Mercantile changes its construction of the Southern/Gusdorf Contract to suit whatever defense it needs at the moment. Mercantile's cavalier use of the contract reveals the document for what it always was, an artifice to avoid liability:

There is no doubt that Mercantile kept the Gusdorf Company alive as, in effect, a shell company. There is no doubt that Mercantile did that. There was good reasons for doing it....**And the reason? Mr. Rosenfeld has alluded to it, is environmental liability. And what you are going to hear, and the real reason for that is, if you become an owner, you are potentially liable for the environmental problem.**

(Merc. Opening Statement at 272-273) (emphasis added).

In *Williamson*, the leading case cited by Mercantile, this Court indicated that it would give no deference to contracts where it appears "from the contract or

circumstances that there was any purpose or intent to evade or circumvent any law, duty or liability." *Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 360 (Mo. 1954).

A second reason that the Southern/Gusdorf Contract is not dispositive of agency is that, contrary to Mercantile's statement that "[t]he contract in the instant case is unambiguous" (Merc. Br. at 32), the document gives both Southern and the "Owner" the right to control the actual work. Although the contract contains the familiar boilerplate cited by Mercantile, the Appendix entitled "Scope Of Work" specifically reserves in the owner authoritative direction and control of the day-to-day work, including the selection of the **material**, the manner of **use** of the material, the specific "**method of compaction**" to be employed by Southern, and the precise **location** of disposal (Ex. 137 at Appendix B, Section A). This internal inconsistency, together with Mercantile's testimony that it always retained the right to control the manner, method and location of disposal of the waste, clearly presents a question for the jury's deliberation and decision. *Baker v. Scott County Milling Co.*, 20 S.W.2d 494, 497-98 (Mo. 1929).

Third, Missouri courts have never allowed the parties to contractually determine agency in the face of conflicting evidence of actual performance. This is not a parole evidence question. Even a legitimate or unambiguous contract will not control agency if the parties do not follow it. The Court has long followed this rule:

In this case, the defendant introduced a written contract it had made with Bryant for the work in question.... But if it is conceded that under the contract Bryant could have insisted on doing the work

in any way he chose, still we think that if the parties understood and acted upon the contract as leaving the right to direct the method of doing the work in defendant, the fact that the contract might have been construed to deprive defendant of that right cannot now be asserted by it as conclusive against the plaintiff.

*Baker v. Scott County Milling Co.*, 20 S.W.2d 494, 498 (Mo. 1929). *See also, Empson v. Missouri Hwy & Transp. Co.*, 649 S.W.2d 517, 521 (Mo. App. 1983) (characterization of party in a contract as an independent contractor is not controlling where surrounding facts evince an agency relationship, "however artfully disguised"); *Talley v. Bowen Constr. Co.*, 340 S.W.2d 701, 705 (Mo. 1960) (recognizing that the designation "in such a contract . . . is never controlling if there is evidence to overcome it in fact").

Mercantile quotes a passage from the Eastern District's opinion in *Hougland v. Pulitzer Publ. Co.*, 939 S.W.2d 31 (Mo. App. 1997) indicating that the contract at issue was determinative of agency (Merc. Br. at 26-27). Mercantile, however, omits the following sentence that introduces the passage quoted:

**Because nothing in the documents that governed Carron's work for Pulitzer was refuted by any witness**, the determination of the relationship between Carron and Pulitzer is based solely on the interpretation of those documents.

*Id.* at 33 (emphasis added). The Southern District Court of Appeals recently summarized *Hougland* as follows:

In *Hougland*, the trial court based its decision on interpreting the contract provisions after reviewing the transcript and finding that none of the witnesses' testimony disputed or called into question the terms of the contract. **Here, what actually occurred in practice and what was stated in the contract created a factual issue for resolution by a trier of fact.**

*Jones v. Violet Brashears and Butler County Publ'g, Inc.*, 2003 Mo. App. LEXIS 572 at page 4 (Mo. App. 2003)(citations omitted; emphasis added).

The Southern/Gusdorf contract is just one of the many factual considerations relevant to the issue of agency. *E.g.*, *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo. App. 2002). The two decisions relied upon by Mercantile do not stand for a different proposition. In *Williamson v. Southwestern Bell Tel. Co.*, 265 S.W.2d 354, 359 (Mo. 1954), the telephone company contracted with a tree service to clear the right of way for new lines. On the day in question, the tree trimming crew quit early and went to a local tavern. After leaving the tavern, the crew's truck collided with the plaintiff's car *Id.* at 355.

The *Williamson* contract, as bid by the trimmer, included engineering plans detailing the exact trees to remove or trim and required the trimmer to dispose of the

scraps in the manner directed by the telephone company. The Court concluded that the detailed trimming requirements of the contract left the telephone company only with the right to "secure that [the contract] shall be properly performed," which did not amount to the ongoing "authoritative control" necessary to establish agency. *Id.* at 358. The Court did not discuss the requirement that the trimmer dispose of the scraps according to the telephone company's direction other than to acknowledge that the requirement existed. In all likelihood, the Court considered the disposal of the scraps as incidental to the core trimming work. The Court also noted that the injury to the plaintiff "was not a danger inherent in the work of clearing right of way or the transportation of tools and employees so as to be nondelegable." *Id.* at 358.

*Williamson* is not "in point" as argued by Mercantile. First, in *Williamson*, the contract unquestionably was legitimate and not designed to "evade or circumvent any law, duty or liability." Here, the record is replete with evidence that the Southern/Gusdorf Contract was, from its inception, an artifice designed to shield Mercantile from its duty and liability to properly dispose of the waste (*See, supra*, Statement of Facts, Sections B, E, G, H, N).

Second, in *Williamson*, the telephone company did not reserve in its contract control or supervisory rights over the manner and method of performance, as did the Owner in the Southern/Gusdorf Contract (Ex. 137, Appendix B).

Third, in *Williamson*, the contract described the tree trimmer's duties in sufficient detail such that, once accepted, the telephone company was removed from any substantive ongoing role in the undertaking, in contrast to this case, where Mercantile

always retained absolute control over the manner, method and location of disposal (i.e., third-party site--no testing; no crushing, no landfill, no on-site, no alternative Bank-owned site).

Fourth, in *Williamson*, the injury--a drunken driving accident-- did not arise out of a danger inherent in the work contracted for by the telephone company. Here, the injury--environmental contamination--arose directly out of the disposal method chosen by Mercantile (no testing, no crushing, disposal at third-party sites). It is precisely because Winter did as instructed by Mercantile that 5900 tons of PCB-contaminated concrete ended up in Plaintiffs' creek and not in a landfill.

Finally, in *Williamson*, the contractor was a professional tree trimmer whom the telephone company hired to do one thing--trim trees. In contrast, for four years, Winter acted as Mercantile's "eyes and ears" on the Lackland project, performing a wide range of tasks for Mercantile, including construction, demolition, hauling, grading, seeding, and weed cutting (Winter 1603; Exs. 40, 41, 67, 69, 137, 150, 171, 184, 185, 191, 199). Mercantile's counsel conceded in opening statement:

I need to give you some explanation here, of Southern Contractors' role. **Southern Contractors actually has three different roles over this period of three or four years.**

(Merc. Open. Stmt. 275).

*Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552 (Mo. App. 2001), also cited by Mercantile, is another case where the putative principal contracted away its

control. In *Lipps*, a property owner removed itself from the project by specifically instructing a logger to harvest all trees greater than 18" in diameter. The Court analogized *Williamson* as a case where “the contract did not reserve control or supervisory rights over the tree trimmer or his employees.” *Lipps*, 68 S.W.3d at 559.

**C. Ample Evidence Supported The Jury's Finding That  
Mercantile Had The Right To Control Southern**

The disposal of the concrete was left entirely to Mercantile's authoritative control (Myers 1389-94). Mercantile, not Southern, retained control over: (i) whether the stockpiled material would be tested prior to removal; (ii) who would perform the testing, if performed; (iii) whether some or all of the material would be used as onsite fill; (iv) the method of compaction; and (v) where Southern should deliver the material (Myers 1043-44, 1088-80, 1902-94, 1097, 1101, 1104, 1396-97, 1399, 1438; Duncan 742, 744-746, 748-749; Winter 1620-21, 1645-46; Ex. 137, Appendix B). Southern had no authority to make any of these decisions (Sweet 415-416, 537; Myers 1043-44, 1048-49, 1438).

This control encompassed more than simply ensuring proper performance of the contract. There could be no performance at all until Mercantile made the decision as to the manner, method and location of disposal. As Mercantile points out, Winter testified on direct that Mercantile controlled the disposition of the stockpiled material, on cross that he retained some discretion and again on redirect that Mercantile controlled the decision (Merc. Brief at 13). As a matter of fact, however, Winter did not remove the stockpiles until Mercantile reviewed its options and made the decisions regarding the

means and methods of disposal-- not to test, not to crush, not to remove the rebar, not to landfill, not to take to Mercantile-owned sites, "just take it off" to third-party sites (Myers 1382-83, 1421; Winter 1747, 1750).

There is no dispute that, had Mercantile given Winter the address of where to take the concrete, he would have done so (Winter 1620). The fact that Mercantile failed to do so is irrelevant. It is the *right* to control that is key. *See, e.g., Talley v. Bowen Constr. Co.*, 340 S.W.2d 701, 704 (Mo. 1960); MAI 13.06.

Further, it is not critical that Mercantile did not supervise Southern while it shoveled the rock or tell Southern how fast to drive its trucks. In *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560 (Mo. App. 2002), a medical malpractice case, Justice Teitelman concluded that the plaintiff made a submissible case that the doctor was the hospital's agent even though "the hospital does not have the right to stand over the doctor's shoulder and dictate to him or her how to diagnose and treat patients." *Id.* at 568. Justice Teitelman undertook a comprehensive examination of the contractual and testimonial evidence of the physician/hospital's relationship and concluded that "the mere fact that a physician retains such independent [medical] judgment will not preclude a court, in an otherwise proper case, from finding the existence of an employer-employee or principal-agent relationship." *Id.*

At the other end of the spectrum, in cases involving unskilled trades, the Missouri courts have held that the right to control "need only be commensurate with the supervision appropriate to the kind of work to be done and the skill required to do it." *Shinuald v. Mound City Yellow Cab Co.*, 666 S.W.2d 846, 849 (Mo. App. 1984). That is,

as work becomes less skilled, a principal may forego control over the more pedestrian elements of the work without undermining the agency relationship.

In hauling cases like this one, for example, the fact that the contractor supervises the loading, driving and dumping of the material does not make him an independent contractor:

[T]he degree of skill required was minimal. There is no special aptitude necessary to drive a truck up to a stockpile of sheetrock, load it on to a truck, drive the truck to a place pointed out, and dump it as directed. The only control retained by Wright related to the starting, stopping, and guiding of the truck incident to its operation. This type of work is of such simplicity that it requires neither supervision nor a specialist.

*Carter v. Wright*, 949 S.W.2d 157, 161 (Mo. App. 1997)(citations omitted). *See also*, *Muckenthaler v. Ehinger*, 409 S.W.2d 627 (Mo. 1966) and *Pratt v. Reed & Brown Hauling Co.*, 361 S.W.2d 57, 64 (Mo. App. 1962), both holding haulers to be agents where, among other things, the principal had the right to choose or chose the destination of the material.

Within the context of Mercantile's and Southern's relationship, whether defined by contract or testimony, or both, disposal of the concrete awaited Mercantile's sole decision, direction and advice. Southern did Mercantile's bidding and, as such, was Mercantile's agent.

The conclusion is consistent with the application of the ten-part test laid out in the Restatement (Second) of Agency §220(2):

(a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaged in a distinct occupation or business; (c) the kind of occupation with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is a part of the regular business of the employer; (i) whether or not the parties believe they are creating the relation of master and servant; (j) whether the principal is or is not in business.

The Restatement's test is a more detailed statement of Missouri law's directive to consider the totality of the circumstances when examining a potential agency relationship. Consistent with the analysis under Missouri common law, this Court

observed that under the Restatement control still is “the element primarily which distinguishes a servant and an independent contractor.” *Dean v. Young*, 396 S.W.2d 549, 553 (Mo. 1969). As stated by the court in *Bargfrede v. Am. Income Life Ins. Co.*, 21 S.W.3d 157, 162 (Mo. App. 2000): "None of these elements alone is conclusive, and all must be viewed to see whether control, or the right to control, has been retained over the alleged servant's physical conduct and the details of the work."

Application of the factors confirm Southern's status as Mercantile's agent.

Referencing the Restatement subparts:

(a) **Control**. The seminal element, control of the concrete's destination, rested solely with Mercantile.

(b),(c) **Distinct Occupation or Specialty**. As stated above, during his four years on the project, Winter acted as Mercantile's "eyes and ears" on the project, performing a wide variety of tasks including construction, demolition, hauling, grading, seeding and weed cutting (Merc. Op. Stmt. 275; Winter 1603; Exs. 40, 41, 67, 69, 137, 150, 171, 184, 185, 191, 199). Hauling rubble is not a specialized or distinct business and was just one of the "miscellaneous items" that was covered by the Southern/Gusdorf Contract and Change Order, together with removing fencing, signage and general site reclamation work (Myers 1286; Ex. 137 and 171).

(d) **Skill Required**. There was little to no skill required to accomplish the disposal or the other miscellaneous items covered by the Southern/Gusdorf Contract. *See, e.g., Carter*, 949 S.W.2d 157.

- (e) **Instrumentalities; Place of Work.** Southern went out and got the trucks and Mercantile provided the place of work (Ex. 137, Appendix D).
- (f) **Duration of Employment.** Mercantile employed Southern at Lackland for four (4) years in various capacities (Merc. Open. Stmt. 275) *See* subparts (b) and (c).
- (g) **Method of Payment.** Although, in this instance, Mercantile paid Southern by the job, at other times, Mercantile paid Southern a monthly salary (Ex. 58; Winter 1602).
- (h) **Mercantile's Business.** Myers testified at length that Mercantile's Special Assets Division is set up to oversee all aspects of liquidating, remediating, restoring, foreclosing, marketing and selling its collateral (Myers 1775-1204). At Lackland, Mercantile was "in charge of the project and calling the shots on it" (1203-04).
- (i) **Parties' Belief.** In *Carter*, the Western District, held that the principal's misrepresentation that, at the time of the accident, the hauler was working for another "strongly suggests" that the principal believed the hauler to be his agent:

Furthermore, subsequent to the accident, Hollis asked Wright to tell anyone who asked that he was hauling the sheetrock for Nino, another contractor in the subdivision. **This request strongly suggest that Hollis thought of Wright as his agent and was**

**attempting to avoid liability for his agent's  
negligent act.**

*Carter*, 949 S.W.2d at 162 (emphasis added). Here, Mercantile perpetrated a four-year fiction to the MDNR, the Attorney General and to the Court that Southern was working for Gusdorf, not Mercantile, when it disposed of the waste in Plaintiffs' creek. This strongly suggests that Mercantile believed Southern to be its agent. Southern's execution of the AMI testing proposal "as agent for and in behalf of Mercantile" evidences that Southern also believed it was Mercantile's agent (Ex. 216).

**(j) Principal's Ongoing Operation.** Mercantile is in business.

By any legal standard, the record contains substantial evidence from which jurors could conclude that Southern was Mercantile's agent. Mercantile purposefully retained control over the removal of the stockpiled concrete to serve Mercantile's economic interest by making the property as attractive as possible and shielding Mercantile from liability for the PCB contamination. Mercantile's reckless execution of that control was the primary cause of Plaintiffs' loss. Southern was Mercantile's agent.

**II. THE TRIAL COURT'S JUDGMENT AGAINST MERCANTILE  
ON PLAINTIFF'S NEGLIGENCE CLAIM SHOULD BE AFFIRMED  
BECAUSE MERCANTILE OWED A DUTY TO PLAINTIFFS UNDER  
THE WORK PLAN AS A MATTER OF LAW**

Thirty five years ago, this Court recognized that:

This rule requiring privity has not been followed blindly and without exception. As stated in Prosser on Torts 2nd ed. § 84, p. 498, when the application of the rule would produce a result contrary to the requirements of essential justice and sound public policy it has been whittled away by exceptions. In fact, throughout the years so many exceptions have been engrafted upon the rule that it has been said, perhaps too broadly, that the exceptions have "swallowed the rule."

*Westerhold, v. Carroll*, 419 S.W.2d 73, 77 (Mo. 1967)(citations omitted).

The Restatement states the general rule as follows:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm<sup>2</sup> resulting from his failure to exercise reasonable care to protect his undertaking, if

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<sup>2</sup> The Restatement defines physical harm as harm "to the person, land, or chattels of the plaintiff." Restatement §323, comment d.

(a) his failure to exercise reasonable care increases the risk of such harm...

Restatement (Second) of Torts §324A. *See L.A.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247, 263 (Mo. 2002)(citing Restatement §324A).

Mercantile refers to the two-stage analysis of duty set forth in *Fleischer v. Hellmuth, Obata & Kassabaum*, 870 S.W.2d 832, 834 (Mo. App. 1993). The *Fleischer* court first looked to see whether the case ran afoul of the reasons traditionally supporting the privity requirement: (1) The concern that recognition of a duty would lead to excessive and unlimited liability; and (2) The concern that recognition of a duty would undermine contractual relations by burdening contracting parties with obligations and liabilities to others which parties would not voluntarily assume. *Fleischer*, 870 S.W.2d at 834.

**A. The Policies Favoring Privity Are Not Satisfied**

Excessive and unlimited liability is not imposed where the potential class of plaintiffs is easily identifiable from the nature of the duties assumed. For example, a security company who contracts to provide mall security assumes a duty to mall patrons. *L.A.C. v. Ward Parkway Shopping Ctr. Co. L.P.*, 75 S.W.3d 247, 263 (Mo. 2002). Because the obvious and stated purpose of the company's contract contemplates protection of mall visitors, the patrons are both third party beneficiaries and owed a duty in tort. *Id.* at 260-62. This is true even though the company's exposure is extended to an unlimited and unknowable number of putative plaintiffs, a danger not presented here.

The whole reason for the Work Plan was to ensure that Mercantile and Cooper properly disposed of contaminated materials at appropriate and legal places:

Waste segregation and handling procedures will be enforced **to preclude mixing or misdirection of materials that could result in illegal or inappropriate disposal of wastes or on-site/off-site use of materials.**

(Ex. 78 at 44; emphasis added).

Third party repositories of the contaminate materials are the obvious (and perhaps only) beneficiaries of the precautions against misdirection of contaminated materials. It is difficult to understand how Mercantile's promise to dispose of waste in the right place does not encompass a promise to the depositor that Mercantile will follow the guidelines of the Work Plan. Implying such a duty does not radically expand the scope of Mercantile's liability. Mercantile had the absolute right to control the destination of all materials less than 10 ppm. Mercantile thus knew the class of potential plaintiffs when the Work Plan was executed and had the means to identify and limit the exact members of that class--a luxury not enjoyed by the security personnel in *L.A.C.* who were exposed to liability to anyone who wandered into the mall.

Affording Plaintiffs an opportunity to sue Mercantile under these circumstances will not unreasonably burden contractual relations. Mercantile argues that the parties to the Work Plan should be left with the ability to modify the Work Plan to respond to changing conditions—i.e., Mercantile says it could have exempted concrete with less than 10 ppm from disposal at a landfill. Assuming that to be the case, and that

it was done, what relevance does that have to Mercantile's liability for dumping the contaminated concrete on an unwilling recipient? Dumping contaminated concrete on an unwilling recipient is no less a negligent act under the Work Plan just because Mercantile could have taken the material to a willing recipient. Is Mercantile saying that it could have amended the Work Plan to allow Mercantile to dump contaminated concrete on private property without the owners' knowledge or consent? Short of that, this lawsuit does not interfere with any legitimate right on the part of Mercantile to amend its agreement.

Mercantile concludes with the warning that holding Mercantile liable for dumping environmental waste in a private creek will chill others from executing environmental work plans which are a "good thing for society" (Merc. Br. 36). This supposed ripple effect of such a decision is dubious, at best. More important, work plans are only a "good thing" for society to the extent that the parties follow them. If Mercantile or any other party to a work plan is free to disregard the work plan's requirements with impunity, they are of little value to anyone.

**B. Application Of The *Fleischer* Factors Supports The Imposition Of Liability In The Absence Of Privity**

Mercantile also warns that, once the Court holds Mercantile liable to the depositors chosen (or which should have been chosen) by Mercantile, there is no principled way to limit Mercantile's exposure to those putative plaintiffs. Whether Mercantile might also be liable, for example, to a child who impaled himself on rebar in the creek or drank PCB contaminated water does not necessarily follow from affirming a

judgment in favor of Plaintiffs. Mercantile ignores the second step mandated by *Fleischer* under which the Court must

balanc[e]...various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to defendant's conduct, and the policy of preventing future harm.

*Fleischer*, 870 S.W.2d at 834. All the factors need not be present. *Westerhold*, 419 S.W.2d at 81.

The factors are easily satisfied where the Plaintiff is an unwilling depositee. The Work Plan was designed to protect against the improper disposition of material from the Lackland Property, a goal that “affects” any appropriate or inappropriate depository. The foreseeability of harm to a wrongful recipient of the contaminated material presumably drove the implementation of the Work Plan’s stringent requirements in the first place. That Plaintiffs suffered injury is without question and that Plaintiffs’ injury was the direct result of Mercantile’s negligence and morally culpable conduct is reflected in the jury’s verdict. Whether a case filed by one of Southern's drivers or a trespasser on Plaintiffs' property, a couple of the examples cited by Mercantile, would also satisfy this analysis is not before this Court and certainly is not a foregone conclusion.

**III. THE TRIAL COURT'S JUDGMENT AGAINST BOTH MERCANTILE AND SOUTHERN FOR PUNITIVE DAMAGES IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE AFFIRMED BECAUSE:**

**A. MERCANTILE DID NOT HAVE A CONSTITUTIONAL RIGHT TO ARGUE A LEGAL DEFENSE THAT IT KNEW TO BE FALSE**

Plaintiffs agree that Mercantile had a Constitutional right to defend itself.

Mercantile did not have the right, constitutional or otherwise, to argue with impunity a legal position that it knew was false. *See, TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

In *TXO*, TXO acquired oil and gas development rights from Alliance. *Id.* at 447-448. Thereafter, TXO filed a frivolous suit to quiet title to the development rights, the real intent of which was to reduce the royalty payments that TXO had agreed to pay Alliance. *Id.* at 451. To support its quiet title action, TXO: (i) obtained a "worthless" quit claim deed of the rights from a party in the chain of title; and (ii) unsuccessfully attempted to convince another party in the chain of title to execute a false affidavit concerning the intent and scope of a prior transfer. *Id.* at 449-50.

Alliance counterclaimed against TXO for slander of title. *Id.* at 447. The jury awarded Alliance \$19,000 in actual damages, (representing the cost of defending the quiet title action), and \$10,000,000 in punitive damages, 526 times the actual damages. *Id.* at 447. The Supreme Court concluded that the punitive award was supported by TXO's reprehensible conduct, the potential loss to Alliance (\$1-4 million) and the net

worth of TXO (\$2.2-2.5 billion)<sup>3</sup>. *Id.* at 462. The Supreme Court was most distressed that TXO "knowingly and intentionally brought a frivolous declaratory judgment action" and agreed with the trial court's assessment:

What could be more egregious than the Vice President of a company saying, well, testifying and saying that he knew all along that this property belonged to [Alliance]?

*Id.* at 451.

Mercantile relies upon this Court's decision in *Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226 (Mo. banc 2001). *Alcorn* presents the reverse situation from *TXO* and this case. In *Alcorn*, the railroad arguably did not act quickly enough to guard a dangerous crossing involved in a fatal accident and was therefore negligent. However, the railroad successfully argued that it could not be liable for punitive damages because its remedial efforts complied in all respects with Missouri crossing regulations. *Id.* at 248, 249. However, *Alcorn* does not create a safe haven for Mercantile because the Court warned that punitive damages might have been appropriate had "the railroad failed to cooperate or comply with the regulatory process." *Alcorn*, at 249.

Mercantile's conduct in this litigation paralleled TXO's deceit, not the railroad's honest defense. For four years, Mercantile defended its actions based upon the frivolous position that Gusdorf, not Mercantile, had assumed responsibility for the clean-up, had hired Southern, and was responsible for the concrete in Plaintiffs' creek.

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<sup>3</sup> Mercantile's net worth was \$15 billion as of the date of trial (Tr. 2687).

Mercantile's deceit went well beyond a single unsuccessful attempt to obtain a false third party affidavit. Mercantile repeated this story in depositions, pleadings, affidavits and in its dealings with MDNR (Ex. 263 at 1, 2; Ex. 335 at 2, 3; Myers 979, 984, 986, 987,991-995; Kasper 1982-85).

Mercantile's conduct cannot be explained away as an honest defense.

Mercantile's duplicitous statements regarding the Southern/Gusdorf Contract and Mercantile's role in the clean up of Lackland were and are inexplicable and indefensible, except as evidence that Mercantile was and is willing to say anything to avoid liability.

Moreover, it grossly oversimplifies this case to suggest that Plaintiffs' *only* complaint was that Mercantile defended this lawsuit. There were many reasons warranting the imposition of punitive damages in this case and Mercantile's four-year history of misrepresentations certainly was one of them. The jury undoubtedly was also influenced by Mercantile's calculated decision to ignore the Work Plan and the injury threatened by improper disposal of the waste, its refusal to test the waste despite numerous warnings from its environmental consultants and Winter, and its callous treatment of its long-time customer. Mercantile was and should be punished for such callous disregard.

**B. NEITHER MERCANTILE NOR SOUTHERN MADE ANY TIMELY  
BONA FIDE OFFER TO REMOVE THE CONCRETE**

**1. The Legal Standard**

Punitive damages may be awarded for intentional torts where "the conduct of defendant was outrageous because of defendant's evil motive or reckless indifference

to the rights of others." MAI 10.01; *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. banc 1989). Plaintiffs have no argument with the notion that prompt, good faith efforts to rectify a trespass may preclude the imposition of punitive damages.

Mercantile relies principally upon *Shady Valley Park & Pool v. Weber, Inc.*, 913 S.W.2d 28 (Mo. App. 1995). The plaintiff sued a contractor when highway construction work caused mud and silt to flow into plaintiff's lakes. Even though the contractor did not design or control the plans and specifications for the work (this was left to the highway department's engineers), the contractor implemented a myriad of measures to prevent siltation during construction. *Id.* at 37. The precautions were not effective-- "inept" in the words of the court. *Id.* However, after the damage was done, the contractor offered to dredge the lake at no cost to the owner while the owner tried to collect from the highway department. *Id.* at 37.

It follows then, that good faith, successful corrective measures will also preclude the imposition of punitive damages. In *White v. James*, 848 S.W.2d 577 (Mo. App. 1993), the defendant, upon learning on September 25 that his sewer line trench might be infringing onto plaintiff's property: (i) stopped all work immediately that same day; (ii) met with plaintiff and the State Highway Department twice on the following two days, September 26 and 27, to determine their respective property boundaries; (iii) closed off his business' toilets connected to the sewer line; (iv) temporarily filled the trench with sand; (v) offered to purchase plaintiff's property for \$50,000; and (vi) on October 11, fourteen days after the trespass, commenced repairs to plaintiff's property, including pouring a new sidewalk, which repairs were completed by October 16. *Id.* at 579-580.

These good faith and prompt remedial actions warranted a reversal on punitive damages. *Id.* at 581.

## **2. The Evidence**

### **(a) The January 8 Meeting and Winter's "Offer"**

When Plaintiffs learned the source of the concrete, Plaintiffs invited Mercantile (Harry Mueller and Karen Myers) and Winter to meet at the creek on the afternoon of January 8 (Ex. 194; Myers 1126-27). Myers reported that she was sick and Mercantile did not send anyone else to the meeting (Myers 1304,1428-29).<sup>4</sup>

Mercantile states that, at this meeting, Southern "offered to remove the concrete at its expense and to restore the property to its original condition," citing the testimony of Kaplan (Mercantile Br. 43). This statement takes the testimony out of context and ignores the conditions placed by Winter on removal (Kaplan 2189-90). At the meeting, Kaplan told Winter that he wanted the material tested (Ex. 197; Kaplan 2039-40). Winter assured Kaplan that no contaminated material had been placed in the creek and offered to provide documentation (Ex. 197; Kaplan 2040). At Kaplan's insistence, Winter agreed that the concrete should be tested (Ex. 197 at 2; Kaplan 2040). Winter stated, however, that he would remove the concrete only "if the tests were positive for contamination" (Ex. 197 at 2; Kaplan 2189-90)). If the tests were negative,

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<sup>4</sup> In fact, no one from Mercantile came to Plaintiffs' property until October 1997, ten months after Plaintiffs initial phone call (Myers 1428-29; Werre 1452).

Winter reserved the right to leave some or all of the concrete in Plaintiffs' creek (Ex. 197 at 2).

As subsequent events bore out, even with these conditions, Winter never intended to assume responsibility for the testing or removal.

**(b) January-April 1997**

Mercantile claims that it was "ignored" for the first five months of 1997 and jumps from the January meeting to May 1997 without explanation (Merc. Br. 43). The problem was not that Mercantile was ignored. Mercantile received and sent letters, was invited to meetings and spent a good deal of time arguing with Winter over who was responsible for the concrete. The problem was that Mercantile did not want to be involved (Winter 1752-53; Myers 1440). On January 14, 1997, six days after his meeting with Kaplan, Winter copied Myers on his letter to ATC, in which he misrepresented that the concrete had initially "tested with no contamination" and then was tested again before disposal (Ex. 200 para. 3, 4; Ex. 73 at para. 5.15, 5.17). Myers read the letter, knew it was a lie, and filed it (Myers 1431, 1437-39).

On January 31, 1997 ATC sent out a testing proposal (Winter 1662). Contrary to Mercantile's statement that "Southern offered to pay for removal immediately upon learning of the problem" (Merc. Brf. 47), Winter and Mercantile spent the next few months either trying to convince Plaintiffs that testing and removal was unnecessary because the material was clean or negotiating over who would pay for the work (Winter 1663-64).

Plaintiffs could not get Winter and Mercantile to agree to testing (Winter 1662). On February 6, contrary to Mercantile's statement that Plaintiffs made no demand prior to June 1997, Kaplan wrote to both Winter and Myers demanding testing (Ex. 207). On February 10 and 12, Winter reported to Plaintiffs that he did not want "to sign the ATC proposal and later try to collect from Mercantile" and that he was having "numerous conversations" with Myers (Exs. 208, 209; Winter 1749-50). Mercantile, however, refused to participate (Myers 1447).

On February 19, Kaplan contacted another Mercantile officer, Harry Mueller, who told Kaplan that he had to deal with Myers (Kaplan 2048-49). On February 25, Winter requested that Mercantile attend a February meeting called by Kaplan (Ex. 214). Mercantile did not attend (Winter 1753; Kaplan 2050).

In March, when Winter finally signed the ATC testing proposal, Mercantile let ATC know in no uncertain terms that "Mercantile shall have no obligation on any contract entered into by your firm and Southern Contractors" (Ex. 218; Milster 897-898). Simply put, Mercantile "didn't want to have anything to do with the testing" (Milster 898).

Q: So when it was your property and there was a perception of recovering value, you were willing to spend a million two, even though you didn't put those PCBs there, right?

A: Yeah. Yes. And we got Cooper to do most of it.

Q: Cooper did most of it.

A: That's right.

....

**Q: But on our property in '97, in '98, you wouldn't-- you wouldn't even spend a dime to help us get it tested, would you, the bank?**

**A: I can't testify past the first five months.**

Q: Okay. During the period which it was tested, the bank wouldn't pay a dime for us to find out what we had?

A: Mr. Winter was undertaking that effort.

**Q: During that period, the bank--**

**A: The bank did not contribute, no.**

**Q: Not a penny?**

**A: Not-- no, not a penny.**

(Myers 1445, 1446, 1447). In fact, neither Winter nor Mercantile ever paid ATC for its work (Winter 1761).

**(c) May-June 1997**

On May 2, 1997, Winter promised that he would obtain releases from the neighboring homeowners to access their property to remove the concrete, and that "once the ATC report is issued. . . . Jerry will begin work" (Ex. 225; Kaplan 2058). Two weeks later, on May 14, Winter again promised that his "attorney is preparing the release forms

for the homeowners to sign," and that he would "begin removal early next week after delivering one copy of the signed releases to [Plaintiffs]" (Ex. 226; Kaplan 2058-59). The following day, May 15, 1997, ATC issued its report confirming PCB-contamination in the concrete (Ex. 227). Two weeks later, on June 2, 1997, Winter again promised to deliver releases to Plaintiffs, this time by June 4 (Ex. 230). Winter never provided any releases (Kaplan 2060).

In late June 1997, Plaintiffs asked for a meeting with Mercantile's CFO John Arnold (Ex. 234; Kaplan 2063-65). Arnold would not attend (Ex. 235; Kaplan 2065-67). In contrast to Mercantile's assertion that "Kaplan preferred a lawsuit to an immediate resolution of the problem" (Merc. Brief at 44), Winter testified that Plaintiffs "were being very patient" at this time (Winter 1759-60; Ex. 230) and Alan Milster, the bank officer who did attend, concurred:

Q: Do you recall that Mr. Kaplan was very quiet, very respectful to the bank? Do you recall that?

A: Yes.

Q: And he expressed that, you know, he had been doing business for 20 years with the bank. He wanted the stuff out. He wanted it clean and he wanted an indemnity. Is that what he said?

A: That is what he said.

(Milster 899). Milster added that Kaplan's requests relating to removal of the concrete were reasonable (Ex. 236 at 2; Milster 860-899).

Mercantile, however, remained unwilling to either: (i) commit funds toward removal; or (ii) indemnify Plaintiffs against future claims (Milster 861, 864, 899).

**(d) July 1997**

In early July 1997, Winter obtained a bid to haul and dispose of the concrete at a landfill not to exceed \$85,000 (Ex. 241). Neither Winter nor Mercantile conveyed this proposal to Plaintiffs because Winter could not get Mercantile to contribute any money for the removal (Winter 1672, 1735).

Nonetheless, Mercantile states that "by mid-July, the Bank had offered to remove all the concrete from the site and have ATC supervise the clean-up" (Mercantile Br. 44). The evidence of this "offer" is a note made by one of Plaintiffs' employees referencing second-hand a telephone call between counsel in which Mercantile's attorney "indicated to [Plaintiffs' counsel] they would have the materials removed but did not indicate how soon" (Ex. 245; Kaplan 2310). Mercantile did not produce either of the lawyers involved or even the employee who made the note to explain the context or substance of the conversation. Far more odd, Mercantile did not produce a bank witness or document to substantiate this mid-July "offer". To the contrary, Myers, Mercantile's corporate representative, testified that she didn't know of any offers *ever* made by Mercantile to Plaintiffs to remove the waste (Myers 1444-45). Mercantile chose to simply ask Mr. Kaplan to testify that the note said what it said (Kaplan 2239). That is Mercantile's "substantial and uncontradicted evidence" of an offer (Merc. Br. 42).

Winter recalls that Mercantile assumed a far different posture than the note would suggest:

Q: And the bank wouldn't pony up the 85; is that right?

A: I don't remember talking to them about this proposal. **I do remember talking to them about trying to get them to participate to give us money to clean this up.**

Q: **And their reaction?**

A: **No.**

(Winter 1672).

Moreover, immediately following the July telephone call between counsel, Mercantile fired its environmental attorney involved in the conversation and hired litigation counsel (Ex. 246; Kaplan 2303-06). Over the next few months, Mercantile's new counsel gave Plaintiffs one reason after another why the material could not be removed-- the need for additional surveys, City approval, Corps of Engineers approval, etc.-- all of which Plaintiffs achieved and none of which satisfied Mercantile (Kaplan 2124-30).

As late as October 1997, Mercantile was still telling the neighboring homeowners that the concrete was "clean and safe," and that Mercantile would not remove it from their property (Werre 1487-88, 1509-10).

Finally, in November 1997, Plaintiffs filed suit (RSLF 26).

**(e) 1997 - 2000**

Over the next four years, Mercantile unveiled its "Gusdorf did it" defense already discussed in this Brief, including its May 4, 1999 letter to MDNR, expressing Mercantile's understanding for MDNR's "concern about the materials in this ditch," but disavowing any connection to the concrete (Ex. 263 at 1). Strangely absent from its communication to MDNR is any protest that Mercantile previously had offered to remove the waste, or that "the only reason that the removal was not promptly completed was that plaintiffs refused these offers," now the cornerstones of Mercantile's defense (Merc. Br. 47).

**(f) The EOI Proposal**

Mercantile first proposed to remove any concrete from the creek three years after the dumping and *only* after Mercantile learned that Plaintiffs had undertaken to remediate the creek themselves (Kaplan 2143). Mercantile's offer came in the form of the August 1999 EOI proposal, a document drafted by Mercantile as an agreement between EOI and the Werres in order to insulate Mercantile (Ex. 286; Milster 909). The proposal was so deficient that it was criticized *by its author* for lack of a work plan and sampling plan, and for, at Mercantile's insistence, grossly understating the volume of concrete to be removed (Hippensteel 2409-14). When Plaintiff responded to the proposal, Mercantile did not even show Plaintiffs' response to EOI, a clear indication that the EOI proposal was a product of new counsel's litigation strategy, not a serious offer (Hippensteel 2414).

Mercantile never intended to pay to test or remove the concrete. Mercantile had a multitude of opportunities to meet with Plaintiffs, to make a bona fide offer to test

or clean and to set the record straight regarding the contamination. To say that Mercantile was recklessly indifferent to Plaintiffs' rights falls short because it suggests Mercantile considered Plaintiffs' exposure to PCB contamination at all. Mercantile concerned itself with only one thing throughout the entire remediation and subsequent litigation: How much will the PCBs cost Mercantile?

**C. MERCANTILE AND SOUTHERN IGNORED REPEATED WARNINGS OF CROSS-CONTAMINATION AND THE REQUIREMENTS OF THE WORK PLAN, CONSCIOUSLY REFUSED TO TEST THE CONCRETE AND LIED TO PLAINTIFFS AND REGULATORY OFFICIALS AND THEREBY KNEW THAT THEIR CONDUCT CREATED A HIGH PROBABILITY OF INJURY AND DEMONSTRATED A COMPLETE INDIFFERENCE TO OR CONSCIOUS DISREGARD OF PLAINTIFFS' RIGHTS**

**1. The Legal Standard**

Punitive damages may be awarded in a negligence case where the defendant knew or should have known that its conduct created a high degree of probability of injury and the defendant thereby showed complete indifference to or conscious disregard of the rights of others. *Alcorn v. Union Pac. R.R. Co.*, 50 S.W.3d 226, 247 (Mo. 2001). This is true whether the loss is personal or economic. *See O'Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 69-70 (Mo. banc 1989); *Arana v. Koerner*, 735 S.W.2d 729, 736-737 (Mo. App. 1987); *and Stephens v. Lever Bros. Co.*, 155 S.W.2d 540, 541, 543 (Mo. App. 1941), all economic injury cases upholding punitive damage awards.

That is because the critical focus is the defendant's mental state, not the plaintiff's damage:

To rule as Laclede invites us to rule, namely, that the submissibility of a punitive damages claim is dependent on the harm that actually occurs rather than the defendant's mental state, would blur--perhaps eradicate--the clear demarcation between the functions of punitive and compensatory damages.

*Haynam v. Laclede Elec. Coop.*, 889 S.W.2d 148, 154 (Mo. App. 1994) *citing Chappell v. City of Springfield*, 423 S.W.2d 810, 812 (Mo. 1968).

In the two cases primarily relied upon by Mercantile, this Court identified three factors that weigh against a finding of conscious disregard:

prior similar occurrences known to the defendant have been infrequent; the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant; and the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred.

*Alcorn v. Union Pac. R.R.*, 50 S.W.3d 226, 248 (Mo. 2001) and *Lopez v. Three Rivers Elec. Corp.*, 26 S.W.3d 151, 160 (Mo. 2000).

In both *Alcorn* and *Lopez*, the Court was persuaded that the defendants' honest compliance with regulatory or industry standards negated conscious disregard even in the presence of one or more of the other factors in varying degrees. In *Alcorn*, a railroad crossing case, the Court found that the railroad's strict compliance with the state-mandated regulatory process relating to crossings negated a conclusion of "intentional wrongdoing" notwithstanding the defendant's knowledge of the potential danger and arguable failure to take remedial action sooner than the state regulations required. *Alcorn*, 50 S.W.2d at 248-49. While the Court was reluctant to punish the railroad for its observance of the law, the Court admonished that "if there was evidence that the railroad failed to cooperate or comply with the regulatory process, punitive damages might appropriately have been brought." *Id.* at 249.

Similarly, in *Lopez*, where a helicopter crashed into electric wires, the electric cooperative's placement of the wires complied with all industry and statutory standards. The Court concluded that a prior accident, 20 years earlier due to pilot error, did not suggest that the company's regulatory compliance was nevertheless in conscious disregard of potential injury:

Three Rivers investigation of the 1975 accident determined that accident involved negligence by the pilot, a complete defense at the time. There was no evidence that either the accident here or the accident in 1975 involved the violation of a statute or regulation designed to prevent the injury that occurred. In

addition, there has been no violation of an industry standard warranting the imposition of punitive damages in this case.

*Lopez*, 26 S.W.3d at 160.

## **2. Application Of The *Alcorn/Lopez* Factors**

Appellants give the *Alcorn/Lopez* factors short shrift, condensing the three week trial of this case into a sentence or two for each element (Merc. Br. 49; Southern Br. 31). Appellants understandably would like to avoid any substantive discussion of the evidence. Although none of the three mitigating factors are present here, the most obvious distinction between this case and *Alcorn/Lopez* is Appellants' utter contempt for their regulatory responsibilities under both the Work Plan and Missouri environmental regulations.

### **(a) Appellants Consistently Demonstrated A Conscious Disregard For Regulatory And Contractual Requirements Governing The Proper Disposal Of The Waste**

The Work Plan was submitted to and approved by the EPA so that the EPA would provide Lackland with an "unrestricted" designation for Lackland following the cleanup (Vajda 549, 559, 589; Myers 1079-82). As Mercantile indicates in its brief, Work Plans are common in the industry and are binding between the parties and the EPA (Merc. Br. 11). The primary reason for the Work Plan was to ensure proper handling and disposal of the waste in compliance with environmental regulations "to prevent the type of injury that occurred." *Lopez*, 26 S.W.3d at 160.

Even before Mercantile agreed to assume responsibility for the concrete under the Work Plan,<sup>5</sup> Mercantile and Southern knew that PCB-contamination was "everywhere" and that "all materials being removed from the site **shall be assumed to contain some levels of PCB contamination**" (Exs. 32, 34; Myers 1017; Exs. 31, 41; emphasis added). Mercantile knew that PCBs adhere and then leach into soil and water, which became a predominant factor in its cost-benefit approach to removal (Ex. 19 at 4; Hutkin 621). Mercantile always believed that, if any detectable PCBs remained, Lackland would be subject to: (i) increased regulatory compliance; (ii) greater risk of liability; and (iii) decreased market value (Ex. 98 at 2; Hutkin 649-51; Myers 1048-50, 1055-56).

After the execution of the Work Plan, from April to August 1995, Mercantile ignored AMI's and Winter's repeated warnings of rampant cross-contamination at the clean-up which included photographs of work plan violations (Exs. 3, 96; Myers 1059-62; Sweet 381-382, 384-390; Winter 1738). Mercantile was over-

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<sup>5</sup> Mercantile repeats its nonsensical argument that it could have avoided liability by simply amending the Work Plan to exempt the waste from landfill disposal (Merc. Br. 49). Of course, Mercantile never did this. But even so, Mercantile would always have the duty and right to control its disposition. It still would violate Mercantile's duty of care to dump the concrete in someone's back yard or to amend the Work Plan to do it: "[The parties] may deviate as long as the original objectives of the Work Plan are being achieved" (Vadja 560).

budget and under the gun (Myers 1076-77). Instead of dealing with the cross-contamination, Mercantile told AMI's President, Steve Sweet, to "shut up" and terminated AMI's oversight functions (Sweet 391-392; Ex. 113; Myers 1066-67).

In January 1996, AMI told Mercantile that Southern was adding contaminated concrete slabs to the stockpiles (Ex. 143 at 16; Sweet 405-407). Mercantile told AMI to test the ground underneath the slabs--Mercantile's property--but not the stockpiled concrete "that was going" (Sweet 415-416; Ex. 177 at 8; Myers 1438).

Mercantile's consideration of the five removal options is an excellent example of Mercantile's complete disregard for anything other than its pocketbook. Although the Work Plan required off-site disposal in a landfill (Ex. 78 at 14, 37, 44; Vajda 551-556; Sweet 379-381), Mercantile did not want to pay \$400,000 to landfill the estimated 27,000 tons of stockpiled material (Myers 1088-89; 1413; Winter 1621, 1625-27, 1645-46). Mercantile also did not want the stockpiles of cross-contaminated concrete on Lackland, or on any other Mercantile property, instructing Winter, "We're not going to take them to our site" (Myers 1090-91, 1421-22). That left only option 3, "haul to third party site for fill". But option 3 required pre-removal testing and removal of rebar. Mercantile did not want to do either (Ex 159; Myers 1438; Sweet 537):

Q: Now, there is no dispute, is there that the stockpiled concrete--we have heard from Mr. Sweet. We have heard from you. **There is no dispute that there was not confirmation testing done at the stockpile concrete?**

A: **No. After the stockpiles were there, no.**

(Myers 1438).

Southern attempts explain its conduct by suggesting that it obtained a "certification" from Cooper's Rick Uber that the stockpiles were clean (Southern Br. 12, 26). In fact, there is absolutely no evidence of any such "certification" from Cooper--or from anyone else. Winter's actual testimony of the claimed "certification" is that he and Uber "looked at" the piles (Winter 1739-40):

Q: Can you see PCBs?

A: No.

Q: Are they visible to the naked eye?

A: Sometimes.

(Winter 1740). AMI's report of June 28, 1996 evidences that both Mercantile and Winter knew the stockpiles were contaminated when the dumping began on Plaintiffs' property three days later, on July 1:

The concrete walls parking areas, and loading dock slabs exhibiting PCB concentrations to 10 ppm were removed and stockpiled on the east parking lot by Southern. The disposal procedures for these materials have not been decided upon.

(Ex. 177 at 11).

Plaintiffs' discovery of the concrete six months later only fueled Appellants' contempt for the regulatory process. After Appellants lied to Plaintiffs and the

homeowners that the concrete was tested and clean, Mercantile spent the next four and one-half years telling the world that it was Gusdorf, not Mercantile, who was responsible for the concrete (*See, supra* Statement Of Facts, Section N, Argument Section III.A, III.B). Southern broke promise after promise to Plaintiffs to have the material removed, blaming Mercantile's failure to contribute (Winter 1672, 1735). Later, Southern completely ignored MDNR's repeated Notices of Violation that Southern remove the waste from Plaintiffs' property (Exs. 251, 253, 259; Kasper 1976).

This is not a case where regulations were followed in good faith. Mercantile remorselessly ignored repeated warnings of cross-contamination of and its obligation to test the stockpiles (Ex. 159; Winter 1723). Mercantile's disregard of the requirements of the Work Plan and the repeated warnings of its consultants was a conscious undertaking, culminating in its cold and calculated instruction to Winter to "just take it off" (Myers 1421). In fact, Mercantile knew that the jury might wonder why Mercantile did not test the stockpiles in light of the cross-contamination. Mercantile unsuccessfully moved in limine to exclude any evidence of cross-contamination (RSLF 17, Tr. 102-110). While the jury did not hear about the motion, it did hear about Mercantile's subsequent attempt to keep AMI's Steve Sweet from testifying at trial:

Q: When did you talk to Mr. Wilson?

A: Monday of this week.

Q: Monday?

A: Yes.

Q: You never talked to Mr. Wilson before that?

A: No.

Q: No one -- they never took your deposition?

A: No.

Q: And what did Mr. Wilson tell you when he called?

A: He told me that he was unaware that I would be testifying until the previous Friday.

Q: Now, you had submitted an affidavit in this case a year and a half ago, correct?

A: Correct.

Q: Okay. And what else did Mr. Wilson tell you?

A: He asked if I had been subpoenaed and I said yes.

Q: And what did he say then?

A: He said that I could not be subpoenaed from Missouri to Illinois.

\* \* \*

Q: What did he say with respect to the subpoena which we issued to you?

A: He said I didn't have to show up.

Q: Did we issue a subpoena to you?

A: Yes.

Q: What else did Mr. Wilson tell you? Excuse me.  
What did you say he told you?

A: He said the subpoena wasn't valid<sup>6</sup> and that I  
didn't have to show up.

(Sweet 422-423).

**(b) Mercantile Cannot Satisfy The Other *Alcorn/Lopez*  
Considerations**

Mercantile claims that it satisfies the first mitigating factor--no knowledge of a "prior occurrence"--because it never "previously violated an environmental work plan" (Merc. Br. 49). To the extent that the prior occurrence factor is meant to measure whether a defendant is on notice of potential injury, however, the evidence clearly demonstrated that Mercantile thoroughly understood the environmental and financial devastation associated with the waste, enough to know that Mercantile did not want the concrete on its own property (Myers 1421-22):

And the reason? Mr. Rosenfeld has alluded to it, is  
environmental liability. And what you are going to  
hear, **and the real reason for that is, if you become  
an owner, you are potentially liable for the  
environmental problem.**

(Merc. Opening Statement 272-273) (emphasis added).

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<sup>6</sup> In fact, Sweet had been properly subpoenaed in Missouri.

This case presented Mercantile with a clear choice to either act with, or without, regard to the rights of others. Mercantile chose the latter. This Court has never indicated that first time offenders can avoid punitive liability simply because they have previously never had the same opportunity to do wrong.

With respect to the second factor, Mercantile's suggestion that this whole affair could have been avoided had Southern only properly determined the Plaintiffs' property line is exactly the kind of misplaced finger-pointing that contributed to the punitive award in this case. In closing argument, Mercantile argued that everything was *Plaintiffs' fault* because they did not fill in the creek earlier (Merc. Closing Arg. 2699-2700). It was Mercantile's regulatory and contractual duty to direct the proper disposition of the waste. By everyone's testimony, Mercantile had the absolute right to control the placement of the concrete. Once Mercantile decided to remove the waste to a site other than landfill, Mercantile knew that the third party site would experience precisely the same injury that Mercantile was seeking to avoid for its own properties-- increased environmental liability, increased regulatory compliance, and decreased value. There is no evidence whatsoever suggesting that, had Mercantile properly exercised that control and directed that the waste be taken to a landfill, that it would have ended up anywhere but in a landfill (Winter 1620). It was precisely because Mercantile abdicated its responsibility that waste from its environmental remediation ended up in the Faye Avenue creek.

The punitive damage case was properly submitted to the jury and the jury's unanimous punitive award should be affirmed.<sup>7</sup>

**D. THE GORE REPREHENSIBILITY FACTORS ARE AMPLY MET IN THIS CASE.**

Mercantile contends that the trial court erred in submitting Plaintiffs' punitive damage claims to the jury because "[t]he record in the instant case satisfies none of the *Gore/Campbell* reprehensibility factors" (Merc. Br. 53). This argument fails for two reasons. First, neither *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), nor *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003), establishes a Constitutional test for the submissibility of punitive damage claims. Second, as the Court of Appeals recognized, this case is rich with evidence of reprehensible conduct.

**1. *Gore And Campbell* Dealt With Remittitur Rather Than Submissibility**

The question presented in *Gore* was "whether a \$2 million punitive damages award . . . exceeds the constitutional limit" upon such awards. 517 U.S. at 562-

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<sup>7</sup> The Court of Appeals remanded the case for a new trial on the amount of punitive damages on the ground that only one of the plaintiffs' two punitive damage theories survived its review and the jury had been provided a single punitive damage verdict form. Mercantile has not raised the issue in its Brief. In any event, Plaintiffs submitted a single verdict form because the identical evidence supported the recovery of punitive damages on Plaintiffs' trespass and negligence theories.

63. In *Campbell*, the question was “whether . . . an award of \$145 million in punitive damages, where full compensatory damages are \$1 million, is excessive and in violation of the Due Process Clause.” 123 S.Ct. at 1517. In both cases, the Supreme Court was called upon to address the constitutional necessity of *remitting* punitive damage awards. In neither case did the Court have occasion or purport to establish a constitutional test for the *submissibility* of punitive damage claims.

*Gore* recognizes that states may allow punitive damage awards “to further [their] legitimate interests in punishing unlawful conduct and deterring its repetition.” 517 U.S. at 568. The Court identified the focus of its analysis: “Only when an award can fairly be categorized as ‘grossly excessive’ in relation to those interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment.” *Id.* *Campbell* acknowledges the “considerable discretion” enjoyed by states “in deducing when punitive damages are warranted,” noting again that “each award must comport with the principles set forth in *Gore*.” 123 S.Ct. at 1525.

With respect to the *Gore* reprehensibility factors, *Campbell* observes in *dictum* that “the absence of all of them” would render a punitive damage award constitutionally “suspect.” *Id.* at 1521. That observation is a far cry from Mercantile’s proposition that *Campbell* establishes a due process litmus test for the submissibility of punitive damage claims (Merc. Br. 52).

## 2. Mercantile's Conduct Was Reprehensible.

Even if one reasonably could conclude that the Supreme Court intended *Campbell* to create a federal constitutional rule to govern submissibility, reprehensibility within the contemplation of *Gore* was realized in this case. In *Gore*, the Supreme Court identified several factors to be considered in assessing the reprehensibility of a tort defendant's conduct: (a) whether "the harm caused was physical as opposed to economic," (b) whether the defendant's conduct "evinced an indifference to or a reckless disregard of the health or safety of others," (c) whether the plaintiff "had financial vulnerability," (d) whether the conduct was "an isolated incident" as opposed to part of a series of actions, and (e) whether the defendant engaged in "intentional malice, trickery, or deceit" or merely had an accident. *Id.* at 576-77.

(a) "***Economic***" versus "***physical***" harm. Mercantile insists that the harm it caused was "purely economic in nature" (Merc. Br. at 53). This contention reflects a refusal to recognize the distinction between harm to a pocketbook and harm to the environment. The United States Supreme Court has had no trouble differentiating between issues affecting private property alone and those that affect "the public interest in health, the environment, and the fiscal integrity of [an] area." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 487-88 (1987), citing *Block v Hirsh*, 256 U. S. 135, 155 (1921).

Mercantile takes comfort in the fact that MDNR could have cited Mercantile for violating the Missouri Clean Water Law if all Mercantile did was dump 5900 tons of uncontaminated concrete and rubble into a Cole Creek tributary (Merc. Br.

16, 53). While Mercantile correctly quotes Mr. Kasper to this effect (Merc. Br. 16), Mercantile fails to mention that Mr. Kasper testified that the addition of PCBs to the equation created an entirely different problem:

PCBs are very toxic. And if they do leach or dissolve into water, they can have an affect on the fish, fauna, micros that live in the water. And any time you affect any aspect of the biota in water you are affecting it all, because everything feeds off of each other.

(Tr. at 1999-2000.) Mercantile also fails to point out the evidence that Edwin Knight, Director of the MDNR WPCP, and John Madras, WPCP Section Chief, each considered the presence of PCBs in Plaintiffs' creek to be a Clean Water Law violation (Eck 2540; Ex. 249 at 3, Ex. 259):

By the time Plaintiffs began their cleanup of the creek in 1999 “[t]here was PCB contamination that extended all the way to Cole Creek in the sediment down below the concrete” (Brenneke 1828, 1843, 1858; Ex. 327 at Table 1, Samples GB 3, 5, 8, 9, 10). The distinction between economic and physical injury offers no support for Mercantile's position.<sup>8</sup>

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<sup>8</sup> It should be noted that nothing in *Gore* or *Campbell* precludes the award of punitive damages in a case of purely economic harm. The defendant in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), caused only economic injury. The Supreme Court affirmed a punitive damage award 526 times greater than the actual economic loss.

**(b) *Mercantile's' indifference to and reckless disregard for the safety and health of others.*** Indifference refers to “[h]aving no particular interest in or concern for” a matter, not caring “one way or the other.” AMERICAN HERITAGE DICTIONARY 919 (3<sup>rd</sup> ed. 1996). That would be a generous description of the attitude that Mercantile displayed toward the plaintiffs, the Faye Avenue homeowners and the environment.

Mercantile argues that “the trace levels of PCBs on the concrete were not ‘a hazard to the health or the environment’” and that “[b]oth EPA and DNR deemed the concrete to be clean fill” (Merc. Br. 53). Even if those statements were true, which they are not, they stand in stark contrast to the manner in which Mercantile treated the concrete when it was on Mercantile's property.

In its opening statement, Mercantile admitted that it had delayed foreclosure on the Gusdorf property to avoid liability for “the environmental problem” (Merc. Open. Stmt. 272-73). Mercantile knew that “PCB’s adhere, and then may leach into soil and water” (Hutkin 619; Ex. 19). In April 1995, Mercantile's soil consultant advised that Mercantile would avoid increased regulatory compliance and increased

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*Id.* at 447. In neither *Gore* nor *Campbell* did the Court find occasion to repudiate or retreat from the result it had reached in *TXO*. *See, e.g., Gore*, 517 U.S. at 568 (citing *TXO* for the proposition that “[o]nly when an award can fairly be categorized as ‘grossly excessive’ . . . does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment”).

environmental liability by removing this concrete to a landfill (Ex. 98 at 2; Myers 1048-50, 1055-56).

In January 1996, Mercantile exhorted Cooper to give greater emphasis in the closure report to the EPA to the removal of material under 10 ppm from Lackland, stating:

This section does not mention the significant efforts of Gusdorf in removing materials with PCB concentration between 1 and 10 ppm. **We believe such a reference and inclusion of a descriptive of the activities with respect to the 1-10 material is a significant aspect of the remediation.**

(Ex. 126 at §2.3, emphasis added; Myers 1079).

Despite receiving numerous warnings and photographs from AMI regarding cross-contamination and, later, additional warnings from AMI that Winter had placed contaminated slabs in the stockpiles, Mercantile did not bother to test “the stuff that was going” (Sweet 391-92, 405-407, 410, 415-416; Myers 1437). Mercantile did, however, have AMI test the ground where the slabs had been to ensure that nothing was being left at Lackland (Sweet 410, 415-416). After Plaintiffs' discovery of the waste, Mercantile and Southern told the Plaintiffs and neighboring homeowners that the material that Mercantile was so anxious to rid from its property, was "clean" and could stay in Plaintiffs' creek (Werre 1509-10; Exs. 200, 201).

As discussed above, MDNR considered the presence of PCBs in the creek a threat to the environment (Kaspar 1999-2000; Eck 2540; Ex. 259). Mercantile's expert, Dr. James, refused to testify that the contaminated rubble would have posed no threat to future occupants of the Gusdorf site (James 2486). James testified that he would not want this material on his own property and that people lacking his expertise would have been less likely to appreciate the problems that its presence might entail (James 2482). James also acknowledged that "the Clean Water Law doesn't allow you to discharge chemicals in aquatic systems . . . This being a creek, materials that contain PCBs really aren't allowed to be placed in there" (James 2463-64).

Mercantile is challenging the sufficiency of the evidence to establish the reprehensibility of its conduct. When the defendant challenges the sufficiency of the evidence, the plaintiff is entitled "to the benefit of all favorable probative evidence and all favorable inferences to be drawn therefrom" and the defendant's evidence "is to be disregarded unless it aids plaintiff's case." *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. 1993).

(c) ***Mercantile's intentional misconduct and Mr. Kaplan's financial vulnerability.*** Mercantile claims that "[t]here is no evidence that Southern or the Bank intentionally tried to injure plaintiffs" and that Mr. Kaplan "by his own admission . . . is not a poor man" (Merc. Br. at 53). That hardly disposes of this reprehensibility factor.

In *Gore* the Supreme Court wrote that "economic injury . . . can warrant a substantial penalty" if the victim is "financially vulnerable," especially if the defendant's conduct was "done intentionally through affirmative acts of misconduct." 517 U.S. at

576. The Court did not say that the Constitution prohibits a plaintiff of means from recovering punitive damages, regardless of the cost and risk imposed upon him by the defendant, simply because he had the wherewithal to make repairs. Although Mercantile tried to paint Mr. Kaplan as "a wealthy man" (Merc. Closing 2704), the jury clearly understood that if Plaintiffs had not been able to remediate the creek, the waste likely would still be there, leaching PCBs downstream.

The notion that Plaintiffs were not "vulnerable" to the \$650,000 expense imposed upon them by Mercantile, and to the ongoing liability under the indemnity Plaintiffs were required to give in order to sell their property (Ex. 310), has no basis in the record or in common sense.

Mercantile also protests that "[t]here is no evidence that Southern or the Bank intentionally tried to injure plaintiffs" (Merc. Br. 53). That misses the point. Mercantile controlled the final destination of the rubble and refused to pay for its disposal at an appropriate landfill. Mercantile affirmatively disregarded all warnings of environmental danger associated with material leaving the site and, instead of ensuring the proper disposition of the concrete, made the decision to simply tell its agent to just get rid of it. "When an intentional act results in injuries which are the natural and probable consequences of the act, the injuries as well as the act are intentional." *Truck Ins. Exch. v. Pickering*, 642 S.W.2d 113, 116 (Mo. App. 1982).

**(d), (e). *Isolated incident, or a series of actions and Mercantile's "trickery and deceit."*** Mercantile claims that the record reflects "no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper

motive” (Merc. Br. at 54). Without citation to the record, Mercantile declares that Plaintiffs did not submit punitive damages on this basis, which leaves one wondering why it took three weeks to try this case. In fact, Mercantile's extensive history of misconduct, trickery and deceit-- running full circle, from its conscious disregard of AMI's warnings in April-August 1995, to its failed attempt to keep AMI's President, Steve Sweet, from testifying at trial in August 2001-- was the centerpiece of much of Plaintiffs' evidence.

**(i) Deliberate false statements.** Mercantile's litany of lies to the homeowners, Plaintiffs, MDNR, the Attorney General, the trial court and the jury have been dealt with at length in this Brief.

**(ii) Affirmative misconduct.** Mercantile completely ignored any evidence of environmental concern that did not bear on the fair market value of Mercantile's property. This is not a case where consultants' warnings did not make their way to Mercantile. Mercantile knew that contamination was "everywhere" at Lackland, but completely derogated its responsibility to get the contaminated material to a landfill. When caught by Plaintiffs and MDNR, Mercantile refused to test or remove the concrete, engaged in chronic misrepresentations, litigated issues it knew to be false and tried to convince at least one witness--Steve Sweet --not to show up at trial.

Mercantile concludes that “[i]n short, this case involves none of the *Gore/Campbell* reprehensibility factors”, and that “[u]nder the plain holding in *Campbell*, it violates due process to award any punitive damages under those circumstances.”

(Merc. Br. 54). The bank is wrong on both counts. To the extent that *Gore* and

*Campbell* even deal with submissibility, this case is replete with evidence that establishes the reprehensibility of Mercantile's conduct within the contemplation of *Gore* and *Campbell*.

**IV. THE TRIAL COURT PROPERLY DENIED MERCANTILE'S MOTION FOR REMITTITUR BASED ON: (A) THE EVIDENCE OF MERCANTILE'S REPREHENSIBILITY; (B) THE 11 TO 1 RATIO BETWEEN PUNITIVE DAMAGES TO ACTUAL DAMAGES; AND (C) THE RELATIONSHIP BETWEEN THE PUNITIVE DAMAGE AWARD AND THE CIVIL PENALTIES SET FORTH IN §644.076.1**

Mercantile argues that the trial court's refusal to remit the punitive damage award violates its right to due process, citing *Gore* and *Campbell*. Both of those decisions support the trial court's decision not to remit in this case. *Gore* and *Campbell* identify three "guideposts" for courts reviewing purportedly excessive punitive damage awards:

1. the degree of reprehensibility of the defendant's misconduct;
2. the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and
3. the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

*Gore*, 517 U.S. at 559; *Campbell*, 123 S.Ct. at 1520. None of those considerations affords Mercantile the quarter that it claims.

**A. Mercantile’s Conduct Was Reprehensible.**

Plaintiffs agree with Mercantile that reprehensibility is the most important of the criteria (Merc. Br. 55). As discussed in the previous section, Mercantile’s contention that “[t]here is no evidence of reprehensibility” in the present record ignores the lion's share of the evidence at trial. Mercantile’s stunning display of indifference to the rights of other property owners, the welfare of the environment, and the rules of civilized behavior—carried on over a period of years, acted out in administrative agencies and courts and communications with the human victims, and so plainly impelled by greed that not even the bank offered another rationale—has been documented in this brief.

For three years, while Mercantile was stonewalling and attempting to deceive Plaintiffs, regulatory authorities, the Attorney General and the trial court, the PCBs in the waste leached further down and into the plaintiffs’ creek, as Mercantile knew they would (Ex. 19). As a result of Mercantile’s egregious conduct, Plaintiffs incurred extensive cleanup costs and ongoing exposure to additional liability, and the environment suffered an inexcusable insult. The bank should be ashamed to peddle its claim to this Court that “[t]here is no evidence of reprehensibility.”

**B. The Ratio Between “Actual Or Potential Harm” And The Punitive Damage Award Does Not Offend Due Process.**

Mercantile also argues that its due process rights have been violated because “the 11 to 1 ratio between punitive and actual damages is grossly excessive.” (Merc. Br. 55). Mercantile's position is premised on the notion that in *Campbell* the Supreme Court expanded the rule of substantive due process that it had announced in *Gore*. That did not happen. More to the point, the ratio of punitive damages to actual and potential harm in this case is consonant with *Gore* and *Campbell* and with traditional notions of substantive due process.

**1. *Campbell* did not expand the substantive due process rule announced in *Gore*.**

In *Gore* the Supreme Court held for the first time that grossly excessive punitive damage awards violate substantive due process. 517 U.S. at 568. The Court made it clear that only grossly excessive awards are unconstitutional and that the states remain at liberty to impose punitive damages “to further [their] legitimate interests in punishing unlawful conduct and deterring its repetition.” *Id.* The Supreme Court “always [has] been reluctant to expand the concept of substantive due process because guideposts for responsible decision-making in this uncharted area are scarce and open-ended.” *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

As badly as Mercantile may wish it was otherwise, the Court did not regard its decision in *Campbell* as an expansion of the rule announced in *Gore*. *Campbell* emphasized that “under the principles outlined in *BMW*, this case is neither close nor

difficult.” 123 S.Ct. at 1521. The Court then began its constitutional analysis by reiterating that the states retain discretion over the imposition of punitive damages subject to previously articulated due process limitations. *Id.* at 1519.

**2. The ratio of actual or potential harm to punitive damages is not excessive.**

In *Campbell*, the Supreme Court suggested that “in practice, few [punitive damage] awards exceeding a single-digit ratio between punitive damages and compensatory damages, *to a significant degree*, will satisfy due process.” 123 S.Ct. at 1524 (emphasis added). The Court refused, as it had in *TXO* and in *Gore* “to impose a bright-line ratio which a punitive damages award cannot exceed,” and stressed that, as a matter of course, each punitive damage award must be based upon the particular defendant’s conduct and the harm that it worked or portended. *Campbell* at 1524. In *TXO*, 509 U.S. 443 (1993), the Supreme Court found that a 10:1 ratio of punitive damages to actual damages did not “jar one’s constitutional sensibilities.” *Id.* at 462. The Court did not repudiate or retreat from that result in *Gore* and *Campbell*.

Mercantile contends that “[d]umping the concrete on plaintiffs’ property carried no risk of harm to anyone else” and thus that the 10-to-1 ratio of punitive to compensatory damages in this case offends substantive due process (Merc. Br. 56). The argument that dumping 300 truckloads of PCB-contaminated concrete—comprising 5,900 tons of rubble in chunks that were sometimes the size of automobiles—into a creek running across other people’s property and into the state’s waterway, threatened no cognizable harm offends both common sense and the testimony of Kasper, Eck and

James. Eck, the MDNR Regional Director who authored the Notices of Violation, made it clear that the water pollution officials at his agency considered “[t]he presence of detectable concentrations of PCBs on the concrete . . . a clear indication [that] water contaminants have been placed in the creek, and [were] readily available for uptake by biological organisms in the food chain” (Eck 2539-40; Ex. 251). James, Mercantile's top toxicology expert, testified that "you can't have concrete containing PCBs in the water, because you would be concerned about the leaching of that from the concrete into an aquatic environment" (James 2450-51).

The Supreme Court specified in *Campbell* that a "higher ratio might be necessary where the injury is hard to detect or the monetary value of non-economic harm might have been difficult to determine." 123 S.Ct. at 1524 (quoting *Gore* 517 U. S. at 582); see also *Werremeyer v. K. C. Auto Salvage Co., Inc.*, 2003 Mo. App. Lexis 1074 at \*31 (Mo. App. June 30, 2003) (citing *Campbell* for the constitutionality of "non-single-digit multipliers" when harm is "hard to detect" and observing that "the laws of chance would crack under the weight of a claim that the average consumer could have detected the [harm] perpetrated in this case"). In the present case the contamination of Mercantile's rubble was invisible and the "monetary value" of the threat that contaminant posed to the environment was incalculable.<sup>9</sup>

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<sup>9</sup> Mr. Kasper testified that the presence or absence of PCBs can only be established by testing. (Kaspar 1993-94).

Mercantile argues that the ratio of punitive damages to actual or threatened harm violates its due process rights because “[t]he injury was obvious” (Merc. Br. 56). Here Mercantile appears to have wandered across the border that separates imaginative thought from outright hallucination. Certainly Mercantile’s insistent refusal to pay for testing the rubble and its false assurances to the property owners that the concrete was clean cannot be reconciled with its argument that the harm must have been obvious to the victims.

**3. The penalties available for Mercantile’s misconduct exceeded the punitive damage award.**

The third guidepost identified in *Gore* is the “civil or criminal penalties that could be imposed for comparable misconduct.” 517 U.S. at 583. The Supreme Court specified that a court called upon to determine whether a punitive damage award is excessive and thus violates due process “should accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue.” *Id.* Mercantile contends that there is no statutory penalty applicable to its misconduct in this case and that the available criminal penalties “do not come close to supporting a \$7 million punitive award” (Merc. Br. 57). That argument is mistaken.

The statute cited by MDNR in each of its letters and notices of violation in this case (and in its pending suit against Appellants) provides “for the assessment of a penalty not to exceed ten thousand dollars per day for each day, or part thereof, the violation occurred and continues to occur . . . . as the Court deems proper.” RSMo §644.076.1. The record amply supports a finding that Mercantile caused its PCB-

contaminated rubble to be placed on the plaintiffs' property beginning on July 1, 1996, and allowed it to remain there for more than 1,200 days, until December 23, 1999 (Exs. 180, 181; Ex. 327, Table 1). The bank thus was susceptible to a maximum fine in excess of \$12 million.

Mercantile's contention that the punitive damage award violates its right to substantive due process is untenable. Substantive due process protects individuals from government action that "shocks the conscience," *Rochin v. California*, 342 U.S. 165, 172 (1952), or interferes with rights "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937). With due regard for the Court's recognition in *Gore* that a grossly excessive award of punitive damages can operate to deprive an individual of substantive due process, in this case it is Appellants' conduct rather than the jury's punitive damage award that sends the conscience reeling. The federal constitution does not require remittitur of the jury's award in this case.

**V. THE TRIAL COURT PROPERLY SUBMITTED INSTRUCTION NO. 24  
BECAUSE THE EVIDENCE OF PLAINTIFFS' SALE TO LOWE'S  
DEMONSTRATED THAT THE COST OF REPAIR WAS EQUAL TO OR  
LESS THAN THE DIMINUTION IN VALUE OF PLAINTIFFS'  
PROPERTY**

In determining whether the evidence at trial was sufficient to support a jury instruction, the evidence is viewed in the light most favorable to the offering party, and the court gives the offering party the benefit of all reasonable inferences *Caples v.*

*Earthgrains Co.*, 43 S.W.3d 444, 449 (Mo. App. 2001); *Linton v. Missouri Highway and Transp. Comm'n*, 980 S.W.2d 4, 6 (Mo. App. 1998).

Plaintiffs offered and the trial court submitted the following damage instruction:

If you find in favor of plaintiffs, then you must award the plaintiffs such sum as you may find from the evidence to be the reasonable cost of repair of any damage to plaintiffs' property.

(Instruction No. 24/L.F. 193). The instruction tracks exactly the alternative offered by the drafters in note 2 to MAI 4.02 where cost of repair is the appropriate remedy.

The particular facts of a case determine whether costs of repair or diminution of value is the appropriate measure of damages. *McLane v. Wal-Mart Stores*, 10 S.W.3d 602, 606 (Mo. App. 2000).

Cost of repair is the appropriate measure of damages in negligence and trespass cases where it is less than the diminution of value. *Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500 (Mo. App. 1999)(trespass); *Flora v. Amega Mobile Home Sales, Inc.*, 958 S.W.2d 322 (Mo. App. 1998)(negligence). Because the cost of repair was less than the diminution in value in this case, Instruction 24 was appropriately given.

Plaintiffs' Lease with Lowe's granted Lowe's an option to purchase the Kaplan Property for \$6.7 million subject to Lowe's inspection for environmental matters (Ex. 269 at 33). Lowe's demanded the following concessions to account for the PCB-contamination: (i) that Plaintiffs bear the cost to remediate the site; and (ii) that Plaintiffs

indemnify Lowe's for all time against any and all liability arising out of the PCB-contamination (Ex. 310 at 1, 5-7). Without Plaintiffs' agreement to those concessions, Lowe's would not purchase the property (Ex. 310 at 1, 5-7; Kaplan 2141-43). These negotiations were arms-length (Kaplan 2140-43).

The purchase price negotiated by Lowe's provide undisputed evidence of the diminution of fair market value. The traditional definition of fair market value is the price which property will bring when it is offered for sale by an owner who is willing but under no compulsion to sell and bought by a buyer who is willing or desires to purchase but is not compelled to do so. MAI 16.02. *See also, City of St. Louis v. Vasquez*, 341 S.W.2d 839, 843-45 (Mo. 1960); *Hostler v. Green Park Dev. Co.*, 986 S.W.2d 500, 506 (Mo. App. 1999). Evidence of the actual purchase price of property is often admitted as evidence of its fair market value provided the sale was bona fide, voluntary, and not remote in time. *State ex rel. State Highway Comm'n v. Langley*, 422 S.W.2d 309, 311-12 (Mo. 1967); *State ex rel. State Highway Comm'n v. Rauscher Chevrolet Co.*, 291 S.W.2d 89, 92-93 (Mo. 1956).

The Lowes transaction provided timely evidence that the contamination devalued Plaintiffs' Property by an amount equal to the combination of: (i) the remediation costs; plus (ii) Plaintiffs' indemnity. Ascribing any value at all to the indemnity leads to the conclusion that the diminution in value was greater than the cost of

repair.<sup>10</sup>

Moreover, Southern cannot claim that Instruction No. 24 was improper because Southern failed to offer any evidence of the diminution of value of Plaintiff's property.

Where evidence of the cost of repairs has been offered without objection and the defendant offers no evidence of the diminution in the market value of the property, the defendant may not complain on appeal that damages based on cost of repairs were improperly awarded.

*McLane*, 10 S.W.3d at 606-07.

When the evidence is viewed in the light most favorable to the offering party, and the offering party is given the benefit of all reasonable inferences, the trial court did not err in submitting Instruction No. 24 to the jury.

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<sup>10</sup> Mercantile's repeated refusal to give Plaintiffs the same indemnity establishes that the indemnity is of no small economic consequence (Milster 864, 899). Nevertheless, even if the indemnity were given no value, the diminution in value would then simply equal the cost of repair. Use of Instruction 24, therefore, did not "mislead or confuse the jury" and did not result in prejudicial error to Southern. *Burns Nat'l Lock Installation Co. v. Am. Family Ins. Co.*, 61 S.W.3d 262, 270 (Mo. App. 2001).

**VI. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
AWARDING SOUTHERN \$1,000.00 IN ATTORNEYS' FEES WHERE  
SOUTHERN FAILED TO SEGREGATE ANY OF ITS FEES AND THE  
EVIDENCE DEMONSTRATED THAT SOUTHERN'S COUNSEL DID  
VIRTUALLY NO WORK ASSOCIATED WITH PLAINTIFFS' CITY  
ORDINANCE CLAIM**

The amount of attorneys' fees is within the sound discretion of the trial court and should not be reversed unless the award is arbitrarily arrived at or is so unreasonable as to indicate indifference and lack of proper judicial consideration.

*Roberts v. McNary*, 636 S.W.2d 332 (Mo. banc 1982); *Brockman v. Soltysiak*, 49 S.W.3d 740, 745 (Mo. App. 2001).

The Supreme Court of Missouri and all three Courts of Appeals have uniformly ruled that a party seeking fees must segregate the fees attributable to the claim or defense on which fees are sought where the underlying case involved multiple claims:

The required segregation may be difficult, **but must nevertheless be essayed.**

*O'Brien v. B.L.C. Ins.*, 768 S.W.2d 64, 71 (Mo. banc. 1989) (emphasis added). *See also Funding Sys. Leasing Corp. v. King Louie Int'l, Inc.*, 597 S.W.2d 624 (Mo. App. 1979); *Schnucks Carrollton Corp. v. Bridgeton Health and Fitness, Inc.*, 884 S.W.2d 733 (Mo. App. 1994); and *Bolivar Insulation Co. v. R. Logsdon Builders, Inc.*, 92 S.W.2d 232 (Mo. App. 1996).

In the absence of such segregation, there is no proper basis upon which to make any fee award:

King Louie has not disentangled what its attorneys did in those two different respects and has made no proof of any allocation as between those two branches of legal services. **In the absence of such an allocation, there is no proper basis upon which to make any allowance of fees.**

*Funding Sys.*, 597 S.W.2d at 637 (emphasis added).

In this case, plaintiffs filed suit against Southern Contractors seeking actual and punitive damages under three common law claims. In a separate claim for violation of a municipal ordinance, Plaintiffs sought only attorneys' fees.

During the course of the litigation, a total of 33 depositions were taken, with only a single, 20-minute deposition arguably touching on Plaintiffs' ordinance claim. Although numerous pre-trial motions were filed by the parties in the litigation (including motions to dismiss, motions for summary judgment, motions in limine), not a single substantive motion was filed by any party with respect to Plaintiffs' ordinance claim. At trial, of the 600+ exhibits offered into evidence, only 2, offered by Plaintiffs, related to Plaintiffs' ordinance claim. Southern offered no exhibits or witnesses on the ordinance claim.

The jury returned a verdict for Defendants on Plaintiffs' ordinance claims. Southern moved for recovery of all of its attorneys fees in the litigation, without allocation or segregation. Of the 1700 time entries on Southern's legal bills, only 15 entries, totaling approximately 30 hours, arguably were attributable to the ordinance claim. According to Southern's own bills, the fees attributable to defending the ordinance claim totaled \$3,355.00.

Based on these facts, the trial court's award of \$1,000.00 for attorneys' fees was reasonable and not a not a clear or manifest abuse of judicial discretion.

Southern cites *Brockman v. Soltysiak*, 49 S.W.3d 740 (Mo. App. 2001). In *Brockman*, a designer sued two shareholders, incurring \$34,869 in legal fees in the process. The jury returned a verdict in favor of the designer on her breach of contract claim against one shareholder, and against the designer on her claim against the other shareholder. Under the designer's successful contract claim, the judge awarded attorneys' fees of \$15,755.23, representing less than one-half of the designer's total fees. On appeal, the losing shareholder complained that the trial court had failed to specifically allocate between the designer's claims against the two shareholders.

The Court of Appeals rejected the shareholder's argument, ruling that, because the damages sought against each of two defendants were "identical and indivisible," no allocation was necessary: *Id.* at 716. Similarly, in *Architectural Res., Inc. v. Rakey*, 912 S.W.2d 676 (Mo. App. 1995), segregation was not required because the court found that the trial court had evaluated the testimony and found that "much of the testimony is applicable to all claims." *Id.* at 682.

Under Missouri law, the significant differences between Plaintiffs' common law claims and their ordinance claim required segregation of Southern's fees. Because Southern failed to provide any segregation, the trial court properly limited Southern Contractors' attorneys' fee award to \$1,000.00.

**VII. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN  
AWARDING TECHNOLOGY COSTS TO PLAINTIFFS BASED ON  
SOUTHERN'S USE OF THE TECHNOLOGY PROVIDED BY  
PLAINTIFFS AND THE JUDICIAL ECONOMIES AND EFFICIENCIES  
THE TECHNOLOGY PROVIDED TO THE COURT AND ALL PARTIES.**

An item is taxable as a cost where it is specifically authorized by statute or by agreement of the parties. *Architectural Res., Inc. v. Rakey*, 912 S.W.2d 676, 679 (Mo. App. 1995). RSMo. §514.060 permits the prevailing party to recover his costs in a civil action. A cost award will be reversed only upon a showing of an abuse of discretion. *Laubinger v. Laubinger*, 5 S.W.3d 166, 181 (Mo. App. 1999).

Plaintiffs hired Courtroom Technology Consultants ("CTC") to assist in the presentations of the evidence to the jury and the Court. CTC scanned virtually every document that would be admitted into evidence during the trial. CTC set up monitors for all counsel, the trial judge, the witness and a screen for the jury. Although Plaintiff initiated the use of CTC's services, the parties agreed that counsel for both Defendants could use the services throughout the trial. Upon request, Debbie Weaver of CTC projected the document on the monitors highlighted sections of the text or zoomed in on hard-to-read portions of the document. Southern's counsel used CTC's services with

numerous witness throughout the trial (*See e.g.* Milster 891; Hutkin 677; Sweet 532-533; Duncan 787-788; Myers 1339; Werre 1545-47; Winter 1714; Brenneke 1914; Kaplan 2276; Eck 2544).

Despite Southern's assertion that some of Plaintiffs' witnesses were duplicative, the trial court taxed \$323.00 in witness fees as costs. The trial court was in the best position to determine the necessity of each witness. The trial court's decision to tax the witness fees was not arbitrary or unreasonable.

Southern also challenges the trial court's taxing of photocopy and transcript expenses. In light of the length of the trial and the three years of litigation that preceded it, the trial court's decision to tax these expenses as costs was not arbitrary or unreasonable.

### **CONCLUSION**

The Judgment of the Circuit Court should be affirmed.

STONE, LEYTON & GERSHMAN,  
A PROFESSIONAL CORPORATION

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**CERTIFICATE OF SERVICE  
AND OF COMPLIANCE WITH RULE 84.06**

The undersigned hereby certifies that Respondents' Brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06 and contains 27,467 words as determined by the undersigned's word-processing system. I further certify that the attached Sony 3.5 floppy disk which contains a copy of the Respondents' Brief was scanned with the Anti Virus program and was found to be free from viruses.

The undersigned hereby certifies that two hard copies and one floppy disk of Respondents' Brief were hand-delivered this 11th day of August, 2003, to:

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