

**IN THE
MISSOURI SUPREME COURT**

SC85341

ROBERT KAPLAN, et al.,

Plaintiffs-Respondents,

vs.

AVANTI MARKETING GROUP, INC., d/b/a SOUTHERN CONTRACTORS

Defendants-Appellants.

**Appeal from the Circuit Court of the County of St. Charles
State of Missouri
Eleventh Judicial Circuit**

**Honorable Ronald R. McKenzie
Division 1**

**SUBSTITUTE BRIEF OF APPELLANT
AVANTI MARKETING GROUP, INC., d/b/a SOUTHERN CONTRACTORS**

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JURISDICTIONAL STATEMENT

This appeal arises from a civil action filed by Robert Kaplan, as Trustee of the Robert Kaplan Trust, and Leonard O'Brien, d/b/a Cloverleaf Properties ("plaintiffs"), in the Circuit Court for St. Charles County against defendants, Firststar Bank, N.A.¹, f/k/a Mercantile Bank N.A. ("U.S. Bank"), Avanti Marketing Group, Inc. d/b/a Southern Contractors ("Southern Contractors"), and Gerald L. Winter ("Winter")² for the recovery of damages to real property owned by plaintiffs resulting from the dumping of waste materials on and adjacent to plaintiffs' property. Plaintiffs' Amended Petition contained four counts: trespass (Count I), nuisance (Count II), violation of City zoning ordinance (Count III), and negligence (Count IV). After a three-week jury trial before the Honorable Ronald R. McKenzie (Visiting Judge), on October 18, 2001, the trial court entered an amended judgment on the jury's verdict against Defendants U.S. Bank and Southern Contractors for compensatory damages on plaintiffs' trespass and negligence

¹Between the filing of the original Petition and trial of this cause, Firststar subsequently became U.S. Bank N.A., and is therefore referred to as "U.S. Bank."

²Other defendants were named in the Petition and the Amended Petition, but subsequently were dismissed with prejudice.

claims in the amount of \$650,000, and for punitive damages against Defendants U.S. Bank and Southern Contractors in the amounts of \$7,000,000 and \$225,000, respectively. On plaintiffs' negligence claim, Defendant U.S. Bank was found to be 80% at fault, and Southern Contractors was found to be 20% at fault.

Southern Contractors and U.S. Bank both appealed the judgment of the trial court to the Missouri Court of Appeals for the Eastern District. After briefing and oral argument, the Court of Appeals issued its decision on March 18, 2003. The author of the opinion was the Honorable Glenn Norton. Judge Sherri Sullivan and Presiding Judge William Crandall concurred in this opinion. The Court of Appeals held that U.S. Bank could not be held vicariously liable for the conduct of Southern Contractors on plaintiffs' trespass claim, but that there was sufficient evidence that U.S. Bank was independently negligent in disposing of the waste from the Cleanup Site. The Court sustained the award of punitive damages against both defendants. However, the Court reversed the judgment as to the punitive damages award against U.S. Bank, because it was unclear to what extent the punitive damages assessed against U.S. Bank were for the imputed conduct of Southern Contractors on the trespass claim as opposed to its own negligence.

Southern Contractors and U.S. Bank timely filed Motions for Rehearing or Transfer in the Court of Appeals. These Motions were denied on May 27, 2003.

Pursuant to Missouri Supreme Court Rule 83.04, Southern Contractors and U.S. Bank both timely filed Applications for Transfer to this Court. On July 1, 2003, the Court granted both Applications. The Court has final jurisdiction over this entire cause pursuant to Article V, section 10 of the Missouri Constitution.

STATEMENT OF FACTS

In 1992, Gusdorf Corporation (“Gusdorf”), a manufacturer of wood furniture, defaulted on a loan to Mercantile Bank (“Mercantile”). (Tr. 336). The collateral for the loan included 105 acres of property at 11440 Lackland Road in St. Louis County, Missouri (“Cleanup Site”), on which was located its manufacturing facility. (Tr. 336). The property had previously been the site of a manufacturing facility owned and operated by Wagner Electric Corporation, which manufactured electrical transformers. (Tr. 365).

As part of the manufacturing process, the electrical transformers were filled with a liquid mixture containing polychlorinated biphenyls (“PCBs”). (Tr. 548). The liquid mixture containing the PCBs was stored in tanks near the manufacturing plant. (Tr. 375). Wagner ceased its operations at the Cleanup Site in 1974, and became a subsidiary of Cooper Industries, Inc. (“Cooper”). (Tr. 264). Gusdorf purchased the Site in 1976. (Tr. 264).

Starting in 1993, at the request of Mercantile, a number of additional environmental studies were performed on the Cleanup Site. (Tr. 266). The results of this subsequent testing confirmed high levels of PCB contamination on the Site. (Tr. 267). A series of tests performed by Abatement Management, Inc., in 1994, found PCB contamination throughout the facility. (Tr. 377). Contamination levels on the Site ranged from less than 1 ppm to 9,923 ppm. (Tr. 445-48). Overall, the Site was determined to be badly contaminated. (Tr. 448).

In early 1995, Cooper, with the consent of Mercantile, engaged the environmental consulting firm of Dames & Moore to develop and implement a work plan for the demolition and remediation of the Cleanup Site. (Tr. 548). Dames & Moore formulated a work plan (“Work Plan”), the objective of which

was to reduce PCB contamination at the site to 10 ppm. (Tr. 550). Under the Work Plan, materials were classified into four different categories of waste. (Tr. 551). The first category of waste consisted of materials with PCB concentrations of 40 ppm or greater, which were to be transported out-of-state to a federally licensed landfill. (Tr. 552). All other material was classified generally as “special waste”, which was sub-divided into three sub-categories. (Tr. 554). The definition of special waste was any material that did not contain hazardous levels of PCB contamination or did not contain PCBs but came from an industrial site. (Tr. 553). The Work Plan provided that special waste would be either disposed of at a permitted landfill, or crushed and used at the Cleanup Site as landfill. (Tr. 554). The Environmental Protection Agency (EPA) approved the Work Plan in 1995. (Tr. 559).

Under the Work Plan, Mercantile had the option of leaving the special waste material with PCB concentrations of less than 10 ppm on the Cleanup Site or disposing of it elsewhere. (Tr. 1043). Although Dames & Moore proposed as part of the Work Plan that it be the Oversight Engineer Representative (“OER”), with responsibility for overseeing plan compliance by contractors, Dames & Moore was not selected for this task under the Work Plan. (Tr. 558). The OER was Earth Science Consultants. (Tr. 451).

Defendant Avanti Marketing Group, Inc. d/b/a Southern Contractors (“Southern Contractors”), was selected as the demolition and disposal contractor for the remediation project. (Tr. 454). Southern Contractors was a Missouri corporation and Gerald L. Winter (“Winter”) was its principal. (Tr. 1602). The PCB remediation contractor was AWSR. (Tr. 451). Southern Contractors was the non-PCB contractor. (Tr. 454). Southern Contractors had no responsibility for environmental testing. (Tr. 1708).

The Cleanup Site was remediated between April 1995 and January 1996. As a result, a stockpile of concrete and other materials containing PCB levels of less than 10 ppm (amounting to approximately 30,000 tons) were left on the Site to be used on-site as backfill, or to be disposed of as Special Waste to a permitted landfill, as provided by the Work Plan. (Tr. 1623-24).

Mercantile eventually decided that the Special Waste material with PCB concentrations of less than 10 ppm would be removed from the Cleanup Site. (Tr. 1043). Soon after the decision was made to remove this material from the Site, Gerald Winter was approached by Leonard Werre, owner of property at 9 Faye Avenue in St. Charles, Missouri. (Tr. 1450, 1458). Mr. Werre and his neighbors, Walter Dietz and Harold Roberts, had serious problems with soil erosion in their backyards. (Tr. 1453-54, 2354-57). The erosion was caused by a culvert which had been installed by the City, and had created a large ditch behind the homes on Faye Avenue. (Tr. 1454). After a number of requests to the City to correct the condition went unanswered, Mr. Werre decided to correct the problem himself. (Tr. 1455). He made arrangements with Gerald Winter for the dumping of the concrete in the creek behind Faye Avenue (“Creek”). (Tr. 1458-61). He wished to use the material as landfill to stem erosion of a creek area behind their properties. (Tr. 1456).

Gerald Winter informed Mr. Werre that the stockpiled concrete and debris were clean (Tr. 1459). At the time the concrete was hauled, Gerald Winter was unaware that the waste material was contaminated with PCBs, and testified that, based upon prior testing, he thought it was clean. (Tr. 1724). Although Winter initially assumed that the material was contaminated because of his awareness of cross-contamination, he knew the material was later tested and sorted by Rick Uber, and as far as he knew, the material he deposited in the Faye Avenue Creek was clean. (Tr. 1715, 1724, 1729-30, 1737-39). When

asked about a May 24, 1996 memorandum he sent to Karen Meyers at Mercantile in which he mentioned the need for additional testing, Mr. Winter testified as follows:

A: Additional testing was required or we needed certification of testing from AWS and Earth Sciences. If there was [sic] areas that couldn't be — all testing was done per the EPA guidelines.

Q: And you didn't get it after — Did you get certification from AWS or Earth Sciences after May 24?

A: From Rick Uber.

(Tr. 1739, lines 12-18). Significantly, Southern Contractors was not responsible for environmental testing (Tr. 1708), nor was it equipped for environmental testing. (Tr. 1702, 1740). In fact, Winter testified that he would never have disposed of the waste material there unless he thought it was clean. (Tr. 1663). This testimony was consistent with the fact that Winter disposed of a large amount of the same waste material (99 truck loads) on property that he himself owned. (Tr. 1724). He would not have done so if he hadn't believed the material was clean. (Tr. 1724).

From July 1 to August 2, 1996, Southern Contractors hauled the waste material from the Cleanup Site to the Creek behind the homes on Faye Avenue. (Tr. 1647). Southern Contractors deposited 295 truckloads of concrete in the Creek. (Tr. 1647). Some of the Creek which was filled was located on plaintiffs' property. (Tr. 2043).

Plaintiffs own the property on the other side of the Creek from the homes on Faye Avenue. (Tr. 1451-52; 2017-2018). Plaintiff operated a mobile home park on the property, which was known as the Trio Mobile Home Park (Tr. 2017-18).

In December of 1996, the Creek flooded the Trio Mobile Home Park. (Tr. 2024-25). The flooding was caused by the concrete which had been dumped in the Creek. (Tr. 1580).

In October of 1998, Robert Kaplan, as Trustee of the Robert Kaplan Trust, and Leonard O'Brien, d/b/a Cloverleaf Properties ("plaintiffs"), in the Circuit Court for St. Charles County against defendants, Firststar Bank, N.A.³, f/k/a Mercantile Bank N.A. ("Mercantile"), Avanti Marketing Group, Inc. d/b/a Southern Contractors ("Southern Contractors"), and Gerald L. Winter ("Winter")⁴ for the recovery of damages to real property owned by plaintiffs resulting from the dumping of waste materials on and adjacent to plaintiffs' property. (L.F.27). Plaintiffs' Amended Petition contained four counts: trespass (Count I),

³Between the filing of the original Petition and trial of this cause, Firststar subsequently became U.S. Bank N.A. However, because it was known as Mercantile during most of the events in question, it is referred to hereinafter "Mercantile."

⁴Other defendants were named in the Petition and the Amended Petition, but subsequently were dismissed with prejudice.

nuisance (Count II), violation of City zoning ordinance (Count III), and negligence (Count IV). (L.F. 66-95).

At trial, the parties stipulated that the PCB-contaminated landfill was not hazardous waste under either federal or state law. (Tr. 161-62). In fact, the evidence at trial established that the United States Environmental Protection Agency (EPA) and the State of Missouri Department of Natural Resources regarded such material as clean fill. (Tr. 2258, 2510-11).

After a three-week jury trial before the Honorable Ronald R. McKenzie (Visiting Judge), on October 18, 2001, the trial court entered an amended judgment on the jury's verdict against Defendants U.S. Bank and Southern Contractors for compensatory damages on plaintiffs' trespass and negligence claims in the amount of \$650,000, and for punitive damages against Defendants U.S. Bank and Southern Contractors in the amounts of \$7,000,000 and \$225,000, respectively. (L.F. 236-37). On plaintiffs' negligence claim, Defendant U.S. Bank was found to be 80% at fault, and Southern Contractors was found to be 20% at fault. (L.F. 236).

The defendants appealed to the Missouri Court of Appeals for the Eastern District. The Court of Appeals held that U.S. Bank could not be held vicariously liable for the conduct of Southern Contractors on plaintiffs' trespass claim, but that there was sufficient evidence that U.S. Bank was independently negligent in disposing of the waste from the Cleanup Site. As a consequence, the court sustained the award of punitive damages against both defendants. However, the court reversed the judgment as to the punitive damages award against U.S. Bank, because it was unclear to what extent the punitive damages assessed against U.S. Bank were for the imputed conduct of Southern Contractors on the trespass claim as opposed to its own negligence.

POINTS RELIED ON

1. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NO. 24, WHICH INSTRUCTED THE JURY TO AWARD PLAINTIFFS THE REASONABLE COST OF REPAIR OF ANY DAMAGE TO PLAINTIFFS' PROPERTY, BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF THE INSTRUCTION, IN THAT THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF PLAINTIFFS' PROPERTY BEFORE AND AFTER THE DUMPING OF THE CONCRETE.

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

Tong v. Kincaid, 47 S.W.3d 418 (Mo. App. 2001);

Sheridan v. Sunset Pools of St. Louis, Inc., 750 S.W.2d 639 (Mo. App. 1988)..

- II. **THE TRIAL COURT ERRED IN ENTERING A JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST DEFENDANT SOUTHERN CONTRACTORS ON PLAINTIFFS' TRESPASS AND NEGLIGENCE CLAIMS, BECAUSE THE EVIDENCE DID NOT SUPPORT THE AWARD OF PUNITIVE DAMAGES ON EITHER CLAIM, IN THAT THERE WAS A COMPLETE ABSENCE OF EVIDENCE SUPPORTING THE ELEMENTS OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS, COMMISSION OF AN ACT INTENTIONALLY WITHOUT CAUSE OR EXCUSE, OR OUTRAGEOUS CONDUCT.**

Alcorn v. v. Union Pacific Railroad Co., 50 S.W.3d 226 (Mo. banc 2001);

Lopez v. Three Rivers Electric Cooperative, Inc., 26 S.W.3d 151

(Mo. banc 2000);

Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104 (Mo. banc 1996);

State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. ____ (2003).

III. THE TRIAL COURT ERRED IN AWARDING DEFENDANT SOUTHERN CONTRACTORS ONLY \$1,000.00 IN ATTORNEY'S FEES, BECAUSE THE AWARD WAS CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE, IN THAT THERE WAS NO DISPUTE DEFENDANT SOUTHERN CONTRACTORS INCURRED \$167,539.00 IN LEGAL FEES, AND THAT THE SERVICES EXPENDED IN THE DEFENSE OF PLAINTIFF'S ORDINANCE VIOLATION CLAIM WERE INSEPARABLE FROM THE DEFENSE OF THE OTHER CLAIMS ASSERTED BY PLAINTIFFS.

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

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

Next Day Freight, Inc. v. Hirst, 950 S.W.2d 676 (Mo. App. 1997).

IV. THE TRIAL COURT ERRED IN TAXING AS COSTS TO PLAINTIFFS NUMEROUS ITEMS, INCLUDING MULTIMEDIA EXPENSES, PHOTOCOPYING CHARGES, WITNESS FEES, AND EXPENSES FOR EXPEDITED TRIAL TRANSCRIPTS, BECAUSE THE TAXING OF THESE EXPENSES AS COSTS WAS UNAUTHORIZED BY LAW, IN THAT THE EXPENSES ARE NOT RECOGNIZED AS COSTS UNDER

**STATUTE OR CONTRACT, AND WERE NOT REASONABLY
NECESSARY TO THE PROSECUTION OF PLAINTIFFS' CLAIMS.**

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

Harrison v. Monroe County, 716 S.W.2d 263 (Mo. banc 1986).

ARGUMENT

1. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY INSTRUCTION NO. 24, WHICH INSTRUCTED THE JURY TO AWARD PLAINTIFFS THE REASONABLE COST OF REPAIR OF ANY DAMAGE TO PLAINTIFFS' PROPERTY, BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF THE INSTRUCTION, IN THAT THERE WAS NO EVIDENCE OF THE FAIR MARKET VALUE OF PLAINTIFFS' PROPERTY BEFORE AND AFTER THE DUMPING OF THE CONCRETE.

1. Standard of Review

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

2. Argument

The trial court submitted to the jury the following instruction (Instruction No. 24) offered by plaintiffs, over defendant's objections (Tr. 2661), as follows:

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.

(L.F. 193). This instruction was defective and given in error over defendant's objections, in that the instruction fails to set forth the proper measure of damages to real property for a trespass claim and that the evidence was totally lacking to submit such an instruction to the jury.

The proper measure of damages to real property in a trespass case, where the property can be restored to its former condition, "is the difference in its fair market value before and after the injury, or the cost of restoring it, whichever is less." Tong v. Kincaid, 47 S.W.3d 418, 421 (Mo.App. 2001)(citing

Smith v. Woodard, 15 S.W.3d 768, 773 (Mo.App. 2000)). *See also* Curtis v. Fruin-Colnon Contracting Co., 253 S.W.2d 158, 164, 363 Mo. 676, 686 (Mo. 1952) The cost of repair is the proper measure of damages to real property only in cases where the repairs amount to a small percentage of the diminution of value. Sheridan v. Sunset Pools of St. Louis, Inc., 750 S.W.2d 639, 642 (Mo. App. 1988). It is error for the trial court to enter judgment awarding damages for the cost of repair where there is no evidence of diminution in value. Flora v. Amega Mobile Home Sales, Inc., 958 S.W.2d 322, 324 (Mo. App. 1998).

Absolutely no evidence was offered or received which established the fair market value of plaintiffs' property before and after the dumping of concrete took place. The only evidence introduced pertained to plaintiffs' expenses in removing the concrete and cleaning up their property: \$636, 781.66. (Tr. 2158). Therefore, no determination could have been made as to which amount was less, the fair market value or cost of repair, because there was no evidence of the fair market value before or after the dumping took place. In fact, the evidence adduced at trial established that plaintiffs received no discount in the fair market value of the property by Lowe's when it entered into the ground lease with plaintiffs; in the way of an amendment to the purchase agreement, Lowe's only required that plaintiffs take remediation actions and promise to indemnify Lowe's. (Tr. 2140-43). The evidence at trial also established that plaintiffs purchased the property for roughly \$800,000.00 in 1981 and subsequently sold the property for \$6,700,000 to Lowe's, which sale was to be closed in September 2001. (Tr. 2170). Plaintiffs' own testimony was that there was no claim for loss of fair market value to the property; rather, he was making a claim for his special damages for remediation of the property. (Tr. 2160). Furthermore, during the instruction conference, plaintiffs' attorney represented that he was not making a claim for diminution in fair market value, and was

proceeding under the theory that the cost of repair was equal to the diminution in value of the property. (Tr. 2660). In the absence of any evidence of the alleged diminution in value of plaintiffs' property, the measure of damages submitted to the jury was improper.

In Flora v. Amega Mobile Home Sales, 958 S.W.2d 322, 324 (Mo. App. 1998), the court reversed a judgment awarding plaintiff the cost of repair to his basement foundation against the seller of the property, where there was no evidence presented at trial regarding the market value of the damaged property. Id. The court reversed and remanded for a determination of the difference in the fair market value in the property. Id. Similarly, in this case the court should reverse and remand for a determination of the difference in fair market value of plaintiffs' property.

The decision of the Court of Appeals was based upon the premise that the fair market value decreased by at least the cost of remediation. There was no evidence in the record to support this assumption. Moreover, to make this assumption as a matter of law would in effect eliminate the need for plaintiff ever to present actual evidence of fair market value prior and after damage to real property, because the cost of restoring the property would always be presumed to be at minimum the decrease in fair market value. Finally, even if this presumption were permissible in the present case, the Court of Appeals' decision would nevertheless be erroneous, because the cost of restoration is the proper measure of damages only where it is significantly less than the decrease in fair market value. Sheridan, supra. Without any actual evidence in the record as to the value of the indemnity agreement with Lowe's, there was no way the court could determine whether the cost of the remediation represented only a small percentage of the decrease in fair market value.

II. THE TRIAL COURT ERRED IN ENTERING A JUDGMENT AWARDING PUNITIVE DAMAGES AGAINST DEFENDANT SOUTHERN CONTRACTORS ON PLAINTIFFS' TRESPASS AND NEGLIGENCE CLAIMS, BECAUSE THE EVIDENCE DID NOT SUPPORT THE AWARD OF PUNITIVE DAMAGES ON EITHER CLAIM, IN THAT THERE WAS A COMPLETE ABSENCE OF EVIDENCE SUPPORTING THE ELEMENTS OF EVIL MOTIVE OR RECKLESS INDIFFERENCE TO THE RIGHTS OF OTHERS, COMMISSION OF AN ACT INTENTIONALLY WITHOUT CAUSE OR EXCUSE, OR OUTRAGEOUS CONDUCT.

1. Standard of Review

In determining the issue of the sufficiency of evidence to support submission of punitive damages, the evidence most favorable to plaintiff's submission and all inferences favorable to that submission are to be considered. Crabtree v. Bugby, 967 S.W.2d 66, 71 (Mo. banc 1998).

2. Argument

Over defendants' objection, the trial court permitted plaintiffs to submit the issue of punitive damages to the jury. (Tr. 2661-66). The jury returned a verdict for punitive damages in the amount of \$225,0000 against Defendant Southern Contractors, and the trial court entered judgment accordingly. The trial court erred in entering a judgment awarding punitive damages against defendant, because there was a complete absence of evidence that Defendant Southern Contractors exhibited any evil motive or reckless indifference to the rights of others.

The decision of the Court of Appeals affirming the award of punitive damages against Southern Contractors was wholly inconsistent with this Court's recent pronouncements on the subject. In recent years, this Court has stated unequivocally that the remedy of punitive damages is “so extraordinary or harsh that it should be applied only sparingly.” Alcorn v. Union Pacific Railroad Co., 50 S.W.3d 226, 248 (Mo. banc 2001)(quoting Rodriguez v. Suzuki Motor Corp., 936 S.W.2d 104, 110 (Mo. banc 1996)). The purpose of the remedy is imposed as punishment for and deterrence of bad conduct. Id. Punitive damages are justified only where the defendant's conduct is tantamount to intentional wrongdoing, where the natural and probable consequence of the conduct is injury. See Lopez v. Three Rivers Electric Cooperative, Inc., 26 S.W.3d 151, 160 (Mo. banc 2000). It is because of the extraordinarily harsh nature of punitive damages that Missouri law now requires that the evidence supporting the award meet the “clear and convincing” standard of proof. Rodriguez, 936 S.W.2d at 111.

On an allegation of trespass, punitive damages may be awarded if the evidence shows that the trespass was malicious, willful, intentional, or reckless. Crook v. Sheehan Enterprises, Inc., 740 S.W.2d 333, 337 (Mo. App. 1987). To recover punitive damages in a negligence case, the plaintiff must show that the defendant displayed complete indifference to, or conscious disregard for the rights of others. MC v. Yeargin, 11 S.W.3d 604 (Mo. App. 1999).

This Court has also set forth factors that weigh against the submission of punitive damages: (1) prior similar circumstances known to the defendant were infrequent; (2) the injurious event was unlikely to have occurred absent negligence on the part of someone other than the defendant; and (3) the defendant did not knowingly violate a statute, regulation, or clear industry standard designed to prevent the type of injury that occurred. Alcorn, 50 S.W.3d at 248.

In addition to the common law limitations on the award of punitive damages recognized by this Court, there are also constitutional restraints. As the United States Supreme Court has made clear, Fourteenth Amendment due process places limits on the award of punitive damages. In the very recent decision of State Farm Mut. Automobile Ins. Co. v. Campbell, the United States Supreme Court reaffirmed that “[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. ____ (2003)(quoting BMW of North America v. Gore, 517 U.S. 559, 575 (1996)). Among the factors in the determination of reprehensibility is whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, whether the conduct involved repeated actions or merely an isolated incident, and whether the harm was the result of intentional malice, trickery, or deceit as opposed to simple accident. Id.

Initially it is worth noting that when he was asked at trial why he was seeking punitive damages against Defendant Southern Contractors, plaintiff Robert Kaplan’s answer referenced only Gerald Winter’s conduct subsequent to the dumping. (Tr. 2161). Never did Mr. Kaplan mention the fact that he thought Southern Contractors acted with evil motive or reckless indifference to the rights of others in dumping the waste material in the creek.

There was no evidence that Defendant Southern Contractors dumped the waste material in the creek behind Faye Avenue with actual knowledge or reckless indifference to the possibility that the material was contaminated with PCBs. Southern Contractors was the non-PCB contractor on the Cleanup Site (Tr. 454, 1706), which Plaintiff Robert Kaplan admitted he knew. AMI and Earth Sciences were brought in to perform the environmental testing, precisely because Gerald Winter, the principal of Defendant Southern

Contractors, was not an environmental engineer, and had never claimed to be an environmental engineer. (Tr. 1702, 1708-09). The testing of materials was not part of Southern Contractors' contract under the Work Plan. (Tr. 1708). Winter was unaware that the waste material was contaminated with PCBs, and testified that, based upon prior testing, he thought it was clean. (Tr. 1724).

Although Winter initially assumed that the material was contaminated because of his awareness of cross-contamination, he believed that the material was later tested and sorted by Rick Uber, and as far as knew, the material he deposited in the Faye Avenue Creek was clean. (Tr. 1715, 1724, 1729-30, 1737-39). In fact, he testified that he would never have disposed of the waste material there unless he thought it was clean. (Tr. 1663, 1724). This was evidenced further by the fact that he dumped some of the same waste material (99 truck loads) on property that he himself owned. (Tr. 1724). Finally, while the waste material was not in fact clean, it did not qualify as hazardous waste under federal or state law. (Tr. 2258, 2510-11).

Furthermore, there was no evidence that Defendant Southern Contractors was aware that any part of the creek in which the material was deposited was on plaintiffs' property. Leonard Werre, the homeowner that requested the concrete be placed in the creek, indicated that he sought out and requested that Defendant Southern Contractors to dump the waste material in the creek. (Tr. 1458-62). Southern Contractors did not solicit him as a recipient for the waste material. Mr. Werre also testified that he indicated his property line to one of Defendant Southern Contractor's employees. (Tr. 1463). At the request of and based on representations from Mr. Werre, Southern Contractors began to truck the concrete to the site behind his house on Faye Avenue. Further, Southern Contractors was specifically informed of the property line by Mr. Werre, and was told that the adjacent property owners wanted the

concrete as well. (Tr. 1462-63). Gerald Winter, the principal of Southern Contractors, believed that Mr. Werre's property line extended to the far bank of the Creek. (Tr. 1726-27).

The evidence of Winters' reliance on the homeowner's representations showed the exact opposite of disregard and indifference to plaintiffs' rights. In Southern Missouri District Council of the Assemblies of God v. Hendricks, 807 S.W.2d 141 (Mo. App. 1991), the court held that where the defendants relied upon a survey in erroneously constructing a boundary fence on plaintiff's property, there was no basis for concluding that the defendants acted with evil motive or reckless indifference to plaintiff's rights. Id. at 149. In this case, Winter relied upon the homeowners' representations regarding the extent of his own property. While such reliance may have been mistaken, it completely fails to support any finding of evil motive or reckless indifference to plaintiffs' rights.

The fact that Southern Contractors disposed of the concrete landfill without obtaining a permit also does not make his conduct sufficiently wanton or reckless to justify the imposition of punitive damages. Winter believed based upon a conversation with a St. Charles City employee, Kevin Skinner, that he did not require a City permit to dump the concrete in the Creek behind Faye Avenue. (Tr. 1726). In fact, Timothy Koenig, a construction contractor, testified that he had previously dumped concrete in the same Creek for the City of St. Charles, and that he had never obtained a permit (Tr. 1635), and that City inspectors had never objected to his dumping of concrete in the Creek (Tr. 1636-37).

The evidence showed that there was nothing surreptitious about Southern Contractors' dumping of the waste material in the Faye Avenue Creek. Southern Contractors' employees operated their trucks during the daytime and were never approached by anyone to stop their actions or instructed that the dumping occurred on property of others. (Tr. 1542). When a party acts in good faith and in the honest

belief that his act is lawful, he is not liable for punitive damages. White v. James, 848 S.W.2d 577, 581 (Mo. App. 1993) (*citing* Walker v. Gateway National Bank, 799 S.W.2d 614, 617 (Mo. App. 1990)).

As was previously observed, when asked why he was seeking punitive damages against Gerald Winter, the principal of Defendant Southern Contractors, plaintiff Robert Kaplan referred exclusively to Winter's conduct subsequent to the dumping of the waste material. However, the evidence regarding Mr. Winter's subsequent behavior completely fails to sustain a submission of punitive damages, because the undisputed evidence was that he attempted to correct the problem once it was brought to his attention. Plaintiff Robert Kaplan himself testified that Defendant Winter, on behalf of Southern Contractors, attended a meeting with him in early 1997 to discuss the problem, and admitted that he had dumped the concrete debris in the Faye Avenue Creek. (Tr. 2277). Moreover, he admitted that Winter provided background information to ATC, the environmental consulting firm retained by plaintiffs to remediate their property, and submitted a bid to remove the concrete. (Tr. 2279-2281). In addition, plaintiff testified that starting in February of 1997, Winter attempted to bring Mercantile into negotiations with plaintiffs for the remediation of their property. (Tr. 2282). Plaintiff also acknowledged that Winter obtained authorization from ATC to dig test pits using his own equipment. (Tr. 2283-84). He did, in fact, place his backhoe on Mr. Werre's property in order to remove the concrete from the Creek. (Tr. 1553). Plaintiffs, however, would not permit Winter to remove the concrete until testing had been performed. (Tr. 2279, 2284). When test results were obtained, plaintiffs did not authorize Winter to begin work removing the concrete. (Tr. 2285).

Where the evidence shows that the defendant negotiated in good faith with the plaintiff to correct a trespass, the plaintiff cannot establish reckless indifference to the rights of others. Shady Valley Park &

Pool v. Fred Weber, Inc., 913 S.W.2d 28, 37 (Mo. App. 1995); White v. James, 848 S.W.2d 577, 581 (Mo. App. 1993).

There was never any evidence of evil motive or reckless indifference to the rights of others. The undisputed evidence showed the contrary. Southern Contractors was unaware that the waste material was contaminated with PCBs, and believed the material to be clean based upon prior testing. Southern Contractors did not know that any portion of the Creek was on plaintiffs' property, and in fact believed that the Creek was on Leonard Werre's property. Based upon conversations with the City, Southern Contractors believed that it did not require a permit to dump the concrete in the Faye Avenue Creek. Finally, once the problems resulting from the dumping of the concrete were made known to Southern Contractors, it attempted to remedy the problem in good faith. The evidence at trial failed as a matter of law to support a submission of punitive damages to the jury on either trespass or negligence.

The evidence for an award of punitive damages against Southern Contractors was wholly inadequate. There was no evidence that it acted with malice or conscious disregard or reckless indifference to the safety of others. This point is illustrated by a comparison of the facts of this case with those in Alcorn, *supra*, in which the Court reversed an award of punitive damages, despite evidence that the defendant was on notice as to the hazardous condition of the railroad crossing where plaintiff was injured, but failed to place additional warning devices at the crossing. Specifically, there was evidence of a fatal collision at the same crossing only four months prior to plaintiff's accident. If the evidence was insufficient to support an award of punitive damages in Alcorn, there is even less support for an award of punitive damages against Southern Contractors in the present case. *See also Lopez, supra*. Certainly there was no "clear and convincing" evidence sustaining an award of this harsh remedy against Souther Contractors. The decision

of the Court of Appeals effectively ignored the “clear and convincing” standard of proof propounded by this Court in Rodriguez, *supra*. Because of the lack of any evidentiary foundation for an award of punitive damages against Southern Contractors, the Court should reverse the judgment of the trial court.

The holding in Alcorn is also significant in that the three factors militating against the submission of punitive damages set forth in that case apply here. *See Alcorn*, 50 S.W.3d at 248. There was no evidence of prior similar circumstances known to the defendant. The injurious event was unlikely to have happened absent the negligence of those persons who were responsible for testing the remaining waste material, which was not Southern Contractors' responsibility. Finally, the defendant did not knowingly violate a statute, ordinance or clear industry standard. In fact, the evidence at trial established that Southern Contractors believed, albeit mistakenly, that it was acting in compliance with the law.

Finally, Southern Contractors submits that the award of punitive damages against it is inconsistent with the principles of due process confirmed in the very recent decision of the United States Supreme Court in State Farm Mut. Automobile Ins. Co. v. Campbell, 538 U.S. ____ (2003). Defendant's conduct did not evince indifference to or reckless disregard of the health and safety of others, because defendant believed the material was clean, and it was not in fact hazardous waste. Moreover, defendant's conduct represented an isolated incident. The harm certainly did not result from “intentional malice, trickery, or deceit” as opposed to simple accident. Id.

The trial court's award of punitive damages against Southern Contractors was unsupported by the evidence at trial. As a consequence, the award is contrary to Missouri law and the due process guarantees of the United States Constitution. The Court therefore should reverse the award.

III. THE TRIAL COURT ERRED IN AWARDING DEFENDANT SOUTHERN CONTRACTORS ONLY \$1,000.00 IN ATTORNEY’S FEES, BECAUSE THE AWARD WAS CONTRARY TO THE OVERWHELMING WEIGHT OF EVIDENCE, IN THAT THERE WAS NO DISPUTE THAT DEFENDANT INCURRED \$167,539.00 IN LEGAL FEES, AND THAT THE SERVICES EXPENDED IN THE DEFENSE OF PLAINTIFF’S ORDINANCE VIOLATION CLAIM WERE INSEPARABLE FROM THE DEFENSE OF THE OTHER CLAIMS ASSERTED BY PLAINTIFFS.

1. Standard of Review

The trial court has broad discretion to award attorney's fees, and its discretion will not be overturned unless it abuses that discretion. DCW Enterprises, Inc. v. Terre Du Lac Ass'n, Inc., 953 S.W.2d 127 (Mo. App. 1997). The setting of attorney's fees 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. Miller-Stauch Const. Co. v. Williams-Bungart Elec., Inc., 959 S.W.2d 490 (Mo. App. 1998).

2. Argument

The undisputed evidence before the trial court was that Defendants Gerald Winter and Southern Contractors expended \$167,539.00 in attorney's fees in defending against plaintiffs' claims. (L.F. 341).

Defendant Gerald Winter prevailed on all claims asserted against him by plaintiffs, and Southern Contractors prevailed on Count III, plaintiffs' claim for violation of St. Charles City Zoning Ordinance §§152.01, *et seq.* Section 89.491, RSMo, permits persons to bring civil actions to enforce any ordinance adopted under Chapter 89, and authorizes the recovery of litigation costs, including attorney's fees, to the

prevailing party. §89.491.4, RSMo. Despite the undisputed evidence of fees totaling \$167,539, and the fact that defendants clearly prevailed on plaintiffs' city ordinance violation claim, the trial court only awarded these defendants \$1,000 in attorney's fees. (L.F. 495). For reasons set forth below, the trial court committed a clear abuse of discretion in awarding such a low amount in attorney's fees.

This case was adjudicated in a three-week jury trial in the Circuit Court of St. Charles County, Missouri, wherein a verdict was reached on Friday, August 31, 2001. Plaintiffs submitted counts I through IV against defendants Gerald L. Winter (“Winter”) and Southern Contractors to the jury. Count III was a claim for violation of the St. Charles City Flood Damage Prevention Ordinance, §§152.01 *et seq.* In accordance with the ordinances and the statutes of the State of Missouri, the prevailing party in a civil action is entitled to recover their costs and attorneys’ fees. §89.491.4, RSMo.

The jury returned a verdict in favor of defendants Winter and Southern on plaintiffs’ ordinance violations submissions and therefore each defendant is entitled to recover their attorneys’ fees in accordance with the verdict. On October 26, 2001, this Court heard oral argument from both parties regarding evidence of attorneys’ fees from this case and the position of each side as to the appropriateness in requesting what the trial court should award defendants. (L.F. 23). As the Court requested, defendants submitted a memorandum in support of their Motion to Recover Attorney's Fees. (L.F. 247-56). In connection therewith, the defendants provided a copy of their statement of attorney's fees along with the aforementioned memorandum. (L.F. 257-341).

On Friday, August 10, 2001, plaintiffs were granted leave to file their First Amended Petition (L.F. 66-95) with the trial court (Tr. 159), despite the fact that trial was to proceed on the following Monday. Plaintiffs filed a 22-page 6-count Amended Petition directed to each and every defendant named. Plaintiffs

pled counts of trespass, nuisance, ordinance violation and negligence against Defendants Southern Contractors and Winter. Within plaintiffs' First Amended Petition, paragraph 49, plaintiffs alleged that their attorneys had incurred fees of \$76,935.66 to remediate plaintiffs' property. (L.F. 77). Further, in plaintiffs' Supplemental Answers to Interrogatories, plaintiffs requested \$76,990.66 for attorneys' fees associated with the remediation of the St. Louis property on behalf of Stone, Leyton & Gershman along with attorneys' fees of \$2,550.00 from the law firm of Barklage, Barklage, Brett, Ohlms & Martin, attorneys' fees of \$8,960.26 from the law firm of Ehlmann, Guinness & Flavin, additional attorneys' fees of \$1,912.70 from Pellegrini & Emmerich and finally plaintiff's attorneys' fees regarding litigation in an amount of \$278,699.74 submitted by Stone, Leyton & Gershman as of July 6, 2001. (L.F. 365).

At trial, plaintiffs proceeded on all counts against all defendants up to the day of the jury instruction conference. At that time, defense counsel was informed for the first time that plaintiffs would not be submitting any trespass count against defendant Winter and no nuisance counts against the defendants. (Tr. 2589, 2603).

Counsel for Defendants Winter and Southern Contractors entered their appearance in this case around February 22, 1999. The case proceeded for more than two and one-half years with plaintiffs proceeding on all counts against all defendants. Only during the third week of trial did opposing counsel make a decision to proceed on the counts in which they ultimately submitted to the jury.

In specifying their own attorney's fees in their Supplemental Interrogatory Answers (attached to Defendant's Memorandum as Exhibit C) (L.F. 365), the plaintiffs did not describe what counts what individuals testified to in their case. Although plaintiffs argued before the trial court that the ordinance

violation was only a small part of this case and could be separated out from the other counts, the record belies this claim.

The amount of attorneys' fees awarded is within the sound discretion of the trial court. Distler v. Reuther Jeep Eagle, 14 S.W.3d 179, 186 (Mo.App. 2000). Because trial courts are considered experts on attorneys' fees, they require no evidence as to the value of the services. Id. In determining the amount of attorneys fees recoverable, there are many factors to consider, such as time taken, the nature and importance of the matter in which services are rendered, the degree of responsibility imposed on the attorney, and the result. Next Day Freight, Inc. v. Hirst, 950 S.W.2d 676, 680 (Mo.App. 1997); *citing* Howard Construction Company v. Teddy Woods Construction Company, 817 S.W.2d 556 (Mo.App., 1991). The efforts of defense counsel were totally successful in defense of all counts submitted against Defendant Gerald Winter. Furthermore, although not totally successful for Defendant Southern Contractors, the efforts undoubtedly contributed to the verdict reached, which was much less than plaintiffs requested against Southern Contractors.

Plaintiff conceded that there was no argument being put forth in opposition to defendants' Motion for Attorneys' Fees as to the reasonable value of the services performed by defense counsel on behalf of Defendants Winter and Southern Contractors. Plaintiffs' only objection was to the amount sought by defendants for the trial court to award.

Plaintiffs below made the argument that defendants are under some obligation or mandatory requirement to allocate their fees amongst the different counts put forth by the plaintiffs. The law is to the contrary. Specifically, in the case of Brockman v. Soltysiak, 49 S.W.3d 740 (Mo. App. 2001), plaintiff was contacted by defendant to renovate a restaurant located at the Lake of the Ozarks. Defendant was

a principal shareholder in a company that was retained by plaintiff to renovate space at the Lake of the Ozarks. The two parties entered into a contract for such work. Id. at 742. Defendant had a partner who was not a party to the contract. Plaintiff eventually filed suit against defendant alleging two causes of action, one on the accounts established by the contract and one for unjust enrichment.

Later, defendant's company filed for bankruptcy. At the time, plaintiff had unpaid invoices totaling \$31,510.00. Id. at 743. Plaintiff later amended her Petition to include additional counts against defendant and four counts against his partner. Of the nine counts contained in the Second Amended Petition, only two counts were submitted to the jury: one against the original defendant for breach of contract and one against his partner for unjust enrichment. Id. The jury returned a verdict in favor of plaintiff and against the original defendant, but in favor of defendant's partner on the count submitted against him. Id. Plaintiff then filed a post-trial motion for an award of attorneys' fees, which the trial court granted. Plaintiff was awarded her \$15,784.23 in attorney's fees. Id. at 744.

Defendant appealed, claiming that the trial court erred in awarding attorneys' fees because plaintiff failed to allocate fees between her claims against the two defendants. Id. The trial court awarded plaintiff \$15,755.23 in attorneys' fees, which was exactly 50 percent of the amount the jury found defendant owed plaintiff under the contract they had entered. Id. Defendant objected that this was improper because plaintiff failed to indicate which services and expenses were used for her counts against the separate defendants. Defendant cited the case of Funding Systems Leasing Corp. v. King Louie Int'l, Inc., 597 S.W.2d 624, 637 (Mo.App. 1979) for the proposition that "the requesting party must allocate which attorneys' fees belong to which claim in order to be awarded any attorneys' fees." Id. at 746.

The court held that the Funding Systems case does not stand for the proposition that a party must allocate attorneys' fees where, as here, the damages against each defendant in a two-count submission are identical and indivisible. Id. This case is exactly on point as plaintiffs' claims for damages were exactly the same against both defendants in all of their counts. While plaintiffs put forth an argument that the trespass damages were different than the negligence damages, but as the verdict reads, the jury had the power award the damages under either. The damages against both defendants would have been identical and indivisible under the ordinance claims. Further, the ordinance submission counts against each defendant were the same. Plaintiffs sought the same damages under those counts against both defendants, and should they have prevailed, they would have sought their attorneys' fees. As such, defendants seek the same.

In another similar case, Architectural Resources, Inc. v. Rakey, 912 S.W.2d 676, 678 (Mo. App. 1995). Plaintiff filed a claim on a construction contract for renovations to the their house. The defendants then filed a three-count counterclaim as well as third-party claim against an architectural firm and their individual employee. Id. at 678. The defendants received a verdict on the claims submitted by plaintiff, which was ordered to pay \$35,000.00 of the defendants' attorney's fees. Id. Plaintiff appealed the award of the attorneys' fees on the ground that the trial court's award was arbitrary, unreasonable, and lacked careful consideration. Id. at 680.

The defendants submitted evidence supporting their claim for their attorney's fees at a hearing. Id. The total fees were \$61,812.75. The attorney for the defendants submitted all of the invoices of the law firm and all of the time records regarding their fees. Id. The trial attorney for the defendants informed the trial court that he could not find a rational way to allocate the fees between the various claims that were being pursued. Id. The trial court stated that because of the inability to separate the individual architect's

acts from those of the other defendants, and **“because much of the testimony is applicable to all claims,”** it was proper to award the defendant \$35,000.00 in attorney's fees. Id.

Significantly, plaintiff in that case (as in this one) did not challenge the evidence that the attorneys' fees were fair and reasonable; rather, plaintiff claimed that the trial court abused its discretion in not allocating the fees. Id.

On appeal, the court examined the over 1,678 page transcript and agreed with the trial court that “much of the testimony is applicable to all claims.” Id. The court held that the defendants incurred attorneys' fees in preparing and presenting evidence that was common to all disputes, and that the trial court did not abuse its discretion in the attorney's fees award that was given. Id.

The Trial Transcript in the present was **2,700 pages long, and the Legal File (which contains only part of the pleadings) is over 500 pages long.** The trial lasted for three weeks. Plaintiffs' case alone took up twelve (12) days of the trial. Defendants were under no burden to put on any evidence, and in fact Defendant Winter and Southern Contractors called no witnesses after plaintiffs finished their case. It was not incumbent on the defendants to somehow separate out the evidence that plaintiffs put forth in their case in chief. Defense counsel was defending this case as vigorously as it could on behalf of both Defendants Winter and Southern Contractors. The trial court's ruling that only \$1,000 of their fees were attributable to the ordinance violation is absurd. In fact, defendants direct the Court to review Plaintiffs' Supplemental Interrogatory Answers, which demonstrate that plaintiffs were ready, willing and able to try and collect over \$300,000.00 in attorney's fees against both defendants should they have prevailed on the ordinance violations. (L.F. 365). As was already observed,

there was no separation or allocation of any of the fees contained in Plaintiffs' Supplemental Interrogatory Answers specifically to the ordinance violation. The magnitude of this case and the case law supported defendants' request for the full amount of their attorney's fees, \$167,539.00, and it was a clear abuse of discretion for the trial court to award anything less than that.

The factors to be considered as stated in Next Day Freight, Inc. v. Hirst, 950 S.W.2d 676, 680 (Mo.App. 1997), indicate that the time expended is an important factor in the determination of an attorney's fees award. This case proceeded for over two years under the same counts to all parties involved. Only the day before the case went to the jury did plaintiff advise defendant of the claims to be submitted. The nature and importance of the matter certainly is not a small portion of the case, given that plaintiffs were set to request over \$300,000.00 in attorneys fees from the defendants. This amount would have represented more than the verdict that was eventually entered against Defendant Southern Contractors. Certainly, the magnitude and importance of the matters were substantial as to both defendants. The degree of responsibility imposed on defense counsel was equally difficult. This was a case involving difficult environmental law issues, nuisance and trespass claims, and claims seeking punitive damages against both defendants. Plaintiffs demanded \$1,000,000 in punitive damages against Defendant Gerald Winter in an individual capacity. (Tr. 2161). These factors should have been considered carefully by the trial court in the determination of the attorneys fees to be awarded to both defendants. Based on the aforementioned factors, Defendants Gerald

Winter and Southern Contractors are entitled to the full amount of their attorney's fees, or at the very least a substantial amount more than the \$1,000 awarded by the trial court.

In holding that the trial court did not abuse its discretion in awarding Southern Contractors only \$1,000 in attorney's fees after it prevailed on plaintiffs' ordinance violation claim, the Court of Appeals reasoned that because there were some issues that were not common to plaintiffs' ordinance violation claim and the other claims in the case (trespass and negligence), the trial court did not abuse its discretion in awarding only \$1,000 in fees. (Slip op. at 23). However, the court overlooked the fact that the common issues predominated. While it is true that the plaintiffs did not seek punitive damages on the ordinance violation claim, this distinction is of little importance, because very little of the litigation involved developing a case for punitive damages specifically against Southern Contractors as opposed to Bank. In fact, as plaintiff Robert Kaplan himself testified at trial, the basis for seeking punitive damages against Southern Contractors was Winters' conduct during the remediation negotiations in which Bank was involved. (Tr. 2161).

In its opinion, the Court of Appeals also reasoned that not all of the evidence was equally applicable to all counts. (Slip op. at 23). Specifically, the court observed that evidence regarding the relationship between Southern Contractors and the Bank and the conduct of the parties in unsuccessfully negotiating the remediation were not relevant to the ordinance claim against Southern. While it is true that not all of the evidence was equally applicable to all claims, the court's decision overlooks the fact that most of the evidence was relevant to all claims. Certainly it was an abuse of discretion for the trial court to conclude that only \$1,000

of the \$167,539 Southern Contractors incurred as legal expenses was applicable to the ordinance claim.

The court also reasoned that the theories of liability on the various claims were not different. (Slip op. at 23). Southern Contractors respectfully urges that the question is not whether the theories were the same, but whether most of the same evidence was required to prove the various theories. Clearly it was. The different theories of liability were factually related. While couched in terms of the Flood Control Ordinance, most of plaintiffs' basic factual allegations, and thus the evidence needed to prove them at trial, in Count III, the ordinance claim, are identical to the allegations made in their other three Counts for trespass (Count I), nuisance (Count II), and negligence (Count IV): defendants dumped contaminated concrete waste in the Creek, the Creek flooded as a result, and plaintiffs' property was thereby diminished in value, necessitating the expenditure of substantial sums to remove the contaminants.

IV. THE TRIAL COURT ERRED IN TAXING AS COSTS TO PLAINTIFFS NUMEROUS ITEMS, INCLUDING MULTIMEDIA EXPENSES, PHOTOCOPYING CHARGES, WITNESS FEES, AND EXPENSES FOR EXPEDITED TRIAL TRANSCRIPTS, BECAUSE THE TAXING OF THESE EXPENSES AS COSTS WAS UNAUTHORIZED BY LAW, IN THAT THE EXPENSES ARE NOT RECOGNIZED AS COSTS UNDER STATUTE OR

CONTRACT, AND WERE NOT REASONABLY NECESSARY TO THE PROSECUTION OF PLAINTIFFS' CLAIMS.

A. Standard of Review

Costs were unknown at common law, and statutory provisions allowing them are to be strictly construed. Townsend v. Boatmen's National Bank of St. Louis, 159 S.W.2d 626, 628 (Mo. 1942); Architectural Resources, Inc. v. Rakey, 912 S.W.2d 676, 679 (Mo. App. 1995). Consequently, a litigant bears a heavy burden to show cause for departure from the general rule that each party must bears his or her own costs. Rakey, 912 S.W.2d at 679. Statutory construction is a matter of law to be determined by the court. Delta Air Lines, Inc. v. Director of Revenue, 908 S.W.2d 353 (Mo. banc 1995).

2. Argument

The trial court awarded the plaintiffs their alleged “costs” in an amount in excess of \$30,000 over Southern Contractors' objection that there was no statutory or contractual authority for taxing many of the items as costs. The Court of Appeals reversed the trial court's award of costs and remanded the issue to the trial court for reconsideration. For the reasons set forth below, the Court should adopt this portion of the Court of Appeals' opinion.

An item is not taxable as costs unless it is specifically authorized by statute or by agreement of the parties. Architectural Resources, Inc. v. Rakey, 912 S.W.2d 676, 679 (Mo. App. 1995) (citing Groves v. State Farm Mut. Auto. Ins. Co., 540 S.W.2d 39 (Mo. banc 1976)); Briner Elec. Co. v. Sachs Elec. Co., 703 S.W.2d 90 (Mo. App. 1985). Moreover, the proper test for determining whether court costs are reasonable is whether the costs are reasonably related to the expense of the administration of justice.

Harrison v. Monroe County, 716 S.W.2d 263 (Mo. banc 1986). The presumption is that each party is primarily liable for the costs he incurs. State ex rel. Gottlieb v. Wilson, 74 S.W. 636, 174 Mo. 505 (Mo. 1903); Architectural Resources, *supra*.

In its ruling on post-trial motions (L.F. 496), the trial court awarded plaintiffs their costs as represented in their statement of Litigation Costs and Expenses (L.F. 405-491), over Defendant Southern Contractors' objection (L.F. 492-94). The single largest item in plaintiffs' statement of litigation costs and expenses (\$30,579.78) was labeled "Multimedia." (L.F. 405). No statute permitted the recovery of multimedia services as costs. There was no agreement between the parties which would authorize the recovery of these services as costs. Even if there were a statute or contractual provision authorizing taxability of multimedia expenses as costs, the expenses (\$30,579.78) were not reasonably related to the expense of the administration of justice in this case. There was no need for videotaping plaintiffs' property, nor was there any need for courtroom technology consulting services. The trial court erred in awarding plaintiffs their "multimedia" expenses as costs in this matter.

Plaintiffs' statement of litigation costs and expenses included \$7,817.38 worth of copying charges. (L.F. 406-07). Plaintiffs' provided no information regarding what documents were copied or why. No statutory provision authorized the taxing of copying charges as costs, nor was there any contract between the parties calling for recovery of these expenses as costs. Therefore, the trial court erred as a matter of law in taxing plaintiff's alleged photocopying expenses as costs.

Plaintiffs' sought and received recovery of \$323.00 in witness fees as costs. (L.F. 407). While Defendant Southern Contractors concedes that witness fees may be recovered as costs, defendant disputes

that the costs were reasonably related to the expense of the administration of justice, because a number of these witnesses were not necessary to plaintiffs' case, and much of their testimony was duplicative.

Plaintiffs listed \$2,840.90 in "miscellaneous expenses." (L.F. 408). These expenses were apparently for obtaining expedited trial transcripts. However, no statutory provision authorized the taxing of expedited trial transcripts as costs, nor was there any contract between the parties calling for recovery of these expenses as costs. Moreover, these expenses were not reasonably necessary to the trial of this case. If anything, these costs were incurred by plaintiffs for their own convenience. Therefore, the trial court erred in permitting the taxing of these expenses as costs.

CONCLUSION

For the reasons set forth above, the Court should reverse and remand the trial court's judgment awarding actual damages to plaintiffs, because there was insufficient evidence of the difference in fair market value of plaintiffs' property. Furthermore, the Court should reverse the trial court's judgment awarding the plaintiffs punitive damages from Defendant Southern Contractors, because the evidence at trial was wholly inadequate to submit the issue of punitive damages to the jury. In addition, the Court should modify the trial court's judgment awarding Defendant Southern Contractors \$1,000 in attorney's fees by awarding defendant the undisputed amount of legal fees incurred in the defense of this action. Finally, the Court should adopt the decision of the Court of Appeals to the extent that it reversed the award of costs to the plaintiffs and remanded for reconsideration, or by reducing the amount of the award by striking those items which are not authorized as costs under statute.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Appellant, Avanti Marketing Group, d/b/a Southern Contractors, brief and electronic duplication of the same (virus-free) were forwarded on this 21st day of July, 2003, to all known counsel of record by U.S. Mail, postage paid and correctly addressed as follows: **Thomas P. Rosenfeld**, STONE, LEYTON & GERSHMAN, Attorney for Respondent, 7733 Forsyth Blvd., Suite 500, St. Louis, Missouri 63105; **Harold Wilson**, HUSCH & EPPENBERGER, Attorney for Co-Appellant U.S. Bank, 190 Carondelet Plaza, Suite 600, St. Louis, MO 63105.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the type-volume limitations contained in Supreme Court Rule 84.06(b).

1. Exclusive of all exempted portions, this brief contains 10601 words;
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**IN THE
MISSOURI SUPREME COURT**

SC85341

ROBERT KAPLAN, et al.,

Plaintiffs-Respondents,

vs.

AVANTI MARKETING GROUP, INC., d/b/a SOUTHERN CONTRACTORS

Defendants-Appellants.

**Appeal from the Circuit Court of the County of St. Charles
State of Missouri
Eleventh Judicial Circuit**

**Honorable Ronald R. McKenzie
Division 1**

**APPENDIX TO SUBSTITUTE BRIEF OF APPELLANT
AVANTI MARKETING GROUP, INC., d/b/a SOUTHERN CONTRACTORS**

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