

Case No. SC 92770

IN THE SUPREME COURT OF MISSOURI

VOLKSWAGEN GROUP OF AMERICA, INC.,
Appellant,

v.

DARREN BERRY, *et al.*,
Respondents.

BRIEF OF *AMICUS CURIAE*
MISSOURI ASSOCIATION OF TRIAL ATTORNEYS
IN SUPPORT OF RESPONDENTS

Appeal from the Jackson County Circuit Court
Sixteenth Judicial Circuit
Honorable Michael W. Manners, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE..... 1

CONSENT OF PARTIES 2

STATEMENT OF FACTS 2

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT..... 4

I. Statutory Fee-Shifting Provisions Are Vital Tools For The Legislature
 To Accomplish Important Public Policy Objectives..... 4

 A. To give effect to the legislature’s purpose, there must be an
 incentive for private attorneys to take fee-shifting cases on
 a contingency basis..... 7

 B. Court awarded attorney fees should incentivize a rational
 approach to managing the litigation. 12

II. Perdue’s Reliance On The Lodestar (i.e., Billable Hour) Model
 Of Setting A Reasonable Attorney Fee Disregards Other Relevant
 Factors And Therefore Is Not The Best Rule For Missouri Courts. 16

CONCLUSION 20

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE..... 23

TABLE OF AUTHORITIES

Supreme Court of Missouri

Burger v. Springfield, 323 S.W.2d 777 (Mo. banc 1959) 14

Daugherty v. City of Md. Heights, 231 S.W.3d 814 (Mo. banc 2007)..... 20

Hess v. Chase Manhattan Bank, USA, N.A., 220 S.W.3d 758 (Mo. banc 2007) 20

Howard v. City of Kan. City, 332 S.W.3d 772 (Mo. banc 2011) 6

Essex Contr., Inc. v. Jefferson County, 277 S.W.3d 647 (Mo. banc 2009)..... 9

German Evangelical St. Marcus Congregation v. Archambault,
 404 S.W.2d 705 (Mo. banc 1966) 6, 9

Gilliand v. Mo. Ath. Club, 273 S.W.3d 516 (Mo. banc 2009) 5, 16

Munday v. Thielecke, 290 S.W.2d 88 (Mo. 1956)..... 14-15

Nelson v. Hotchkiss, 601 S.W.2d 14 (Mo. banc 1980)..... 9, 17

O'Brien v. B.L.C. Ins. Co., 768 S.W.2d 64 (Mo. banc 1989) 17-18

Seabaugh v. Milde Farms, Inc., 816 S.W.2d 202 (Mo. 1991) 18

Scott v. Blue Springs Ford Sales, Inc., 176 S.W.3d 140 (Mo. banc 2005) 6

Missouri Court of Appeals

Zweig v. Metro. St. Louis Sewer Dist., 2012 Mo. App. LEXIS 417 (Mo. Ct. App. E.D. 2012) 19

U.S. Supreme Court

Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662 (2010)..... 3, 7, 16, 19

U.S. Court of Appeals for the 8th Circuit

NLRB v. Swift & Co., 233 F.2d 226 (8th Cir. 1956)..... 18

Missouri Constitution

Mo. Const. Art. I, § 14..... 4

Mo. Const. Art. X, § 23 19

Missouri Revised Statutes

Mo. Rev. Stat. § 198.093 19

Mo. Rev. Stat. § 213.111 19

Mo. Rev. Stat. § 213.041 19

Mo. Rev. Stat. § 407.025 5-7, 11

Mo. Rev. Stat. § 429.625 19

Mo. Rev. Stat. § 452.340 19

Missouri Supreme Court Rules

Mo. Sup. Ct. R. 55.03 13

Mo. Sup. Ct. R. 55.27 13

Mo. Sup. Ct. R. 74.04 13

Mo. Sup. Ct. R. 77.04 13

Federal Rules of Civil Procedure

Fed. R. Civ. P. 23..... 19

Secondary Materials

Am Bar Ass’n, *Model Rules of Professional Conduct, Preamble* 1

Davies, *Federal Civil Rights Practice in the 1990s*, 48 Hastings L.J. 197 (1997) 11

Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation* (1990) 8

Missouri Bar Ass’n, *The President’s Page: A Civil Gideon? Let the Debate
Begin*, 65 J. Mo. B. 5 (Jan./Feb. 2009)..... 5

Missouri Attorney General Chris Koster, Consumer Protection Mission Statement
<http://ago.mo.gov/Consumer-Protection.htm> (accessed November 1, 2012). 5

National Ctr. for State Courts, *How the Public Views the State Courts:
1999 National Survey* 8

Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence
of the Attorney Fees Statute and the Government as Defendant*,
73 CORNELL L. REV. 719 (1988) 10

INTEREST OF THE AMICUS CURIAE

The Missouri Association of Trial Attorneys (MATA) is a non-profit, professional organization consisting of approximately 1,300 trial attorneys in Missouri. For over fifty years, MATA lawyers have worked to advance the interests and protect the rights of individuals across our State. In doing so, MATA's membership strives to promote the administration of justice, preserve the adversary system, and ensure that those citizens of our State with a just cause will be afforded access to our courts.

One of MATA's concerns is to increase access to the civil justice system for those who cannot afford counsel. MATA's members are “mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance” and seek “to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” Model Rules of Professional Conduct, Preamble.

MATA's members are interested in this case because they are concerned that Appellant's suggested changes to Missouri's well-hewn standards for awarding attorneys fees to a prevailing party under a fee-shifting statute will erode citizens' access to the courts by making legally viable claims economically unfeasible to pursue. MATA's members are also troubled by Appellant's request to supplant well-settled Missouri law on the trial court's proper exercise of discretion in awarding attorney fees with a recently pronounced federal standard that replaces the trial court's discretion with a rigid formula. MATA urges the Court to uphold Missouri's longstanding rule that an attorney fee award

issued by a trial court after careful consideration of all relevant factors is entitled to heavy deference and affirm the judgment of the trial court below.

CONSENT OF PARTIES

Counsel for Appellant Volkswagen Group of America, Inc. and counsel for Respondents have both consented to the filing of this brief.

STATEMENT OF FACTS

MATA adopts Respondents' Statement of Facts.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case where a Missouri trial court, after holding three days of hearings and weighing a number of factors, issued an attorney fee award when the plaintiffs' counsel obtained class-wide resolution of a claim under the Missouri Merchandising Practices Act (MMPA) after six years of protracted litigation. It is well established that Missouri trial courts are entitled to heavy deference on the question of setting a reasonable attorney fee. The reasons behind this rule are apparent: it is the trial court that lived with the case, witnessed first-hand the work of the attorneys, and understands the dynamics of the litigation. Accordingly, this Court has traditionally been loath to disturb a trial court's decision on attorney fees, particularly if the record below reveals that the decision was made after careful consideration. Yet, this is just what Appellant requests here.

Tacitly recognizing that long-standing Missouri precedent counsels in favor of upholding the decision below, Appellant and *amicus curiae* Products Liability Advisory Counsel (PLAC) argue that this Court should adopt the U.S. Supreme Court's rigid

limitation on what factors a trial court may consider in fashioning a reasonable attorney fee from *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).

This Court should decline Appellant's invitation to overrule at least 50 years of Missouri jurisprudence on attorney fees. The newly-minted federal rule undermines the important Missouri policy consideration that all citizens, regardless of financial means, should have access to justice. This policy underpins the legislative scheme in allowing for a prevailing plaintiff to recover attorney fees on certain statutory claims, including the MMPA. In addition to running contrary to legislative intent, Appellant's suggested limitation on the trial court's discretion in setting reasonable attorney fees would create incentives for irrational and unfair conduct in litigation.

The decision on how much in attorney fees may be appropriately awarded in a given case is an issue that routinely arises in our trial courts under a myriad of claims and circumstances. Missouri's current standard that permits the trial court to exercise its discretion under the facts and circumstances of each individual case acknowledges that there is no 'one size fits all' rule that will be appropriate in all circumstances. None of the arguments advanced by Appellant or PLAC demonstrate a need to change the standard that has served Missouri courts well for decades. For these reasons, and those more fully set out below, MATA urges this Court to affirm the trial court's decision below.

ARGUMENT

This case presents the question of whether Missouri's courts will continue to enforce our remedial statutes in such a manner as to permit private enforcement, even by citizens of modest means. In furtherance of this objective, the General Assembly has included provisions in certain remedial statutes that allow prevailing plaintiffs to recover their reasonable attorney fees. These provisions allow aggrieved individuals to retain counsel even if they are unable to pay in advance for the attorney's services.

Traditionally, Missouri's trial courts have been afforded wide discretion in making attorney fee awards. Appellant would have this Court change that and significantly curtail the trial court's discretion in such a manner that will have the inevitable effect of lowering the exposure to attorney fee liability for those who commit statutory violations. For the reasons explained below, Appellant's suggested changes to Missouri's governing standards run contrary to the legislative purpose of fee-shifting provisions – *i.e.*, to encourage private enforcement of remedial laws and discourage violations of those laws in the first place – and should therefore be rejected.

I. Statutory Fee-Shifting Provisions Are Vital Tools For The Legislature To Accomplish Important Public Policy Objectives.

One of the fundamental tenets of Missouri's civil justice system is that everyone in our State should have "access to justice." *See* Mo. Const. Art. I, § 14. The notion that all citizens with a just cause should have their day in our Missouri courts is not just some laudable goal. It is a pressing concern and continuing struggle as the courts deal with ever more complex modern litigation. Our lawmakers and courts continue to make

conscious efforts to improve Missouri citizens' access to justice.¹ One such effort that is by no means new, but now finds itself challenged in this appeal, is the traditional method of awarding attorney fees to plaintiffs who prevail on statutory claims with fee-shifting provisions.

The General Assembly's purpose in including a fee-shifting provision in a statute is to encourage private attorneys to bring claims on behalf of aggrieved individuals rather than having to rely principally on government agencies to enforce the law. *See Gilliland v. Mo. Ath. Club*, 273 S.W.3d 516, 523 (Mo. banc 2009). It is well recognized that the government has limited resources to address ever-growing mandates. This is particularly true in the area of consumer protection – the field of law at issue in the instant case. For example, the Consumer Protection Division of the Missouri Attorney General's office receives over 90,000 complaints and inquiries each year.² Though not all of those inquiries warrant court action, certainly many of them do. But it is simply not feasible for the Attorney General to undertake to represent every actionable consumer case in the State of Missouri. Accordingly, the General Assembly provided a private right of action in the Missouri Merchandising Practices Act (MMPA). *See* Mo. Rev. Stat. § 407.025. And to ensure that this private right of action is of practical effect, the legislature

¹ *See, e.g.*, Missouri Bar Ass'n, *The President's Page: A Civil Gideon? Let the Debate Begin*, 65 J. Mo. B. 5 (Jan./Feb. 2009).

² Missouri Attorney General Chris Koster, Consumer Protection Mission Statement, <http://ago.mo.gov/Consumer-Protection.htm> (accessed November 1, 2012).

included a provision that allows plaintiffs to recover their reasonable attorney fees if they prevail in the action.³ *Id.* Of course, the effectiveness of the fee-shifting provision in the MMPA (and in other remedial statutes like it) will depend on the manner in which the courts enforce and apply the statutory language in the particular cases before them.

For decades, the Supreme Court of Missouri has maintained that, in awarding the prevailing plaintiff attorney fees under a fee-shifting statute, the trial court should evaluate all relevant factors and then exercise its discretion to set a reasonable fee. *See German Evangelical St. Marcus Congregation v. Archambault*, 404 S.W.2d 705, 711 (Mo. banc 1966); *Howard v. City of Kan. City*, 332 S.W.3d 772, 792 (Mo. banc 2011). Appellant asks the Court to abandon this approach in favor of the U.S. Supreme Court's recent holding in *Perdue*, which would require trial courts to disregard any factor relevant

³ This apparent legislative purpose stands in stark contrast to the contention by PLAC that reducing a malfeasant corporation's liability for attorney fees in consumer cases will benefit consumers because the costs will ultimately be revisited upon the very consumers the law is intended to protect. *See* PLAC Brief at 8. Of course, taking this argument to its logical conclusion would counsel in favor of repealing all consumer protection laws and installing a pure *laissez faire* market. But it is clear that the Missouri General Assembly embraced a contrary view when it designed the MMPA. *See Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 143 (Mo. banc 2005) (Teitelman, J., concurring) (recognizing that the MMPA's attorney fees provision is intended, in part, to deter consumer protection violations).

to the question of attorney fees other than (1) the market rate for the work performed by the attorneys, (2) the reasonableness of the amount of time spent on the case, and (3) whether “rare and exceptional circumstances” exist to rebut the “strong presumption” that the first two factors must be considered alone. *See Perdue*, 130 S. Ct. at 1672-73.

As discussed above, this approach does not provide Missouri’s trial courts with the discretion they need to ensure that the fee-shifting provisions in our statutes are appropriately applied to carry out the legislature’s statutory scheme and encourage rational litigation. For this reason, and those discussed in more detail below, the Court should decline Appellant’s invitation to change Missouri law.

A. To give effect to the legislature’s purpose, there must be an incentive for private attorneys to take fee-shifting cases on a contingency basis.

This case concerns a claim under the MMPA and its provision that allows a prevailing plaintiff to recover its reasonable attorney fees. *See Mo. Rev. Stat. § 407.025*. As explained above, this fee-shifting provision evidences an intention on the part of the General Assembly for MMPA violations to be enforced by private individuals and their counsel. *Id.* Of course, for the legislature’s intent to be realized, private attorneys must be willing to take on MMPA cases. Adopting the rule set out in *Perdue* that limits awards of attorney fees to a billable hour calculation without adjustment (other than downward adjustments) to account for the risk of non-payment would not provide a reasonable incentive for private counsel to take on cases for people who are unable to pay the attorney on an hourly basis. This is particularly true, as was present here, when the case is complex and the defendant is entrenched.

The practical reality of modern litigation is that only a minority of private citizens have the financial wherewithal to pay an attorney a guaranteed hourly rate to pursue their claims.⁴ Indeed, the contingency fee, in which the attorney forgoes guaranteed payment and takes on the risk of loss in exchange for receiving a higher total fee if successful on the case, is “the dominant system in the United States by which legal services are financed by those seeking to assert a claim.”⁵ Accordingly, in order to give practical effect to the legislature’s remedial scheme, there should be some incentive for attorneys to take on fee-shifting cases on a contingency basis. The nature of a contingency fee arrangement is that counsel assumes the risk that he may ultimately never be paid for his work or expenses on the case. The potential for a fee enhancement provides a counterbalancing incentive needed to attract competent counsel willing and able to accept contingency representations because of the potential that exceptional work will be compensated at a rate greater than he could earn if he simply switched sides.

Attorneys, like other service providers, operate in an economic market and are subject to the laws of supply and demand. As a general matter, a lawyer will accept a

⁴ See National Ctr. for State Courts, *How the Public Views the State Courts: 1999 National Survey*, at 18 (finding that 68% of respondents disagreed with the statement: “It is affordable to bring a case to court.”).

⁵ See Kritzer, *The Justice Broker: Lawyers and Ordinary Litigation*, at 58-59 (1990) (empirical evidence indicating that the contingency fee is the overwhelming means used by individuals seeking to obtain legal representation to assert claims).

particular representation only if the lawyer expects to earn fees that are at least equal to the fees he would earn if he accepted an alternative matter. This is true on both a case-by-case basis and in the aggregate. That is, if a type of case cannot be profitable, lawyers will not rationally take on cases of that type. Another part of the lawyer's analysis, naturally, is the amount of expenses that will have to be outlaid to pursue a particular case, the impact that the case will have on the lawyer's ability to take on other work, and the amount of time the case will take. Perhaps unsurprisingly, these are all factors recognized by this Court as being relevant in deciding an appropriate attorney fee award. *See Essex Contr., Inc. v. Jefferson County*, 277 S.W.3d 647, 657 (Mo. banc 2009) (recognizing the amount of time a case will require as a factor to be considered); *Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980) (rejecting the contention that the fee should be calculated "according to an arbitrary, fixed percentage of the value" of the case); *German Evangelical St. Marcus Congregation*, 404 S.W.2d at 711 (recognizing multiple factors from the rules of professional conduct as proper for consideration including the certainty of compensation and the effect the representation will have on counsel's ability to take on other matters).

As the case at bar illustrates, even payment for services rendered in a successful MMPA case is uncertain and subject to a level of scrutiny unheard of in the normal private sector: after securing a successful outcome, the prevailing attorneys are subjected to attacks on their hours, rates, and bills by the party against whom they just prevailed. Notably, nowhere in Appellant's brief is the suggestion that a prevailing plaintiff should always receive their counsel's lodestar. Rather, Appellant is asking this Court to set an

upper bound at the lodestar (less any deductions in rate or number of hours) and then to consider the possibility for a further downward departure based on a number of factors including the level of success and the amount in controversy. *See* Brief of Appellant at 26.

PLAC contends that Appellant’s suggested approach is sufficient to encourage private attorneys to pursue even modest claims on a contingency basis. *See* Brief of PLAC at 12. It argues that lawyers representing plaintiffs are paid an “enviable” enough rate that they should be willing to take on a fee-shifting case based on the prospect of a full lodestar even though there is the countervailing prospect that they may lose the case and, of course, receive no fee. *Id.* Candidly, this is a curious proposition coming from an organization of corporate attorneys who are reliably paid monthly (at an often even more “enviable” rate) regardless of the outcome of their cases. Many attorneys who represent civil rights and consumer-protection plaintiffs are solo practitioners and local, small-firm lawyers who must be able to obtain attorney fees in order to take a case.⁶ To ask those attorneys to risk non-payment requires a financial incentive to do so. The approach outlined in *Perdue*, and advanced by Appellant herein, removes that incentive and thereby limits the pool of attorneys who are able to pursue those types of cases. The end result being that the legislature’s remedial scheme of private enforcement is undermined.

⁶ *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 CORNELL L. REV. 719, 767-69 (1988).

Even with the promise of statutory attorney fees, taking on large-scale, capital-intensive consumer protection cases can be a highly unattractive financial proposition. Expert fees are not reimbursable under the MMPA. *See* Mo. Rev. Stat. § 407.025. As a result, even in the best-case scenario where the plaintiff prevails and the attorney is compensated at market rates for all hours worked, the attorney's net return after a lodestar award will be significantly less than what the lawyer could make in the market from paying clients.⁷ Should the plaintiff lose, the lawyer would not only go uncompensated for the immense amount of attorney and staff time such cases require, but would also lose the capital expenses invested in the case.

Because prevailing plaintiff attorney fees provisions are an important part of the legislature's consumer protection statutory scheme, it is critical that Missouri trial courts continue to be afforded the discretion to set the reasonable fee at an amount that encourages counsel to take on such cases. Appellant's suggested approach would have the opposite effect and should therefore be rejected.

⁷ *See* Davies, *Federal Civil Rights Practice in the 1990s*, 48 *Hastings L.J.* 197, 229 (1997) (“[i]n cases that are expert-intensive and in which expert witness fees are not recoverable . . . the lack of a multiplier can be devastating”).

B. Court awarded attorney fees should incentivize a rational approach to managing the litigation.

In addition to incentivizing counsel to initially undertake the meritorious case on behalf of a deserving plaintiff, this Court should also structure its fee-shifting jurisprudence to provide both parties with the proper incentives to rationally manage the litigation. Appellant and PLAC argue that allowing “runaway” attorney fee awards will discourage settlement and encourage frivolous litigation. *See* Brief of Appellant at 61, *et seq.*; Brief of PLAC at 8. As an initial matter, this demonstrates an astonishing lack of trust in our state’s trial judges to appropriately exercise their discretion. Further, the argument considers only the negative incentives that may be present for the plaintiff while ignoring similar negative incentives to the defendant. Our adversarial system of justice is a balancing act that sometimes requires that safeguards be employed to prevent one side from having an unfair advantage. The system should incentive both sides to act rationally. If either party has an incentive to over-litigate the case, without a countervailing incentive, then the required balance will have been lost.

Viewing the argument of Appellant and PLAC through this prism reveals that they would entrench a system that would constrain the plaintiff’s approach to the litigation while at the same time providing no check against over-litigation by the defendant. Appellant and PLAC contend that the Court needs to change the standard on court awarded attorney fees to prevent frivolous litigation and over litigation of claims with limited merit. *See* Brief of Appellant at 66-67; Brief of PLAC at 11-12. But this Court has already crafted rules that allow trial courts to address such abuses.

First, defendants can move to dismiss questionable claims at the outset, or move for summary judgment once the case is more developed but before undergoing the cost of preparing for trial. *See* Mo. Sup. Ct. R. 55.27, 74.04. Second, in the event a claim is truly frivolous, a party and its counsel are subject to sanctions. *See* Mo. Sup. Ct. R. 55.03. Third, defendants can offer judgment under Mo. Sup. Ct. R. 77.04 when they acknowledge that they have some liability, but the plaintiffs insist on continuing to pursue the case in an effort to secure more than they are entitled to recover. Under this rule, if the defendants are correct in their calculus, then they can “cut-off” their liability for costs and reasonable attorney fees if the plaintiff refuses the offer, fails to achieve a better result, and is therefore no longer the prevailing party. *See* Mo. Sup. Ct. R. 77.04. Finally, the biggest check against plaintiffs over-litigating cases is the fact they bear the risk of receiving no fee if they do not prevail. This risk of loss is a practical reality that counsels in favor of managing that risk by litigating the case efficiently.

On the other hand, without the threat of a substantial attorney fees award, defendants may have an incentive to vigorously, perhaps even overzealously, defend even the most blatant legal violations in an effort to drain the counsel for the plaintiff of time and resources and possibly end the case without a decision. This is particularly true, as was present here, when the case involves a wide-spread issue that may be the subject of future litigation in other jurisdictions. Of course, defendants should not be punished for defending themselves. But a defendant utilizing a “scorched earth” approach in a case must be subject to ramifications if a level playing field is to be maintained.

In our adversarial system, most actions taken by a party during the litigation trigger a reaction by the other side. Because of this, the defendant has the ability to exert great influence on how much effort plaintiff's counsel will expend in the case. Further, the fact that defendants influence how the case is litigated eliminates almost any surprise that the defendant may claim in the size of the attorney fee award. *See Burger v. Springfield*, 323 S.W.2d 777, 784 (Mo. banc 1959) (rejecting the contention that a contractual provision in a note requiring the reasonable expenses of collection, including reasonable attorney fees, was void for uncertainty).⁸

The most obvious disincentive to a defendant under such circumstances is that it will ultimately face a fee application from plaintiff's counsel that seeks to recover for extensive time and resources that were expended on the case as a result of the defendant's tactics. *See Munday v. Thielecke*, 290 S.W.2d 88, 91-92 (Mo. 1956). In *Munday*, this Court affirmed an unusually high fee in a partition action. *Id.* at 92. The court justified

⁸ This lack of surprise vitiates Appellant's claimed "due process concerns." *See* Brief of Appellant at 74-75. Appellant analogizes to cases finding that certain large punitive damage awards violate due process because of the lack of notice to the offending party that its conduct could result in such an award. *Id.* These concerns are not present when analyzing an awarded reasonable attorney fee because the defendant is getting real-time notice of what efforts the plaintiff's attorney is taking throughout the case. Accordingly, Appellant's alleged due process violations are ephemeral at best.

its refusal to disturb the “violent presumption that the trial court did not err in gauging the quantum of the fee” as follows:

Appellant wanted to fight and his wishes were carried out. The time has come to pay the fiddler. Appellant has listened to the music he ordered and should not be allowed to complain about paying the bill.

Id.

If the plaintiff’s fee application can be reduced on the grounds that the total recovery is modest compared to the amount of time required to secure it, in the aggregate, defendants may be incentivized to “litigate by attrition” thereby simultaneously reducing the economic feasibility of the case for plaintiff’s counsel and discouraging other counsel from pursuing similar claims and subjecting themselves to the same untenable financial dynamic. This dynamic may be even more one-sided, as Appellant urges here, if a court was obligated to measure the recovery solely by the claims made in a class action settlement – a necessary feature of the procedural device that is largely outside the control of the plaintiffs’ counsel. Of course, were defense counsel to raise objections to an overzealous defense, they would do so against their interest because they would continue to be reliably paid for all time spent in the defense of the case.

Ultimately, Appellant and PLAC’s request to install a new rule that limits the decision on reasonable attorney fees to the application of a rigid lodestar analysis would tie the trial court’s hands and render it effectively incapable of remedying unreasonable litigation tactics. Of course, Missouri’s current approach of permitting the trial court to exercise its discretion after considering all relevant factors, provides the trial courts with

the tools it needs to require the parties to take a reasoned approach to the litigation and tax the party accordingly if it fails to heed that charge. Accordingly, all of the policy concerns raised by Appellant and PLAC can be (and are) considered by the trial court in exercising its discretion in setting a reasonable fee. *See, e.g., Gilliland v. Mo. Ath. Club*, 273 S.W.3d 516, 523 (Mo. banc 2009) (approving a trial court's use of multiple factors, including the trial court's belief that counsel spent too many hours on the case, when exercising its discretion to award a lower attorney fee than requested). Removing that discretion upsets the balance of competing incentives between the parties while providing no additional tools to the trial court. Here, the old adage applies: there is no need to fix something that is not broken.

II. Perdue's Reliance On The Lodestar (i.e., Billable Hour) Model Of Setting A Reasonable Attorney Fee Disregards Other Relevant Factors And Therefore Is Not The Best Rule For Missouri Courts.

Appellant and PLAC imply that adopting the *Perdue* decision would not entail a significant change to Missouri law. *See* Brief of Appellant at 56-58; Brief of PLAC at 11. But a comparison of *Perdue's* test for setting a reasonable attorney fee and this Court's own test demonstrates the marked difference.

In *Perdue*, a nearly evenly-divided U.S. Supreme Court rejected its prior fee jurisprudence that utilized 12 factors to be evaluated when setting a fee. *See Perdue*, 130 S.Ct. 1672 & n.4. In its place, the Supreme Court entrenched the lodestar method of determining a reasonable attorney. *Id.* at 1672-75. Under this method, trial courts would have to limit their discretion to three inquires: (1) the market rate for the work performed

by the attorneys, (2) the reasonableness of the amount of time spent on the case, and (3) whether “rare and exceptional circumstances” exist to rebut the “strong presumption” that the first two factors must be considered alone. *Id.*

In contrast, Missouri trial courts have traditionally not even needed the aid of evidence, other than the background that is naturally compiled during the course of handling the case, to set the fee. *See Nelson v. Hotchkiss*, 601 S.W.2d 14, 21 (Mo. banc 1980). In fact, the only case in the last 50 years located by the undersigned where this Court reversed a trial court’s determination of a reasonable attorney fee was in *O’Brien v. B.L.C. Ins. Co.*, 768 S.W.2d 64, 71 (Mo. banc 1989). Appellant relies heavily on dicta contained in *O’Brien*. But a review of the holding of the case demonstrates that *O’Brien* actually counsels in favor of affirming the trial court here.

In *O’Brien*, an odometer fraud case, the trial court awarded a \$1,000 attorney fee without conducting a hearing. *Id.* This Court reversed that decision because the trial judge erred in refusing to hear from the parties on the disputed point of the amount of fees to be awarded. *Id.* That is, the abuse of discretion was in the way the court reached

its decision, not necessarily the result of that decision.⁹ As this Court has often recognized, it is not the role of this Court to second-guess the trial court when reviewing an action under the abuse of discretion standard. *See Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 211 (Mo. 1991).

The traditional Missouri approach is the better rule for several reasons. As described above, permitting the trial court to exercise its discretion and consider all relevant factors permits it to balance the incentives to encourage efficient litigation. Further, the Missouri approach permits our trial judges to employ whatever methods are most effective in their own courtrooms and for the case at hand.

It bears remembering that Missouri trial courts are courts of general jurisdiction as opposed to the limited jurisdiction of the federal courts. *See NLRB v. Swift & Co.*, 233 F.2d 226, 229 (8th Cir. 1956). As such, Missouri courts must be equipped to handle any number of cases where awarding reasonable attorney fees is an issue. While this case

⁹ Moreover, the *O'Brien* Court's guidance to the trial court on remand was fully consistent with Missouri's longstanding rule that trial courts are to consider all factors related to fees in exercising its discretion. To wit, the trial court in *O'Brien* was instructed that it should not limit itself to the singular fact that damages awarded by the jury failed to offset a prior settlement. It should also consider that the earlier settlement itself was a product of counsel's efforts. As the purpose of the fee-shifting statute was to "aid the public authorities in the enforcement" of the law, "[f]ees must be determined with this statutory policy in mind." *O'Brien*, 768 S.W.2d at 71-72.

(and the Court of Appeals opinion in *Zweig v. Metro. St. Louis Sewer Dist.*, 2012 Mo. App. LEXIS 417 (Mo. Ct. App. E.D. 2012)) arose in the context of class actions, the new standard pressed by Appellant would not be limited to cases pursued under Rule 52.08. Fee-shifting provisions arise in any number of contracts, Missouri statutes, and even constitutional claims. *See, e.g.*, Mo. Const. Art. X, § 23 (taxation); Mo. Rev. Stat. § 452.340.7 (child custody); Mo. Rev. Stat. § 213.111.2 (employment discrimination); Mo. Rev. Stat. § 213.041.3 (fair housing); Mo. Rev. Stat. § 429.625 (real estate commissions); and Mo. Rev. Stat. § 198.093.3 (patient care in nursing homes). While the *Perdue* approach may be workable in the federal courts where only claims involving more than \$75,000 or a violation of a federal statute are heard, more discretion is needed in our Missouri trial courts given the wide range of claims (both legally and in terms of their monetary value) they handle.

Appellant implies that because the MMPA references Fed. R. Civ. P. 23 when it clarifies that class actions are to be part of its legislative scheme, that federal precedent should be given special consideration. *See* Brief of Appellant at 48-49. But Rule 23 does not speak to the reasonableness of attorney fees – rather it imposes an obligation that attorney fees allowed in class action cases should be disclosed to the class and be the product of court review. *See* Fed. R. Civ. Proc. 23(g). Notably, the *Perdue* court did not base its decision on Rule 23. Rather, it issued an opinion interpreting the language of a federal civil rights statute. *See Perdue*, 130 S. Ct. 1672-73. Notwithstanding Appellant’s attempted sleight of hand, it remains the province of the Supreme Court of Missouri to decide how to interpret the laws of our State, whether contract, common law, or the

MMPA. See *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 772 n.9 (Mo. banc 2007) (declining to be bound by or follow federal statutory interpretation precedent in applying a Missouri statute); see also *Daugherty v. City of Md. Heights*, 231 S.W.3d 814, 818 (Mo. banc 2007).

CONCLUSION

In this case, the trial court had a difficult job. This case lasted for over six years and was heavily litigated. The attorney fees award had to account for all relevant factors presented by the case – the time and expense invested by plaintiffs’ counsel, the risk they undertook, the delay in receiving payment occasioned by the unusual length of the case, the result they obtained, the role of the defendant in the conduct of the litigation, and the need to effect an appropriate deterrence against conduct prohibited by the MMPA, to name a few. The record reflects that the trial court gave careful consideration to the decision, holding a three day hearing on just the subject of attorney fees. Given this level of diligence on the part of the court below, there must be a heavy showing that the trial court abused its discretion. Appellant has not made that showing. More importantly, none of the reasons advanced by Appellant or PLAC should compel the Court to break new ground in its long-standing attorney fee jurisprudence. Missouri’s current standards afford the trial courts with the flexibility to use their discretion to justly award fees that incentivize desired conduct and disincentivize unreasonable conduct. MATA urges this Court to affirm the judgment of the circuit court below.

Dated: November 1, 2012

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and that the brief contains 6,332 words (as determined by Microsoft Office Word 2007 software);

A handwritten signature in black ink that reads "Todd C. Werts". The signature is written in a cursive style with a horizontal line underneath the name.

Todd C. Werts

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was served using the Court's electronic filing system this 1st day of November, 2012 upon:

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