No. SC87691

IN THE SUPREME COURT OF MISSOURI

DENNIS E. HESS,

Plaintiff-Appellant,

v.

CHASE MANHATTAN BANK USA, N.A.,

Defendant-Respondent.

Appeal from the Circuit Court of Platte County, Missouri
Case No. 00CV82892 – Honorable Abe Shafer, Judge

PLAINTIFF-APPELLANT'S SUBSTITUTE REPLY BRIEF ON PRINCIPAL APPEAL, AND RESPONSE BRIEF ON CROSS-APPEAL

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Chase's Brief offers no persuasive reason for this Court to disturb the well-reasoned conclusions reached by a unanimous panel of the Court of Appeals.

The Court of Appeals properly held that Chase had failed to preserve, either in the trial court or on appeal, its cross-appeal argument that it was immunized from fraud liability by the very contract it fraudulently induced Mr. Hess to execute. Even if the issue is considered on its merits, Chase's argument cannot be adopted under well-established Missouri law: a fraud-feasor cannot be permitted to rely on the fruits of his fraud to defeat his victim's fraud claim.

With respect to Mr. Hess's appeal, although Chase struggles mightily to distinguish it, the fact remains that the Court of Appeals ruling was mandated by this Court's opinion in *Wilkes v. Missouri Highway & Transportation Commission*, 762 S.W.2d 27 (Mo. 1988). Like here, in *Wilkes* the defendant violated an existing substantive standard of conduct, but at the time of the injury-causing event the plaintiff was barred from filing suit to obtain relief. This Court held that a later statutory amendment removing the bar to suit was remedial, and could therefore be applied in the *Wilkes* case, because the amendment merely "provides a remedy for a cause of action whose remedy was previously barred." *Id.* at 28. The same result applies here, *a fortiori*: unlike in *Wilkes*, Chase's conduct was actually subject to enforcement action by the Missouri Attorney General, and to suit by Mr. Hess for common-law fraud, when it occurred. Chase's argument that it had a vested right to be free of suit by Mr. Hess, or that any statute altering the remedies to which it was subject is necessarily substantive, are inconsistent with *Wilkes* and a host of more recent Missouri decisions, and also

ignores the scope of the remedies to which Chase was *already* subject for the fraud underlying this action.

Given that Chase's cross-appeal arguments are not preserved (and are contrary to established Missouri law in any event), and that the Court of Appeals' retroactivity ruling followed existing precedent of this Court, Mr. Hess submits that this case should be retransferred to the Court of Appeals for that Court to reinstate its opinion. In the alternative, this Court should reach the same result: affirm the fraud verdict, and remand the Merchandising Practices Act claim for trial solely on damages, and for the trial court's assessment of Mr. Hess's recoverable attorneys fees, since the existing fraud verdict establishes Chase's liability under the Act.

RESPONSE TO CHASE'S STATEMENT OF FACTS

Mr. Hess offers this response to specific claims made in Chase's Statement of Facts.

1. Chase begins by arguing that Mr. Hess's Brief improperly cited to extraneous facts, and that only the allegations of his Petition are relevant to the trial court's dismissal of his Merchandising Practices Act ("MPA") claim on the pleadings. Chase Br. 12-13.[1] The course of proceedings in the trial court is plainly relevant to this Court's resolution of the issues, including the issues presented in Mr. Hess's appeal.

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[1] Chase does not argue that the allegations in Mr. Hess's Petition are in any way inadequate to state a claim under the MPA.

Further, the facts found by the jury, and the evidence on which those findings are based, are relevant to the Court of Appeals' determination that Mr. Hess had proven at trial all elements necessary to establish Chase's liability under the MPA, and that a remand was accordingly only necessary with respect to damages and fees recoverable under the statute. For this reason, Chase's statement that "the fraudulent nondisclosure verdict in favor of plaintiff has no bearing whatsoever on the issue raised in his appeal," Chase Br. 12, is inaccurate. Finally, Mr. Hess filed his Brief fully aware of Chase's cross-appeal attacking the jury's fraud verdict. Mr. Hess is aware of no rule preventing him from providing the Court with "the facts relevant to [***all of***] the questions presented for determination" in his Opening Brief. Rule 84.04(c). (Indeed, it is ironic that Chase accuses *Mr. Hess* of citing "extraneous" facts to "obscure" the issues, when Chase's own Brief contains a 16-page fact statement, despite its claim that its appeal raises a pure legal issue as to the effect of the parties' contract.)

2. Chase claims that Mr. Hess references to Chase's knowledge of EPA's "involvement" with the property represents his effort "to obscure the fact that Chase knew only that the EPA wanted to access the property to remove paint cans." Chase Br. 13-14.

The evidence plainly permitted the jury to find that Chase had knowledge of USEPA's involvement going well beyond the presence of paint cans. While witnesses from Chase and from the law firm it used to foreclose the property uniformly claimed a lack of memory concerning these issues, the available documents plainly refer to more than just paint cans. One January 1999 USEPA memorandum of conversation states that

Chase's foreclosure counsel intended "to contact someone at Chase that handles ***contaminated properties***," who would deal with USEPA further, 2SR39; another referred to Chase's consent to USEPA's access to the property "to pick up ***the hazardous waste***." 2SR43. The February 1999 letter from foreclosure counsel to Chase employee Amber Metzler, which conclusively demonstrated Ms. Metzler's knowledge of USEPA's involvement prior to the property sale to Mr. Hess, refers to "the ***environmental issues and clean up of paint containers***," designating these as "the EPA issues." 2SR31. Further, the April 1999 appraisal report Ms. Metzler ordered, and which she used to set the listing price, explicitly states the following, under the heading "***Adverse Environmental Conditions***": "According to the Realtor, the ***EPA is scheduled to inspect the site and possible requirement [sic] may be made***." 2SR2. (All emphasis added).

These documents clearly permitted the jury to conclude that Chase was aware of EPA involvement with the property beyond its desire to remove paint cans. Further, the evidence established that USEPA's involvement with the property was perceived to be a material, adverse condition relating to the property, even apart from the presence of the paint cans: two different individuals who bid on the property, each of whom bid on the property *with full awareness of the presence of the paint cans,* testified unambiguously that they would not have done so if they had been aware that USEPA was involved. Tr. 996-99 (testimony of Rhyan L. Reynolds); Tr. 1009-11 (testimony of Joseph D. Reed).[2]

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[2] This testimony also shows why it is irrelevant whether or not Mr. Hess *could have* discovered the presence of the paint cans (Chase Br. 18) – the evidence at trial

Chase's persistent efforts to portray this case as a "dispute about paint cans" simply ignores the evidence the jury obviously believed.[3]

3. Chase highlights the wording of the contract documents it fraudulently induced Mr. Hess to sign, suggesting that those documents, and Mr. Hess's conversations with Chase's agent, should have alerted him that Chase was not obligated to disclose material, adverse information concerning the property of which it was aware. But Chase's recitation of these "facts" ignores that the jury found that Mr. Hess reasonably relied on Chase's silence, "us[ing] that degree of care that would have been reasonable in plaintiff's situation." SLF8 (¶ Fifth). Moreover, the testimony from Mr. Hess – as well

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was that those paint cans would not have informed a reasonable observer that the United States Environmental Protection Agency was actively involved with the property. Tr. 997, 1010.

[3] Mr. Hess's use of the word "involvement" itself was perfectly proper. Mr. Hess's fraud claim was submitted to the jury using a verdict director – unchallenged on appeal – which asked the jury to decide whether Chase "failed to disclose that the EPA was involved with environmental issues concerning the property," having superior knowledge of that involvement, with the intention of defrauding Mr. Hess. SLF8. The jury's verdict also necessarily found that Chase's intentional concealment of its knowledge of USEPA's involvement "was material to [Mr. Hess's] purchase of the property." *Id.*

as from two experienced area real estate agents – was that disclosure of known adverse conditions was expected, despite the contract language. Tr. 977-79, 982-83, 1025-26, 1042-44, 1095-99, 1208-09. Even Chase's own employee, Amber Metzler, testified that, despite the terms of sale, "anything factual that we know as a certainty should be disclosed. *It would be illegal not to disclose that.*" SR127.

It is also noteworthy that the contract documents themselves could contribute either to the belief that Chase would be providing customary disclosures, or that it had no information to disclose. Thus, the standard sales contract for the property which Chase and Mr. Hess executed states that "**THIS CONTRACT SHALL NOT BE EFFECTIVE UNTIL SELLER COMPLETES AND BUYER SIGNS A SELLER'S DISCLOSURE – STATEMENT OF CONDITION FOR THE PROPERTY**." LF16 (emphasis original); Tr. 727-28 (testimony of Chase's agent that condition never expressly waived by Mr. Hess). No such disclosure was ever provided. Further, the Addendum on which Chase places such heavy reliance itself minimizes Chase's potential knowledge, stating that "The seller is a corporation who acquired the property through foreclosure sale. The seller has never seen nor occupied the property." LF20 ¶ 9.[4]

[4] The statement that Chase had "never seen * * * the property" is contradicted by the fact that its agent had walked and photographed the property, and provided those photographs to Ms. Metzler. Tr. 736-40.

4. Chase's fact statement also describes the fact that Mr. Hess buried the paint cans he discovered on the property, believing them to be run-of-the-mill construction debris, leading USEPA to issue a Unilateral Administrative Order requiring their removal. Br. 18-21. Chase also recounts evidence that USEPA has no present intention to require additional environmental cleanup. Br. 20-22. But Mr. Hess's position – copiously supported in the evidence – is that he would not have bought the property if he knew what Chase did, *see* Hess Opening Br. at 12; that USEPA's involvement with the property rendered the property valueless and unmarketable, *id.* at 16-17; that Chase knew of that involvement and intentionally concealed it, *id.* at 12-13, SLF8; that further investigations were needed to meaningfully assess the full extent of the contamination of the property, Hess Opening Br. at 18-19; and that USEPA retained the ability to order further remedial actions. *Id.* Moreover, Mr. Hess never sought to recover his costs for removing the paint cans, or the cost of future USEPA-ordered cleanup. Tr. 2207-15. As such, USEPA's future intentions, or the circumstances leading to the paint-can removal, are completely irrelevant to the case Mr. Hess presented, and which the jury believed.

ARGUMENT

I. The Court of Appeals Correctly Held that Chase Had Failed To Preserve its Contract-Based Defense. (Additional Argument Responsive to Chase Cross-Appeal)

Chase argues that the very contract it fraudulently induced Mr. Hess to enter immunized it from fraud liability. Br. 30-38. Chase's contract defense is meritless, as explained *infra* § II. But the Court of Appeals did not address the merits of Chase's

contract defense, holding instead that Chase had failed to properly preserve the claim, either in the Circuit Court or on appeal. While Chase briefly acknowledges the procedural basis of the Western District's ruling (Br. 27), it nowhere challenges it.

As shown below, the Court of Appeals properly held that Chase abandoned its contract defense, both in the trial and appellate courts. This Court should adopt that ruling, and affirm the jury's fraud verdict without addressing the substance of Chase's cross-appeal arguments.

The Court of Appeals held that Chase failed to properly present its contract defense in the Circuit Court by failing to plead the "as-is" provisions of the contract as an affirmative defense:

> Chase is claiming in this point that the "as-is" provisions of the parties' contract waived any duty it had to disclose the EPA's involvement with the property sold to Hess or released it from any liability for its silence because of its superior knowledge, as found by the jury. Such a waiver or release are affirmative defenses, which in accordance with Rule 55.08, must have been pled by Chase in its answer to Hess's second amended petition. *Roth v. Roth*, 176 S.W.3d 735, 738 (Mo. App. [E.D.] 2005).

Op. 34. The Court recognized that Chase's answer did generally plead as defenses, without elaboration, that Hess's claims "are barred by the doctrines of waiver, estoppel, laches, and unclean hands." LF40 ¶ 2. But those generic, boilerplate assertions were insufficient: "[t]o properly plead an affirmative defense, under Rule 55.08, the rule requires that the pleading contain a short and plain statement of the facts showing that the

pleader is entitled to the defense. '[A]n affirmative defense must be pled in the same manner as required in alleging a claim such that mere conclusory allegations are insufficient.'" Op. 34, *quoting Mobley v. Baker*, 72 S.W.3d 251, 258 (Mo. App. E.D. 2002).

The Court of Appeals also held that Chase had failed to properly present its contract defense on appeal. Chase's Point Relied On argued that "[t]he trial court erred in denying Chase's Motions for Directed Verdict and for Judgment Notwithstanding the Verdict because Plaintiff ***did not make a submissible case*** on his fraudulent non-disclosure claim * * *." Chase Br. in Court of Appeals at 19, 20 (emphasis added).

The Court of Appeals observed that, to establish its "no submissible case" point, "Chase, as the appellant, had the burden of demonstrating on appeal that there is no evidence in the record, which if believed by the jury, would support a finding by it on paragraph Third of Hess's verdict director" (relating to Chase's duty to disclose). Op. 33, *citing Blue v. Harrah's N. Kansas City, LLC*, 170 S.W.3d 466, 472 (Mo. App. W.D. 2005). Despite this burden, "Chase makes no showing in that respect, and, in fact, does not even argue that matter." Op. 33.

The Court of Appeals went on to explain that Chase's argument did not seek to negate Hess's evidentiary showing – as would be appropriate for a submissibility argument – but instead sought to avoid the effect of Hess's evidence by invoking an affirmative defense:

> [I]n [ ] claiming [that its duty to disclose was negated by the contract], Chase is not attacking the basis on which Hess was asserting a duty to

> disclose. Rather, it is claiming that any duty to disclose on that basis was trumped by the "as-is" provisions of the parties' contract. Hence, in not attacking the basis on which duty was submitted to the jury, Chase, in effect, does not make a submissible-case claim at all.

Op. 33. The Court concluded that Chase's failure to make any "argument in its brief as to why Hess failed to make a submissible case" "constitutes abandonment of that claim." Op. 34, *citing Eagle ex rel. Est. of Eagle v. Redmond*, 80 S.W.3d 920, 924 (Mo. App. W.D. 2002); *see also* Op. 34 (holding that Chase's argument "does not correspond to its claim of error as to a submissible case on the issue of duty, rendering it irrelevant").

The Court rejected Chase's claim that the contract defeated Mr. Hess's right to rely for the same procedural reasons. Op. 35-36.

A. Chase's Contract Defense Was an Affirmative Defense which Chase Failed To Properly Plead.

As the Court of Appeals recognized, Chase's contract defense does not challenge the evidence on which Mr. Hess relied to establish either a duty to disclose, or Mr. Hess's right to rely on Chase's forthrightness: "Chase is not attacking the basis on which Hess was asserting a duty to disclose. Rather, it is claiming that any duty to disclose on that basis was trumped by the 'as-is' provisions of the parties' contract." Op. 33.

This argument – that Mr. Hess's properly pleaded fraud claim was avoided based on additional facts – is a classic affirmative defense.

> An affirmative defense seeks to defeat or avoid the plaintiff's cause of action, and avers that even if the allegations of the petition are taken as true,

> he or she cannot prevail because there are additional facts that permit the defendant to avoid the legal responsibility alleged.

Glasgow Enterps, Inc. v. Bowers, 196 S.W.3d 625, 630 (Mo. App. E.D. 2006); *see also*, *Roth v. Roth*, 176 S.W.3d 735, 738 (Mo. App. E.D. 2005), *quoting Mobley v. Baker*, 72 S.W.3d 251, 257 (Mo. App. W.D. 2002); 15 Mo. Prac. § 55.08 ("If, however, the fact at issue presents an entirely new matter, not depending upon the truth of plaintiff's allegations, it is an affirmative defense.").

Chase's contract argument is plainly an affirmative defense under this standard. Mr. Hess argued – and proved at trial – that Chase had a duty to disclose the material, adverse facts in its possession, because Chase "had superior knowledge or information" concerning USEPA's investigations that "was not within the fair and reasonable reach of" Mr. Hess. SLF8 (verdict director). Chase's contract defense does not question or attack Mr. Hess's evidence, but argues instead that "there are additional facts that permit the defendant to avoid the legal responsibility alleged." *Glasgow Enterps,* 196 S.W.3d at 630. This is an affirmative defense, and should have been pleaded as such.

As the Court of Appeals recognized, Chase's contract defense is most closely analogous to a claim that Mr. Hess had released Chase from fraud liability, or waived his right to disclosures from Chase. But Missouri's procedural rules explicitly require that release and waiver be affirmatively alleged by a defendant:

> In pleading to a preceding pleading, a party shall set forth all applicable affirmative defenses and avoidances, including but not limit to *

> * * release, * * * waiver, and any other matter constituting an avoidance or affirmative defense.

Rule 55.08; *see also*, *Westinghouse Elec. Co. v. Vann Realty Co.*, 568 S.W.2d 777, 781 (Mo. banc 1978) ("Waiver is an affirmative defense which must be pleaded."); *Rice v. Bol*, 116 S.W.3d 599, 605 (Mo. App. W.D. 2003) ("a release is considered an affirmative defense").

Consistent with the Court of Appeals' decision in this case, *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002), holds that an *identical* contract defense was an affirmative defense which Rule 55.08 required to be plead with supporting facts. In *Kesselring*, a business broker argued that it could not be held liable for fraudulent nondisclosure in connection with the sale of a business' assets, based on a provision of the Asset Purchase Agreement (Paragraph 21) which provided:

> Purchaser acknowledges that Broker has not verified, and will not verify, the representations of Seller and should such representations be untrue, Purchaser agrees to look solely to Seller for relief and hold Broker harmless in connection with all losses and damages caused Purchaser thereby.

Quoted at 74 S.W.3d at 815-16.

The Eastern District held that the Brokers' reliance on this contractual provision was an affirmative defense which the brokers were required to plead as required by Rule 55.08:

> If the agreement bars Buyer from relying on the representations of Broker, then Buyer can never seek redress for those misrepresentations. While

> Brokers admit that paragraph 21 is not a release, they nonetheless claim that it is an admission that Buyers did not rely on Brokers' representations. But ***this argument, if followed, gives paragraph 21 the power of a release. Brokers did not plead release in their answer, as required by Rule 55.08.***

Id. at 816 (emphasis added).

Although Chase's Answer is 20 pages long, LF24-43, it makes absolutely *no* reference to the "as-is" provisions of the contract, or to Chase's claim that those provisions immunized it from fraud liability. While Chase's answer alleges generically that "Plaintiff's claims are barred by the doctrines of waiver, estoppel, laches, and unclean hands," LF40 ¶ 2, that boilerplate litany preserves nothing under Missouri law. Indeed, this Court held virtually identical allegations to be "insufficient as a matter of law" in *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 384 (Mo. 1993). In *ITT Commercial*, the defendant generically alleged – like Chase here – that the plaintiff "is barred from any relief by estoppel, waiver, duress and failure of consideration." *Id.* at 383. Without extended discussion, this Court found that boilerplate statement insufficient to preserve any affirmative defense: "[b]are legal conclusions, such as those set forth by [defendant], fail to inform plaintiff of the facts relied on and, therefore, fail to further the purposes protected by Rule 55.08." *Id.* The same result applies here. Chase's Answer fails to preserve its affirmative defense of fraud-immunity-by-contract; its recitation of "bare legal conclusions" in its Answer does not alter that outcome.

B. Chase's Contract Defense Was not Tried by Consent.

In its Application for Transfer, Chase argued that its contract defense was "tried by consent" under Rule 55.33(b), and that it should therefore be relieved of the waiver arising from its failure to plead the contract defense in its Answer. Although Chase's transfer application claimed (at 12) that Chase "introduced evidence on that argument at trial," it did not identify any evidence that would support a finding of "trial by consent."

Because Chase has not identified the evidence which purportedly establishes Mr. Hess's consent to trial of the contract defense, Mr. Hess cannot specifically respond. However, Mr. Hess notes that "[i]t is well settled that evidence will give rise to an amendment of the pleadings by implied consent only when it bears solely on the proposed new issue and is not relevant to some other issue already in the case." *Lester v. Sayles*, 850 S.W.2d 858, 869 (Mo. 1993). The reason for this rule is straightforward – the opposing party can only be said to have consented to the trial of an unpled issue if evidence was admitted which could *only* be relevant to the unpleaded claim. *If* the evidence was relevant to claims properly in the case, the opposing party had no reason to object to it, and the lack of objection proves nothing concerning the opponent's acquiescence in the trial of an unpleaded issue.

Under *Lester v. Sayles*, the admission at trial of the contract documents themselves, or evidence concerning the terms of the sale, cannot establish "trial by consent." The contract documents, and the terms of Mr. Hess's purchase of the property, were obviously relevant to *Mr. Hess's* affirmative claim: these documents embodied the transaction Mr. Hess was claiming Chase had fraudulently induced him to enter. *Cf.*

Warren Davis Props. V, LLC v. United Fire & Cas. Co., 4 S.W.3d 167, 171-72 (Mo. App. S.D. 1999) (where contract documents admitted in evidence, and effect of particular provisions argued to jury, on plaintiff's affirmative claims, "this evidence was not relevant solely to Defendant's affirmative defenses and it cannot be said that Plaintiff impliedly consented to try them").

Chase's "trial by consent" argument fails for an additional reason – Chase did not request any jury instruction on its contract defense. "[T]he failure of the party relying on [an affirmative] defense to request an instruction on the same constitutes an abandonment thereof, even though it was properly pled." *Lomax v. Sewell*, 1 S.W.3d 548, 553 (Mo. App. W.D. 1999); *accord*, *Missouri Dep't of Transp. v. Safeco Ins. Co. of Am.*, 97 S.W.3d 21, 40 (Mo. App. E.D. 2002). Of course, in this case Chase neither plead its contract defense in its Answer, *nor* did it seek a jury charge on the issue. The defense was plainly waived.

C. Chase's Appellate Briefing Failed To Properly Present its Contract Defense for Decision.

Chase's Point Relied On in the Court of Appeals raised a single legal claim: that Mr. Hess "***did not make a submissible case*** on his fraudulent non-disclosure claim * * *." Chase Br. in Court of Appeals at 19, 20 (emphasis added).

Although Chase's Point Relied On purported to frame the issue in terms of Mr. Hess's failure to make a submissible case, its briefing did not make a submissible-case *argument.* A submissibility argument attacks the sufficiency of the plaintiff's evidence necessary to establish the affirmative elements of plaintiff's claim. "To make a

submissible case, a plaintiff must present substantial evidence for every fact essential to liability." *Blue v. Harrah's N. Kansas City, LLC*, 170 S.W.3d 466, 472 (Mo. App. W.D. 2005). Significantly, in deciding a submissibility argument, the reviewing court must "view the evidence and all reasonable inferences from it in the light most favorable to the plaintiff *and disregard all evidence to the contrary*." *Id.* (emphasis added).

As the Court of Appeals properly recognized, Chase did not make this sort of argument – Chase did *not* "attack[ ] the [evidentiary] basis on which Hess was asserting a duty to disclose." Op. 33. The Court concluded that "Chase, in effect, does not make a submissible-case claim at all," *id.*, but instead argues that it had established an affirmative defense as a matter of law.

On the same day it issued its decision in this case, the Western District issued another opinion that emphasized the important differences between a submissibility argument – the argument asserted in Chase's Point Relied On – and an argument that a defendant established an affirmative defense as a matter of law – the argument Chase apparently intended to make. In *Damon Pursell Construction Co. v. Missouri Hwy. & Transp. Comm'n*, 192 S.W.3d 461 (Mo. App. W.D. 2006), the defendant Highway Commission argued that plaintiff's claim to recover compensation was defeated by payment or settlement of the claim. Although the Commission suggested that this was a submissibility argument, the Court found that it was not:

> Although MHTC characterizes its claimed error as the failure of Damon Pursell to make a submissible case, what MHTC is really arguing is that Damon Pursell's claim was defeated, as a matter of law, by its

> evidence of an affirmative defense. ***The proper characterization of MHTC's claim is necessary because it impacts the law applicable to this court's review***. Generally, this court reviews the denial of a motion for directed verdict as a question of law, viewed in the evidentiary light most favorable to the non-moving party, and determines whether that party has made a submissible case. In determining whether the trial court erred in overruling a motion for directed verdict, this court must consider all the evidence viewed in the light most favorable to the plaintiff, give the plaintiff the benefit of all favorable inferences arising therefrom, and disregard the defendant's evidence except insofar as it aids the plaintiff's case. When the claim of error on appeal is the failure to direct a verdict because of proof of an affirmative defense, however, the moving party is only entitled to a directed verdict if that party proved its affirmative defense as a matter of law. A directed verdict should only have been granted if there were no factual issues remaining for the jury to decide.

Id. at 474-75 (citations and internal quotations omitted).

Chase's Point Relied On alleged that Mr. Hess had failed to make a submissible case. But its argument did not attack the sufficiency of Mr. Hess's proof on any of the essential elements of his claim. Chase thereby abandoned its submissibility argument, and the Court of Appeals properly rejected it. *Beatty v. State Tax Comm'n*, 912 S.W.2d

492, 498-99 (Mo. 1995) (claim made in Point Relied On abandoned if not supported by relevant authority or argument).[5]

II. The Trial Court Properly Overruled Chase's Motion for Judgment as a Matter of Law on Mr. Hess's Fraud Claim. (Response to Chase Cross-Appeal Point)

A. Chase Has Shown no Basis to Overturn the Jury's Finding that Chase Had a Duty to Disclose Based on its Superior Knowledge of EPA's Active Investigation of the Property.

Missouri caselaw is well-established: silence or non-disclosure can constitute actionable misrepresentation if the non-disclosing party had a duty to speak. *Keefhaver v. Kimbrell*, 58 S.W.3d 54, 59 (Mo. App. W.D. 2001); *Murray v. Crank*, 945 S.W.2d 28, 31 (Mo. App. E.D. 1997).

Mr. Hess made a submissible case of fraudulent non-disclosure. As Chase's own Brief acknowledges (at 32), Missouri courts have found that a duty to disclose exists

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[5] By failing to claim in its Point Relied On that it had established an affirmative defense as a matter of law, Chase failed to present that issue for appellate review. *See, e.g., Brizendine v. Conrad*, 71 S.W.3d 587, 593 (Mo. 2002) ("an argument not set out in the point relied on but merely referred to in the argument portion of the brief does not comply with the requirements of Rule 84.04(d) and the point is considered abandoned in this Court").

"where one of the parties has superior knowledge not within the fair and reasonable reach of the other party." *Seidel v. Gordon A. Gundaker Real Est. Co.*, 904 S.W.2d 357, 361 (Mo. App. E.D. 1995); *see also, e.g.*, *Burris v. Burris*, 904 S.W.2d 564, 568 (Mo. App. S.D. 1995); *Burnett v. Thrifty Imports, Inc.*, 773 S.W.2d 508, 511 (Mo. App. S.D. 1989). "The affirmative duty to disclose and the failure to do so is substituted for the false representation element required in a fraud action." *Seidel*, 904 S.W.2d at 361.

Given the Court's instructions, the jury here necessarily found that "defendant had superior knowledge or information that the EPA was involved with environmental issues concerning the property sold by defendant to plaintiff which knowledge was not within the fair and reasonable reach of plaintiff." SLF8. This finding cannot be overturned unless no "reasonable and honest person" could have come to that conclusion on the evidence presented. *Seidel*, 904 S.W.2d at 361.

Chase makes a half-hearted argument that Mr. Hess's evidence "does not establish that Chase had superior knowledge which he relied on Chase to disclose." Br. 33.[6] But Chase cannot meet the demanding standard necessary to establish its right to judgment as a matter of law, particularly where it fails to even acknowledge – much less rebut – the

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[6] Although Chase's Brief claims that Mr. Hess's evidence was somehow insufficient, it elsewhere states that "[t]he sole issue raised by Chase's cross-appeal is whether, as a matter of law, Chase can be liable for fraudulent nondisclosure" given the terms of the contract documents. Br. 14.

evidence presented at trial on which the jury relied. As Mr. Hess described in his Opening Brief, that evidence showed: that Chase had knowledge from multiple sources that USEPA was investigating the property, Br. 12-13; that USEPA's involvement was not reasonably discoverable to a buyer of the property, Br. 17;[7] and that USEPA's involvement was a material fact which would have led Mr. Hess – *and* other bidders who actually made offers – not to attempt to acquire the property. Br. 12.

Droz v. Trump, 965 S.W.2d 436 (Mo. App. W.D. 1998), addressed a similar situation. Droz found fraud justifying rescission of a real-estate purchase contract when the seller had not disclosed that a landfill which had formerly operated on the property was under investigation by the Missouri Department of Natural Resources, *even though the purchaser was told that the land was a former landfill*. *Id.* at 439.

Similarly, in *Seidel* the plaintiff, a licensed real estate broker, had entered into a contract for the purchase of a home for her personal use. When she learned a week later that the Metropolitan St. Louis Sewer District would not accept public dedication of the subdivision's sewer system, she sued alleging fraudulent non-disclosure. 904 S.W.2d at 360. The court held that defendants had a duty to disclose, noting especially the intrinsic nature of the sewer system defect and that the problem had not been mentioned by the seller's agent or referred to in documents. *Id.* at 362. The court found that even though

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[7] Indeed, Chase employee Amber Metzler acknowledged that a potential buyer's on-site inspection would not have revealed USEPA's involvement. SR47.

the plaintiff had fourteen years of experience as a realtor, she did not have an obligation to inquire or investigate regarding the sewer system, since the sellers did not tell the buyer of the problem, and "[t]here was no evidence that a visual inspection of the property would indicate * * * MSD's refusal to accept dedication of the sewer system." *Id.* at 362. *See also, e.g.*, *VanBooven v. Smull*, 938 S.W.2d 324, 328-29 (Mo. App. W.D. 1997) (affirming fraud verdict for home purchasers where sellers concealed odor and flooring damage caused by dog urine, although purchasers visited home four times before purchase, and were aware of sellers' dog ownership; finding that "[t]he [trial] court [ ] could have found that the defective condition of the carpet was not readily observable"); *Burris v. Burris*, 904 S.W.2d 564 (Mo. App. S.D. 1995) (wife's knowledge that husband had failed to disclose certain items of property in divorce proceeding did not prevent finding of fraud based on husband's concealment of *other* property).

Chase also claims that Mr. Hess failed to show "superior knowledge" because "[t]he evidence showed at best that Chase knew that some 300-plus paint cans sat in an old barn foundation on the south end of the property – information plaintiff could have gleaned for himself had he bothered to make a full visual inspection of the property he was acquiring." Chase Br. 33. But that argument flagrantly disregards Mr. Hess's actual trial theory. Mr. Hess's theory was *not* that Chase failed to disclose *the presence of the paint cans*; indeed, he did not seek to recover the cost of the paint-can removal from Chase. Instead, Mr. Hess' theory, proven at trial, was that Chase failed to disclose *that USEPA was actively involved with the property*, with the effect on value and marketability, and the potential for substantial future liability, which such involvement

entails. The evidence at trial shows that this is not a trivial distinction: two potential buyers, who made offers despite knowledge of the paint cans, testified that USEPA's involvement would have dissuaded them from purchasing the property. Tr. at 995-98; 1008-11. Mr. Hess testified to the same thing. Tr. at 1172-73; 1211. In reaching its fraud verdict, the jury also made a finding – unchallenged by Chase – that "the failure to disclose that EPA was involved with environmental issues concerning the property sold by defendant to plaintiff was material to the purchase of the property by plaintiff." SLF8.

This is virtually identical to the concealed information in *Droz v. Trump*, 965 S.W.2d 436 (Mo. App. W.D. 1998), where the Court of Appeals found that a buyer made a submissible fraud case based on the seller's non-disclosure of an MDNR investigation of a former landfill on the property, *despite the buyer's knowledge of the landfill itself.* As *Droz* found, active regulatory oversight of a piece of property is itself a material, adverse fact, even if all parties knew that the property was a former, inactive waste-disposal site.

Chase's Statement of Facts contains a lengthy discussion of U.S. EPA's purported present intentions concerning enforcement action at the property, and its assessment of the risk the contamination at the property presents (contrary to caselaw, all taken in the light *least favorable* to the verdict). Chase Br. at 19-22. Mr. Hess has responded in his own fact statement. Br. 18-19. But more importantly, Chase's discussion of USEPA's future intentions once again ignores what this case is actually about – the issue is not whether USEPA will in fact order future costly remedial action. The jury awarded no damages based on a forecast of future remedial activities. Instead, the issue is whether

knowledge of USEPA's involvement with the property would have affected buyers' interest in purchasing the property, and thus the property's value. *See*, *e.g.*, *Barylski v. Andrews*, 439 S.W.2d 536, 541 (Mo. App. E.D. 1969) (home seller concealed charred structural members caused by fire; "The structural safety of the house is not relevant where its burned condition, though covered, very materially affected its value.").

The jury here was presented copious evidence: that USEPA's interest in the property was not reasonably discoverable; that numerous buyers, including Mr. Hess, would not have made offers to purchase the property if they had known of USEPA's role; and that the appraised value of the property was significantly, adversely affected by USEPA's ongoing investigations. Tr. at 997-98, 1008-11; 1096-99; 1172-75; 1211; 1775. Based on that evidence, the jury found that Chase had a duty to disclose what it knew to Mr. Hess, and that its failure to do so was fraudulent. That conclusion is amply supported in the evidence, and must be affirmed.

B. Chase Cannot Rely on an "As-Is" Clause To Immunize Itself from Mr. Hess' Fraudulent Inducement Claim.

1. Under Well-Established Missouri Law, Chase Cannot Invoke Disclaimers in the Contract it Fraudulently Induced Mr. Hess to Enter To Defeat his Fraud Claim.

Chase's main argument to overturn the jury's fraud verdict proceeds as follows: although the jury found that Chase fraudulently induced Mr. Hess to enter an agreement to purchase the property – all the while concealing its superior knowledge of material,

adverse information – Chase is immunized from fraud liability by the very contract it fraudulently induced Mr. Hess to sign.

The circularity and unfairness of Chase's position is palpable. A fraud-feasor cannot be permitted to rely on the fruits of its fraud to escape liability for the fraud itself. Chase's position is nonsensical. It is also contrary to well-established Missouri law. The Eighth Circuit described Missouri law on this issue in *Bening v. Muegler*, 67 F.3d 691 (8th Cir. 1995), which involved investors' suit against an attorney who represented a corporation, Concepts Communication Management, in the sale of Concepts' stock to plaintiffs. On appeal, the attorney sought to rely on a provision of the offering prospectus, which provided that the investors were relying solely on the representations contained therein. The Court summarily rejected this argument:

> Muegler also contends that appellants could not have reasonably relied on any of the alleged misrepresentations because the Concepts prospectus explicitly stated that investors were not relying on any representations outside the prospectus. We reject this argument. * * * ***[W]hen a fraudulent misrepresentation is used to induce entry into an agreement which then purportedly shields the declarant from the fraud, the contractual disclaimer will not bar an action for fraud.*** It would be inequitable and inconsistent with Missouri law to allow Muegler to avoid liability by a disclaimer after allegedly inducing appellants' investments through misrepresentations.

Id. at 698 (emphasis added; citations omitted).

The Court of Appeals expressed these same concerns in *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002), which likewise refused to allow a seller-defendant to rely on contractual disclaimers of liability to defeat a fraudulent inducement claim. *Kesselring* involved the liability of a broker for alleged misrepresentations and nondisclosures in the sale of a business' assets to the plaintiffs. In language far more explicit than that at issue here, the Asset Purchase Agreement in *Kesselring* provided:

> Purchaser [ ] acknowledges that Purchaser is relying solely on Purchaser's own inspection of the Seller's Business Assets and the representations of the Seller, and not the Broker, with regards to * * * the value of the Assets being purchased * * *. * * * Purchaser agrees to look solely to Seller for relief and to hold Broker harmless in connection with all losses and damages caused Purchaser thereby.

Id. at 815 (quoting Agreement).

Despite the explicit "non-reliance" and "hold harmless" language, *Kesselring* held that the broker could not avoid liability for its own pre-contractual fraudulent misrepresentations.

> Our concern with Brokers' argument is that, if accepted, it would immunize Brokers from being held accountable for any of their misrepresentations, whether negligent or intentional. * * * If enforcement of paragraph 21 of this agreement will immunize brokers against liability for negligent and fraudulent misrepresentation, brokers will be encouraged

to use this immunity for their clients' benefit and conceal damaging information from buyers without fear of suit. This is in itself troubling.

74 S.W.3d at 815.

The Court of Appeals similarly refused to relieve a defendant of fraud liability based on disclaimers in a purchase contract in *Maples v. Charles Burt Realtor, Inc.*, 690 S.W.2d 202 (Mo. App. S.D. 1985). In *Maples*, a home purchaser sued a real-estate broker for fraud based on termite damage which the broker allegedly misrepresented and concealed. The broker argued that it was immunized from fraud liability by the following "exculpation clause" in the home-sale contract: "It is further understood that CHARLES BURT, Realtor, makes no guarantee or representation * * * as to the repair or condition of any of the buildings or improvements" located on the property. *Id.* at 212 (quoting contract).

Maples rejected this argument, stating broadly: "'***A party simply may not, by disclaimer or otherwise, contractually exclude liability for fraud in inducing that contract.***'" 690 S.W.2d at 212 (emphasis added), *quoting Slater v. KFC Corp.*, 621 F.2d 932, 935 (8th Cir. 1980) (Missouri law). *Maples* explained that the principles "well set forth" in a treatise "reflect this state's subscription" to the majority view:

> A provision in a writing that no representations were made to procure the contract, that neither party shall be bound by any representation not contained therein, that the writing contains the entire agreement or all the terms, and that there is no warranty not specifically set forth in it, or that the representee does not rely on representations by the other party, and

> expressly waives any claim on account thereof, does not, in most jurisdictions, preclude a charge of fraud based on oral representations or proof of what representations were made.

Id. at 212-13.

Numerous other cases – including cases involving real-estate sales – also recognize this principle: a party may not use the provisions of a contract it fraudulently induced another party to enter to immunize itself from liability for that very fraud. *See, e.g., Werremeyer v. K.C. Auto Salvage Co.*, 2003 WL 21487311, at *4 (Mo. App. W.D. June 30, 2003), *aff'd in relevant part*, 134 S.W.3d 633 (Mo. 2004) (also quoting *Slater*); *Wagner v. Uffman*, 885 S.W.2d 783, 786 (Mo. App. E.D. 1994) (fraud claim against home sellers; "A party may not contractually exclude oneself from fraud through the use of general disclaimers."); *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 839 (Mo. App. E.D. 1991) (statement in purchase contract that car sold "as is," and contract's "entire agreement" provision, properly excluded from evidence in fraud action; "a defense to this type of fraud action cannot be predicated upon the contract by which the sale of the car was made"); *Lollar v. A.O. Smith Harvestore Prods., Inc.*, 795 S.W.2d 441, 448 (Mo. App. W.D. 1990) (refusing to allow defendant to escape fraud liability based on "boilerplate" statements of "general application" that buyer did not rely on seller's representations; "Missouri law [ ] holds that a party may not, by disclaimers or otherwise, contractually exclude liability for fraud in inducing such contract."); *Slusher v. Jack Roach Cadillac, Inc.*, 719 S.W.2d 880, 882 (Mo. App. W.D. 1986) (defendant relies on "as is" clause in contract for purchase of used car; holding that "a defense to an action

for fraud in the sale of an automobile could not be predicated upon the contract by which the sale was made"; recognizing that "as is" clause merely reflects buyer's "agree[ment] to accept the van without further warranties," and that clause "was concerned only with whether or not [the seller] would be responsible for future repairs"); *Koch v. Victoria Loan Co.*, 652 S.W.2d 212, 215 (Mo. App. E.D. 1983) (sale of apartment complex; contractual provision disclaiming seller's responsibility for representations not contained in written agreement "does not apply to fraudulent representations made for the purpose of inducing a party to enter into such contract"; citations omitted).

As recognized in *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002), Chase's attempt to rely on an as-is/no representations provision essentially turns that provision into a release of the buyer's (then-unknown) fraud claims. *See, id.* at 816. But Missouri caselaw has long recognized that fraud in the inducement can render a release voidable. *See, e.g., Nelson v. Browning*, 391 S.W.2d 873, 877 (Mo. 1965); *Watson v. Bugg*, 280 S.W.2d 67 (Mo. banc 1955). Once again, these cases show that Chase cannot rely, *as a matter of law*, on the contract's provisions to preclude Mr. Hess from claiming fraud in the inducement of the real estate purchase agreement.

Chase argued in the Court of Appeals that this substantial body of Missouri caselaw was irrelevant, because the decisions involved claims of affirmative misrepresentations, rather than fraudulent non-disclosures, as in this case. But Chase is wrong on at least two fronts. First, fraudulent non-disclosure claims are simply a species of common-law fraud; where a duty to disclose exists (as the jury found here), "a person's failure to disclose information constitutes a positive misrepresentation."

Kesselring, 74 S.W.3d at 814; *see also, e.g.*, *Seidel v. Gordon A. Gundaker Real Est. Co.*, 904 S.W.2d 357, 361 (Mo. App. E.D. 1995) ("The affirmative duty to disclose and the failure to do so substitutes for the false representation element required in a fraud action."). There is no basis in Missouri law to distinguish fraudulent non-disclosure claims from affirmative misrepresentation claims for purposes of applying the caselaw cited above.

Second, Chase's attempt to distinguish the cases cited above suffers from a more fundamental defect: at least some of those cases *do* involve non-disclosure claims. *Artilla Cove*, 72 S.W.3d 291 (real estate seller's failure to disclose bowing basement wall); *Kesselring*, 74 S.W.3d 809 (business seller's failure to disclose that business in arrears on numerous trade accounts); *VanBooven*, 938 S.W.2d 324 (as in this case, finding that real estate sellers had duty to disclose floor damage caused by dog urine because sellers "had superior knowledge, which was not within the fair and reasonable reach of the plaintiffs"). The rule that a fraud-feasor cannot rely on provisions of a fraudulently procured contract to immunize itself from liability applies fully to fraudulent non-disclosure cases like this one.

Chase's argument boils down to the claim that it has the absolute legal right to defraud individuals to whom it sells property, with impunity, so long as the sales contract includes an "as is" clause. This troubling argument is not only nonsensical, but it is demonstrably contrary to established Missouri law. This Court should emphatically reject it.

2. *Ringstreet* is Plainly Distinguishable.

Chase's argument that it is immunized from liability – by the real estate contract which the jury found it fraudulently induced Mr. Hess to execute – relies virtually exclusively on *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713 (Mo. App. W.D. 1995).

If read as broadly as Chase proposes, *Ringstreet* would be inconsistent with *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002) and *Bening v. Muegler*, 67 F.3d 691 (8th Cir. 1995) (Missouri law), both of which were decided after *Ringstreet*, and both of which sensibly hold that a defendant who fraudulently induces a plaintiff to enter a contract cannot rely on provisions of that very contract to defeat the plaintiff's fraud recovery. Chase's reading of *Ringstreet* would also put that case into conflict with the numerous other cases cited *supra*.

But *Ringstreet* does not establish the broad propositions for which Chase contends, and is plainly distinguishable here. First, that case involved the purchase of a 153-unit apartment complex by a sophisticated commercial buyer, unlike Mr. Hess's home purchase. Further, the quotation from *Ringstreet* at pages 35-36 of Chase's Brief identifies two other, critical distinctions:

- First, "[t]he real estate contract clearly state[d] that Ringstreet agree[d] that 'it relies upon no warranties, representations or statements' by Respondents in purchasing the property." 890 S.W.2d at 724.

- Second, "Ringstreet was told prior to purchasing the Property that there had been one instance of pipes freezing," and based on that disclosure it "should have investigated the potential problem further." *Id.*

Neither of these critical factors exists here. *First*, Mr. Hess never contractually disclaimed reliance on Chase's pre-sale conduct or statements. *Second*, and equally important, Chase never told Mr. Hess *anything* about regulatory involvement with the property, which might have imposed upon him a duty of further inquiry.

Ringstreet was careful not to state broad legal principles. Instead, the Court emphasized that it found no duty to disclose by the seller only "given the particular circumstances herein and the specific provisions in the real estate contract entered into between the parties." 890 S.W.2d at 720.

Two more recent Court of Appeals decision expressly distinguish *Ringstreet* on these grounds. In *Artilla Cove Resort, Inc. v. Hartley*, 72 S.W.3d 291 (Mo. App. S.D. 2002), a couple bought a ten-unit resort at Table Rock Lake from the defendants. Only after the sale did the buyers learn that the resort's foundation suffered from severe cracking and structural problems, which had been artfully concealed behind a false plywood wall.

The contract in *Artilla Cove*, like the purchase documents here, expressly provided that the seller was making no representations. The *Artilla Cove* contract provided:

> BUYER acknowledges that neither SELLER nor any party or [sic] SELLER'S behalf has made, nor do they hereby make, any representations as to the past, present or future condition, income, expenses, operation or

any other matter or thing affecting or relating to the Property except as expressly set forth in this Contract.

Quoted at 72 S.W.3d at 298.

Artilla Cove held that the seller was not absolved from fraud liability by the "no representations" clause of the sale contract. *Artilla Cove* distinguished *Ringstreet* on grounds equally applicable here: (1) "In *Ringstreet* the buyer was given notice, upon inquiry, that pipes had frozen in the past."; and (2) "the representations clause in the 'as is' contract in *Ringstreet* was explicit in that its buyer agreed it was relying upon no warranties, representations, or statements of the seller." 72 S.W.3d at 299.

VanBooven v. Smull, 938 S.W.2d 324 (Mo. App. W.D. 1997), distinguished *Ringstreet* on similar grounds. *VanBooven* affirmed a fraud-by-nondisclosure judgment in favor of home purchasers, despite the fact that the purchase contract stated that "[t]he Buyers further acknowledge that they accept the property in its present condition and release the Sellers and the Sellers' Agents from all further responsibility regarding the condition of the property." Quoted at 938 S.W.2d at 329 (emphasis omitted). This Court concluded that "[t]his case is distinguishable from *Ringstreet*," based in part on the fact that, unlike in *Ringstreet*, "nothing said by the [sellers] alerted the [buyers] to the possibility of substantial damage to the carpet." 938 S.W.2d at 330.

Ringstreet is distinguishable here for the same reasons the Court of Appeals distinguished it in *Artilla Cove* and *VanBooven*. Chase's reading of *Ringstreet* must be rejected, because it would throw that decision into direct conflict with a well-established principle of Missouri law: having fraudulently induced Mr. Hess to enter into the

purchase agreement, Chase cannot rely on that very agreement to immunize itself from fraud liability.

3. This Court Must Also Reject Chase's Claim that the "As-Is" Clause Defeats Mr. Hess' Right to Rely on Chase's Fraudulent Actions as a Matter of Law.

Chase also suggests that the contract's "as-is"/"no representations" clause defeats Mr. Hess' right to rely on Chase's statements or conduct. Br. at 36-37.

Missouri courts have repeatedly rejected Chase's suggestion that the "as is" clause defeats Mr. Hess' right to rely. *See, e.g., Werremeyer v. K.C. Auto Salvage Co.*, 2003 WL 21487311, at *5 (Mo. App. W.D. June 30, 2003), *aff'd in relevant part*, 134 S.W.3d 633 (Mo. 2004) ("an 'as is' clause in [a] used car sales contract is irrelevant to whether the buyer relied on the seller's representations"); *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834, 839 (Mo. App. E.D. 1991) ("If the 'as is' clause is not relevant to show [that no] representations were made in a fraud action, it follows that the clause cannot be a basis for showing [non-]reliance on those representations.").

Volker Court, LLC v. Santa Fe Apartments, LLC, 130 S.W.3d 607 (Mo. App. W.D. 2004), cited in Chase Br. at 37, is completely distinguishable. In that case the plaintiff alleged that a letter from one partner fraudulently represented that it was a binding offer to sell a piece of real estate, even though that very letter expressly stated that another partner's approval would be required for any sale, and that the other partner "doesn't want to sell it." *Id.* at 610. These circumstances – involving a "representation" that itself specifically contradicts the plaintiff's interpretation – is completely different

from the present situation, in which Chase contends that the transaction documents it fraudulently induced Mr. Hess to execute absolved it from liability for its *earlier* non-disclosure.

Thus, contractual disclaimers are legally irrelevant to whether a purchaser had a right to rely on a seller's fraudulent conduct or statements. But even if this rule did not exist, at a bare minimum, the effect of the "as is" clause on Mr. Hess' right to rely on Chase's non-disclosure would have presented a jury issue. This is based on the more general principle that "'[i]n Missouri, in an action for fraud, it is for the jury to decide whether a party is entitled to rely on the verbal representations that conflict with a written agreement.'" *Werremeyer v. K.C. Auto Salvage Co.*, 2003 WL 21487311, at *4 (Mo. App. W.D. June 30, 2003), *aff'd in relevant part*, 134 S.W.3d 633 (Mo. 2004), *quoting Slone v. Purina Mills, Inc.*, 927 S.W.2d 358, 373 (Mo. App. W.D. 1996); *see also Koch v. Victoria Loan Co.*, 652 S.W.2d 212, 216 (Mo. App. E.D. 1983) (contract for sale of apartment complex; despite "as is" clause, and provision stating that seller would not be bound by representations outside written contract, Court found that "the jury was empowered to weigh the facts as to whether Koch had a right to rely on the representations made to him."); *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1264 (8th Cir. 1994).

In finding for Mr. Hess on his fraud claim, the jury was required to find that, in relying on Chase's non-disclosure, "plaintiff used that degree of care that would have been reasonable in plaintiff's situation." SLF8. Chase does not even argue that there was insufficient evidence to support the jury's finding that Mr. Hess was entitled to rely on

Chase's conduct. Any such argument would be meritless. As explained in the Statement of Facts in Mr. Hess's Opening Brief, the evidence showed that USEPA's involvement with the property was not reasonably discoverable by a buyer inspecting the property. Tr. at 973-74; 997; 1010; 1021; 1040. Moreover, even Chase's own REO Specialist acknowledged that "it would be illegal" for Chase not to disclose this involvement if Chase knew of it, despite the disclaimers in the contract documents. SR127. Other real-estate brokers also testified that disclosure of such a material condition was required, despite the "as is"/"no representations" clause. Tr. at 977-79; 982-83; 1025-26; 1042-44; 1095-99.[8] Clearly, the jury could have found – and *did* find – that Mr. Hess could reasonably rely on Chase's fraudulent non-disclosure, whatever the provisions of the purchase documents.

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[8] This testimony from experienced area real-estate brokers, as well as Mr. Hess's own testimony that he expected disclosures of known adverse conditions despite the contract's provisions, Tr. 1208-09, defeat Chase's wholly unsupported contention that "Plaintiff's background and experience as a home inspector and real estate agent should have made him particularly cognizant that the terms of the deal * * * precluded him from reliance on Chase's silence." Chase Br. at 37.

III. The Court of Appeals Properly Held that the 2000 Amendments to the Merchandising Practices Act Must Be Applied in This Case.

A. This Court's Decision in *Wilkes* Is Controlling.

Mr. Hess showed in his Opening Brief (at 34-40) that the Court of Appeals properly recognized that *Wilkes v. Missouri Highway & Transportation Commission*, 762 S.W.2d 27 (Mo. 1988) is controlling here: as in this case, *Wilkes* involved a plaintiff who, at the time of the damage-causing act, had no right to sue the defendant for its conduct, even though the defendant's conduct violated standards of conduct in effect at the time. As in this case, in *Wilkes* a post-injury statutory amendment "provide[d] a remedy for a cause of action whose remedy was previously barred"; this Court concluded that the amendment was "procedural or remedial," and therefore could be applied to the present lawsuit without violating Article I, § 13. 762 S.W.2d at 28.

This Court followed the result in *Wilkes* in *Mispagel v. Missouri Highway & Transportation Commission*, 785 S.W.2d 279 (Mo. 1990), which emphasized yet again that a statute which merely authorizes suit to enforce existing rights is *not* substantive, even though any lawsuit on those rights was previously barred:

> Such statutes do not create new rights, but simply confer an authority to sue that has been previously lacking. The legislature may confer authority to sue on existing claims.

Id. at 281; *accord, Oldaker v. Peters*, 817 S.W.2d 245, 250 (Mo. 1991) (following *Wilkes*; emphasizing that statute authorizing suit on pre-existing rights "neither created, modified nor abrogated a substantive duty").

As Mr. Hess showed in his Brief (36-38), the decisions in *State Division of Family Services v. Slate*, 959 S.W.2d 944 (Mo. App. E.D. 1998), and *Gunter v. Bono*, 914 S.W.2d 437 (Mo. App. E.D. 1996), recognize the same distinction as in *Wilkes* – a statute is not "substantive" if it merely authorizes suit for underlying, substantive rights which existed prior to the recognition of a litigation remedy. Chase claims that *Gunter* is distinguishable because it merely "removed a temporal limitation" on the right to sue for recovery on a note. Br. 60. But that distinction is meaningless – the fact is that, like here, *but for the later statutory amendment* the corporate plaintiff in *Gunter* had no ability to enforce its rights in court; the court nevertheless held a statute allowing a judicial remedy to be "procedural," because it "merely provides a legal channel through which this long-standing right may be vindicated." 914 S.W.2d at 441. Similarly, while the plaintiff in *Slate* may have had a pre-existing, substantive right to child support, until the statutory enactment in issue the plaintiff did not have "a method of enforcing the right" in court. 959 S.W.2d at 944. Chase's claim that the amendment in *Slate* "did not create an illegitimate child's right to retroactive support," Br. 60, proves Mr. Hess's point – the 2000 amendment to the MPA "did not create Mr. Hess's right to be free of deceptive merchandising practices," either.

If anything, Mr. Hess's position is *stronger* than that of the plaintiff in *Wilkes* or its progeny – while in *Wilkes* the State was apparently protected by sovereign immunity from suit *by anyone* over a defective highway condition, in this case Chase *was* subject to suit at the time of the real-estate transaction by the Attorney General, a suit in which materially similar remedies to those later afforded Mr. Hess were available. Moreover,

unlike in *Wilkes* (where suits against the sovereign were unknown at common law), Chase was also subject to a common-law fraud action by Mr. Hess prior to the 2000 amendments.

Chase struggles in vain to distinguish *Wilkes*. But none of its suggested distinctions are persuasive. First, Chase argues that *Wilkes* is distinguishable because it involved a waiver of the State's sovereign immunity. Br. 55-56. But it gives no reason why this supposed "distinction" matters – like the *Wilkes* plaintiff, Mr. Hess was injured by actions which violated existing standards of conduct, but was at the time barred from personally enforcing his rights.[9]

Chase then argues that Mr. Hess did not have a present "cause of action" in 1999 within the meaning of *Wilkes* because, at that time, "he could not bring a proceeding for a violation of the Act in connection with that purchase, and had no legal entitlement to relief under its terms, nor did he have a basis for suing under the Act." Br. 56-57. But ***each of these statements applies equally to the plaintiff in Wilkes*** – that individual

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[9] Chase argues in a footnote (Br. 58 n.6) that waivers of sovereign immunity are subject to a different retroactivity analysis than other statutes. But *Wilkes* draws no such distinctions – it proceeds on the understanding that the State was entitled to the protections of Article I, § 13 to the same degree as any other person or entity, and it cites retroactivity caselaw (including, *e.g.*, *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986)) having nothing to do with sovereign-immunity waivers.

likewise "could not bring a proceeding," "had no legal entitlement to relief," and had no "basis for suing," until *after* the accident. Despite the fact that *no remedy whatsoever* was available in *Wilkes* at the time of the injury-causing accident, this Court concluded that the post-accident statutory amendment merely "provide[d] a remedy for a cause of action *whose remedy was previously barred*," and could therefore apply to Wilkes's case.

Chase next argues that in this case, unlike *Wilkes*, the 2000 amendment to the MPA "*defines* the cause of action," and conditions Mr. Hess's ability to recover. Chase Br. 57. But the same could be said for the statute waiving sovereign immunity for the *Wilkes* plaintiff's claim: § 537.600, the sovereign-immunity waiver at issue in *Wilkes*, likewise "defines" and "conditions" the remedy available under the post-accident statutory amendments, including by defining the elements of the cause of action itself. Indeed, the statutory amendment in *Wilkes* for the first time created a special defense for claims for dangerous highway conditions: the State cannot be liable if the highway was constructed before September 12, 1977, and the "design reasonably complied with highway and road design standards generally accepted at the time." § 537.600.1(2), RSMo. Chase's claim that the MPA amendments at issue here are somehow different in kind from the amendments at issue in *Wilkes* is meritless.

Chase's desperate attempts to distinguish this case from *Wilkes*, or from the other Missouri cases to like effect, are futile; as the Court of Appeals found, *Wilkes* is controlling, and mandates that Mr. Hess be allowed to recover under the Merchandising Practices Act.

B. The 2000 Amendments to the MPA Did not Alter the Statute's Substantive Reach, since they Do not Expand the Protected Class or the Covered Transactions, or Alter the Substantive Standards of Conduct to which Chase Was Already Subject.

The bulk of Chase's non-retroactivity argument hinges on a single point: that the 2000 amendments to the MPA subjected it to liability "to individuals under the Act *for the first time*." Br. 55 (emphasis original).

Chase's argument ignores that all of the substantive elements of Mr. Hess's claim were in place at the time Chase defrauded him in April 1999:

- the *substantive standard of conduct* already existed: § 407.020.1, RSMo already prohibited Chase from "the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise";
- the *class protected* by the statute already existed, namely any person entering such a transaction with Chase in the State of Missouri; and
- the *transactions covered* were already defined to include any sale of merchandise "in trade or commerce," § 407.020.1, RSMo.

Moreover, Chase was *already subject to enforcement action* for its violation of Mr. Hess's rights under the MPA, in a suit by the Attorney General in which materially similar remedies were available. *See* Hess Opening Br. at 40-44.

In these circumstances, Chase's repeated claim that the 2000 amendments "*created* a cause of action," *e.g.*, Br. 42 (emphasis original), rather than simply affording an additional remedy for an *existing* cause of action, ring hollow.

While Chase claims at various points that the 2000 amendments to the MPA subjected it to liability "to individuals under the Act *for the first time*," Br. 55 (emphasis original), Chase elsewhere itself recognizes that its violation of its statutory duty not to deceive Mr. Hess was already subject, *in 1999*, to "another means of enforcement" – namely, suit by the Attorney General. Chase Br. at 59. This is precisely *Mr. Hess's* point – the private remedy afforded by the 2000 MPA amendments merely supplemented the existing enforcement mechanisms in place for *the identical violation* – this is emphatically *not* a case where Chase's violation of its statutory obligations was "remedy-free" at the time it occurred.[10] For the same reasons, Chase's claim that "the amended

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[10] Chase cites cases refusing to find an *implied* private right of action where a statutory violation is already subject to "another means of enforcement." Chase Br. at 59 (citing *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662 (Mo. 1999); *Johnson v. Kraft Gen. Foods, Inc.*, 885 S.W.2d 334 (Mo. 1994); *R.L. Nichols Ins., Inc. v. Home Ins. Co.*, 865 S.W.2d 665 (Mo. 1993)). But this is completely beside the point – Mr. Hess does not seek to prosecute any *implied* private remedy, nor does he argue that an implied private remedy existed in 1999. What Mr. Hess does argue is that the *express* private remedy afforded him by the 2000 amendments is remedial or procedural and

statute expanded the class of individuals with a cause of action under the act," Br. 48, is irrelevant – while the amendment may have expanded the class of individuals *entitled to seek a remedy* for Chase's violation of the MPA, the Act *already* protected Mr. Hess and others similarly situated from exactly the type of fraud Chase perpetrated, and *already* provided a remedy for such fraud.[11]

Chase claims that Mr. Hess "cite[d] no case law to support the notion" that Chase's violation of *existing substantive standards of conduct* is relevant to the retroactivity issue, and argues to the contrary that the fact that it violated the MPA *as it existed in April 1999* "has no bearing" on the retroactivity issue, and is "immaterial." Br. 49-50, 51. Chase apparently did not read Mr. Hess's Opening Brief: that Brief showed in detail that the fact that a statute merely supplements or modifies the remedies available

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therefore applies to this case, because the 2000 amendments merely provided "another means of enforcement" (Chase Br. 59) of Chase's pre-existing duties.

[11] For the same reasons, Chase's claim that, in 1999, the statute only provided a "general right of the public at large to be free from the condition prohibited," Br. 49, ignores that the statute was plainly directed toward the protection of the rights of *individual* Missourians like Mr. Hess, and provided remedies for violation of the rights *of those individuals*. *See, e.g.*, § 407.100, RSMo (providing Attorney General the right to seek restitution and other remedies for individuals aggrieved by violations of the Act).

for existing statutory violations renders the amendment a "procedural" or "remedial" one subject to immediate application in pending cases. *See* Hess Opening Br. at 32-40.

C. Chase Enjoyed no "Vested Right to Be Free from Suit."

Chase's Brief attempts to liken its position to that of a party who had previously settled a claim, or as to whom a statute of limitations had expired; in *those* situations, this Court has held that a later statute "cannot be applied to resuscitate a cause of action that has already expired." Chase Br. 53-54, citing *Beck v. Fleming*, 165 S.W.3d 156 (Mo. 2005); *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338 (Mo. 1993); *Files v. Wetterau, Inc.*, 998 S.W.2d 95 (Mo. App. E.D. 1999); *State ex rel. Wade v. Frawley*, 966 S.W.2d 405 (Mo. App. E.D. 1998).

The obvious answer to this caselaw is that Chase was *actually subject to suit under the MPA*, in an action in which *materially similar remedies were available*, at the time the legislature amended the MPA in 2000, and at the time Mr. Hess filed this lawsuit in April 2000. Chase was also subject to liability to Mr. Hess directly in a common-law fraud action. Chase's claims that, prior to the 2000 amendments, it had a "vested right to be free from liability *to an individual*," Br. 61 (emphasis added), and that Mr. Hess was "entitled to no remedy," Br. 64, ignores both Mr. Hess's pre-existing common-law remedy, *and* the fact that any suit by the Attorney General would be directed at remedying Chase's misconduct *toward Mr. Hess*, and providing relief (at least in part) *to Mr. Hess*, not to "the public generally."

Clearly, neither the Attorney General, nor Mr. Hess, were time-barred in April 2000 from filing suit over an April 1999 real-estate transaction, and Chase does not claim

that it had entered a binding agreement with the Attorney General releasing any claims. Chase's reliance on the caselaw barring the resurrection of time- or release-barred claims is unavailing. *See, e.g.*, *Doe*, 862 S.W.2d at 341 ("Until [claim became time-barred], the defendants had no vested rights to the original statutes of limitation because the requisite time period had not yet run."). Chase simply had no "vested right to be free from suit," and its reliance on the *Doe*, *Beck*, *Wade* and *Files* decisions proves nothing.

D. The Private Remedy Afforded by the 2000 Amendments Did not Create New Obligations or Impose New Duties on Chase, but Merely Supplemented the Existing Remedies Available for Chase's Misconduct.

Chase repeatedly claims that the 2000 amendments "create[d] a new obligation[s]," "impose[d] new duties," or "attache[d] new disabilities" to Chase's fraudulent conduct. Br. 43, 46, 61-62; *see also, e.g.*, Br. 49 (claiming that 2000 amendment "'created and defined' the rights of purchasers and lessees of real estate with respect to violations of the Act").

As Chase itself recognizes, however, the distinction between "substantive" and "remedial" legislation focuses on whether a statutory amendment affects the primary conduct of individuals or entities outside the courtroom, or instead merely alters the process for vindicating underlying rights:

> Substantive law creates, defines and regulates rights; procedural law prescribes a method of enforcing rights or obtaining redress for their invasion. The distinction between substantive law and procedural law is

> that substantive law relates to the rights and duties giving rise to the cause of action, while procedural law is the machinery used for carrying on the suit.

Cook v. Newman, 142 S.W.3d 880, 893 (Mo. App. W.D. 2004) (*en banc*) (citations omitted), quoted in Chase Br. at 47.

What Chase stubbornly refuses to admit, however, is that the remedy afforded Mr. Hess under the 2000 amendments plainly falls on the "procedural" or "remedial" side of this divide – the 2000 amendments made absolutely no change to "the rights and duties giving rise to the cause of action," but merely "prescribed a method of enforcing rights or obtaining redress for their invasion" that supplemented the *existing remedies* in place at the time of Chase's actions.

E. Chase Had no "Vested Right" in a Particular Level of Damages Exposure, or in Being Subject to Suit only by the Attorney General.

As Mr. Hess explained in his Opening Brief (at 33, 40-41, 47), a large number of Missouri cases expressly hold that amendments to the measure of damages, or other procedures which affect a plaintiff's scope of recovery or a defendant's financial exposure, are remedial, *not* substantive, since they do not alter the underlying, primary substantive rights of the plaintiff or defendant. Those cases apply a more general principle recognized by this Court in *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656 (Mo. 1986), which held that a revision to the recoverability of punitive damages was remedial: "***No person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights***." *Id.* at 660 (emphasis added).

The cases recognizing that amendments to the measure of recovery in a lawsuit are "merely procedural" include:

- *Cook v. Newman*, 142 S.W.3d 880, 894 (Mo. App. W.D. 2004) (*en banc*) (post-malpractice increase in non-economic damages recoverable by plaintiff through operation of statutory inflation escalator "neither defines or regulates a plaintiff's right to compensation nor imposes or ascribes new or different legal effects to a defendant's conduct in violation of the constitutional proscription against retrospective laws")
- *Files v. Wetterau, Inc.*, 998 S.W.2d 95, 98 (Mo. App. E.D. 1999) ("Missouri courts have interpreted statutes that affect a measure of damages as remedial.")
- *American Family Mut. Ins. Co. v. Fehling*, 970 S.W.2d 844, 851(Mo. App. W.D. 1998) (statute giving trial court discretion to disallow Division of Medical Services' recoupment of payments previously made to private party after third-party recovery merely procedural, although statute had the effect of diminishing DMS's relief: "The amended statute substituted a more appropriate remedy for the enforcement of DMS's existing right in its cause of action to recover public assistance benefits paid.")
- *Estate of Pierce v. State of Mo. Dep't of Social Servs.*, 969 S.W.2d 814, 822-23 (Mo. App. W.D. 1998) (statute amending Department of Social Services ability to recover benefit payments previously made from third-party recoveries merely procedural; similar language to *Fehling*, *supra*)

- *Leutzinger v. Treasurer of Mo. Custodian of Second Injury Fund*, 895 S.W.2d 591, 594 (Mo. App. E.D. 1995) (characterizing statute which liberalized standards for injured worker's recovery from Second Injury Fund to be a "remedial statutory provision[ ]," which "should be applied retroactively to pending cases")
- *Croffoot v. Max German, Inc.*, 857 S.W.2d 435, 436 (Mo. App. E.D. 1993) (statute amending recoverability of prejudgment interest merely procedural, since it "affects only the measure of damages in the enforcement of that right" to compensation for injuries)

Chase claims that *Croffoot* and *Estate of Pierce* are distinguishable, because "an amended statute was applied retroactively to *reduce* the plaintiff's recovery." Br. 64. But those cases are not so limited – they state generally that laws which merely "substitute a more appropriate remedy" for an existing one, or which "affect[ ] only the measure of damages," are procedural and must be applied to pending cases.[12]

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[12] *Croffoot* did not "make clear that a different result would obtain if the amended statute had increased the defendant's liability," as Chase claims. Chase Br. 65. While *Croffoot* acknowledged and paraphrased the holding of *State ex rel. St. Louis-San Fran. Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974), *see Croffoot*, 857 S.W.2d at 436, it never suggested that its ruling (that amendments to a "measure of damages" were procedural) applied only where such amendments *reduced* a plaintiff's recovery.

As against these many decisions, Chase argues that the Court of Appeals "overlook[ed] the controlling case" of *State ex rel. Webster v. Cornelius*, 729 S.W.2d 60 (Mo. App. E.D. 1987), which held that the 1985 amendments to the MPA, authorizing the Attorney General's recovery of attorneys fees and a 10% penalty, could not be applied retroactively. However, as Mr. Hess explained, *Cornelius* is distinguishable because it involves penalties payable to the State. Hess Br. 46. Further, *Cornelius* involved statutory enactments which, for the first time, subjected violators to sanctions *Cornelius* deemed punitive, whereas "Appellants' acts at the time of commission were subject to liability only in the amount of normal court costs and restitution for any ascertainable losses." 729 S.W.2d at 66. Here, in contrast, Chase was *already* subject to punitive sanctions in a suit by the Attorney General when the 2000 amendments were enacted, besides its liability directly to Mr. Hess in a common-law fraud action. *See* Hess Br. 40-44, and *infra* § III.F.

More fundamentally, *Cornelius* cannot be read to brand *any* statutory change to the measure of recovery a "new disability," and hence subject to prospective-only application, since that outcome would be inconsistent with this Court's decisions in *Vaughan* and *Wilkes*, and with the Court of Appeals decisions described above. Each of those cases reaches the opposite conclusion – statutes amending the measure of recovery in an action to enforce pre-existing rights are merely remedial, and *can* be applied retroactively.

Chase's reliance on *State ex rel. St. Louis-San Fran. Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974), founders for the same reason – while *Buder*'s general statement of

the legal standards governing the retroactivity analysis continues to be cited, later cases have rejected the principle Chase derives from *Buder*: that *any* upward revision to a damages measure is necessarily substantive and therefore barred from application to pending cases. Chase Br. 52-53. Instead, more recent cases hold that "[n]o person may claim a vested right in any particular mode of procedure for the enforcement or defense of his rights," *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986), and, in particular, that revisions to measures of damages, or authorization to sue on claims previously barred, are procedural, *not* substantive. *See Estate of Pierce v. State of Mo. Dep't of Social Servs.*, 969 S.W.2d 814, 823 n.2 (Mo. App. W.D. 1998) (recognizing that, if read as Chase proposes, *Buder* would not "be fully consistent with subsequent Missouri Supreme Court cases which hold that amendments to remedial statutes are to be retroactively applied"; citing *Wilkes, Vaughan*).

Significantly, *Buder* interpreted an amendment modifying the wrongful death statute. Unlike here, the wrongful death cause of action has no common-law analogue, nor does a parallel State civil enforcement remedy exist. *Buder*'s holding should be limited to the wrongful-death statute which it actually interpreted as "operat[ing] to protect defendants from verdicts in excess of a certain maximum." 515 S.W.2d at 411.

These same considerations distinguish *State Board of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564 (Mo. App. W.D. 1991), and *Wellner v. Director of Revenue*, 16 S.W.3d 352 (Mo. App. W.D. 2000), which followed *Warren*. Chase Br. 62-63. Moreover, both *Warren* and *Wellner* involved statutory amendments which for the first time authorized the award of attorneys fees against the State in particular

proceedings. Both cases emphasized this fact – which has no relevance here – in refusing to apply the fee-shifting statutes to pending cases. *See Wellner*, 16 S.W.3d at 354 (emphasizing that "[s]tatutes waiving sovereign immunity must be construed strictly"); *Warren*, 820 S.W.2d at 566 (emphasizing that "statutory authority is essential to obligate a sovereign for payment of attorney fees"; finding statute substantive because it "imposed new obligations on the state by eliminating an immunity that it previously enjoyed").[13]

Chase also cites *Garrett v. Citizens Savings Association*, 636 S.W.2d 104 (Mo. App. W.D. 1982), for the proposition that Missouri law bars the application of a statute increasing a penalty to pending cases. As an initial matter, and as the Court of Appeals found (Op. 21), the 2000 amendments did not increase Chase's exposure to punitive sanctions. *See also* Hess Opening Br. at 43; *infra* § III.F. Moreover, *Garrett* refused to apply a double-damages statutory amendment retroactively *because the statute expressly said so*: "the legislature clearly intended * * * the double damages provision to apply

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[13] Chase characterizes Mr. Hess's distinction of *Wellner* on this basis as "feebl[e]," Br. 62, since *Wilkes* also involved a sovereign immunity waiver. But *Wilkes*'s analysis did not turn on the sovereign-immunity waiving nature of the statutory amendment before it. If anything, one can reasonably question whether *Wellner* and *Warren* – both of which find waivers of the State's immunity *for attorneys fees* to be "substantive" – can be squared with this Court's decision in *Wilkes*, which held that waiver of a *complete immunity from suit* was merely procedural.

only to loans procured '[a]fter January 1, 1975' * * *." 636 S.W.2d at 111-12 (quoting statute). The 2000 MPA amendments contain no similar, express statutory mandate for prospective-only application.

F. Chase Was Subject to Substantially Similar Remedies prior to the 2000 Amendments.

1. Restitution/Actual Damages.

Chase complains that Mr. Hess "apparently assume[s] that actual damages are the equivalent of restitution * * *." Chase Br. at 65. But Chase never responds to Mr. Hess's citation of *State v. Polley*, 2 S.W.3d 887, 891-92 (Mo. App. W.D. 1999), which held that the "plain and inclusive language of the statute" could include recovery, as "restitution," of a victim's consequential damages. Hess Opening Br. at 44 n.6; *see also*, *e.g.*, *State v. May*, 689 A.2d 1075, 1077 (Vt. 1996) (collecting cases from multiple jurisdictions holding that crime victim's proven lost profits may be recovered as "restitution"). Mr. Hess's reasonably foreseeable damages, such as his construction of a home on the property or the cost of studies to fully delineate the extent of contamination, fall within the existing statutory authorization.

2. Attorneys Fees.

As Mr. Hess explained in his Opening Brief (at 42), in 1985 the MPA was specifically amended to expand the scope of the litigation expenses recoverable by the Attorney General: while prior law had only authorized the Attorney General "to recover costs for the use of this state," Historical and Statutory Notes to § 407.130, RSMo, the statute was amended to provide that "the attorney general is entitled to recover as costs,

in addition to normal court costs, the costs of investigation and prosecution of any action * * *." § 407.130 (emphasis added).

Given that existing law gave the Attorney General the right to recover his attorneys fees, the 2000 amendment applying that remedy in private suits over real-estate transactions did not materially alter Chase's pre-existing liability.

Chase claims that § 407.130 does not give the State the right to recover its fees, citing two cases for the proposition that "'the term "costs" as used in a statute does not include attorneys' fees, with certain exceptions.'" Br. 70. But the two cases Chase cites merely hold that a statute's generic reference to the term "costs," without elaboration, should not be read to include attorneys fees. *State ex rel. Cain v. Mitchell*, 543 S.W.2d 785, 786 (Mo. banc 1976) (construing § 472.040, RSMo); *Wirken v. Miller*, 978 S.W.2d 60, 63 (Mo. App. 1998) (construing § 211.281, RSMo).

The 1985 amendment to the MPA specifically provides that "the costs of investigation and prosecution of any action" may be recovered "***in addition to normal court costs***." (Emphasis added). Given the statutory language, cases defining the scope of "normal court costs" are simply inapplicable here – *this* statute explicitly authorizes recovery *beyond* such "normal court costs." Notably, other Missouri cases have held that a statute authorizes the award of attorneys fees even though the term "attorneys fees" is not employed in the statute, where statutory wording beyond a simple reference to "costs," or the structure of the enactment, suggest that this was the legislative intent. *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 251-52 (Mo. 2003) (attorneys fees fall within "whole cost of the proceedings" which may be awarded under § 287.560,

RSMo, against party which litigates workers compensation proceeding "without reasonable ground"); *L.R.R. v. Christian Family Servs., Inc.*, 620 S.W.2d 14, 15 (Mo. App. E.D. 1981) (interpreting "costs" in § 211.462, RSMo to include attorneys fees, where statute provides for appointment of counsel to indigent litigants).

The Court of Appeals properly held (Op. 21) that the 1985 amendments to the statute unambiguously authorized the Attorney General to recover his attorneys fees for any enforcement action, and that the 2000 amendment did not materially alter Chase's liability exposure in this regard.[14]

3. Penalties/Punitive Damages.

Chase argues at length that the 2000 amendments must be applied prospectively because they are purportedly punitive. However, as Mr. Hess explained in his Opening Brief (at 42-43), this Court's decision in *Vaughan v. Taft Broadcasting Co.*, 708 S.W.2d 656, 660 (Mo. 1986), labeled punitive damages "remedial" for purposes of a retroactivity analysis. While Chase seeks to turn *Vaughan* into a "one-way ratchet" (*i.e.*, "punitive

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[14] Notably, even one of the cases on which Chase heavily relies recognizes that the 1985 amendments to the MPA authorized the State to recover "[t]he expenses of prosecution and investigation, *which included attorney fees* and a 10% addition to any award made * * *." *State Bd. of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564, 566 (Mo. App. W.D. 1991) (emphasis added).

damages are remedial to a plaintiff, but substantive to a defendant"), nothing in the opinion is so limited.[15]

In any event, as Mr. Hess further explained in his Opening Brief (at 43), Chase was *already* subject to uncapped punitive sanctions in any action by the Attorney General, as well as punitive damages liability on the common-law fraud theory available to Mr. Hess personally. Br. 43. Chase seeks to minimize the scope of the statutory sanctions to which it was subject, arguing that the uncapped discretion afforded the trial court under § 407.140.3, RSMo, was merely "intended to give the court some flexibility to award an amount that is not strictly ten percent of the restitution award." Chase Br. 69. Chase proposes no limit to the trial court's statutory authority, however, and none appears in the statute itself. While Chase refers to federal constitutional constraints on the court's power, Br. 69-70, those same constraints will apply to any punitive damages awarded Mr. Hess – the two remedies are not *distinguishable* on that basis. Further, the fact that trial courts in other cases may have awarded only a 10% penalty (a fact noted –

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[15] Chase's citation to federal due process considerations should not be considered, since it was not raised in the Court of Appeals. *See infra* § III.G.1. This rule should be applied with special force to constitutional arguments, which this Court has stressed must be raised and developed at the first available opportunity. *See*, *e.g.*, *Hollis v. Blevins*, 926 S.W.2d 683, 683 (Mo. 1996); *see also*, *McCormack v. Capital Elec. Construc. Co.*, 159 S.W.3d 387, 404-05 (Mo. App. W.D. 2004).

but not substantively addressed – in the appellate cases cited in Chase Br. at 70) plainly does not somehow limit the broad scope of the trial court's discretion under the statute.

G. The Court of Appeals Properly Remanded the Case Solely for a Determination of Mr. Hess's Recoverable Damages and Attorneys Fees.

1. Chase Did not Argue in the Court of Appeals that Mr. Hess Had Failed To Prove Chase's MPA Liability, and Cannot Do so for the First Time Here; the Evidence Plainly Established All Necessary Elements of an MPA Claim in any Event.

For the first time in this Court, Chase argues that, even if the 2000 MPA amendments are applicable here, Mr. Hess has not proven Chase's liability under the statute. Br. 72.

Chase's argument comes too late. Mr. Hess argued at length in his Court of Appeals Brief that the jury's verdict on his fraud claim also established Chase's liability under the MPA. Chase did not respond. Thus, in the Court of Appeals, it was undisputed that if the 2000 MPA amendments applied to this case, Chase's liability under the Act had been established by the existing fraud verdict.

Rule 83.08(b) is crystal clear: a substitute brief filed in this Court following the grant of transfer "shall not alter the basis of any claim raised in the court of appeals brief." Under Rule 83.08(b), where an argument was not made before the Court of Appeals, "[t]his Court [ ] may not review the claim." *Blackstock v. Kohn*, 994 S.W.2d 947, 953 (Mo. 1999); *accord, Dupree v. Zenith Goldline Pharmaceuticals, Inc.*, 63

S.W.3d 220, 222 (Mo. 2002); *Linzenni v. Hoffman*, 937 S.W.2d 723, 727 (Mo. 1997). This Court should not permit Chase to raise new arguments it never gave the Court of Appeals the opportunity to consider.

Chase's argument is meritless in any event. Chase claims that the existing jury verdict does not establish whether or not Mr. Hess purchased his home "primarily for personal, family or household purposes" under § 407.025, RSMo. Br. 72. While Chase complains that it "had no reason or incentive to present evidence on the issue or to cross-examine plaintiff on the nature of his intentions at the time of his purchase," Br. 72-73, it points to nothing that would suggest that Mr. Hess bought the property for any reason other than to make it into his permanent residence. Mr. Hess testified to exactly this intention. *See, e.g.*, Tr. 1170-71 (property was "perfect," with acreage for Mr. Hess's girlfriend's horse); Tr. 1175 (testifying to his intention to live in the house while remodeling, and that he in fact did so for three years); Tr. 1176 (Mr. Hess's intention to build "[t]he home I've always fantasized about"). Chase's claim that Mr. Hess failed to establish its liability under the MPA is meritless.[16]

[16] Of course, even if Chase's argument had been preserved and had any merit (neither of which is true), it would justify a trial *only* of this allegedly "missing element."

2. Under this Court's Decision in *Scott v. Blue Springs Ford*, Mr. Hess Was Entitled to a Separate Jury Determination of Punitive Damages under the MPA; Chase's New Collateral Estoppel Argument Was Waived, and Is Meritless Anyway.

Mr. Hess showed in his Opening Brief (at 51-52) that this Court's decision in *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140 (Mo. 2005), established his right to an independent jury determination of punitive damages under the MPA – as *Scott* observed, although a jury had already assessed punitive damages under a common-law fraud claim, "[i]t would not be proper to assume that the same, or any, amount of punitive damages would be awarded for such [MPA] violations." *Id.* at 143.

Chase argues that the jury's failure to award punitive damages on Mr. Hess' fraud claim bars him from seeking punitive damages under the MPA, because the jury "necessarily f[ound] that Chase's conduct was not outrageous." Br. 73. But as Mr. Hess explained in his Opening Brief (at 51), the jury was instructed that, even if it found Chase's conduct outrageous, it could *still* decide, in its discretion, not to award punitive damages. SLF12. Chase does not respond. Nor could it: there simply was no jury "finding" as to the quality of Chase's conduct, that could somehow bar Mr. Hess from seeking punitive damages on remand.

Chase also argues that Mr. Hess should be barred from seeking punitive damages "by reason of collateral estoppel." Br. 74. But Chase made no such argument to the Court of Appeals, and that claim is accordingly barred under Rule 83.08(b). *See* § III.G.1, *supra*. But even if it were preserved, collateral estoppel would only apply "as

to the facts *actually decided*, and *necessarily determined* in rendering the judgment." *Trow v. Worley*, 40 S.W.3d 417, 422 (Mo. App. S.D. 2001) (citations and internal quotations omitted; emphasis added). Once again, the lack of any necessary, actual factual finding by the jury on the outrageousness of Chase's conduct defeats its collateral estoppel claim.

CONCLUSION

For the foregoing reasons, and those stated in Mr. Hess's Substitute Opening Brief, this case should be retransferred to the Court of Appeals for reinstatement of its Opinion. In the alternative, this Court should reverse the trial court's dismissal of Mr. Hess' Merchandising Practices Act cause of action, and remand that claim to the trial court for a jury determination of Mr. Hess' recoverable actual and punitive damages, and the court's determination of the attorney's fees to which Mr. Hess is entitled under § 407.025, RSMo. Following that determination, the trial court should be instructed to permit Mr. Hess to elect between the common law and statutory awards prior to the entry of final judgment. Because Chase's cross-appeal is meritless both procedurally and substantively, this Court should affirm the jury's fraud verdict.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND CERTIFICATE OF SERVICE

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 16,698 words, excluding the parts of the brief exempted by Rule 84.06(b).

This brief complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 13 point Times New Roman.

The diskette filed with the Court has been scanned for viruses and is virus free.

I further certify that on the 13th day of October, 2006, I served the foregoing Brief by e-mail, and served two copies by United States Mail, postage prepaid, on the following:

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