

IN THE SUPREME COURT OF MISSOURI

SUPREME COURT NO. SC92072

AMERICAN EAGLE WASTE INDUSTRIES, LLC, et al.,

Respondents/Cross-Appellants

v.

ST. LOUIS COUNTY, MISSOURI,

Appellant/Cross-Respondent

RESPONDENTS'/CROSS-APPELLANTS' BRIEF

APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY, MISSOURI

The Honorable Barbara Wallace, Division 13, Presiding

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JURISDICTIONAL STATEMENT

Respondents/Cross-Appellants American Eagle Waste Industries, LLC ("American Eagle"), Meridian Waste Services, LLC ("Meridian"), and Waste Management of Missouri, Inc. ("Waste Management") (collectively "Haulers"), filed this cross-appeal following Appellant St. Louis County, Missouri's (the "County") Notice of Appeal filed on October 4, 2011. In its Notice of Appeal, the County claimed the Supreme Court of Missouri has original jurisdiction over its appeal because the validity of a statute or provision of the Constitution of Missouri is at issue. Haulers did not agree with the County's assertion and filed Suggestions in Opposition to Defendant's Statement of Jurisdiction with this Court. Haulers also filed a Motion for Transfer that was denied by this Court on December 6, 2011. Haulers still believe that the County's appeal is more properly heard at this time by the Missouri Court of Appeals, Eastern District.

The County appeals the Circuit Court's Judgment awarding Haulers statutory damages as a result of the County's violation of Mo. Rev. Stat. § 260.247 (2008) ("§ 260.247"). The Circuit Court determined that the County violated § 260.247 by: (1) failing to provide Haulers the requisite certified notice two years prior to taking over the market in unincorporated St. Louis County, and (2) refusing to contract with Plaintiffs for the two-year waiting period for at least "the amount [Haulers] would have received for providing such services during that period."

In order to claim original appellate jurisdiction of this Court, the County asserts that the legislature's 2007 amendment of § 260.247 requiring the County's compliance violated the single subject requirement of Article III, § 23 of the Missouri Constitution.

As the Circuit Court properly determined, the County's procedural constitutional claim is time-barred pursuant to Mo. Rev. Stat. § 516.500 ("§ 516.500"). Moreover, the County never properly filed suit or counterclaimed to have the 2007 amendment to § 260.247 declared unconstitutional. Thus, no court has jurisdiction over such a claim. Finally, the County's argument that its time-barred procedural claim could serve as an affirmative defense to bar Plaintiffs' recovery is without merit.¹ As such, the validity of § 260.247 is not legitimately at issue in this case, thus depriving this Court of original appellate jurisdiction over this appeal pursuant to Art. V, § 3 of the Missouri Constitution.

¹ Haulers' arguments are fully briefed in point III, *infra*.

INTRODUCTION

Contrary to the amount of briefing in this Court, and despite the nearly four years of litigation, this case is simple. Pursuant to state law, the County was prohibited from entering the trash hauling market in unincorporated St. Louis County until it provided two years notice to existing haulers in that area. If the County wanted to enter the trash hauling market before the mandated two years expired, it was required to hire the existing haulers and pay them what they would have received had they continued to provide the service. It is undisputed that the County never complied with this law. Instead, the County took 40,000 of Haulers' customers and gave them to other private haulers. Haulers have not been compensated since their customers were illegally taken in 2008. The *uncontroverted* evidence in the record is that absent the County's illegal action, Haulers would have received over \$23 million in revenue.

The County's illegal actions were not inadvertent or simply a mistake. Instead, the County's actions were the result of a knowing and willful political calculation. The County's passage of the authorizing legislation for its waste collection program in 2006 prompted the Missouri General Assembly to amend § 260.247 to include the County in 2007. This amendment became effective on January 1, 2008. The County did not challenge the amendment and, even though it was directed specifically at the County and would directly affect any program the County would implement, the County did not seek clarification from a court as to whether the state law applied. Instead, the County sped up implementation of its plan.

In response to the County's actions, a bi-partisan group of St. Louis County state legislators sought an opinion from the Attorney General's Office as to the applicability of the new amendment to § 260.247 to the County. Before a single contract had been let, and before the statute of limitations on any procedural challenge to the amendment had passed, the Attorney General's office told the County that the new law applied to the proposed program. The County was put on notice that the new amendment could be considered a market regulation of statewide concern that would trump the County's assertion of charter power. Unfortunately, the County did not seek judicial clarification prior to ignoring the state law. Instead, the County publicly stated that the law did not apply to them. Again, before any contracts had been let, the same eight state legislators from St. Louis County publicly implored the County, in writing, to comply with state law. The County again ignored the warning and proceeded with implementation of its waste collection program. Prior to awarding the contracts in all but one of the monopoly trash districts, Haulers sued to try to stop the program. Undeterred, the County moved forward and began collecting trash in all eight districts the day before oral argument in the Court of Appeals. When the County lost the appeal in the fall of 2008, it refused stop the program and continued to press forward.

After four years of litigation in the St. Louis County Circuit Court, Missouri Court of Appeals, Missouri Supreme Court and United States District Court, the County still claims the laws of this state do not apply to them. The County still claims that it is entitled to permanently take Haulers' 40,000 customers, create monopoly trash districts and give Haulers' customers to other haulers without notice or recourse.

The County's claims that § 260.247 does not apply to its program have already been decided; the doctrine of law of the case prevents those claims from being relitigated in this Court. Even ignoring law of the case, the County's assertions that it can avoid all liability for its actions are without merit. The County's challenge to Haulers' uncontroverted evidence of lost revenue is without merit. The trial court found the testimony and calculations of Haulers' expert credible and reliable.

The trial court properly applied the measure of damages set forth in § 260.247 throughout this case. The trial on damages was limited to revenues, as was discovery. Accordingly, the Haulers presented uncontroverted evidence of the revenues they lost. Following trial, however, the trial court changed its mind regarding the measure of damages to be applied in the case. After admitting and relying upon Haulers' evidence, the trial court reduced Haulers' damages by ninety-five percent (95%). The trial court apparently believes that this amount represents the profit Haulers would have generated over the relevant two-year period. The problem, however, is that the trial court specifically precluded all discovery and evidence related to Haulers' profits; therefore, there was no evidence of profit or profit margin presented to the trial court. The trial court's unsupported factual determination cannot stand. Prior to the court's entry of its final order and judgment, the trial court properly determined the measure of damages to be revenues. The parties relied upon this determination in trying the case. Haulers put on competent and substantial evidence of over \$23 million in lost revenue. The record and the proper application of § 260.247 mandate judgment for Haulers for the amount of Haulers' lost revenue as proven at the trial of this matter.

STATEMENT OF FACTS²

In December 2006, the County made changes to its Waste Code. *See* Exhibit A. Key to these revisions was enabling language for the establishment of trash hauling districts in unincorporated County and authorization for the County Executive to solicit and award contracts for the collection of waste in those districts. Exhibit A, p. 56; Appellant's/Cross-Respondents' Appendix, p. A17. The new Waste Code provisions require that contracts be awarded to the most responsible bidder in each established district for a duration of three years. *Id.* Although the revisions to the Waste Code require that the districts be designated by January 15, 2008, the revisions do not require that waste collection program ever be implemented. *Id.*

In 2007, § 260.247 was amended by the Missouri General Assembly to include all "political subdivisions." *See* Exhibit B. The amendments to § 260.247 became effective on January 1, 2008. Exhibit B, p. 57. In February 2008, bipartisan members of the St. Louis County state legislative delegation (the "Delegation") requested a formal opinion from the Attorney General of Missouri regarding whether the newly amended § 260.247 applies to St. Louis County. *See* Respondents'/Cross-Appellants' Appendix, p. A15. After reviewing the facts presented, as well as those independently gathered, the Attorney

² Haulers disagree with the County's summary and general characterization of many of the facts contained within the County's Statement of Facts. However, in an effort to conserve judicial resources, Haulers offers only those pertinent facts the County failed to include in its Statement of Facts.

General issued an opinion on April 7, 2008 (the "Opinion") that "the two-year notice provision of § 260.247, which extended that requirement to all 'political subdivisions,' does apply to the activities now being pursued by the County." Respondents'/Cross-Appellants' Appendix, p. A15. Furthermore, the Opinion put the County on notice that this statute could be deemed a market regulation. Respondents'/Cross-Appellants' Appendix, p. A19.

On April 9, 2008, St. Louis County Counselor Patricia Redington (the "County Counselor") wrote a letter to the members of the St. Louis County Council stating that the Opinion "did not say . . . that the notification requirements of Section 260.247 RSMo. applied specifically to St. Louis County in light of [its] status as a charter county." Respondents'/Cross-Appellants' Appendix, p. A20. The County Counselor further stated "[t]he Attorney General instead acknowledged that the regulation of solid waste collection and disposal 'would seem to fall within the police powers that charter counties ordinarily may legislate freely.'" *Id.*

In light of the Opinion and the County Counselor's letter, the Delegation wrote a letter to County Executive Charles Dooley on April 18, 2008. Respondents'/Cross-Appellants' Appendix, p. A21-A23. In this letter, the Delegation pointed out that the Opinion states the County's program is in violation of state law, contrary to the County Counselor's assertions in her letter of April 9, 2008. Respondents'/Cross-Appellants' Appendix, p. A21. The Delegation also warned that "any further actions implementing

the St. Louis County Trash Collection and Recycling plan can only move forward by knowingly disregarding state law." Respondents'/Cross-Appellants' Appendix, p. A22.³

Under the revised Waste Code, the County established eight (8) waste collection districts in unincorporated County. Legal File ("L.F."), p. 97. After soliciting bids, contracts were awarded for District 3 on April 8, 2008, and the remaining districts on June 10 and 17, 2008. L.F., p. 126. Collection began in District 3 on July 1, 2008 and on October 1, 2008 in the remaining districts. L.F., p. 125.

On October 21, 2008, following Haulers' appeal of the trial court's dismissal of their Petition for declaratory relief, the Missouri Court of Appeals Eastern District held:

The County is authorized to enter the business of trash collection, and even to take it out of the hands of private collectors. But enacting an ordinance which would allow the County to do so without following the notice requirement and waiting period in section 260.247 would bring it "out of harmony with the general laws of the states" and amount to "[an] attempt to change the policy of the state as declared for the people at large. A charter county's exercise of power that produces this result is impermissible."

³ It should be noted that the County was aware of the Opinion and the Delegation's warnings regarding the applicability of § 260.247 within the statute of limitations set forth in § 516.500 for challenging the procedural constitutionality of the amendments to § 260.247.

L.F., p. 44. The Court of Appeals reversed the trial court's dismissal and remanded the case to the trial court. L.F., p. 45. Thereafter, Haulers filed their First Amended Petition on April 27, 2009. L.F., p. 47.

On January 25, 2011, following the entry of partial summary judgment in favor of Haulers, the trial court found the measure of damages to which Haulers were entitled to be set forth in the text of § 260.247, which reads "the amount paid by the city shall be at least equal to the amount the private entity or entities would have received for providing such services during that period." L.F., p. 124. The trial court also determined Haulers would be entitled to damages for a two-year period beginning on the date the County entered into contracts with the replacement haulers. L.F., p. 126.

On May 16, 2011, following a hearing on the County's third request for a continuance of the May 31, 2011 trial setting, the trial court denied County's oral request to amend its interrogatory responses to name an expert to be called at trial on the grounds of timeliness and prejudice to Haulers. Supplemental Legal File ("S.L.F."), p. 216. Thus, the County was unable to call an expert witness at trial. *See id.*

The trial on damages was held on May 31, 2011. Trial Transcript ("T.T."), p. 4. Haulers presented evidence of their damages through the testimony of C. Eric Ficken, CPA, CVA, CFF ("Mr. Ficken"). T.T., pp. 8-119. The trial court found Mr. Ficken to be qualified as an expert on the basis of his knowledge, experience and education. L.F., p. 156. Mr. Ficken testified that Haulers suffered cumulative damages of approximately \$23 million. T.T., p. 15. To calculate Haulers' damages, Mr. Ficken relied upon the actual databases maintained by Haulers in the normal course of business. T.T., pp. 19,

21, 70-71, 92, 96, 113. Mr. Ficken testified that the information upon which he relied in calculating Haulers' damages is of the kind reasonably relied upon by experts in his field. T.T., pp. 38, 47, 58, 73, 92, 112. The trial court found Mr. Ficken's testimony to be credible. L.F., p. 158. The County call no witnesses at trial and presented no evidence regarding damages. *See* T.T., pp. 119-146.

On September 2, 2011, the trial court entered judgment in favor of Haulers in the amount of \$1,159,903.90 as follows: \$261,086.65 to American Eagle, \$99,224.20 to Meridian, and \$799,593.05 to Waste Management. L.F., pp. 159-160.

ARGUMENT

I. THE TRIAL COURT PROPERLY DETERMINED THAT PURSUANT TO THE COURT OF APPEALS DECISION, § 260.247 APPLIED TO THE IMPLEMENTATION OF THE COUNTY'S WASTE PROGRAM AND PURSUANT TO THE DOCTRINE OF LAW OF THE CASE, THE COUNTY'S FIRST, SECOND AND THIRD POINTS ON APPEAL SHOULD NOT BE RELITIGATED HEREIN.

Haulers appear before this Court briefing and arguing, yet again, that § 260.247, as constitutionally amended by the Missouri legislature in 2007, applies to the County. This question was squarely answered by the Court of Appeals in 2008. Moreover, during its 2008 appeal, the County could have and should have argued that the amendment to § 260.247 was allegedly and improperly retrospective, but did not. Over the past three and one-half years, Haulers have expended countless hours and attorneys' fees rearguing these points before all manner of state and federal courts. In a desperate attempt to avoid liability for willfully violating state law, the County has once again raised these issues in its appeal to this Court. As set forth below, the Court of Appeals' decision regarding the applicability and constitutionality of § 260.247 is law of the case and should not be reexamined in this subsequent appeal.

"The doctrine of law of the case provides that a previous holding in a case constitutes the law of the case and precludes relitigation of the issue on remand and subsequent appeal." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128-29 (Mo. banc 2007). The doctrine applies to "successive adjudications involving the same issues and

facts." *Id.* at 129. "Generally, the decision of a court is the law of the case for all points presented and decided, as well as for matters that arose prior to the first adjudication and might have been raised but were not." *Id.* Failure to raise a point on appeal means that a later court need not address the issue. *Id.*

The law of the case doctrine "insures uniformity of decisions, protects the parties' expectations, and promotes judicial economy." *Walton*, 223 S.W.3d at 129. It is a rule of "policy and convenience." *Id.* at 130. The doctrine applies irrespective of which appellate court hands down the initial decision. *See Laclede Inv. Corp. v. Kaiser*, 596 S.W.2d 36, 40 (Mo. Ct. App. E.D. 1980) ("Where a decision by a superior court is involved a lower court is absolutely bound by that decision and lacks jurisdiction to rule contrary to that decision upon retrial or upon a second appeal. *State ex rel. Curtis v. Broaddus*, 142 S.W. 340 (Mo. 1911). If the initial decision is by the same court or a lower court than the one making the second decision the doctrine normally precludes reexamination of issues decided in the original appeal. *Mangold v. Bacon*, 141 S.W. 650 (Mo. 1911)."). However, a court may refuse to apply the doctrine where the underlying decision was based upon a mistaken fact or resulted in manifest injustice. *Walton*, 223 S.W.3d at 129. A court may also refuse to apply law of the case where the law changed between appeals or where "the issues or evidence on remand are substantially different from those vital to the first adjudication and judgment . . ." *Id.*

In this case, the Court of Appeals properly decided in 2008 that § 260.247 was constitutionally enacted and applied to the County. *See State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 343 (Mo. Ct. App. E.D. 2008).

The County's charter power argument and the alleged *Hammerschmidt* violation issues were fully briefed by the County and argued before the Court of Appeals. S.L.F., pp. 34-52, 64-66, 69-71, 82-85. Regardless of whether or not the Court of Appeals specifically addressed the issue of constitutionality in its opinion, the Court of Appeals implicitly decided against the County when it overturned the trial court and held that § 260.247 applies to the County.

The issues of constitutionality and applicability were also raised and briefed by the County following the Court of Appeals' opinion in Respondents' Application for Transfer to the Missouri Supreme Court. This Court had the opportunity to take the County's appeal of the Court of Appeals' opinion, but chose not to do so. *See* S.L.F., p. 118. To now allow the County to reargue these issues undermines the principals of judicial economy inherent in the doctrine of law of the case and frustrates Haulers' expectations, as Haulers have continued to pursue, in good faith, their claims against the County for the past two years. Nor is this a case in which any of the doctrinal exceptions apply; rather, it would be manifestly unjust to Haulers to consider the merits of the County's arguments once more. The constitutionality of § 260.247 and its applicability to the County is law of the case and should not be relitigated herein.

Furthermore, as stated above, the law of the case doctrine applies not only to issues that were previously raised on appeal but to issues that could have been raised on appeal, but were not. In this instance, the County could and should have raised in the 2008 appeal that applying § 260.247 would be impermissibly retroactive but, for reasons unknown, chose not to do so. This issue is clearly related to the County's ongoing

argument that § 260.247 was inapplicable to its waste collection program. In fact, the County sought to have the Court of Appeals 2008 opinion vacated and Haulers' appeal dismissed in its Motion for Rehearing or in the Alternative for Transfer to the Missouri Supreme Court and Application for Transfer to this Court on the basis of mootness. *See* S.L.F. pp. 76-82, 95-98. The County specifically argued that "[t]he procedural restrictions set forth in [§ 260.247] applied only to cities and not to counties when County enacted its new Waste Management Code in December of 2006." *Id.* At the time of the 2008 appeal, the County was obviously aware of the facts and circumstances upon which it now bases its argument that § 260.247 is impermissibly and retroactively applied. The County's retroactive argument could have been raised at that time, but was not. Therefore, it is now law of the case and this Court should not consider it at this time.

II. THE TRIAL COURT PROPERLY FOUND THE COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE § 260.247 IS APPLICABLE TO ST. LOUIS COUNTY IN THAT IT IS A STATEWIDE MARKET REGULATION THAT DOES NOT IMPINGE ON THE REGULATION OF A MUNICIPAL FUNCTION (COUNTY'S FIRST POINT ON APPEAL).⁴

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

The issue of whether § 260.247 applies to the County has been exhaustively argued before various courts throughout the over three and one-half years this case has been pending. The Court of Appeals decided § 260.247 applied to charter counties, and

⁴ Haulers refer the Court to their argument in I., *supra*, that the applicability of § 260.247 to the County is law of the case and, therefore, should not be reviewed by this Court. In the alternative, however, Haulers provide a substantive response to the County's First Point on Appeal.

to St. Louis County specifically, on October 21, 2008.⁵ Thereafter, the County sought to have this Court reexamine the statute's applicability in this case through transfer, application for a writ of prohibition, and even argument in an unrelated case. Haulers fully acknowledge that St. Louis County is a charter county with authority to regulate municipal functions. Section 260.247, however, is a market regulation of statewide concern; it does not infringe upon St. Louis County's charter powers as granted by the Missouri Constitution. Therefore, § 260.247 is applicable to the County and the County was obligated to comply with the notice provisions therein.

A. St. Louis County is a Charter County with Authority to Regulate Municipal Functions

The Missouri General Assembly's legislative power is plenary unless expressly limited. *Board of Education v. City of St. Louis*, 879 S.W.2d 520, 533 (Mo. banc 1994). The only express limitation on the General Assembly's power to pass laws relating to charter counties is contained in Article VI, § 18(e) of the Missouri Constitution, which prohibits the General Assembly from enacting laws that provide "for any other office or employee of the county or fix the salary of any officer or employee of the county." *Jackson County v. State*, 207 S.W.3d. 608, 612 (Mo. banc 2006) (citing, Mo. Const. Art. VI, Sec. 18(e)).

Charter counties derive their constitutional grants of power from two specific provisions of the Missouri Constitution:

⁵ See *American Eagle*, 272 S.W.3d at 343.

Article VI, § 18(b). The charter shall provide for its amendment, for the form of the county government, the number, kinds, manner of selection, terms of office and salaries of the county officers, and for the exercise of all powers and duties of counties and county officers prescribed by the constitution and laws of this state.

Article VI, § 18(c). The charter may provide for the vesting and exercise of legislative power pertaining to any and all services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities...⁶

Mo. Const. Art. VI, §§ 18(b) and (c).

Article VI, § 18(b) "carries with it an implied grant of such powers as are reasonably necessary to the exercise of the powers granted..." *Information Technologies*, 14 S.W.3d 60, 63 (Mo. Ct. App. E.D. 1999) (citing *Flower Valley Shopping Center, Inc. v. St. Louis County*, 528 S.W.2d 749, 754 (Mo. 1975)). Under the plain language of this provision, county officers in exercising their "powers and duties" remain subject to the "constitution and laws of this state." See Article VI, § 18(b).

Article VI, § 18(c), on the other hand, is an express grant of power to charter counties to exercise legislative authority over services and functions of the municipality or political subdivision. *Chesterfield Fire Prot. v. St. Louis County*, 645 S.W.2d 367, 371

⁶ This excerpt does not reflect Article VI, § 18(c) in its entirety, but only the portions relevant to this discussion.

(Mo. banc 1983). Powers exercised under this provision are referred to as police powers and include, but are not limited to, public health, police and traffic, building construction, and planning and zoning in such areas. *Casper v. Hetlage*, 359 S.W.2d 781, 789 (Mo. 1962). Article VI, § 18(c) allows for local self-government in the exercise of police powers in order to meet the "peculiar" needs of the county. *Id.* at 790.

Charter counties, like other counties, however, remain legal subdivisions of the state. *State ex inf Dalton v. Gamble*, 280 S.W.2d 656, 659 (Mo. banc 1955). As such, the Constitution "...clearly envisions the laws of the state prescribing the powers and duties of [its] charter county officers" under Article VI, § 18(b). *Jackson County*, 207 S.W.3d at 612. Simply put, while charter counties have broad authority to deal with local matters, they may not act in such a way as to "invade the province of general legislation involving the public policy of the state as a whole." *Flower Valley Shopping Ctr.*, 528 S.W.2d at 754. Charter counties continue to be "amenable" to state control in matters concerning the general public. *State ex rel St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. Ct. App. St.L. 1973) (citing *O'Brien v. Roos*, 397 S.W.2d 578, 582 (Mo. 1965)).

It is undisputed that St. Louis County is a charter county. As such, St. Louis County has the authority to establish its government, fix the salaries of its officers, and deal with local problems unique to St. Louis County. Regardless of its charter, however, St. Louis County is subject to the general laws of the State and must remain "amenable" to State control in matters of public character.

B. Section 260.247 Does Not Regulate Municipal Functions

It is clear that the purpose of § 260.247 is to regulate how a political subdivision, including the County, may impact private entities through control of the waste collection market. This purpose is supported by the plain language of the statute and prior interpretations of § 260.247.

A review of the plain language of the statute shows that the overarching objective of § 260.247 is to ensure that when a city or political subdivision decides to enter into or expand solid waste collection services in an area "where the collection of solid waste is presently being provided by one or more private entities," it gives two years notice to those private entities before it assumes control of the services the private entities had been providing. *See* §§ 260.247.1 and 260.247.2. The statute contains only one exception: if "the city or political subdivision contracts with the private entity or entities to continue such services" for the duration of the two-year waiting period, it is not required to wait two years to commence waste collection. § 260.247.2. In other words, the city or political subdivision must either give private entities two years notice before taking over their business or contract with the private entities to continue their service until the two year notice period has elapsed.

Prior interpretations of § 260.247 further support the plain language of the statute. In *Christian Disposal v. Village of Eolia*, the Court of Appeals found that "[t]he fundamental purpose of § 260.247 is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area." 895 S.W.2d 632, 634 (Mo. Ct. App. E.D. 1995). As recognized by the *Christian Disposal* court, the clear intent of the statute is to proscribe

how and when a political subdivision, including the County, may impact participants in the free market – not to regulate trash collection, as maintained by the County.⁷

The Court of Appeals in this case again reiterated that the plain language of § 260.247 "covers notice and entering the business of trash collection – a matter of undeniable state-wide public policy – rather than operational aspects of trash collection, that once initiated, may indeed fall within the purview of a county's police power." *American Eagle*, 272 S.W.3d at 342. The Court of Appeals further explained that the statute at issue

has nothing to do with the process of an entity's collection of trash and everything to do with mitigating the effects of a government's takeover of trash collection on that entity's business. This general purpose reflects the state policy of protecting private entities engaged in trash collection, rather than a locally-centered purpose to provide a default regulation of trash collection for entities without home rule charters.

Id. at 343. Not only is it law of the case that § 260.247 is a market regulation and not a regulation of St. Louis County's police powers, but the clear meaning and purpose of its provisions indicate it is a market regulation.

⁷ In *Christian Disposal*, the Court of Appeals made it very clear that the notice requirement is "mandatory," not "directory" and as a result, must be obeyed. *Christian Disposal*, 895 S.W.2d at 634.

The County has argued that it is authorized to implement the trash districts as trash is a local matter within their police power, and as such the County can legally ignore the notice provisions in the statute. The County's argument completely misses the point. The statute's purpose, as evidenced by its language and prior appellate decisions, is quite simple – private entities must be afforded adequate notice to properly wind down its business before government takes over the market and puts them out of business. The County's argument might have some weight if the statute prohibited it from gathering and disposing of waste, locating a sewage disposal facility, or constructing an incinerator and landfill. *See State ex rel Birk v. City of Jackson*, 907 S.W.2d 181, 185 (Mo. Ct. App. 1995); *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 640 (Mo. banc 1992); and *Applebaum v. St. Louis County*, 451 S.W.2d 107, 111-12 (Mo. 1970). However, § 260.247 does not regulate the health and safety aspects of waste collection but rather when and how a governmental body may disrupt the waste collection market. Market regulation is clearly a matter of statewide concern and legislation related thereto is unquestionably applicable to St. Louis County.

C. Section 260.247 Does Not Infringe upon St. Louis County's Charter Powers and is, Therefore, Applicable to St. Louis County

As discussed more thoroughly above, § 260.247 does not regulate municipal functions. Because the purpose of the statute is related to a matter of general statewide concern, the General Assembly's actions to amend § 260.247 in 2007 to make it applicable to charter counties did not infringe upon St. Louis County's charter powers.

The notice requirements at issue in this case under § 260.247 are comparable to issues previously decided in *Jackson County* and *Information Technologies*.

In *Jackson County*, Jackson County filed suit to challenge a law preventing counties with a population between 600,000 to 700,000 with a charter form of government from entering into contracts over \$5,000.00 without competitive bidding. Jackson County, the only charter county in the State of Missouri at that time to fit within the population parameters of the legislation, argued that the state statute on competitive bidding infringed upon its right to operate under a charter form of government under Article VI, § 18 of Missouri's Constitution.⁸ 207 S.W.3d at 612-613.

This Court reversed the trial court, rejecting Jackson County's arguments that the state statute on competitive bidding infringed on its right to operate under a charter form of government under Article VI, § 18 of Missouri's Constitution, specifically holding that Jackson County's argument that it was not required to comply with the state statute was not supported by the plain language of Article VI, § 18(b) of Missouri's Constitution which "...clearly envisions the laws of the state prescribing the powers and duties of charter county officers" and counties. *Jackson County*, 207 S.W.3d at 612-613. The

⁸ Unlike Jackson County, the County in this case has taken no affirmative action to seek to have § 260.247 declared unconstitutional or inapplicable to them. Nor has the County counterclaimed in this action to seek to declare the notice provision invalid. Rather, the County improperly attempts to challenge the constitutional validity of § 260.247 by way of affirmative defense, as more thoroughly examined in III., *infra*.

Supreme Court further held that ". . . the *only* limitation on the General Assembly in Article VI, § 18 appears in § 18(e), which prohibits the General Assembly from enacting laws that 'provide for any other office or employee of the county or fix the salary of any of its officers or employees.'" *Jackson County*, 207 S.W.3d at 612 (emphasis added). Since the bidding requirement statute neither provided for a new county office nor attempted to fix the salary of any county officers or employee, the state law applied to Jackson County. *Id.* at 613.

In *Information Technologies*, St. Louis County enacted an ordinance which would allow it to enter into a contract for a Computer Aided Dispatch System without taking competitive bids. 14 S.W.3d at 62. The Court of Appeals found that the public policy of the state of Missouri supported competitive bidding, and the state had an "...interest in controlling by statute the making of contracts by officers of municipal corporations." *Id.* at 64. The Court of Appeals stated that acquisition of the system was a governmental function, not a corporate function, and as a result, the St. Louis County charter could not supplant the state law in this area. *Id.* at 65. The Court's determination that the underlying service was of a governmental nature was based on the public purpose of the service - safety and protection of citizens and the fact that the service was not being operated by the County for profit. *Id.* Paramount to the Court's decision that the County could not ignore the competitive bidding requirement was the state's public policy supporting competitive bidding and ensuring that political subdivisions provide notice before letting public contracts regardless of the nature of the underlying contract. *Id.* at 64-65.

Like the bidding requirements in *Jackson County* and *Information Technologies*, the notice requirement contained within § 260.247 relates to acquisition of a service by a political subdivision and the effect of this acquisition on businesses which will be displaced by the letting of the contract. It is plainly and simply a market regulation. The State of Missouri clearly has an interest in ensuring that notice is given before a political subdivision usurps the private waste collection marketplace, just as it has an interest in ensuring that notice is given before the acquisition of goods and services by its political subdivisions at taxpayers' expense. To allow the County to orchestrate the waste collection market in violation of § 260.247 would effectively grant St. Louis County the power to "invade the province of general legislation involving the public policy of the state as a whole." *Flower Valley Shopping Ctr.*, 528 S.W.2d at 754. The Court of Appeals properly stopped the County's attempt to expand its power beyond its constitutional grant and found that § 260.247 clearly applies to St. Louis County.

III. THE TRIAL COURT PROPERLY FOUND THE COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE § 260.247, AS AMENDED BY S.B. 54 (2007), WAS CONSTITUTIONALLY ENACTED IN THAT THE COUNTY FAILED TO PRESERVE A CONSTITUTIONAL CHALLENGE TO ITS ENACTMENT AND ANY CURRENT CHALLENGE THERETO IS TIME-BARRED (COUNTY'S SECOND POINT ON APPEAL).⁹

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

Apparently relying upon an affirmative defense raised in its Answer to Plaintiffs' First Amended Petition on August 16, 2010, the County argues that passage of S.B. 54, which amended § 260.247 to include political subdivisions such as the County, violated

⁹ Haulers refer the Court to their argument in I., *supra*, that the constitutionality of § 260.247 is law of the case and, therefore, should not be reviewed by this Court. Haulers provide a substantive response to the County's Second Point on Appeal, however, in the alternative.

the single subject procedural requirements of Missouri Constitution Article III, § 23 (otherwise known as a "*Hammerschmidt*" challenge after the case *Hammerschmidt v. Boone Co.*, 877 S.W.2d 98 (Mo. banc 1994)). As more fully explained above, application of the law of the case doctrine mandates rejection of the County's argument. The County waived this argument by failing to raise it at the first available opportunity. Regardless, the County failed to timely file or assert a proper claim to the alleged procedural invalidity of the amendment to § 260.247. The County is now prevented from using any purported procedural irregularities surrounding the passage of S.B. 54 in an offensive manner against Plaintiffs under the guise of an affirmative defense.

A. The County Failed to Raise its Constitutional Complaint at the First Available Opportunity

"Attacks on the constitutionality of a statute are of such dignity and importance that raising such issues as an afterthought in a brief on appeal will not be tolerated." *State v. Rogers*, 95 S.W.3d 181, 185 (Mo. Ct. App. W.D. 2003) (quoting *City of Chesterfield v. Dir. Of Revenue*, 822 S.W.2d 375, 378 (Mo. banc 1991)). In fact, this is precisely what the County did in this case.¹⁰

¹⁰ The County first raised any issue with the constitutionality of S.B. 54 in its Brief of Respondents filed with the Court of Appeals on or about September 15, 2008, despite being warned in advance by the St. Louis County legislative delegation and the Attorney General's Office before the statute of limitations passed that the statute was applicable to St. Louis County. S.L.F., pp. 51-52.

This Court explained in *Franklin County ex rel. Parks v. Franklin County Com'n*, 269 S.W.3d 26 (Mo. 2008): "A statute is presumed to be valid and will not be declared unconstitutional unless it clearly contravenes some constitutional provision. The person challenging the validity of the statute has the burden of proving the act clearly and undoubtedly violates the constitutional limitations." Additionally, constitutional challenges must be raised at the earliest opportunity or are waived. *Mikel v. McGuire*, 264 S.W.3d 689 (Mo. Ct. App. 2008) (declining to review newly raised constitutional defense as "[c]onstitutional challenges must be raised at the earliest possible opportunity").

"To properly raise a constitutional issue, a party must: (1) raise the question at the first available opportunity; (2) specifically designate the constitutional provision alleged to have been violated, such as by explicit reference to the article and section, or by quotation from the particular provision; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review." *S.A. v. Miller*, 248 S.W.3d 96, 101 (Mo. Ct. App. W.D. 2008) (quoting *Firemen's Ret. Sys. v. City of St. Louis*, 2006 WL 2403955, *5 (Mo. Ct. App. E.D. 2006)).

If the County wanted to challenge the constitutionality of §260.247, it should have either timely filed a petition challenging the enactment of S.B. 54 or counterclaimed for declaratory judgment in the trial court. This would have allowed for a proper investigation into the facts and law on this subject. Instead, the County first raised this

issue on appeal.¹¹ Because the County did not raise a constitutional challenge to S. B. 54 at the first opportunity, the County has waived any challenge thereto.

B. The County's Constitutional Challenge is Time-Barred

Even if the Court were to overlook the County's waiver of any constitutional challenge to § 260.247, the County's argument is barred by Missouri statute.

Substantively, the County argues that the enactment of S.B. 54 into amendments to § 260.247 violates the single subject requirement of Mo. Const. Art. III, Section 23. Mo. Rev. Stat. § 516.500 provides that "[n]o action alleging a procedural defect in the enactment of a bill into law shall be commenced, had or maintained by any party later than the adjournment of the next full regular legislative session following the effective date of the bill as law." *See also St. Charles County Convention and Sports Facilities Authority v. Mydler*, 950 S.W.2d 668 (Mo. Ct. App. 1997) (finding defense of constitutional challenge based on Article III, § 23 of the Missouri Constitution not properly raised and time-barred).

¹¹ Even after raising the procedural constitutionality of the amendment of § 260.247 in the Court of Appeals and this Court, the County failed to raise the issue in its Memorandum in Support of Defendants' Motion to Dismiss (filed with the United States District Court for the Eastern District of Missouri). The County again raised the constitutional question in the circuit court in response to Plaintiffs' Motion for Partial Summary Judgment and eventually as an affirmative defense in its Answer to Plaintiffs' First Amended Petition. *See* L.F. pp. 139-40; *see also* S.L.F., pp. 121-35, 138-40.

The amendment to § 260.247 had an effective date of January 1, 2008. *See* 2007 Mo. SB 54. Pursuant to § 516.500, the County was required to file any single subject claim prior to the adjournment of the next full regular legislative session. The next full regular legislative session of the Missouri General Assembly began on January 9, 2008 and adjourned on May 16, 2008. The County did not raise the "single subject" objection to the statute until it filed its Brief of Defendants/Respondents St. Louis County, Missouri, *et al.* with the Court of Appeals on September 15, 2008. *See* S.L.F., pp. 51-52. The County's objection did not appear in any of its trial court pleadings until October 23, 2009, when it raised the "single subject" objection in its response to Plaintiffs' Motion for Partial Summary Judgment. *See* S.L.F., pp. 138-40. It was not until August 16, 2010 that the County actually pled its objection to the passage of S.B. 54 as an affirmative defense in its Answer to Plaintiffs' First Amended Petition. L.F., pp. 139-40. The County's purported attempt to challenge the amendments to § 260.247 is clearly out of time.

Irrespective of the County's failure to timely raise a "single subject" challenge to § 260.247, this issue was fully briefed to the Court of Appeals and was rejected in 2008.¹² The fact remains that the County has never filed suit to have the challenged portion of § 260.247 declared unconstitutional. Instead, the County requests that this Court declare the amendment to § 260.247 invalid, without the benefit of a claim being

¹² The County sought rehearing and transfer of this case to this Court attempting again to raise the single subject claim. This request was denied. S.L.F., p. 118.

filed by the County, and overturn the Court of Appeals on procedural constitutional grounds under the guise of an affirmative defense.

When no timely proper challenge to the passage of S.B. 54 surfaced, the amendment became constitutional. There is no claim by the County that the actual substantive terms of § 260.247 violate any constitutional provision. Absent any substantive affirmative claim, there is no proper constitutional challenge before this Court. The County's last-ditch attempt to avoid waiver of its claim and the statute of limitations should fail.

IV. THE TRIAL COURT PROPERLY FOUND THE COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE APPLICATION OF § 260.247 TO COUNTY IS NOT AN IMPROPER RETROACTIVE APPLICATION OF THE LAW (COUNTY'S THIRD POINT ON APPEAL).¹³

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

The County's claim that § 260.247 is being retroactively applied to its trash program is disingenuous and contradicts the County's prior judicial admissions. At the onset of the case before the Circuit Court, the County successfully defeated Plaintiffs' request for a preliminary writ to stop the County's program before it even began by arguing that "[Haulers] cannot claim an established right because County retains the

¹³ Haulers refer the Court to their argument in point I., *supra*, that the purported retrospective application of § 260.247 is law of the case and, therefore, should not be reviewed by this Court. Haulers provide a substantive response to the County's Third Point on Appeal, however, to provide an alternative basis to reject the County's argument.

discretion to abandon its plan altogether if it so chooses." S.L.F., p. 16. In denying Haulers' request for a writ to stop the trash program before it started, the Circuit Court accepted the County's argument that despite having accepted bids and tentatively awarded them, the County could unravel the program any time before it started collecting trash. It is unbelievable that since that admission, the County has repeatedly argued, and continues to argue, that the trash program was set in stone and subject to constitutional protection before the effective date of the amendment to § 260.247 on January 1, 2008.

A cursory review of the ordinance passed in December 2006 reveals the County's claim that its waste collection program was implemented in 2006 is specious at best. The County's waste collection program was *authorized* on December 12, 2006. *See* Appellant's/Cross-Respondent's Appendix, p. A17 (authorizing the County Executive to "establish areas within the unincorporated County for the collection and transfer of waste and recovered materials" once the boundaries of the areas are determined after review and consideration). Nothing in the language of the ordinance requires the collection of trash. The fact of the matter is that that County waited until after the effective date of the amendment of § 260.247 to solicit bids and enter into contracts for the eight districts at issue and to actually begin trash collection. *See* L.F., pp. 123-24. These facts are undisputed and completely contradict the County's cries that application of § 260.247 is retroactive.

The plain words of § 260.247 also belie the County's retrospective claim. The County is correct in asserting that retrospective application of laws in Missouri is generally not allowed. "Article I, Section 13 of the . . . Missouri Constitution . . .

provides that no ex post facto law, nor law impairing the obligations of contracts nor retrospective in its operation shall be enacted." *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 410 (Mo. banc 1974).

Section 260.247, however, provides in relevant part: "[a]ny city or political subdivision which annexes an area or enters into or expands solid waste collection services into an area where the collection of solid waste is *presently being provided by one or more private entities*, for commercial or residential services, shall notify the private entity or entities of its intent to provide solid waste collections services in the area by certified mail." Mo. Rev. Stat. § 260.247.1 (emphasis added). As of January 1, 2008, the effective date of S.B. 54, the collection of solid waste was "presently being provided by one or more private entities" — including the Haulers — in the areas in which the County sought to begin collection services. It was not until some months after the effective date of § 260.247 that the County awarded its first contract on April 8, 2008. L.F., p. 126. The County did not begin to collect trash in the first district until July 1, 2008, six months after the effective date of the amendment, and in the remaining seven districts on September 29, 2008, ten months after the effective date of the amendment. L.F., 124. As a result, § 260.247 does not apply retrospectively to the County. It is undisputed that private entities, including Haulers, were collecting solid waste in unincorporated St. Louis County at the time that S.B. 54 became effective. Therefore, the County had to comply with the notice and other requirements set forth in Mo. Rev. Stat. § 260.247.

The County cites to two cases in support of its argument that application of § 260.247 would be in violation of the prohibition against retrospective laws. See Brief of Appellants/Cross-Respondents, p. 47 (citing *State ex rel. St. Louis-San Francisco Ry. Co.*, 515 S.W.2d at 411 and *Doe v. Blunt*, 225 S.W.3d 421, 422 (Mo. banc 2007)). The County's reliance on these cases is misplaced. In *State ex rel. St. Louis-San Francisco Ry Co.*, the relator sought a writ of prohibition prohibiting a St. Louis City Circuit Court judge from removing the limitation on recovery under the wrongful death statute for actions that occurred prior to amendment of the statute. 515 S.W.2d at 409-10. This Court found that the statute in place *at the time the wrongful action occurred* should control. *Id.* at 411. In that case, the conduct subjecting the relator to liability occurred prior to removal of the recovery limitation and the Court declined to lift the limitation retrospectively. *Id.* Likewise, in *Doe*, this Court denied application of the sex offender registration statute to a person who pled guilty to criminal conduct, finding that the "offense" or bad conduct for which he was charged occurred prior to enactment of the legislation. 225 S.W.3d at 422.

In this case, the "bad conduct" complained of by Haulers, the failure of the County to provide two years' notice or contract with the incumbent haulers in violation of § 260.247, occurred *after* enactment of § 260.247. Unless the County knew in advance of soliciting and opening the bids for its waste collection program exactly which haulers would be awarded the contracts, there was no way the County could have given notice to Haulers prior to the effective date of § 260.247. It is ridiculous to imagine *all* waste haulers in unincorporated St. Louis County winding down their businesses before bids

were solicited or awarded in anticipation of a program that, by the County's own admission, was not set in stone until collection began.

As the Court of Appeals explained, the County could both take over trash collection *and* remain in harmony with the State statutory scheme. *American Eagle*, 272 S.W.3d at 343. Instead, it simply ignored the requirements of § 260.247. There is no improper retroactive application of § 260.247 in this case.¹⁴

¹⁴ The County also raises within its arguments in this point on appeal that giving § 260.247 retrospective application to the County in this instance would somehow waive the County's sovereign immunity. County's half-hearted claim to sovereign immunity is also raised in footnote 13 of County's brief. Brief of Appellant/Cross-Respondent, n. 13. Sovereign immunity is not raised as a point on appeal by County and is therefore waived. *Chancellor Dev. Co. v. Brand*, 896 S.W.2d 672, 678 (Mo. Ct. App. 1995) (finding that issues not raised in a point relied on are not preserved for appellate review). Accordingly, Haulers will not respond to this argument.

V. THE TRIAL COURT PROPERLY FOUND THE COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE HAULERS PROPERLY STATE A CLAIM FOR PAYMENT UNDER § 260.247 (COUNTY'S FOURTH POINT ON APPEAL).

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

Haulers have brought suit against the County for its violation of § 260.247 in implementing its waste collection program in unincorporated St. Louis County. Subsections 2 and 3 of § 260.247 provide the only avenue for the County to begin waste collection prior to the expiration of a compliant two-year notice—the County must use existing haulers and pay them what they would have received had they provided the service directly. Therefore, the statute creates an express legal obligation for the County to pay Haulers the going rate if it wishes to enter the waste hauling market prior to the expiration of the two-year notice period (presuming the notice was properly given, which it never was in this case). Regardless of what title Haulers placed on their cause of action

for violation of the statute,¹⁵ Haulers have properly pled a cause of action against the County.

A private cause of action may be created by express terms or when it is clearly implied to have been the legislature's intent. *Shqeir v. Equifax, Inc.*, 636 S.W.2d 944, 947 (Mo. banc 1982). Here, § 260.247 clearly sets forth a cause of action for violation of its provision. The statute establishes that a political subdivision shall not commence solid waste collection in an area in which there are existing haulers unless it gives the two-year notice to the incumbent haulers or contracts with the incumbent haulers for the solid waste collection, and then declares the amount the governmental entity shall pay the incumbent haulers during this two-year time period if it chooses to begin collecting trash before the expiration of the two-year notice. § 260.247.

A private right of action has already been recognized under § 260.247 by the courts of this state. *See Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632 (Mo. Ct. App. 1995); *American Eagle v. St. Louis County*, 272 S.W.3d 336 (Mo. Ct. App.

¹⁵ "The rule is well established in Missouri that the character of a cause of action is determined from the facts stated in the petition and not by the prayer or name given the action by the pleader." *State ex rel. BP Products North America, Inc. v. Ross*, 163 S.W.3d 922, 927 (Mo. banc 2005) (internal citations omitted).

2008).¹⁶ The Court in *Christian Disposal* clearly found the statutory language requiring two years' notice before the collection of trash by a governmental entity to be mandatory, not directory. *Id.* at 634 (finding that in determining "whether a statute is mandatory or directory, the general rule is when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed"). To hold that the County must follow the two-year notice requirement but suffer no consequences for failing to do so is contrary to the clear legislative intent of the statute.

The County claims that Haulers have failed to plead the elements of a cause of action for breach of implied-in-law contract, suggesting that the County has received no benefit from Plaintiffs. Brief of Appellant/Cross-Respondent, p. 52. Ignoring the provisions of § 260.247 and proceeding with implementation of the County's trash program in violation of the law is clearly a benefit to the County, as the trial court found in her August 5, 2010 order denying the County's Motion to Dismiss with respect to Count II of Plaintiffs' First Amended Petition. L.F., p. 110. The County's unfettered discretion to take Plaintiffs' customers without recourse and give them to the private vendors of its choice is surely as valuable as any monetary benefit it may have received.

Here, regardless of the title placed upon Haulers' claim and the technical characterization of the benefit the County received, the undisputed factual allegations

¹⁶ Furthermore, the County has previously admitted that § 260.247 creates a private right of action for declaratory judgment. *See* S.L.F., p. 205 (citing to *Christian Disposal*, 895 S.W.2d 632).

state an actionable claim based upon § 260.247. Plaintiffs were providing services to the affected unincorporated areas prior to the County's take-over of the trash collection market in those areas. In doing so, the County failed to provide the two-year notice required by § 260.247 to begin trash collection by the County. Rather than providing the notice and waiting the two-year period to begin collection or hiring Haulers to continue collection for the balance of the two-year period, the County chose to award collection contracts to other haulers prior to the expiration of the statutorily required period. The County's refusal to follow the statute's mandate caused Haulers to lose a combined 40,000 customers, L.F., p. 124, that the County is required to redress according to the statute's terms. Haulers properly plead a cause of action under § 260.247.

In *Karpierz v. Easley*, the Court of Appeals held that a "contract 'implied in law' or 'quasi-contract' is not a contract at all but an obligation to do justice even though it is clear that no promise was ever made or intended. . . . This non-contractual obligation is treated procedurally as if it were a contract, but its principal function is to prevent unjust enrichment." 68 S.W.3d 565, 570 (Mo. Ct. App. 2002) (internal citations and quotations omitted). In *Karpierz*, the Court of Appeals determined that because the Missouri legislature established restrictions on state authorities and the evidence presented sufficiently established that the state authorities failed to properly adhere to those restrictions by intentionally bypassing statutory requirements, "allowing Appellants to benefit from ignoring the requisite statutory procedures would constitute unjust enrichment." *Id.* at 571. This Court has also held that a county's violations of its duties, as set forth by the legislature in a statutory scheme, provided the basis for an implied in

law contract cause of action. *Investors Title Co., Inc. v. Hammonds*, 217 S.W.3d 288, 295-296 (Mo. banc 2007).

The County claims that retention of the benefit it received by violating § 260.247 would not be unjust because it passed an ordinance authorizing the waste collection program in December 2006. *See* Brief of Appellant/Cross-Respondent, p. 55. This argument is nonsensical. As the Court of Appeals held, the County could have complied with both § 260.247 and its ordinances and chose not to do so. The County further claims that it should not be punished for relying on the Circuit Court's "favorable decision" in proceeding with implementation of its program. *Id.*¹⁷ Haulers are not seeking to have anyone punished; rather, Haulers simply seek what they are entitled to under the law. Haulers were not dilatory in prosecuting their claim and even filed suit to stop the program to prevent the damages for which they now seek redress, nor could they have possibly had "actual notice" that the County was not complying with the mandates of § 260.247 until the County awarded contracts for the trash districts. Of course Haulers

¹⁷ The County's assertion is disingenuous. By the time the Circuit Court dismissed Haulers' petition, the County had already solicited bids and awarded contracts. The County was relying on the County Counselor's legal advice, not any decision by a court of this state, in proceeding with implementation of its program. *See* Respondents'/Cross-Appellants' Appendix, p. A20 (construing the Attorney General's opinion of April 7, 2008 declaring that § 260.247 applied to the waste collection activities being pursued by the County).

continued to provide service in the districts until they were ousted – in the event that they had been awarded the contracts for the trash districts, Haulers needed to have the manpower and equipment ready and available to perform under the contracts. It would have been irresponsible to wind down their business before knowing the extent of their commitments vis-à-vis the districts.

Amici Curiae Missouri Municipal League, the Missouri Municipal Attorneys Association and St. Louis County Municipal League (collectively "*Amici Curiae*") have also weighed in on the issue of whether Haulers have properly stated a cause of action for breach of implied-in-law contract, or any cause at all. *See* Brief of *Amici Curiae*, pp. 5-7. *Amici Curiae* make much of the fact that a case with similar circumstances has never been heard in Missouri. *Id.* In fact, *Christian Disposal* involved prosecution of a cause of action against a municipality by a private waste hauler under § 260.247. 895 S.W.2d at 633. *Amici Curiae* fails to even attempt to distinguish the pursuit of this private right of action in *Christian Disposal* from the instant case. Perhaps *Amici Curiae* can find no other case because no other municipality or political subdivision in Missouri has had the audacity to so flagrantly violate the laws of this state. As already explained, Haulers clearly stated a cause of action under the provisions of § 260.247 and seek the statutory remedy declared therein. Case law related to common law claims for breach of implied-in-law contracts and the remedies relating thereto are simply inapplicable in this case.

Both the County and *Amici Curiae* also allude to the fact that the County would be entitled to sovereign immunity if § 260.247 created a private right of action. *See* Brief of Appellant/Cross-Respondent, n. 13 and *Amici* Brief, pp. 4, 17. The County raised this

defense below unsuccessfully. The trial court specifically held that the legislature waived any potential sovereign immunity defense the County could raise and found the County "does not have sovereign immunity from damages in this case" L.F., pp. 147-48. By not raising this issue as a point on appeal, the County has waived its right to challenge the trial court's judgment on this issue. *See Chancellor*, 896 S.W.2d at 678.

Haulers have properly stated a cause of action under § 260.247. The trial court did not err in awarding Haulers judgment on the basis therein, and the County's point on appeal should be denied.

VI. HAULERS ADEQUATELY PROVED THEIR DAMAGES UNDER § 260.247 THROUGH THE TESTIMONY OF MR. FICKEN, WHICH WAS PROPERLY ADMITTED AND QUALIFIED AS EXPERT TESTIMONY BY THE CIRCUIT COURT (COUNTY'S FIFTH POINT ON APPEAL).

Standard of Review

"The trial court's decision whether to admit an expert's testimony will not be disturbed on appeal absent an abuse of discretion." *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 760 (Mo. banc 2010). "A trial court will be found to have abused its discretion when a ruling is clearly against the logic of the circumstances then before the court and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration." *Id.* (internal citations omitted). However, if the trial court interprets the statute governing admissibility of expert testimony, an appellate court's review of the trial court's interpretation is *de novo*. *Kivland v. D.C. Orthopaedic Group*, 331 S.W.3d 299, 311 (Mo. banc 2011).

Argument

Without calling a single witness or presenting a shred of evidence on damages, the County seeks to reverse the trial court's determination that Haulers' expert was qualified as an expert to form an opinion as to lost revenues and damages sustained by Haulers.

The trial court found the expert's opinions were admissible and his assumptions were credible. L.F., pp. 156,158.¹⁸

In Missouri, admission of expert testimony at trial is governed by statute:

In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Mo. Rev. Stat. § 490.065.1 (2011).

In this case, the trial court specifically found that Mr. Ficken was "qualified as an expert to testify as to [Haulers'] damages on the basis of his knowledge, experience and education." L.F., p. 156. Furthermore, the County does not challenge the trial court's

¹⁸ The trial court relied upon the expert's calculations as admissible evidence. L.F., pp. 158. After delineating the legal measure of damages in her prior orders, limiting discovery on that basis and granting trial objections based upon her stated measure of damages, the trial court unfortunately changed her mind as to the measure of damages. L.F., pp. 159-60. The trial court accepted Mr. Ficken's calculations but, with no evidence or logical basis, awarded five percent (5%) of that number. *Id.* As outlined below, the trial court erred as to that five percent (5%) award; her error, however, had nothing to do with the reasonableness or reliability of Mr. Ficken's conclusions or the bases therefore. *See* L.F., pp. 151-60.

qualification of Mr. Ficken as an expert. *See* Brief of Appellant/Cross-Respondent, pp. 59-73. What the County does challenge is the veracity of Mr. Ficken's testimony and number of witnesses called by Haulers. *See id.*

The bases upon which an expert can rely in forming his or her opinion in a civil case are also determined by statute:

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at *or before* the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Mo. Rev. Stat. § 490.065.3 (2011) (emphasis added). This statutory provision makes it clear that experts testifying in civil cases may also base their opinions on facts known to them before the hearing. *See Casey v. Florence Construction Co.*, 939 S.W.2d 36, 39-40 (Mo. Ct. App. W.D. 1997). "Indeed, an expert may base his opinion on facts and data derived from sources outside of court and other than by his own perceptions." *Lau v. Pugh*, 299 S.W.3d 740, 755 (Mo. Ct. App. S.D. 2009) (internal citations omitted).

In determining admissibility, a court "must consider whether the facts and data used by the expert are of a type reasonably relied upon by experts in that field or if the methodology is otherwise reasonably reliable." *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 157 (Mo. banc 2003). To determine if the evidence is of a type reasonably relied upon by experts in the field, the trial court should defer to the expert's testimony unless it is shown that the evidence is not of a type reasonably relied

upon by an expert in that field or that the evidence is unreliable. *Murrell v. State*, 215 S.W.3d 96, 100 (Mo. banc 2007). Any weakness in the factual underpinnings of the expert's opinion, or in the expert's knowledge, go to the weight the testimony should be given rather than its admissibility. *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226, 246 (Mo. banc 2001). Only if the opinion is "sheer speculation," *Neiswonger v. Margolis*, 203 S.W.3d 754, 759 (Mo. Ct. App. E.D. 2006), or if the source for the opinion is so slight as to be fundamentally unsupported, should the trier of fact not receive the opinion. *Keyser v. Keyser*, 81 S.W.3d 164, 169 (Mo. Ct. App. W.D. 2002).

In this case, Mr. Ficken relied upon the actual databases maintained by the Haulers in the normal course of business to obtain the raw data used to perform his calculations. T.T., pp. 19, 21, 70-71, 92, 96, 113. Mr. Ficken testified that he had no reason to doubt the accuracy of the data provided. TT. pp. 22, 92. In fact, Mr. Ficken testified that the data necessary to perform his calculations would not likely be obtainable from any source but the Haulers:

Q. . . . Where would you expect to obtain the information about the Plaintiffs' business [sic]? The information that you received in this case, where would you as an accountant typically expect to receive that information?

A. Well in this electronic age I would go right to their computer system that they used for their billing. For this case it was their billing system.

Q. Andy you refer to *they* who do you mean by *they*?

A. I'm sorry. The three trash hauling companies. I met with them individually and asked for a data dump of all their customers including specific

information that we would need to do our calculation. That came from their live systems.

Q. And would you expect to obtain that information from a source outside of the company with which you were particularly dealing?

A. No.

Q. Would anyone outside of the company have access to that information?

A. I find that highly unlikely, no.

Q. Did you find any reason, in your opinion, that the information provided to you was unreliable?

A. No.

T.T. pp. 113-14. There is no *evidence* or *testimony* stating that the bases for Mr. Ficken's calculations are unreliable. In fact, the trial court found Mr. Ficken's assumptions to be credible. L.F., p. 158.

Furthermore, Mr. Ficken's *uncontroverted* and *repeated* testimony was that the information upon which he relied in calculating Haulers' damages is of the kind reasonably relied upon by experts in his field.¹⁹ T.T. pp. 38, 47, 58, 73, 92, 112.

¹⁹ The County called no witnesses, and was actually precluded from calling an expert witness at trial. See L.F., p. 384 (overruling the County's "oral request to amend its Answers to Interrogatories to name experts on the grounds of timeliness and prejudice to Plaintiff [sic]"). Defense counsel's assertions during cross-examination that the bases for

Following the standard declared by this Court in *Murrell v. State*, the trial court deferred to Mr. Ficken's testimony that the evidence was of the type reasonably relied upon by experts in his field because *no contradictory testimony was given*. Opposing counsel's fervent and argumentative remarks to the contrary are not evidence. *See* T.T. p. 90 (describing Mr. Ficken's opinion based upon the information from Haulers' databases as "garbage in, garbage out").

The County's claim that Mr. Ficken merely recited information given to him by Haulers, which constituted inadmissible hearsay, misstates the facts of the case and the law of this state. As explained above, Mr. Ficken relied upon the raw billing data provided by Haulers because it was not available from any other source. Mr. Ficken also testified that it is reasonable for experts in his field to rely upon this type of data. T.T. pp. 38, 47, 58, 73, 92, 112. This is not inadmissible hearsay, nor does it undermine the validity of Mr. Ficken's testimony.²⁰ The cases cited by the County in support of their contention that Mr. Ficken's testimony was unreliable and/or inadmissible either deal

Mr. Ficken's calculations are unreliable are, of course, not evidence and cannot be used to call his testimony into question.

²⁰ Mr. Ficken also relied upon data obtained from the St. Louis County Planning Commission to verify which of Haulers' customers fell within the district boundaries created by the waste collection program. Under the County's proposed definition, this would constitute inadmissible hearsay, yet the County neither objected at trial nor raised this issue on appeal. *See* T.T. 21-22.

with the exclusion of hearsay testimony by lay witnesses or the admissibility of expert testimony prior to the enactment of § 490.065 by the Missouri legislature in 1989. Mr. Ficken's testimony is reliable as an admitted expert and uncontroverted by any evidence offered by the County.

Finally, the County also attacks Haulers' decision to call one witness at the trial on damages. Obviously, the presentation of evidence of Haulers' damages is within Haulers' discretion; judgment had already been entered by the trial court and the measure of damages already declared. The fact that Haulers presented evidence of their damages through only Mr. Ficken does not make his testimony unreliable. The County was free to call any witnesses it wished to challenge Mr. Ficken's testimony, with the exception of an expert witness, but chose not to do so.

The trial court properly qualified Mr. Ficken as an expert and admitted his testimony as credible. The County's point on appeal should be denied.

VII. THE TRIAL COURT PROPERLY FOUND THE COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE HAULERS DID NOT WAIVE THEIR RIGHT TO BRING THIS SUIT BY PARTICIPATING IN THE COUNTY'S WASTE COLLECTION PROGRAM IN THAT HAULERS' CHALLENGE TO THE COUNTY'S WASTE COLLECTION PROGRAM IS WITH ITS IMPLEMENTATION AND NOT ITS VALIDITY (COUNTY'S SIXTH POINT ON APPEAL).

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

The County misunderstands the very basis of Haulers' action. Haulers have challenged the implementation of the program at issue, not its validity. Haulers have never claimed that St. Louis County does not have the right to enter into the business of solid waste collection and even to displace Haulers from the market. In doing so, however, the County must comply with § 260.247. It is undisputed the County has failed to do so. Haulers have not waived and cannot be estopped from bringing the instant action; neither estoppel nor waiver applies in this situation.

As an initial matter, the doctrines of estoppel and waiver are equitable defenses. *See* L.F., p. 117. Haulers' claim is legal in nature. *Id.* As such, neither estoppel nor waiver can bar a claim for damages at law. *Id.* (citing *Karpierz*, 68 S.W.3d at 571-72 and *Marvin E. Nieberg Real Estate Co. v. Taylor-Morley-Simon, Inc.*, 867 S.W.2d 618, 626 (Mo. Ct. App. E.D. 1993)).

The County's invocation of estoppel and waiver fails on the merits as well. The theory of estoppel declares that a party who makes a representation that misleads another person, who then reasonably relies on that representation to his detriment, may not deny the representation. *Murphy v. FedEx Nat. LTL, Inc.* 618 F.3d 893, 904 (8th Cir. 2010). The purpose of this doctrine is to "prevent a party from taking inequitable advantage of a situation he or she has caused." *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. banc 1998). The doctrine is generally disfavored in the law and should not be invoked lightly. *Comens v. SSM St. Charles Clinic Medical Group, Inc.*, 258 S.W.3d 491, 496 (Mo. Ct. App. E.D. 2008).

"In order for a party to prevail on a theory of equitable estoppel, [the party] must prove every fact essential to create an estoppel by clear and satisfactory evidence, and specifically, there must be a representation made by the party estopped and relied upon by another party who changes his position to his detriment." *Comens*, 258 S.W.3d at 496. Clearly, in this case, the County has not proven the elements of an estoppel. The County has not alleged, let alone proven, any of the elements of an estoppel. Furthermore, the purpose of the doctrine is not met here, as Haulers have not made affirmative representations that misled the County and the County has suffered no

detriment as a result of Haulers' alleged actions. The County's defense of estoppel must fail.

Waiver is the "intentional relinquishment of a known right." *Richardson v. Richardson*, 218 S.W.3d 426, 430 (Mo. banc 2007). The County claims that Haulers somehow waived their right to challenge the validity of the waste program at issue by offering suggestions during opportunities for public comment and by submitting bids to become the chosen contract haulers. *See* Brief of Appellant/Cross-Respondent, pp. 75-76. Haulers are not challenging the validity of the program, however. Haulers are challenging the implementation of the program by the County – specifically, the County's failure to give Haulers notice and wait two years to begin waste collection once the bids were open and the contracts were awarded to other haulers in violation of § 260.247. L.F., pp. 59-60. It is unclear how this supposed "participation" in the program was an intentional relinquishment of the right to receive the notice proscribed by § 260.247 if Haulers were not awarded the district contracts. It is also unclear how being forcibly removed from the waste collection market in unincorporated St. Louis County is a "benefit" to Haulers, as the County claims. Haulers have not waived their right to challenge the County's implementation of the trash program. The County's sixth point on appeal should be denied.

VIII. THE TRIAL COURT PROPERLY FOUND COUNTY LIABLE TO HAULERS ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE THE COUNTY FAILED TO SEND THE CERTIFIED NOTICE REQUIRED BY § 260.247 PRIOR TO ITS COMMENCEMENT OF WASTE COLLECTION (COUNTY'S SEVENTH POINT ON APPEAL).

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

As the County correctly points out, the purpose of § 260.247 is "to give existing haulers sufficient notice to allow them to make whatever business adjustments are needed prior to being excluded from particular service areas." Brief of Appellant/Cross-Respondent, p.79 (citing *Weber v. St. Louis County*, 342 S.W.3d 318, 323 (Mo. banc 2011)). The County incredulously argues that the enactment of the December 2006 ordinance authorizing implementation of the trash program served as actual notice pursuant to § 260.247. *Id.* This ordinance supposedly put existing haulers on notice to begin making "whatever business adjustments [were] needed prior to being excluded from particular service areas." It borders on frivolous for the County to contend that existing haulers were supposed to start selling equipment, firing employees, etc., one and

one-half years before a single RFP went out or almost two years before contracts for service were to begin. Did the County know that Haulers were not going to be awarded contracts for any of the districts such that Haulers should have been on notice to wind down their businesses? This argument defies logic.

Section 260.247 provides: "Any city or political subdivision which . . . enters into . . . solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities . . . shall notify the private entity or entities of its intent to provide solid waste collection services in the area by certified mail." § 260.247.1. The statute goes on to provide that the political subdivision "shall not" commence solid waste collection for "at least two years from the effective date of the notice" unless the political subdivision contracts with the private entity or entities to continue service. § 260.247.2.

Provision of the required notice is not optional or directory. When construing a statute, the intent of the legislature controls. *Christian Disposal, Inc. v. Village of Eolia*, 895 S.W.2d 632, 634 (Mo. Ct. App. E.D. 1995). "To determine the legislature's intent, [courts] look to the language of the statute and the plain and ordinary meaning of the words employed." *Id.* If the legislature intended that the notice requirements under § 260.247 were optional, and not mandatory, the legislature could have included language in § 260.247 to that effect. *See id.* (finding that a waste hauler's failure to provide requested information under subsection 4 of the statute did not relieve the political subdivision from the notice requirements of § 260.247).

"To determine whether a statute is mandatory or directory, the general rule is when a statute provides what results shall follow a failure to comply with its terms, it is mandatory and must be obeyed." *Christian Disposal*, 895 S.W.2d at 634. If the statute requires that certain things be done, but "does not prescribe what results will follow if those requirements are not met, such a statute is merely directory." *Id.* In this case, § 260.247 clearly prescribes what must happen if the County does not give notice and wait the statutorily required two years before proceeding with the collection of waste: the County must pay Haulers what they would have received for performing the same services during the required two-year notice period. Therefore, the notice requirements of § 260.247 are mandatory and must be followed by the County. *Id.*

Furthermore, Haulers could not have had actual notice that the County unequivocally intended to implement its Program in December of 2006, as the County claims. To defeat Haulers' 2008 request for a writ to prevent implementation of the County's Program before it started, the County judicially admitted that its intent to implement the Program was not unequivocal until the County's haulers started collecting trash and that the Program could be abandoned at any time prior to collection. *See* S.L.F., p. 16. The trial court also rejected the County's actual notice argument, finding that "the County's intent would be absolute as of the date it signed binding contracts with the new haulers, thereby displacing Plaintiffs." L.F., p. 126.²¹

²¹ The trial court ultimately ignored the mandatory language set forth in § 260.247 and found that Haulers would have had actual notice as of the date the County signed

It is unreasonable for the County to suggest that all incumbent waste haulers in unincorporated St. Louis County should have begun to make business adjustments on December 12, 2006 when the County passed the ordinance authorizing creation of the waste collection program. Such necessary business adjustments, as Haulers later discovered, would have included selling trucks and equipment, laying off personnel and scaling down business operations in the districts. No rational business owner would engage in such drastic measures if County could decide to abandon its program six months later. Furthermore, if one of the incumbent haulers ultimately submitted the "most responsible" bid or bids and was awarded a contract for one or more of the districts, the incumbent hauler would be unable to meet its responsibilities under the contract as a result of winding down its business. The notice provisions of § 260.247 were intended to give Haulers fair notice and adequate time to make the necessary business adjustments upon the award of their customers to another private entity. The County must be held responsible for failing to provide that notice. The County's seventh point on appeal should be denied.

contracts with the new haulers although the County has yet to serve compliant notice. The trial court determined the two-year notice period for determining Haulers' damages began to run from the date of these contracts (April 8, 2008 for District 3 and June 10 and 17, 2008 for the remaining districts).

RESPONDENTS'/CROSS-APPELLANTS' POINTS RELIED ON

- I. THE TRIAL COURT ERRED IN LIMITING HAULERS' AWARD TO FIVE PERCENT ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE THERE WAS NO EVIDENCE OF HAULERS' PROFIT MARGIN IN THAT THE TRIAL COURT SPECIFICALLY PROHIBITED DISCOVERY ON AND THE ADMISSION OF EVIDENCE CONCERNING HAULERS' PROFITS.**

In re the Adoption of C.M.B.R., 332 S.W.3d 793 (Mo. banc 2011)

- II. THE TRIAL COURT ERRED IN DECLARING THAT THE PROPER MEASURE OF DAMAGES UNDER § 260.247 TO BE PROFITS BECAUSE THE STATUTE MANDATES HAULERS' DAMAGES TO BE REVENUES IN THAT § 260.247 STATES HAULERS ARE ENTITLED TO RECEIVE WHAT THEY WOULD HAVE RECEIVED FOR A PERIOD OF TWO YEARS FOR PROVIDING THE SAME SERVICE.**

Gash v. Lafayette County, 245 S.W.3d 229 (Mo. banc 2008)

Geisler v. Director of Revenue, 94 S.W.3d 216 (Mo. Ct. App. E.D. 2004)

Southwestern Bell Yellow Pages, Inc. v. Director of Revenue, 94 S.W.3d 388 (Mo. banc 2002)

Mo. Rev. Stat. § 260.247 (2008)

III. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN HAULERS' FAVOR IN THE TOTAL AMOUNT OF \$23,198,078.00 BECAUSE THE TRIAL COURT'S JUDGMENT THAT HAULERS WERE ENTITLED TO JUDGMENT IN THE AMOUNT OF \$1,159,903.90 WAS CONTRARY TO LAW AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THERE WAS COMPETENT, SUBSTANTIAL AND UNCONTROVERTED EVIDENCE TO SUPPORT A JUDGMENT FOR HAULERS IN THE AMOUNT OF \$23,198,078.00.

White v. Director of Revenue, 321 S.W.3d 298 (Mo. banc 2010)

Mo. Rev. Stat. § 260.247 (2008)

IV. THE TRIAL COURT ERRED IN DISMISSING COUNT III OF HAULERS' FIRST AMENDED PETITION BECAUSE HAULERS PROPERLY PLED A VALID CAUSE OF ACTION UNDER MISSOURI ANTITRUST LAWS IN THAT ST. LOUIS COUNTY CREATED MONOPOLY TRASH DISTRICTS IN UNINCORPORATED ST. LOUIS COUNTY IN VIOLATION OF THE LAW.

Fischer, Spuhl, Herzwurm & Assocs., Inc. v. Forrest T. Jones & Co., 586 S.W.2d 310 (Mo. banc 1979)

L & H Sanitation, Inc. v. Lake City Sanitation, Inc., 769 F.2d 517 (8th Cir. 1985)

Paragould Cablevision, Inc. v. City of Paragould, 930 F.2d 1310 (8th Cir. 1991)

Christian Disposal, Inc. v. Village of Eolia, 895 S.W.2d 632 (Mo. Ct. App. E.D. 1995)

Mo. Rev. Stat. § 260.215 (2008)

Mo. Rev. Stat. § 260.247 (2008)

Mo. Rev. Stat. § 416.031 (2008)

Mo. Rev. Stat. § 416.121 (2008)

Mo. Rev. Stat. § 416.041 (2008)

V. THE TRIAL COURT ERRED IN FAILING TO AWARD HAULERS PREJUDGMENT INTEREST ON THEIR DAMAGES BECAUSE HAULERS ARE ENTITLED TO PREJUDGMENT INTEREST UNDER MO. REV. STAT. § 408.020 IN THAT HAULERS' DAMAGES WERE READILY ASCERTAINABLE AT THE TIME DEMAND WAS MADE.

Jablonski v. Barton Mutual Insurance Co., 291 S.W.3d 345 (Mo. Ct. App. W.D. 2009)

Twin River Constr. Co. v. Pub. Water Dist. No. 6, 653 S.W.2d 682 (Mo. Ct. App. E.D. 1983)

Children Int'l v. Ammon Painting Co., 215 S.W.3d 194 (Mo. Ct. App. W.D. 2007)

Mo. Rev. Stat. § 408.020 (2008)

ARGUMENT

I. THE TRIAL COURT ERRED IN LIMITING HAULERS' AWARD TO FIVE PERCENT ON COUNT II OF HAULERS' FIRST AMENDED PETITION BECAUSE THERE WAS NO EVIDENCE OF HAULERS' PROFIT MARGIN IN THAT THE TRIAL COURT SPECIFICALLY PROHIBITED DISCOVERY ON AND THE ADMISSION OF EVIDENCE CONCERNING HAULERS' PROFITS.

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

Argument

On September 2, 2011, following the trial on damages held on May 31, 2011, the trial court awarded Haulers damages on Count II of their First Amended Petition in the collective amount of \$1,159,903.90. L.F. pp. 159-60. The trial court calculated each individual Hauler's damages by applying a 5% margin of profit to the damage calculation of Haulers' expert on each Hauler's lost revenues during the relevant time period. *Id.* The trial court erred, however, as there was absolutely no evidence of Haulers' profits or Haulers' profit margins introduced at trial or adduced through discovery. Thus, this portion of the trial court's judgment must be vacated.

On January 25, 2011, after entering summary judgment in Haulers' favor on the liability portion of Count II of their First Amended Petition, the trial court found that the measure of Haulers' damages would be "at least equal to the amount [Haulers] would have received for providing such services" during the two-year statutorily required waiting period mandated by § 260.247. L.F., p. 124. Having ruled that Haulers were entitled to receive the equivalent of two years' of revenues as a result of the County's statutory violation, the trial court subsequently prohibited any discovery on the issue of Haulers' profits. *See, e.g.*, L.F., p. 129 ("requesting information regarding expenses or net profit is not reasonably calculated to lead to discovery of admissible evidence of [Haulers'] damages"); S.L.F., p. 216 (limiting "the document requests contained in [the County's] deposition notices to those issues of damages as previously ruled on by the Court"). Even during the trial on damages, the trial court held that profits were irrelevant to the issue of Haulers' damages and overruled the County's offer of proof. T.T., pp. 109-10.

Despite previously ruling the measure of damages to be revenues and then precluding any discovery on Haulers' profits or expenses, the trial court entered judgment awarding Haulers profits based upon an unsubstantiated hypothetical proffered by the County's counsel at trial. L.F., p. 159-60. The relevant portion of the trial transcript indicates:

Q. (by Ms. Redington) And you're familiar with the term profit margin, aren't you?

A. (by Mr. Ficken) I am.

Q. So if each Plaintiff here had a profit margin of 5 percent your opinion of revenues would give them about – well, would give them exactly 20 times the amount of actual damages that they sustained wouldn't it?

MS. DUEKER: Objection, Your Honor. Profits isn't part of this case, and they can't call an expert about that, and Pat's not an expert.

THE COURT: This Court has already ruled that the statute governs the damages here, and so the statute doesn't use the word profit. The Court's already talked about that. I'm taking this as your offer of proof that you believe the Court is wrong about interpreting the statute that way. So I am sustaining the objection to this and this will be your offer of proof.

MS. REDINGTON: Okay. May I have him answer the last question?

THE COURT: Yes. As part of – Yes.

Q. (by Ms. Redington) As part of the offer of proof, if they had a profit margin of 5 percent then your opinion based on gross revenues would be about 20 times their actual losses, wouldn't it?

A. Approximately, yes.

* * *

THE COURT: Hang on. That's the end of the offer of proof, so I'm still going to rule it's irrelevant based on the Court's prior ruling.

T.T., pp. 108-110.

Counsel for the County asking Haulers' expert to assume a five percent (5%) margin of profit does not constitute evidence to justify the trial court reducing Haulers'

uncontroverted, substantiated and admissible damage calculation by ninety-five percent (95%). Not only was there no *substantial* evidence to support the trial court's judgment, there was no evidence *at all* to support that judgment. As such, it must be reversed. *In re the Adoption of C.M.B.R.*, 332 S.W.3d at 815 (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)).

II. THE TRIAL COURT ERRED IN DECLARING THAT THE PROPER MEASURE OF DAMAGES UNDER § 260.247 TO BE PROFITS BECAUSE THE STATUTE MANDATES HAULERS' DAMAGES TO BE REVENUES IN THAT § 260.247 STATES HAULERS ARE ENTITLED TO RECEIVE WHAT THEY WOULD HAVE RECEIVED FOR A PERIOD OF TWO YEARS FOR PROVIDING THE SAME SERVICE.

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

In its final judgment, it appears the trial court awarded Haulers damages based upon a 5% margin of profit. L.F., p. 159-60. The trial court reversed its previous ruling that the language of § 260.247 entitles Haulers to revenues for a two-year period for the County's violation of the statute, *see* L.F., p. 124, and found that "the statutory language, 'would have received for providing such services', necessarily means what [Haulers] would have collected, and not simply what they would have billed." L.F., pp. 158-59. The trial court's interpretation of § 260.247 is incorrect, and Haulers are entitled to receive the equivalent of their revenues for the two-year time period.

The relevant language in § 260.247 relating to Haulers' damages in this case states in part:

If the services to be provided under a contract with the . . . [County] pursuant to subsection 2 of this section are substantially the same as the services rendered in the area prior to the decision of the [County] to . . . enter into . . . solid waste collection services into the area, the amount *paid* by the [County] shall be at least equal to *the amount the private entity or entities would have received* for providing such services during that period.

§ 260.247 (emphasis added).

"The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). To determine the intent of the legislature, the Court should look to statutory definitions, or if none are provided, to the "plain and ordinary meaning" of the text of the statute, which may be found in a dictionary. *Id.* A court cannot read into a statute "legislative intent contrary to intent made evident by plain language," *Geisler v. Director of Revenue*, 94 S.W.3d 216, 218 (Mo. Ct. App. E.D. 2004), nor can a court "add words to a statute under the auspice of statutory construction." *Southwestern Bell Yellow Pages, Inc. v. Director of Revenue*, 94 S.W.3d 388, 390 (Mo. banc 2002).

In this instance, the trial court found, without citation to any case law, it had a duty to "give effect to legislative intent, with the law favoring a statutory interpretation which tends to avert unreasonable results." L.F., p. 159. The trial court stated, again without

citation to any authority, it "[did] not believe the legislature intended a windfall result when it enacted § 260.247 . . . in an effort to protect private entities engaged in trash collection from a government's takeover of their business." *Id.* Finally, the trial court interpreted the purpose of § 260.247 to make "[Haulers] whole by putting them in the position they would have been in had they been given sufficient notice and two years to make adjustments in their businesses." *Id.*

Quite simply, it is not the job of the trial court to read into the statute any more than the plain language provides. There is no language within the text of § 260.247 that refers to reasonableness or the prevention of a "windfall judgment." Further, the text of § 260.247 does not limit a private entities' recovery under the statute to the position they would have been in had they been given time to wind down their businesses. The trial court overstepped its authority in reading such limitations into the text of § 260.247. The trial court was bound to give effect to the plain meaning of the statute, irrespective of the trial court's comfort level with the amount of business the County usurped. It is within the legislature's purview to determine the policy trade-off to allow the County to take private business. It is not unreasonable for the legislature to provide incumbent haulers two years of revenue for the permanent taking of their customers – in this case, 40,000 of them.

The plain language of §260.247.3 mandates Haulers be "paid" the amount they "would have received" if they were permitted to continue collecting waste in unincorporated St. Louis County during the two-year waiting period. *See* § 260.247. The definition of receive is "be provided with or given; acquire; get." Shorter Oxford English

Dictionary, Fifth Edition, 2002. But for the County's illegal implementation of its waste program, Haulers would have received revenue from their customers, as customers pay revenue, rather than profits, for waste collection services. Under the plain meaning of § 260.247, Haulers would have, therefore, received revenues. Section 260.247 does not refer to profits, nor did Haulers receive profits from their customers. As the statute does not provide that expenses be deducted from Haulers' damage award, Haulers are entitled to receive the equivalent of two years' worth of revenues from the date the County entered into contracts with the new haulers.²² The trial court erred, therefore, in reducing Haulers' claims by ninety-five percent (95%) based upon a hypothetical profit margin. Judgment should be entered in favor of Haulers based upon revenues Haulers would have received for the relevant timeframe.

²² The trial court found that while the County has never given the two years' notice required by § 260.247, "the County's intent would be absolute as of the date it signed binding contract with the new haulers, thereby displacing [Haulers]." L.F., p. 126. The trial court found "the two year notice period for determining [Haulers'] damages began to run as of the date of those contracts, i.e., April 8, 2008 for District 3 and June 10 and 17, 2008 for the remaining Districts." *Id.*

III. THE TRIAL COURT ERRED IN FAILING TO ENTER JUDGMENT IN HAULERS' FAVOR IN THE TOTAL AMOUNT OF \$23,198,078.00 BECAUSE THE TRIAL COURT'S JUDGMENT THAT HAULERS WERE ENTITLED TO JUDGMENT IN THE AMOUNT OF \$1,159,903.90 WAS CONTRARY TO LAW AND AGAINST THE WEIGHT OF THE EVIDENCE IN THAT THERE WAS COMPETENT, SUBSTANTIAL AND UNCONTROVERTED EVIDENCE TO SUPPORT A JUDGMENT FOR HAULERS IN THE AMOUNT OF \$23,198,078.00.

Standard of Review

"In appeals from a court-tried civil case, the trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *White v. Director of Revenue*, 321 S.W.3d 298, 307-08 (Mo. banc 2010) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "To set aside a judgment as 'against the weight of the evidence,' this Court must have a firm belief that the judgment is wrong." *Id.* at 308. The Court must defer to the trial court's determination of credibility when the evidence presented at trial is contested. *Id.* A party contests evidence presented when it cross-examines the opposing party's witness. *Id.*

Argument

The trial court's entry of judgment for Haulers in the cumulative amount of \$1,159,903.90 was against the weight of the evidence because the only evidence before the trial court, which the trial court found to be admissible and credible, indicated that

Haulers were entitled to damages in the amount of \$23,198,078.00, plus prejudgment and post-judgment interest. Based upon the uncontroverted record, this Court should reverse the trial court and enter judgment for that amount.

At trial, Haulers offered the expert testimony of Mr. Ficken to prove the amount of damages Haulers sustained as a result of the County's violation of § 260.247. *See* T.T., pp. 8-119. Mr. Ficken testified that Haulers were entitled to approximately \$23 million in damages, to be awarded as follows: American Eagle in the amount of \$5,221,733.00, Meridian in the amount of \$1,984,484.00, and Waste Management in the amount of \$15,991,861.00. T.T., pp. 15, 38, 46, 58; Exhibits 3-5. The County thoroughly cross-examined Mr. Ficken and challenged his testimony. T.T., pp. 68-112. However, the County failed to offer any evidence of its own challenging the manner in which Mr. Ficken calculated Haulers' damages or the information upon which he relied. *See* T.T., pp. 119-146.

Notwithstanding the County's cross-examination, the trial court found Mr. Ficken's testimony to be credible. L.F., p. 158. It was only because the trial court disregarded its previous rulings as to the measure of damages and awarded Haulers their supposed profits, without hearing or allowing any evidence of profits and in contravention of the measure of damages set forth in § 260.247, that Ficken's testimony was ignored.²³ Not

²³ As more fully explained in Haulers' Point Relied On II., *supra*, the trial court erroneously interpreted the measure of damages set forth in § 260.247 for violation of the provisions contained therein.

only is the trial court's judgment against the weight of the evidence presented, there is no evidence to support the judgment.

The record reflects that American Eagle is entitled to damages in the amount of \$5,221,733.00, that Meridian is entitled to damages in the amount of \$1,984,484.00, and that Waste Management is entitled to damages in the amount of \$15,991,861.00. No other evidence of Haulers' damages was before the trial court, nor is any other evidence of damages before this Court. While it is troublesome to all involved that the burden of the County's willful and deliberate violation of the law will fall squarely on the shoulders of the taxpayers of St. Louis County, Haulers are entitled to compensation for the County taking 40,000 of the Haulers' customers.

Regardless of the trial court's motivation to reverse itself, ignore the evidence before it and enter a judgment amount that is *entirely* unsupported by *any* evidence, this Court must defer to the trial court's determination that Haulers' evidence is credible. Because credible and uncontroverted evidence is before this Court, Haulers request this Court enter judgment in their favor as follows: American Eagle be awarded \$5,221,733.00, Meridian be awarded \$1,984,484.00 and Waste Management be awarded \$15,991,861.00, pre and post-judgment interest and attorneys' fees for County's antitrust violation.

IV. THE TRIAL COURT ERRED IN DISMISSING COUNT III OF HAULERS' FIRST AMENDED PETITION BECAUSE HAULERS PROPERLY PLED A VALID CAUSE OF ACTION UNDER MISSOURI ANTITRUST LAWS IN THAT ST. LOUIS COUNTY CREATED MONOPOLY TRASH DISTRICTS IN UNINCORPORATED ST. LOUIS COUNTY IN VIOLATION OF THE LAW.

Standard of Review

"In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, the following standard of review applies:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or a cause that might be adopted in that case."

Bosch v. St. Louis Healthcare Network, 41 S.W.3d 462, 463-64 (Mo. banc 2001).

Argument

Count III of Haulers' First Amended Petition sought damages for the County's illegal monopolization of waste collection in unincorporated St. Louis County. The trial

court erroneously dismissed Haulers' antitrust claim on August 5, 2010, finding that the collection of waste by the County is authorized under Missouri statutes and, therefore, cannot be undermined by "procedural irregularities." L.F., p. 110. The trial court erred, however, in dismissing Count III because Haulers properly alleged Missouri antitrust violations against the County.

Pursuant to Mo. Rev. Stat. § 416.031 (2008) ("§ 416.031"), "[e]very contract, combination or conspiracy in restraint of trade or commerce in this state is unlawful." Moreover, "[i]t is unlawful to monopolize, attempt to monopolize, or conspire to monopolize trade or commerce in this state." *Id.* Further, "[a]ny person, including the state, who is injured in his business or property by reason of anything forbidden or declared unlawful by sections 416.011 to 416.161 may sue therefore in any circuit court of this state...[for] damages sustained by him (and for threefold damages and attorneys' fees)." Mo. Rev. Stat. § 416.121 (2008).

In dismissing Haulers' antitrust claim, the trial court relied on the "state action" exemption found in Mo. Rev. Stat. § 416.041.2 ("§ 416.041.2") to relieve the County of liability for the monopolization of trash collection in unincorporated St. Louis County. Section 416.041.2 creates an exemption for state-regulated activities:

Nothing contained in the Missouri antitrust law shall be construed to apply to activities or arrangements expressly approved or regulated by any regulatory body or officer acting under statutory authority of this state or of the United States.

Id. Finding that waste collection is regulated by §§ 260.247, 260.215, and 71.680, the trial court dismissed Haulers' Count III. L.F., p. 110.

Haulers agree that the collection of waste is a state-regulated and even authorized activity which may fall under the state action exemption. The state action exemption is not absolute, however. "Under the 'state action' exemption, anticompetitive activities are exempt if they are *compelled* by state regulations. The 'state action' doctrine does not relieve antitrust liability for anticompetitive conduct which also violates state regulations for particular industries." *Fischer, Spuhl, Herzwurm & Assocs., Inc. v. Forrest T. Jones & Co.*, 586 S.W.2d 310, 314 (Mo. banc 1979) (emphasis added).

It is clear that to obtain the "state action" exception, an entity "must demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *L & H Sanitation, Inc. v. Lake City Sanitation, Inc.*, 769 F.2d 517, 520 (8th Cir. 1985). Indeed, to obtain immunity, "the state legislature must have *authorized* the challenged municipal activity." *Id.* at 521 (emphasis added). Moreover, the challenged activity must be performed pursuant to a "clearly expressed state policy." *Paragould Cablevision, Inc. v. City of Paragould*, 930 F.2d 1310, 1312 (8th Cir. 1991). "A municipality is therefore subject to searching anti-trust scrutiny and can defeat anti-trust challenges only if the anticompetitive consequence necessarily and reasonably results from engaging in the authorized activity." *Id.*

In *L & H Sanitation, Inc.*, an unsuccessful bidder for a municipal waste collection contract in Arkansas brought suit alleging, among other things, a violation of antitrust

laws. 769 F.2d at 518. The Eighth Circuit held that the state action exception applied to the municipality in question because the "legislature affirmatively granted municipalities the comprehensive and specific authority necessary for effective solid waste management, including the authority to enter into contracts for solid waste disposal and to regulate solid waste management by ordinance." *Id.* at 521-522. There were no allegations, however, that the municipality's conduct was in violation of the authorizing legislation. *See id.* Rather, the Eighth Circuit held that the "Arkansas legislature has clearly authorized the challenged municipal activity, the regulation of solid waste management and disposal." *Id.* at 521.

Conversely, in this case, the actions taken by the County were not authorized by state statute and were in direct contravention of the market regulation policy enumerated in § 260.247:

The County is authorized to enter the business of trash collection, and even to take it out of the hands of private collectors. But enacting an ordinance which would allow the County to do so without following the notice requirement and waiting period in section 260.247 would bring it "out of harmony with the general laws of the state" and amount to "[an] attempt to change the policy of the state as declared for the people at large. A charter county's exercise of power that produces this result is impermissible."

L.F., p. 56 (citing *American Eagle*, 272 S.W.3d at 343). Although Mo. Rev. Stat. §260.215 expresses the state policy of allowing municipalities or counties to contract with private entities for trash hauling, the County clearly violated the state policy set

forth in § 260.247 with respect to how municipalities or counties can do so. As stated in *Christian Disposal*, "[t]he fundamental purpose of § 260.247 is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area." 895 S.W. 2d at 634. Thus, the state action exemption is unavailable to the County. Count III properly states a cause of action and the trial court's dismissal of Haulers' antitrust claims must be reversed.

V. THE TRIAL COURT ERRED IN FAILING TO AWARD HAULERS PREJUDGMENT INTEREST ON THEIR DAMAGES BECAUSE HAULERS ARE ENTITLED TO PREJUDGMENT INTEREST UNDER MO. REV. STAT. § 408.020 IN THAT HAULERS' DAMAGES WERE READILY ASCERTAINABLE AT THE TIME DEMAND WAS MADE.

Standard of Review

"The trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *In re the Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011) (citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

Argument

Mo. Rev. Stat. § 408.020 allows an award of prejudgment interest for "all moneys after they become due and payable . . . after they become due and demand of payment is made." In order for prejudgment interest to be awarded on a claim, three conditions must be met: "(1) the expenses must be due; (2) the claim must be liquidated or the amount of the claim reasonably ascertainable; and (3) the obligee must make a demand on the obligor for the amount due." *Jablonski v. Barton Mutual Insurance Co.*, 291 S.W.3d 345, 350 (Mo. Ct. App. W.D. 2009).

"As a general rule, damages are liquidated when the amount due is fixed and determined or readily ascertainable by computation or a recognized standard." *Jablonski*, 291 S.W.3d at 350 (internal citations omitted). "The mere fact that a party denies

liability or defends a claim against him, or even the existence of a bona fide dispute as to the amount of the indebtedness, does not preclude recovery of interest . . ." *Twin River Constr. Co. v. Pub. Water Dist. No. 6*, 653 S.W.2d 682, 695 (Mo. Ct. App. E.D. 1983).

The filing of a lawsuit can be sufficient demand if no demand is made prior to the filing. *Children Int'l v. Ammon Painting Co.*, 215 S.W.3d 194, n.18 (Mo. Ct. App. W.D. 2007). "The demand need not be expressly stated in the petition – requesting 'such other relief as may be proper' will suffice." *Id.*

Here, Haulers meet the statutory requirements under § 408.020. It is clear that the County owes Haulers damages for its violation of § 260.247. *See* L.F., p. 160. Haulers' claim for damages was reasonably ascertainable at the time Haulers filed their First Amended Petition, as § 260.247 sets forth the measure of damages for Haulers' claim. Haulers sufficiently made a demand for prejudgment interest in their First Amended Petition. *See* L.F., p. 60 (requesting "such other and further relief as this Court deems just and proper" in Count II). Therefore, Haulers are entitled to prejudgment interest at the statutorily prescribed rate of nine percent (9%) from April 27, 2009, the date Haulers filed their First Amended Petition. *See* L.F., p. 3.²⁴

²⁴ At trial, Mr. Ficken testified that Haulers were entitled to \$4 million in prejudgment interest calculated at a rate of nine percent (9%). T.T., p. 59.

CONCLUSION

The County has failed to offer a valid legal or factual reason why it should not be held liable for its willful violation of § 260.247. Based upon the arguments presented herein, Haulers respectfully request that the County's seven Points Relied On be denied.

With respect to Haulers' Cross-Appeal, it is clear that the trial court's judgment cannot stand as entered. There is absolutely no factual basis to support the amount of damages awarded therein, the measure of damages adopted by the trial court is incorrect, and Haulers are entitled to their lost revenues and prejudgment interest. Furthermore, Count III of Haulers' First Amended Petition seeking damages for violation of Missouri's antitrust statutes was improperly dismissed. Haulers request the following relief:

- 1) the trial court's judgment of September 2, 2011 be vacated;
- 2) the Court declare the measure of damages under § 260.247 to be revenues;
- 3) final judgment be entered for Haulers on Count II of their First Amended

Petition in the following amounts representing :

- a. for American Eagle Waste Industries, LLC in the amount of \$5,221,733.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009;
- b. for Meridian Waste Services, LLC in the amount of \$1,984,484.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009;

- c. for Waste Management of Missouri, Inc. in the amount of \$15,991,861.00, plus prejudgment interest at a rate of nine percent (9%) from April 27, 2009; and
- 4) the trial court's dismissal of Count III of Haulers' First Amended Petition be reversed and Count III be remanded to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief of Respondents/Cross-Appellants is 20,527, exclusive of the cover, table of contents, table of authorities, signature block, and certificate of compliance and service.

The undersigned also certifies that on this 27th day of February, 2012, a copy of the foregoing was served via the Court's e-filing system and electronic mail on:

Patricia Redington
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