

SC93816

IN THE SUPREME COURT OF MISSOURI

LINDA S. LABRAYERE, *et al.*, Appellants,

vs.

BOHR FARMS, LLC and CARGILL PORK, LLC, Respondents.

On Appeal from the Thirteenth Judicial Circuit Court of Boone County, Missouri

The Honorable Judge Jodie Asel, Case No. 11BA-CV04755

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STATEMENT OF FACTS

On August 28, 2011, Missouri Revised Statute § 537.296 became effective. Subsection 2 of this statute describes the compensatory damages available to claimants who allege nuisance originating from property used for crop or animal production purposes (“agricultural nuisance”) as follows:

The exclusive compensatory damages that may be awarded to a claimant for a private nuisance where the alleged nuisance emanates from property primarily used for crop or animal production purposes shall be as follows:

- (1) If the nuisance is a permanent nuisance, compensatory damages shall be measured by the reduction in the fair market value of the claimant’s property caused by the nuisance, but not to exceed the fair market value of the property.
- (2) If the nuisance is a temporary nuisance, compensatory damages shall be measured by the diminution in the fair rental value of the claimant’s property caused by the nuisance.
- (3) If the nuisance is shown by objective and documented medical evidence to have caused a medical condition to claimant, compensatory damages arising from that medical condition may be awarded in addition to the exclusive

damages permitted under subdivisions (1) and (2) of this subsection.

Mo. Rev. Stat. § 537.296.2.¹

After this law became effective, on September 8, 2011, a new swine facility near Martinsburg, Missouri was filled with pigs for the first time. (LF154-155, Mo. DNR CAFO Annual Report.) Appellants here (hereafter “Plaintiffs”) assert that the swine facility constitutes a temporary nuisance. Plaintiffs filed suit against Bohr Farms, LLC (“Bohr Farms”) and Cargill Pork, LLC (“Cargill Pork”) (hereafter collectively “Defendants”²), claiming damages as a result of the swine housed at the facility.³

¹ Under prior law, nuisance plaintiffs could recover (1) loss of economic value of the affected property, (2) loss of comfort, and (3) loss of health. With respect to the latter two components, a plaintiff could potentially recover “for any actual inconvenience and physical discomfort which materially affected the comfortable and healthful enjoyment and occupancy of his home, as well as for any actual injury to his health or property caused by the nuisance.” *Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 576 (Mo. 2000) (quoting *McCracken v. Swift & Co.*, 265 S.W. 91, 92 (Mo. 1924)).

² Cargill Pork does not own the facility or the land at issue. Rather, Cargill Pork is party to a contract with Bohr Farms, in which Cargill Pork owns only the pigs populating the Bohr Farms-owned facility. Although Bohr Farms and Cargill Pork are separate entities and their defenses to Plaintiffs’ claims differ in some respects, their positions are identical with respect to the statutory and constitutional arguments raised in this appeal.

Plaintiffs sought money damages under temporary private nuisance and negligence theories, vicarious liability for temporary nuisance and negligence, and conspiracy based on the underlying nuisance and negligence claims. (LF69-71, 2d Am. Pet., pp. 11, 13, 16, 20, and 23.)

In the course of discovery in this action, Plaintiffs have admitted that they are not pursuing any of the categories of damages for which they might be eligible as defined by the statute. Specifically, they “are not seeking damages arising from diminution or loss of [] property value” and that they “have not sought medical treatment for any medical or health condition relating to the swine facility and land application areas at issue in this litigation.” (LF360, Request Nos. 8, 9.) Plaintiffs further admitted that they do “not have any documentation from a medical provider concerning medical conditions.” (LF358-359, Request No. 6.)

In short, Plaintiffs have admitted that they do not seek any of the compensatory damages available to them under subsection 537.296.2, but instead seek only damages for certain types of loss of comfort and enjoyment that are no longer permitted under the statute. (*Id.*; LF150, Def. Statement of Uncontroverted Facts.) Based on these admissions, Defendants brought a motion for summary judgment on the ground that Plaintiffs’ claims for damages were barred as a matter of law. (LF145, Def. Motion for

³ For a detailed account of the procedural history of this matter, including the case filing, change of venue, and amended petitions, see Volume I of the Legal File at pages 1-109.

Summary Judgment.) Plaintiffs did not dispute that the damages they claim are not permitted under the statute, but argued that subsection 2's description of remedies was unconstitutional.⁴ (LF409, Pl. Memo. Opp. to Def. Motion.) The trial court agreed that Plaintiffs' prayers for relief were barred as a matter of Missouri law and granted summary judgment in favor of Defendants on all three causes of action. (LF580, Tr. Ct. Order.)

STANDARD OF REVIEW FOR ALL POINTS RELIED ON

The Missouri Supreme Court applies a *de novo* standard of review following a district court's grant of summary judgment. *Burns v. Smith*, 303 S.W.3d 505, 509 (Mo. banc 2010). On appeal, the criteria for deciding a summary judgment motion are no different than what was employed by the trial court as an initial matter. *ITT Commercial Finance v. Mid-Am. Marine*, 854 S.W.2d 371 (Mo. banc 1993). "An order of summary judgment may be affirmed under any theory that is supported by the record." *In re Estate of Blodgett v. Mitchell*, 95 S.W.3d 79, 81 (Mo. banc 2003).

Plaintiffs claim the statutory provision at issue is unconstitutional. A statute is presumed valid and will not be held unconstitutional unless it clearly contravenes a constitutional provision. *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). "[O]ne claiming otherwise has a heavy burden." *Blaske v. Smith & Entzeroth, Inc.*, 821

⁴ As noted below, Plaintiffs also argued in the trial court that other portions of the statute not at issue here were unconstitutional. These arguments are not properly before the Court, as discussed in *section II*, below.

S.W.2d 822, 835 (Mo. banc 1991) (citation omitted). When there is a constitutional challenge to a statute, the challenging party has the burden of proving that the statute “clearly and undoubtedly” violates the constitution. *Id.* The Court should resolve all doubts as to constitutionality in favor of validity of the statute, as statutes “are to be harmonized with the constitution and held valid if at all possible.” *State ex rel. Cardinal Gelnnon Mem. Hosp. v. Gaertner*, 583 S.W.2d 107, 117 (Mo. banc. 1979). This Court does not impose its own view of whether the statute is good public policy, as it is not the courts’ “province to question the wisdom, social desirability or economic policy underlying a statute as these are matters for the legislature’s determination.” *Winston v. Reorganized Sch. Dist. R-2, etc.*, 636 S.W.2d 324, 327 (Mo. 1982).

This Court should enforce subsection 537.296.2 unless “it plainly and palpably affronts fundamental law embodied in the constitution.” *Id.* at 828. “Every indulgence must be made in favor of the legislature’s handiwork.” *Assoc. Indus. of Missouri v. State Tax Com.*, 722 S.W.2d 916, 926 (Mo. 1987).

ARGUMENT

Plaintiffs cannot meet their heavy burden to show that subsection 537.296.2 is unconstitutional. Summary judgment was appropriate as a matter of law, and this Court should affirm.

I. The Missouri General Assembly Has the Power to Make Substantive Changes to Private Nuisance Causes of Action.

The legislature’s adoption of subsection 2 of section 537.296 effected a substantive change to the common-law cause of action for private nuisance. This Court

has long recognized that the legislature has the power to abrogate or modify the substance of a cause of action, including common law causes of action. *See, e.g., Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. 2000) (“A statute...may modify or abolish a cause of action that had been recognized by common law or by statute”); *see also Fust v. State*, 947 S.W.2d 424, 430-31 (Mo. 1997) (“Placing reasonable limitations on common law causes of action is within the discretion of the legislative branch and does not invade the judicial function”); *Blaske*, 821 S.W.2d at 833 (upholding statute of repose as applied to common law cause of action, on the theory that the statute “modifies the common law to provide that there is no such cause of action” after ten years); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989) (affirming statute granting HMOs immunity from liability in common law medical negligence actions, and recognizing “the legislature’s authority to design the framework of the substantive law”); *Holder v. Elms Hotel Co.*, 92 S.W.2d 620, 624 (Mo. 1936) (“Except as to vested rights, the legislative power exists to change or abolish existing statutory and common-law remedies” (citation omitted)); *De May v. Liberty Foundry Co.*, 37 S.W.2d 640, 647 (Mo. 1931) (“That the Legislature may regulate or entirely abolish the common-law rules of liability...is thoroughly established, and no valid reason exists why it may not require compensation to be made...according to a different rule from that prescribed by the common law...”).

The Missouri Revised Statutes also expressly provide that “no act of the general assembly or law of this state shall be held to be invalid, or limited in its scope or effect by the courts of this state, for the reason that it is in derogation of, or in conflict with, the common law.” Mo. Rev. Stat. § 1.010.

Section 537.296.2 does not permit the existence of a nuisance or authorize a nuisance to continue in perpetuity. Rather, subsection 2 prescribes the *categories of damages* recoverable for a nuisance in an agricultural context. This is a permissible legislative change to the common law, defining the parameters of the cause of action of private nuisance. *See Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 142 (Mo. banc 2005) (“in general, the legislature is free to establish the substance of a claim, as, for instance, to allow or disallow punitive damages”). The availability of different types of damages for nuisance under the prior common law does not prohibit the legislature from properly making changes to those remedies; indeed, the legislature would have the power (if it wished) to eliminate the nuisance cause of action entirely. *See Wheeler v. Briggs*, 941 S.W.2d 512, 514 (Mo. banc 1997) (constitutional right of access “does not assure that a substantive cause of action once recognized in the common law will remain immune from legislative or judicial limitation or elimination”) (citation omitted).

The Missouri General Assembly used its plenary power to define the damages available for an agricultural nuisance. “The general assembly’s authority is plenary, except when express constitutional provisions intervene.” *Harrell*, 781 S.W.2d at 63. In enacting subsection 2, the Missouri General Assembly and Governor properly modified the common-law cause of action for certain kinds of nuisance, and did so within the limits of the Missouri Constitution.

II. The Constitutionality of § 537.296, Subsections 3-5 Are Not Before This Court and the Court Need Not Address Them.

This Court need not address Subsections 3, 4, or 5 of section 537.296 in this appeal. Although Plaintiffs' brief devotes considerable discussion to these subsections, particularly in sections IV and V of their brief, the constitutionality of those subsections was not before the trial court and is not part of this appeal.

In the trial court, Defendants moved for summary judgment on the grounds that Plaintiffs sought damages not available as a matter of law, pursuant to subsection 2 of section 537.296, and did not seek summary judgment based on subsections 3, 4, or 5. The trial court likewise granted summary judgment based solely on subsection 2, and did not base any portion of its decision on subsections 3, 4, or 5. (LF580, Tr. Ct. Order.) On this appeal, Defendants are not arguing that the Court should look to subsections 3, 4, or 5 as alternative grounds for affirming the trial court judgment. Those subsections simply are not at issue here.

Moreover, the constitutionality of subsections 3 through 5 is not ripe for the Court's review. "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Missouri Health Care Ass'n v. Att'y Gen. of the State of Missouri*, 953 S.W.2d 617, 621 (Mo. banc 1997). This requirement is particularly compelling where, as here, a party challenges the constitutionality of a statute. See *Stenger v. Great S. Sav. and Loan Ass'n*, 677 S.W.2d

376, 382 (Mo. Ct. App. 1984) (“The question of the constitutional invalidity of a statute will be ruled on only when essential to disposition of a case.”).

At oral argument in the trial court, Plaintiffs’ counsel tried to justify his arguments concerning subsections 3, 4, and 5 by expressing concern that Defendants would move for directed verdict at trial based on these subsections. (See SJ Tr. at 34:10-15.) But if that was Plaintiffs’ concern and they wanted to resolve the validity of any defenses based on these subsections before trial, the proper procedure would have been to bring their own summary judgment motion directed at any affirmative defenses Defendants might assert based on those three subsections. They brought no such motion. Stated differently, Plaintiffs failed to procedurally address these issues at the trial court level through a motion at the proper point in the process.

As a result, the present appeal involves only the constitutionality of subsection 2, and Plaintiffs cannot expand the scope of the appeal to seek what would be essentially advisory opinions concerning the constitutionality of other subsections not raised by the underlying motion and not addressed in the trial court’s decision. The Court should not address Plaintiffs’ arguments concerning subsections 3, 4, and 5.

In addition, the Court need not consider the constitutionality of subdivisions 3, 4, and 5 because even assuming that those provisions *were* unconstitutional, subsection 2 is constitutional, is severable from subsections 3-5, and entirely disposes of Plaintiffs’ claims. See *Simpson v. Kilcher*, 749 S.W.2d 386 (Mo. banc 1988), *overruled on other grounds*, *Kilmer*, 17 S.W.3d at 550. In *Simpson*, the court addressed a constitutional challenge to one section of a three-section statute. The court held that even if the

challenged subsection of the statute were unconstitutional, the other subsections were complete, constitutional legislative enactments. *Id.* at 393; *see also* Mo. Rev. Stat.

§ 1.140. The same analysis applies here; in light of the constitutionality and severability of subsection 2, the court need not address the constitutionality of subsections 3 through 5.

III. § 537.296.2 Is Constitutional.

Subsection 2 of section 537.296 is constitutional. “An act of the legislature carries a strong presumption of constitutionality.” *Missouri Ass’n of Club Execs. v. State*, 208 S.W.3d 885, 888 (Mo. 2006) (citation omitted). This presumption cannot be rebutted, and a court cannot find an act of the legislature unconstitutional unless the act “clearly and undoubtedly” violates the constitution. *Rentschler*, 311 S.W.3d at 786. Plaintiffs here cannot meet their heavy burden to show that subsection 537.296.2 is unconstitutional.

A. Response to Plaintiffs’ Point I: § 537.296.2 Does Not Violate the State or Federal Takings Clauses.

Plaintiffs claim through a series of complex analyses that by delineating the categories of damages and using a fair market calculation as a way to measure traditional “use and enjoyment” damages, subsection 537.296.2 amounts to a “taking” of the Plaintiffs’ property in violation of the state and federal Constitutions. *See* U.S. Const., amend. V; Mo. Const. art. I, sec. 26; Mo. Const. art. I, sec. 28. Specifically, Plaintiffs claim that Mo. Rev. Stat. § 537.296 is unconstitutional in violation of Article I, Section 28 of the Missouri Constitution and the Fifth Amendment of the U.S.

Constitution because the statute “sanctions” the taking of Plaintiffs’ use and enjoyment of their private property for a private use. Alternatively, they argue that even if the use is not “private,” the statute is nevertheless unconstitutional because it “takes” private property for public use without just compensation. U.S. Const., amend. V; Mo. Const. art. I, sec. 26.⁵ Plaintiffs’ arguments all involve the idea that the statute at issue is a regulatory or “statutory” taking that “effectively imposes an easement on the landowners, making them sell some small part of their bundle of sticks to a corporate farming operation.” (App. Br. at 52.)

The U.S. Supreme Court first recognized regulatory takings in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S. Ct. 158 (1922), which involved a statute that prohibited coal miners from mining in a way that would cause the subsidence of a structure used as a human habitation. *Mahon*, 260 U.S. at 412. The Supreme Court held that the act as applied to the facts in question constituted a regulatory exercise of eminent domain—a regulatory “taking”—because it prevented the coal company from mining the property for profit. *Id.* at 416.

The regulatory takings challenges Plaintiffs raise here are governed by the *Penn Central* balancing test, which involves “essentially ad hoc, factual inquiries” primarily focused upon the economic impact of the regulation. *Penn Cent. Transp. Co. v. New*

⁵ Plaintiffs’ takings analyses involves other subsections of the statute not at issue in this case; Respondents’ argument addresses only subsection 2, given the lack of justiciability of the other subsections here. *See* § II, above.

York City, 438 U.S. 104, 124, 98 S. Ct. 2626, 2659 (1978); *Clay Cnty. v. Harley and Susie Bogue, Inc.*, 988 S.W.2d 102, 107 (Mo. App. W.D. 1999) (noting that Missouri considers the same factors the U.S. Supreme Court considers in making a determination of whether a regulatory taking has occurred).⁶ The *Penn Central* factors include “(1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the government action.” *Schnuck Mkts., Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo. App. 1995) (citing *Penn Cent.*, 438 U.S. at 124, 98 S. Ct. at 2659). Under this test, Plaintiffs’ argument that subsection 2 is an unconstitutional regulatory taking fails as a matter of law.

⁶ The law recognizes only two categories of regulatory action that constitute *per se* takings not subject to the *Penn Central* balancing test: where government requires an owner to suffer a permanent physical invasion of property, see *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and where the government deprives an owner of all economically beneficial use of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S. Ct. 2886 (1992); *Clay County*, 988 S.W.2d at 107 (explaining *per se* regulatory takings under Missouri law). Plaintiffs do not allege that subsection 537.296.2 constitutes a *per se* taking.

1. § 537.296.2 Does Not Interfere with Property Rights

As an initial matter, the damages provision in subsection 2 cannot be a taking because it does not interfere with Plaintiffs' property rights. A takings analysis necessarily begins with determining whether the government's action actually interferes with the landowner's existing "bundle of rights." *Sunrise Corp. v. City of Myrtle Beach*, 420 F.3d 322, 330 (4th Cir. 2005) (citing *Lucas*, 505 U.S. 1003) (takings jurisprudence is guided by the content of and state's power over the "bundle of rights" individuals acquire when they take title to property). If there is no interference with a bundle of rights, there is no taking. *Id.*

Here, subsection 537.296.2 does not destroy or injure property, and Plaintiffs do not claim that it does. Rather, the statute modifies a common-law cause of action by delineating the types of damages recoverable in certain lawsuits and the basis for calculating such damages, allowing for certain types of compensation in agricultural nuisance lawsuits. Subsection 2 provides clarity on the valuation mechanism for calculating monetary damages that a plaintiff can potentially recover for agricultural nuisance; in no way does subsection 2 affect the property itself.

Plaintiffs try to avoid this problem by arguing that they cannot fully enjoy their land without the ability to potentially recover additional types of unlimited monies in a lawsuit (beyond the value of their property or personal medical expenses incurred), and that the denial of that additional remedy therefore constitutes a taking. Plaintiffs rest this argument primarily on *Hoffman v. Kinealy*, 389 S.W.2d 745, 752-53 (Mo. banc 1965), which involved the constitutionality of a zoning ordinance that prohibited landowners'

decades-long lawful but nonconforming use of business property to store construction equipment. The *Hoffman* court concluded that the ordinance's prohibition of this specific use of personal property constituted a taking because the landowners had a "vested right" to use their land a certain way, which involved their livelihood. *Hoffman*, 389 S.W.2d at 753.

By contrast, here, the legislature has not prohibited any use of Plaintiffs' land; rather, it has defined the categories of monetary damages Plaintiffs can recover from third parties in the context of an agricultural nuisance claim. Plaintiffs had no property interest in the rule of law that previously permitted a different rubric for determining the value of damages in such cases. As this Court stated in *Simpson*:

It may be safely stated as a general rule that the citizen has no property in a rule of law, and that, while rights which have accrued to him under operation of existing laws and have thereby become vested may not be taken away by a change of the rules, he cannot be heard to complain if the rule is changed before any rights have accrued to him thereunder.

749 S.W.2d at 394, *overruled on other grounds in Kilmer*, 17 S.W.3d 54. Here, Plaintiffs had no cause of action for nuisance until the commencement of operations at the farm, which undisputedly occurred *after* the effective date of subsection 537.296.2.

Moreover, the recognition of such a property right in a rule of law would effectively straitjacket the legislature and substantially impede the evolution of the law. As this Court has noted:

If the constitution places a limitation on the legislature that prohibits it from eliminating a potential cause of action before it arises, such a provision would prohibit the legislature from changing the substantive law in any way that adversely affects any potential litigant. It is obvious that neither the United States Constitution nor the Missouri Constitution purports to contain any such limitation.

Blaske, 821 S.W.2d at 834. Here, the Missouri General Assembly properly exercised its power by substantively modifying a cause of action through defining categories of damages available for a specific alleged tort. As this modification did not affect any existing property rights of Plaintiffs, there can be no taking, and the Court's inquiry should end there.

2. § 537.296.2 Does Not Create an Easement

In support of their argument that subsection 537.296.2 is a regulatory taking, Plaintiffs claim that (a) subsection 537.296.2 creates a permanent nuisance; (b) a permanent nuisance is equivalent to an easement; and (c) an easement is necessarily a compensable taking. Plaintiffs' arguments rely on a number of jumps in logic and conclusions that are unsupported either by the statute or by Missouri precedent.

a. *§ 537.296.2 Does Not Convert All Nuisances to Permanent*

Plaintiffs offer no legal support for their assertion that subsection 537.296.2 converts all nuisances involving agricultural property to permanent nuisances. (App. Br. at 49.) On the contrary, Missouri law is clear that "[i]t is the character of the *source* of

the injury, rather than the character of the injury, which distinguishes a temporary from a permanent nuisance.” *Hanes v. Cont’l Grain Co.*, 58 S.W.3d 1, 3 (Mo. App. E.D. 2001) (emphasis added). The damages available under the law do not change the character or the nature of the nuisance. And as Plaintiffs acknowledge, “hog farms must constitute a temporary nuisance because ‘the use of the land on which the hog operation is located is subject to change and the smell emanating therefrom is the result of the manner in which the land is used and not an inherent quality of the property itself.’” (App. Br. at 49, n.12 (citing *Owens v. Contigroup Co.*, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011))).

Missouri case law confirms that a plaintiff may assert a claim for temporary nuisance without any claim for damages for loss of comfort or health. For example, in *King v. City of Independence*, cited by Plaintiffs, the court found that the backup of sewage into plaintiff’s basement was an “abatable” and therefore temporary nuisance, despite plaintiff’s purely economic damage claim and the lack of any claimed loss of comfort or health. 64 S.W.3d 335, 340 (Mo. App. W.D. 2002) *overruled on other grounds*, *George Ward Builders, Inc. v. City of Lee’s Summit*, 157 S.W.3d 644 (Mo. Ct. App. 2004)). Similarly, in *City of Harrisonville*, the plaintiff brought a temporary nuisance claim relating to contaminated soil, and the jury awarded actual damages. *City of Harrisonville v. McCall Serv. Stations*, 2014 Mo. App. LEXIS 192, at *10-11 (Mo. App. W.D. Feb. 25, 2014). There was no discussion of or request for “use and enjoyment” damages for the City, nor did the absence of these damages make the oil contamination a permanent nuisance.

In short, the mere fact that under subsection 537.296.2, a claimant can now obtain compensatory damages (1) in the amount of diminution of fair rental value of the property and (2) arising from medical conditions caused by the nuisance, *rather than* (1) amount of diminution of fair rental value of the property and (2) “use and enjoyment” damages, does not transform a temporary nuisance into a permanent one. It changes only the category of damages a claimant can potentially recover by virtue of bringing an agricultural nuisance action—permanent or temporary.

b. *A Permanent Nuisance Does Not Create an Easement Per Se*

Missouri law likewise provides no support for Plaintiffs’ assertion that all permanent nuisances are *de facto* easements. Plaintiffs rely solely on dicta from several Missouri cases, all of which posit that a nuisance is permanent if abatement is impracticable or impossible, and then compare this hypothetical “right to continue the wrong” as “equivalent to an easement.” *Cook v. DeSoto Fuels*, 169 S.W.3d 94, 106 (Mo. App. E.D. 2005) (citing *Schwartz v. Mills*, 685 S.W.2d 956, 958 (Mo. App. E.D. 1985) (citing *Shelley v. Ozark Pipe Line Corporation*, 37 S.W.2d 518, 521 (Mo. 1931) (citing 4 Sutherland on Damages (3 Ed.) 3838 (1903))). Not one of the cases cited by Plaintiffs actually held that a permanent nuisance created an easement, and, perhaps more importantly, not one of these cases involved a takings analysis of the type Plaintiffs urge here. *Id.* Instead, these cases mention in dicta that adjudication of a permanent nuisance

is essentially of the same character as an easement because it involves a permanent use of land. *Id.*⁷ Subsection 537.296.2 does not create a private easement for Defendants.

⁷ Likewise, none of the other cases on which Plaintiffs rely in arguing that subsection 2 creates an easement support the argument in the purported “takings” context here. *See Cook*, 169 S.W.3d at 107 (release of chemicals on land was a temporary nuisance and so Plaintiffs could still recover damages within limitation period); *King*, 64 S.W.3d at 340 (sewage backup was an abatable temporary nuisance), *overruled on other grounds, George Ward Builders, Inc.*, 157 S.W.3d 644; *Schwartz v. Mills*, 685 S.W.2d 956, 958 (Mo. App. E.D. 1985) (manhole was not a permanent nuisance and so action was not barred by the statute of limitations); *Lewis v. City of Potosi*, 317 S.W.2d 623, 629 (Mo. App. 1958) (permanent nuisance jury instruction was erroneous because it allowed consideration of damages beyond property value); *Rebel v. Big Tarkio Drainage Dist. of Holt City*, 602 S.W.2d 787, 794 (Mo. 1980) (nuisance was temporary so statute of limitations was not a bar), *overruled on other grounds, Frank v. Environ. Sanitation Mgmt., Inc.*, 687 S.W.2d 876 (Mo. banc 1985); *Bizzell v. City of St. Peters*, 1985 Mo. App. LEXIS 3194, at *6 (Mo. App. E.D. March 12, 1985) (venue was improper because a cause of action for a permanent nuisance or for inverse condemnation must be in “the situs of the affected real estate”); *Kellogg v. Malin*, 50 Mo. 496, 503 (1872) (no breach of seizin in sale of private land encumbered by easement).

c. *Plaintiffs Cannot Show That the Alleged Easement Is a Compensable Taking*

Even assuming for the sake of argument that subsection 2 created a permanent nuisance and that permanent nuisances were easements, Plaintiffs' claims still fail as a matter of law because they cannot show that this "easement" is an unconstitutional taking. Although Missouri case law generally recognizes that an "easement is a form of private property that can be taken only upon payment of just compensation," *St. Charles Cnty. v. Laclede Gas Co.*, 356 S.W.3d 137, 141 (Mo. banc 2011) (holding that county is required to reimburse for displacing gas lines from gas company's utility easement), Plaintiffs have not demonstrated that the purported "easement" is a compensable governmental taking.

Most critically, Plaintiffs never address the legal requirements for creation of an easement. Instead, they simply *describe* an easement as "an encumbrance that prevents the exclusive and absolute dominion over property," (App. Br. at 49), and then assume that the inverse is necessarily true: that any (alleged) encumbrance is an easement.

Plaintiffs ignore Missouri easement law, which does not support this jump in logic. An easement is an established right of one person to use the property of another for a definite and limited purpose. *Mahnken v. Gillespie*, 43 S.W.2d 797, 800 (Mo. 1931). An easement may be created by express or implied grant, condemnation, prescription, or through estoppel. *Illig v. U.S.*, 58 Fed. Cl. 619, 625 (2003) (applying Missouri law) (stating that under Missouri law, "an easement for which no proper conveyance ever existed may only arise through estoppel or prescription") (citing *Allee v.*

Kirk, 602 S.W.2d 922, 924 (Mo. App. W.D. 1980)); *see also* 25 Am. Jur. 2d Easements and Licenses §§ 13, 15 (describing formation of easements).

Plaintiffs have not established or explained why or how the government has created an easement through subsection 2 of section 537.296. It is undisputed that there has been no condemnation action or express or implied grant here, nor do Plaintiffs claim that the government has created an easement through prescription or by estoppel. *See Poe v. Mitchener*, 275 S.W.3d 375, 380 (Mo. App. S.D. 2009) (requiring clear and convincing evidence of continuously adverse or visible use for at least 10 years for prescriptive easement). The judicial determination of easements is based on specific facts and circumstances, including, for example, interpretation of deeds and analysis of adverse possession factors over time. *See, e.g., Koviak v. Union Elec. Co.*, 442 S.W.2d 934, 939 (Mo. 1969) (title to abandoned railroad passed to plaintiffs by operation of law, constituting an easement); *Brown v. Weare*, 152 S.W.2d 649, 656 (Mo. 1941) (landowner's voluntary grant to a railroad was an easement and not a fee simple interest); *Jacobs v. Brewster*, 190 S.W.2d 894, 897 (Mo. 1945) (prescriptive easement created despite no formal grant or deed).

In contrast here, Plaintiffs merely argue that they believe that subsection 2 of the statute encumbers them, and that this is therefore an easement. Because Plaintiffs point to no facts showing the creation of an easement here, the Court should reject Plaintiffs' argument that the government has created an easement, and thus a compensable taking, simply by defining the measure of damages in an agricultural nuisance action.

In support of their argument that there is a compensable taking, Plaintiffs cite to *United States v. Causby*, 328 U.S. 256, 266, 66 S. Ct. 1062 (1946). In *Causby*, low and frequent flights of federal airplanes destroyed the respondents' use of their property as a chicken farm by causing the death of 150 chickens, along with other damages relating to the physical proximity of the planes. *Id.* at 258. The Supreme Court agreed with the district court that this physical intrusion created an easement, but absent findings as to the "precise nature or duration of the easement," the Supreme Court could not continue its analysis. *Id.* at 267 ("[A]n accurate description of the easement taken is essential, since that interest vests in the United States."). Here, of course, Plaintiffs allege no harmful government intrusion on private property; on the contrary, the only government action involved here is the legislature's prospective alteration of the measure of damages for a common law tort. Moreover, *Causby* teaches that an inquiry into whether there has been a governmental taking is a specific one, dependent entirely on the facts at issue in each particular case. As discussed above, the facts in this case do not support that there has been an easement that resulted in an unconstitutional taking.

3. § 537.296.2 Is Not a Regulatory Taking Under *Penn Central*

Even if the Court were to determine that subsection 537.296.2 impacts Plaintiffs' property rights by creating an easement, this statutory subsection does not result in a constitutional taking under Missouri or federal law. "[N]ot every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83, 100 S. Ct. 2035, 2041 (1980) (citation omitted). An ordinance, law, or regulation that substantially advances a

legitimate governmental goal is not a taking—particularly when the landowner is not prevented from developing the land in other ways. *See Longview of St. Joseph, Inc. v. City of St. Joseph*, 918 S.W.2d 364, 372 (Mo. App. W.D. 1996) (holding that a zoning ordinance regulating use of trucks on private property was not a taking because it merely precluded certain use of a piece of land); *Harris v. Missouri Dep't of Conservation*, 895 S.W.2d 66, 72 (Mo. App. W.D. 1995) (“A land use regulation reasonably related to promotion of the general welfare will not be deemed a taking just because there has been a diminution of property value.”) (Citation omitted).

The U.S. Supreme Court has cautioned of the need to remain cognizant that “government regulation—by definition—involves the adjustment of rights for the public good.” *Andrus v. Allard*, 444 U.S. 51, 65, 100 S. Ct. 318 (1979). “Often this adjustment curtails some potential for the use . . . of private property.” *Id.* Indeed, “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.” *Mahon*, 260 U.S. at 413.

For this reason, Missouri courts employ the *Penn Central* reasonableness test that aims to “identify regulatory actions that are functionally equivalent to a direct appropriation of or ouster from property,” and focuses primarily on the “severity of the burden that government imposes upon property rights.” *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 537 (2005). These factors include (1) the law’s economic harm; (2) the law’s interference with investment-backed expectations; and (3) the character of the governmental action. *Reagan v. Cnty. of St. Louis*, 211 S.W.3d 104, 107-08 (Mo. App. E.D. 2006) (finding no regulatory taking where rezoning did not impart a sufficient

economic loss, the government had the right to prohibit contemplated uses of property to promote general welfare, and the government did not physically invade the landowner's property). Changes to the types of damages a claimant can collect in an agricultural nuisance action cannot be said to be functionally equivalent to an ouster from property, and Plaintiffs' arguments fail under the regulatory-takings balancing test.

First, the economic impact of subsection 2 on Plaintiffs is negligible if present at all. The subsection does not take away a person's livelihood, as in *Mahon* or *Hoffman*. Indeed, the subsection expressly provides for monetary compensation in the event that a claimant proves he or she has been impacted by an agricultural nuisance. Plaintiffs' property use is not limited by subsection 2.

Second, subsection 2 does not intrude on investment-backed expectations, like the regulations in *Kaiser Aetna v. United States*, 444 U.S. 164, 175, 100 S. Ct. 383 (1979). In *Kaiser*, the plaintiff had invested money in developing an exclusive, member-only marina and the government sought to compel free public access. 444 U.S. at 175. This regulation stretched far beyond an ordinary regulation for navigation and resulted in physical interference with the landowner's investment-backed expectations in that property. *Id.* In this case, subsection 2 does not physically interfere with land. Furthermore, it potentially compensates an injured claimant for value the claimant has invested in a home, by providing the option for recovery of loss of fair market value in a nuisance action.

Third, the character of the governmental action is not suspect; by regulating tort law in the state, the legislature is protecting Missouri businesses, farmers, and other

agricultural interests. This is akin to “adjusting the benefits and burdens of economic life to promote the public good,” rather than a physical invasion. *See Reagan*, 211 S.W.3d at 110. Subsection 2 is a prime example of well-intentioned government action involving no physical invasion of property. *Id.* (third factor favored county where law did not physically invade property but merely rezoned for compatibility).

Quite simply, there is no “special and peculiar” governmental action here that would rise to the level of ouster from property. *See Richards v. Washington Terminal Co.*, 233 U.S. 546, 557, 34 S. Ct. 654, 658 (1914). Subsection 2 is not a taking.

4. Even Assuming That § 537.296.2 Were a Taking, It Is Constitutional

Section 537.296.2 is not a taking of private property under any reading of the statute or pursuant to any Missouri law. But assuming for the sake of argument that subsection 537.296.2 somehow resulted in an easement and the easement constituted a regulatory taking, subsection 537.296.2 remains constitutional.

a. *§ 537.296.2 Was Enacted For A Public Use*

Plaintiffs argue that subsection 2 is a taking for private use because it allegedly delegates the power to take property rights to private parties, but cites no case law in support of this argument. (*See App. Br.* at 47.) Subsection 2 does not delegate any power to private entities. Maintaining a nuisance was unlawful before the enactment of subsection 537.296.2 and remains unlawful today. *See Frank*, 687 S.W.2d at 880 (nuisance involves unreasonable use of land).

Further, any arguable “taking” under subsection 2 is done for the public interest and is not for the mere benefit of private parties. The legislature properly exercises its

police power to promote the general welfare of the people of Missouri, even when a statute imposes hardship or inflicts economic loss upon some property owners. After all, such state action is always “apt to affect the property of someone adversely.” *Downing v. City of Joplin*, 312 S.W.2d 81, 85 (Mo. 1958). “So long as the taking has a conceivable public character, ‘the means by which it will be attained is . . . for [the legislature] to determine.’” *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014, 104 S. Ct. 2862, 2879 (1984) (citation omitted) (data-consideration provision of FIFRA intended to make new products available to consumers more quickly was a procompetitive purpose well within the police power of Congress).

In passing subsection 537.296.2, the General Assembly used its power to promote the important public interest of agriculture in the state. (See EF1683087, LF Supp., Exhibit A, Hearing Minutes on HCS SB 187 Before the H. Comm. on Agribusiness, 2011 Reg. Session (Mo. May 3, 2011) (“Supporters say that the bill will benefit farmers and agriculture, the number one industry in Missouri, by protecting farmers from continually being served with nuisance lawsuits”)); see also Mo. Rev. Stat. § 262.630 (encouraging the maintenance of organizations involving agricultural resources); Mo. Rev. Stat. § 262.800 (protecting agricultural land and promoting economic viability of agriculture). Even if a taking occurred, such taking is public, and so does not run afoul of Mo. Const. art. I, sec. 28 (“private property shall not be taken for private use with or without compensation”).

Case law supports this reading. For example, in *Annbar Assoc. v. West Side Redevelopment Corp.*, this Court held that a law allowing a private redevelopment

company to condemn private property for private interests (a hotel and convention center) did not violate art. I, sec. 28, because the legislature has the sole power to invest public *or private* entities with eminent domain power when done for a public purpose. 397 S.W.2d 635, 647-48 (Mo. 1965) (public purpose was to improve a blighted, insanitary area).

Likewise, in *Kansas City v. Kindle*, this Court upheld the constitutionality of a zoning ordinance that required all buildings in a subdivision to be single-family occupancy. 446 S.W.2d 807, 816 (Mo. 1969). Multi-family-occupancy property owners challenged the ordinance as a violation of art. I, sec. 28, as a public act done to benefit a few selected landowners. *Id.* at 814. In affirming the constitutionality of the ordinance, the Court explained:

This is a case in which a relatively few property owners will be deprived of their right to use their properties as they wish, and where the advantage enjoyed for years by a comparatively large number of property owners will be continued . . . but “[every] valid exercise of the police power is apt to affect the property of someone adversely” . . . and the fact that special benefits or advantages accrue to a group of individuals as a result of an eminent domain proceeding does not detract from or deprive it of its public character.

Id. at 815 (citation omitted). The Court distinguished *Kindle* from earlier cases that found a private use, demonstrating that a public act’s influence on private interests must be extreme to actually constitute a taking for private use. *Compare, e.g., State ex rel.*

Gove v. Tate, 442 S.W.2d 541, 543 (Mo. 1969) (city condemned a sewer right of way for the benefit of only one private property owner); *State ex rel. United R. Co. v. Wiethaupt*, 133 S.W. 329 (Mo. 1910) (act blatantly allowed private citizens to instigate condemnation actions to obtain riverbank property for private use and profit). Here, subsection 2 applies not just to a few operators but to the entire Missouri agricultural community, and is beneficial to the “general welfare of the community.” *Kindle*, 446 S.W.2d at 815. Thus, even if the Court were to conclude there was a taking here, that taking was for public use and does not run afoul of Mo. Const. art. I, sec. 28:

b. § 537.296.2 *Permits Nuisance Plaintiffs to Recover the Fair Market Value of Their Property*

Even if Plaintiffs’ claims were treated as claims for easement instead of tort, the well-established standard of compensation for the taking of an easement is the decrease in value of the property resulting from the taking of the easement. *St. Louis Cnty. v. River Bend Estates Homeowners’ Ass’n*, 408 S.W.3d 116, 135 (Mo. 2013) (from a constitutional standpoint the Missouri Supreme Court long has interpreted just compensation to mean fair market value at the time of the taking); *Rigali v. Kensington Place Homeowners*, 103 S.W.3d 839, 846 (Mo. App. 2003); *Union Elec. Co. v. Saale*, 377 S.W.2d 427, 429 (Mo. 1964) (stating “just compensation . . . generally speaking, is the fair market value of the land actually taken, and the consequential damages, if any, to the remainder of the land caused by the taking”). This decrease is measured by the difference in fair market value of the property before and immediately after imposition of the easement. *State ex rel. Missouri Highway and Transp. Com’n v. Roberts*, 926 S.W.2d

18, 20 (Mo. App. W.D. 1996). “A sentimental attachment or an unwillingness to sell is not a consideration in determining fair market value.” *River Bend*, 408 S.W.3d at 124.⁸ This is precisely the measure of damages that subsection 537.296.2 makes available to claimants, in addition to damages relating to medical conditions. *See* Mo. Rev. Stat. § 537.296.2 (2); (3). No unconstitutional taking requiring compensation has occurred here because nuisance plaintiffs can still recover the value of their property via suit against the creator of the alleged nuisance.

In sum, Plaintiffs cannot meet their heavy burden to show that subsection 537.296.2 is an unconstitutional taking. Subsection 2 does not impact an antecedent property right; it involves only the General Assembly’s modification of the damages recoverable in a specific cause of action. Moreover, even if the Court were to conclude that Plaintiffs’ property rights are involved, Plaintiffs still cannot show that subsection 2 makes all nuisances permanent, nor can they support their argument that subsection 2 thereby creates an easement and so is necessarily a taking. Subsection 2 is not a regulatory taking because it is not a public act that so frustrates property rights that compensation must be paid. *Penn Cent.*, 438 U.S. at 127-128. The statute was created for the important public purpose of promoting agriculture and business in Missouri. And

⁸ The U.S. Supreme Court has also “repeatedly held” that just compensation is to be measured by “the market value of the property at the time of the taking contemporaneously paid in money.” *U.S. v. 50 Acres of Land*, 469 U.S. 24, 29, 105 S. Ct. 451, 455 (1984).

finally, the subsection provides the opportunity for Plaintiffs to obtain just compensation if they prevail in their agricultural nuisance action. Subsection 2 is not an unconstitutional taking.

B. Response to Plaintiffs' Point II: § 537.296.2 Does Not Violate Missouri's Equal Protection Clause.

Plaintiffs next allege that subsection 537.296.2 violates Missouri's Equal Protection Clause because the law disadvantages owners of property in close proximity to farms and agricultural production facilities. The Missouri Constitution's guarantee of equal protection requires that the state apply each law equally to persons similarly situated and that any differences in application be justified by the law's purpose. Mo. Const. art. I, sec. 2; *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N.*, 361 S.W.3d 364, 378 (Mo. 2012). The state and federal constitutional guarantees of equal protection "do not mean that the legislature must make all laws equally applicable to all persons." *Overbey*, 361 S.W.3d at 378. Disparate treatment of similar classes is permissible where no fundamental right is involved, as long as classification is rationally related to a legitimate state interest. *Id.* Subsection 2 does not disadvantage a suspect class or impact a fundamental right, so the rational basis test applies here.

1. Strict Scrutiny Does Not Apply

Plaintiffs argue that a strict scrutiny test should apply because (a) rural landowners are a marginalized suspect class, unrepresented by city governments and (b) the fundamental right to "enjoy property" is involved in this case. Plaintiffs did not raise this

“suspect class” argument before the trial court.⁹ “An issue raised for the first time on appeal and not presented to or decided by the trial court is not preserved for appellate review.” *Care and Treatment of Burgess v. State*, 72 S.W.3d 180, 184 (Mo. App. 2002). Plaintiffs also cite no case law in support of their “suspect class” argument. (App. Br. at 62-63.) For these reasons, the Court need not consider this argument at all.

Regardless, legislation often affects different groups of people differently, simultaneously resulting in good news for some and bad news for others. “[E]qual protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons.” *Romer v. Evans*, 517 U.S. 620, 631, 116 S. Ct. 1620 (1996). Subsection 2 does not facially “classify” on any basis; rather, it delineates types of damages for all individuals bringing a particular private cause of action.

The only arguable “classification” within the damages subsection might be described as one based on the type of claim at issue – a lawsuit involving an alleged agricultural nuisance. Statutes that classify on the type of legal claim, including who can sue, why they can sue, or what they can recover, do not give rise to a suspect classification. *See, e.g., Crane v. Riehn*, 568 S.W.2d 525, 530 (Mo. banc 1978)

⁹ Subsection 537.296.2 makes no distinction between claimants from incorporated cities and claimants from unincorporated sections of counties. Further, no facts in the record relate to the difference between unincorporated sections of counties as compared to incorporated city governments. This argument is not properly before the Court.

(classification of those entitled to sue under the wrongful death statute does not involve interference with the exercise of a fundamental right nor discriminate as to suspect classes). No Missouri law supports the argument that rural dwellers are a suspect class and (to the best of Defendants' knowledge) no court in this country has found that to be the case.

A statute creates impermissible or suspect classifications only when it impacts "discrete and insular minorities." *United States v. Carolene Product Co.*, 304 U.S. 144, 152 n.4, 58 S. Ct. 778, 783 n.4 (1938). The arguable class created here (certain nuisance claimants) is not a class "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep.Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28, 93 S. Ct. 1278, 1294 (1973) (no suspect class relating to school system that allegedly discriminated "against a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts").

Nor does Subsection 2 involve a fundamental right. It does not implicate or impact a "property" right or interest, nor prohibit compensation, nor authorize maintenance of a nuisance. Again, it merely delineates the type of damages a claimant can recover in certain nuisance actions. Plaintiffs baldly assert that because their lawsuit involves allegations about a nuisance (which by definition involves alleged unreasonable use of property), subsection 2 necessarily impacts a fundamental right.

Using Plaintiffs' same reasoning, any statute that relates in any way to nuisance, zoning, real estate, land use, estate sales, or otherwise involving the *subject matter* of "property" would likewise impact a fundamental right and be subject to a strict scrutiny analysis. This is not the law. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 7, 94 S. Ct. 1536, 1540 (1974) (holding that a zoning ordinance restricting land use to one-family dwellings involved "no 'fundamental' right guaranteed by the Constitution, such as voting, the right of association, the right to access to the courts, or any rights of privacy") (citations omitted); *Assoc. Indus. of Missouri*, 722 S.W.2d at 921 (reversing district court's decision that statute permitting subclasses of real property was a violation of the equal protection clause and explaining that there was no fundamental right at issue); cf. *Hoffman*, 389 S.W.2d at 748 (ordinances impacting property may be a valid exercise of police power even when they impose hardship and inflict economic loss upon property owners).

Plaintiffs cite only to cases in which the U.S. and Missouri Supreme Courts have generally called the right to own, hold, and dispose of property a "natural right" or a "fundamental right," including *Stone v. City of Jefferson*, 293 S.W. 780, 782 (Mo. 1927) and *O'Brien v. Ash*, 169 Mo. 283 (1902). Neither case supports the application of strict scrutiny here. In *Stone*, the court held that an individual's ability to protest neighborhood street improvement was not an inherent or inalienable right and the statute at issue therefore did not run afoul of equal protection. *Id.* The statute under review simply did not involve any fundamental right to "acquire, hold, enjoy and dispose of property, real or personal," despite that the plaintiff's protest related to her property. *Id.*

O'Brien is not an equal protection case, but rather involved an equitable action by a husband for partition of real estate left to others by his deceased wife. The cherry-picked quote chosen by Plaintiffs is a portion of the case explaining the difference between “vested right” and “power of disposal.” This case provides no guidance or support for the application of anything other than a rational basis review in this case.

Plaintiffs improperly characterize the nature of the right at issue here.

Subsection 2 does not involve a suspect class or a fundamental right, nor do Plaintiffs cite any authority suggesting otherwise. Instead, the Missouri General Assembly’s decision to delineate varying types of recovery in tort actions implicates a rational basis review. *See, e.g., Richardson v. State Highway & Transp. Comm’n*, 863 S.W.2d 876, 879 (Mo. 1993) (statute providing for recovery to those injured by a vehicle or condition of public property but not other causes of injury did not touch a fundamental right). In the words of the U.S. Supreme Court, “We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause” as long as the law is “reasonable, not arbitrary” and bears a rational relationship to the state objective. *Boraas*, 416 U.S. at 8.

2. Whatever the Level of Scrutiny, Subsection 537.296.2 Meets the Constitutional Standard

When no fundamental rights or suspect classifications are involved, a party claiming that a statute violates Missouri’s Equal Protection Clause must prove that no conceivable set of facts could justify the classification created by the statute in order to overcome the presumption of constitutionality. *See Overbey*, 361 S.W.3d at 378.

Rational basis review is “highly deferential, and courts do not question the wisdom, social desirability or economic policy underlying a statute.” *Id.* (quotations and citations omitted). Rational basis review is not an opportunity to question the fairness or logic of legislative choices. *Kan. City Premier Apts., Inc. v. Mo. Real Estate Comm’n*, 344 S.W.3d 160, 170 (Mo. banc 2011). All that is required is that the Court identify “a plausible reason for the classification in question.” *Id.*

Here, the legislature had a rational basis for delineating the categories of damages available in agricultural nuisance actions: protecting agriculture in the State of Missouri from certain costs associated with nuisance lawsuits, and thereby promoting the expansion of agriculture in the state. (*See* EF1683087, LF Supp., Exhibit A, Nuisance Actions: Hearing Minutes on HCS SB 187 Before the H. Comm. on Agribusiness, 2011 Reg. Session (Mo. May 3, 2011)).

This legislation carries a presumption of rationality, and Plaintiffs cannot make a clear showing of arbitrariness. *See Fust*, 947 S.W.2d at 432. The Missouri General Assembly acted reasonably in defining damages recoverable in agricultural nuisance actions. Contrary to Plaintiffs’ unsupported allegations, the statute does not target family farms or provide special rights to corporate entities—the damages delineation in subsection 2 would apply as well to a claim by a corporate plaintiff against a family farmer.

Moreover, even if the Court decides that subsection 2 somehow implicates a fundamental right, the statute can surpass strict scrutiny. The state’s interest in promoting agriculture and protecting farmers in a state like Missouri, in which agriculture

is an essential industry, is compelling. Furthermore, subsection 2 is narrowly tailored; it does not eliminate a cause of action, nor does it set a cap on the amount of damages available to an individual claimant. It delineates the types of damages directly crafted to compensate an injured plaintiff, while protecting Missouri agriculture from overly broad remedies for nuisance.

Section 537.296.2 does not violate equal protection of the law.

C. Response to Plaintiffs' Point III: § 537.296.2 Does Not Violate Substantive Due Process.

Plaintiffs next claim that section 537.296 violates substantive due process because it amounts to the legislature imposing conditions on rural dwellers that are worse than those that would violate the Eighth Amendment right of prisoners to be provided with appropriate nutrition.¹⁰ To prevail on their substantive due process claim, Plaintiffs must establish a protected property interest to which Missouri's due process protection applies. *See Fust*, 947 S.W.2d at 431; *Bromwell v. Nixon*, 361 S.W.3d 393, 400 (Mo. banc 2012). The scope of the substantive due process analysis is very limited. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488, 75 S. Ct. 461 (1955) ("The day is gone

¹⁰ Plaintiffs' Point Relied on III refers only to Mo. Rev. Stat. § 537.295.

Respondents assume that this is a typographical error; however, it is unclear whether Plaintiffs address only § 537.296.5 or whether their arguments in this section involve § 537.296 as a whole. To the extent it involves the statute as a whole, Respondents' response is limited to subsection 2, for the reasons discussed in *section II* above.

when this Court uses the Due Process Clause [to] strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”). As Judge Blackmar explained in *Coldwell Banker Resid. Real Estate Serv., Inc. v. Missouri Real Estate Comm’n*:

It is not for us to determine whether [a statute regulating a business] enactment is wise or not. We are obliged to sustain legislation which is utterly foolish, absent a valid constitutional challenge. The power of our General Assembly is Plenary There was a time when the Supreme Court of the United States struck down economic regulations with some regularity as violative of due process, but that day is past.

712 S.W.2d 666, 668 (Mo. banc 1986) (footnotes omitted). The Missouri Supreme Court has explained that to be protected by substantive due process, the impacted right or liberty must be “deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” *Doe v. Phillips*, 194 S.W.3d 833, 142 (Mo. banc 2006) (citation omitted). In other words, substantive due process principles require invalidation of a law only when it impinges on fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest. *Roe v. Replogle*, 408 S.W.3d 759, 767 (Mo. banc. 2013).

Plaintiffs cannot meet the very high showing required to prove that a statutory provision delineating types of damages in an agricultural nuisance is an exercise of power that shocks the conscious or impairs a protected property right. *Bromwell*, 361 S.W.3d at 400 (collecting filing fees on an installment basis was not “conscience-shocking” and so did not violate due process). *See also supra* § III.A.1 (explaining that plaintiffs have no property right in a non-accrued cause of action). As addressed above, there is no fundamental interest at issue here, and even if there were, any purported infringement is narrowly tailored to serve compelling state interests. *See supra* § III.B.

Furthermore, the U.S. Supreme Court has “long eschewed . . . heightened scrutiny when addressing substantive due process challenges to government regulation.” *Lingle*, 544 U.S. at 545 (admonishing lower court for decision to enjoin further enforcement of an act instating a rent cap provision on allegation that state’s regulatory strategy would not achieve its objectives). The failure of a regulation to accomplish a stated or obvious objective is a rare instance, reserved for the “most egregious of circumstances.” *Eastern Enterprises v. Apfel*, 524 U.S. 498, 550, 118 S. Ct. 2131, 2159 (1998); *see also Elam v. City of St. Ann*, 784 S.W.2d 330, 337 (Mo. App. E.D. 1990) (reversing lower court’s conclusion that zoning law violated due process and noting: “It is difficult to imagine how a zoning ordinance which complies with Missouri’s interpretation of substantive due process requirements could nonetheless amount to a taking.”). Subsection 2 simply does not present one of the rare instances in which a government regulation has violated substantive due process.

D. Response to Plaintiffs' Point IV: § 537.296.5 Is Not At Issue In This Appeal So Any Argument About Separation of Powers and Standing Is Irrelevant.

Plaintiffs next argue that subsection 5 of section 537.296 is a violation of the separation of powers by interfering with the judicial branch's role of determining standing. This argument involves only subsection 5, and therefore is not ripe for the Court's adjudication.

E. Response to Plaintiffs' Point V: § 537.296.2 Does Not Violate the Open Courts Clause.

Plaintiffs next claim that subsection 537.296.2 violates the constitutional provision that guarantees open courts because rightful occupants of property do not have standing to sue pursuant to subsection 5. *See* Mo. Const. art. I, sec. 14 (guaranteeing that "the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character"). Plaintiffs rely on the language of subdivision 2 as support by arguing that the statute is arbitrary in eliminating damages for quiet enjoyment of property, thereby ignoring the inherent value in a homestead. Defendants address only the portion of Plaintiffs' argument that relates to subsection 2: namely, that the damages provision is "arbitrary" pursuant to Missouri's Open Courts Clause.

In interpreting the open courts provision, the Missouri Supreme Court has distinguished between statutes that impose procedural bars to access and statutes that change the common law by changing a cause of action. *See Kilmer*, 17 S.W.3d at 550.

The procedural bars are impermissible if they are arbitrary or unreasonable, but the substantive changes in the law constitute valid exercises of legislative power. *Id.*

In this regard, subsection 2 permissibly modifies the substance of the cause of action. *See id.* And even if the subsection's damages provision were somehow interpreted as a bar to access the state's courts, the law is not arbitrary or unreasonable. *See* § III, B above. Subsection 537.296.2 is constitutional and does not offend Article I, Section 14 of the Missouri Constitution. Plaintiffs' other arguments are non-justiciable because they were raised only on appeal, and not properly before the Court.

F. Response to Plaintiffs' Point VI: § 537.296.2 Does Not Violate the Special Laws Provision.

Plaintiffs raise arguments relating to the Special Laws Provision that were not raised before the trial court. For the first time on appeal, Plaintiffs argue that section 537.296 (a) was intended to and does benefit only one industry, making it close-ended special legislation; (b) classifies on the basis of who the tortfeasors are; and (c) classifies based on the value of land by measuring damages as fair market value. These arguments have not been properly preserved for appellate review. *See Care and Treatment of Burgess*, 72 S.W.3d at 184.

Even if Plaintiffs had properly preserved this issue, their argument nevertheless fails because subsection 2 is not a special law. A law is facially special if it is based on close-ended characteristics, such as historical facts, geography, or constitutional status. *Jefferson Cnty. Fire Prot. Dists. Ass'n v. Blunt*, 205 S.W.3d 866, 870 (Mo. 2006) (law was special because it targeted only one county while excluding counties of similar size).

As explained in *Jefferson County*, historic examples of special legislation include laws enacted to divorce couples, to change the interest rates for one bank, to alter the term of a will, or to modify the course of a judicial proceeding for an individual case. 205 S.W.3d 866, 869 (Mo. banc 2006). But “a law is not special if it applies to all of a given class alike and the classification is made on a reasonable basis.” *Ross v. Kansas City Gen. Hosp. and Med. Ctr.*, 608 S.W.2d 397, 400 (Mo. banc 1980).

Subsection 2 is not facially special. “It is well settled that a law which includes all persons who are in or who may come into like situations and circumstances, is not special legislation.” *State ex rel. Barrett v. Hedrick*, 241 S.W. 402, 407 (Mo. 1922). On its face, the law here includes all those who are similarly situated, and applies equally to all individuals bringing an agricultural nuisance cause of action in Missouri. *Id.* (explaining law at issue was not a special law because it applied to every person that may hold the office of Warehouse Commissioner). Contrary to Plaintiffs’ assertion, the subsection does not classify on the specific identity of the tortfeasor, nor does the statute provide any sort of “special immunity” to those engaged in crop or animal production. Any alleged tortfeasor accused of maintaining an alleged agricultural nuisance is subject to the terms of the law.

Furthermore, a classification relating to the type of tortfeasor is an open-ended, acceptable classification when done in the public interest. *State ex rel. Sullivan v. Cross*, 314 S.W.2d 889, 897 (Mo. 1958) (law classifying on whether person is injured by resident or nonresident motorist not a special law because classification was not arbitrary). Subsection 2 applies to individual claimants based on open-ended

characteristics, so is therefore presumed constitutional. *See O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993).

The applicable test for an open-ended law “is similar to the rational basis test used in equal protection analyses.” *See Overbey*, 361 S.W.3d at 380. “The burden is on the party challenging the constitutionality of the statute to show that the statutory classification is arbitrary and without a rational relationship to a legislative purpose.” *Id.* Plaintiffs cannot meet this burden. *See* § III, B, 2, above.

Plaintiffs append and cite to a March 12, 2011 Joplin Globe article as their sole support for the position that subsection 2 protects only individuals and not the general public, allegedly making the law facially special. (App. Br. 100.) Plaintiffs inappropriately rely on the article as proof that the law is “special.” The article was not brought before the trial court and is not a part of the record on appeal. Also, by its nature, the article does not accurately reflect the legislative history of subsection 537.296.2. In the context of construing the meaning of a Missouri constitutional amendment by referendum, a concurring opinion of this Court expressed distaste for use of newspaper clippings to show intent and meaning:

Nor is it appropriate to place pages of newspaper clippings and editorials in evidence, or to append them to the briefs. . . . Proponents may make extravagant claims, or try to soothe expressed fears. Those in opposition may make dire predictions about the application and effect, or may indulge in

wishful thinking about the meaning of restrictions. None of these expressions can be helpful to us.

Wenzlaff v. Lawton, 653 S.W.2d 215, 218 (Mo. 1983) (J. Blackmar, concurring in part, dissenting in part) (affirming trial court's finding that tax increases contained in ordinances had not been approved by voters as required by an Amendment). Moreover, the Joplin Globe article's language, taken at face value, does not support Plaintiffs' position that this is a close-ended, arbitrary law. A reporter's paraphrased summary that two senators feared that "big agricultural corporations that are doing business in Missouri will leave" does not make a generally applicable law close-ended, nor does it change the fact that the law is not arbitrary or unreasonable. Subsection 2 does not violate Mo. Const. art. III, sec. 40.

G. Response to Plaintiffs' Point VII: The Trial Court Required No Additional Undisputed Facts to Rule That The Negligence and Conspiracy Claims Failed As A Matter Of Law.

Plaintiffs finally argue that the trial court improperly dismissed the negligence and conspiracy claims because disputed material facts prevented summary judgment. Plaintiffs are wrong; their negligence-based claims failed because they sound in temporary agricultural nuisance so are subject to the damages categories prescribed by subsection 537.296.2.

1. Plaintiffs' Negligence Causes of Action Are Inextricably Intertwined with Their Nuisance Claims

Plaintiffs claim that because nuisance and negligence are not mutually exclusive, Plaintiffs should be able to use the law of negligence to obtain the types of damages they seek in this lawsuit: “use and enjoyment” damages. Certainly, nuisance is not the only means by which a claimant may seek to address wrongs allegedly committed against a property owner, but the Plaintiffs cannot circumvent subsection 2 simply by recharacterizing as negligence what is in substance a claim for nuisance. *See Gardner v. Anderson*, 417 S.W.2d 130, 133 (Mo. App. W.D. 1967) (“[w]hether the fault be styled nuisance or negligence, the essence of the cause of action” is the court’s focus). Defendants have never argued that Plaintiffs’ nuisance and negligence causes of action are mutually exclusive; rather, Defendants’ position is that the only negligence Plaintiffs plead here was the alleged nuisance. *See Cook*, 169 S.W.3d at 107 (temporary nuisance action arises from underlying negligence); *Jackson v. City of Blue Springs*, 904 S.W.2d 322 (Mo. App. W.D. 1995) (“[C]ourts often treat negligence and nuisance theories of liability as coexisting and practically inseparable . . . because the acts or omissions constituting negligence themselves are usually what also give rise to the nuisance.”).

The cases cited by Plaintiffs involved separate causes of action because the two theories of recovery pleaded were distinct in those matters. The cases also reinforced the principle that the causes of action may overlap when the negligence constitutes the nuisance: “negligence may constitute an unreasonable use of land and thereby create a

nuisance, but negligence alone does not create a nuisance.” *Frank*, 687 S.W.2d at 882 n.5.

Plaintiffs’ continued reliance on subsection 6 of the statute to support their negligence claims is misplaced because subsection 6 provides that damages may be awarded on the basis of other causes of actions only when they are “independent of a claim of nuisance.” Mo. Rev. Stat. § 537.296.6 (1) (emphases added). Here, Plaintiffs’ purported “negligence” claims are *not* independent from their temporary nuisance claim: all the claims stem from harm allegedly caused by emissions from the hog farm. (LF66-89, Sec. Am. Pet.). The negligence Plaintiffs allege is the alleged temporary nuisance. *See Cook*, 169 S.W.3d at 107. Because Plaintiffs’ negligence claims are not independent of their agricultural nuisance claim, the negligence claim fails just as the nuisance (and thus conspiracy) claim fails.

The Court should affirm the decision of the trial court, which sustained summary judgment “as to all counts as plaintiffs seek damages not recoverable as a matter of law.” (LF580, Tr. Ct. Order.)

2. No Additional Facts Were Necessary for the Court to Conclude that Damages Sought By Plaintiffs For Their Negligence Claim Were Barred By § 537.296.2

Plaintiffs argue Defendants’ statement of undisputed facts was not sufficient to establish as a matter of law that Cargill Pork was not liable in respondeat superior for the conduct of Bohr Farms. Plaintiffs offer a number of additional assertions of “fact” that they claim should have prevented summary judgment. (App. Br. at 112-114). But the

issue of Cargill Pork's liability for the conduct of Bohr Farms, whether through respondeat superior or otherwise, has no bearing on the issue in the present appeal: whether subsection 2 bars Plaintiffs' claims.

Cargill Pork's contract and corresponding relationship with Bohr Farms had no bearing on the Defendants' joint motion for summary judgment, nor are they relevant on appeal. (See LF562, Def. Resp. to Pl. Statement of Add. Facts; LF544, Def. Reply In Support of Summary Judgment at 15, n.3.) The disputed "facts" Plaintiffs cite did not affect the constitutionality of subsection 2 on which the trial court based its decision, and so were not *material* issues of disputed fact that could prevent summary judgment. (See LF580, Tr. Ct. Order); *Margiotta v. Christian Hosp.*, 315 S.W.3d 342 345 (Mo. banc 2010) (explaining that all but one fact were controverted but the controverted facts were "not material to the judgment as a matter of law"); *Orla Holman Cemetery v. Plaster Trust*, 304 S.W. 3d 112 (Mo banc. 2010) (factual disputes not relevant where they were not material to the resolution of the case on summary judgment).

This is not a case in which the trial court has "overlook[ed] material in the record that raises a genuine dispute as to the facts underlying the movant's right to judgment," *ITT Commercial Finance Corp.*, 854 S.W.2d at 378. Instead, the disputed facts set forth by Plaintiffs are completely unrelated to the "movant's right to judgment." *Id.* A trial court cannot err by failing to consider irrelevant facts. See Mo. Rule 74.04 (the statement of uncontroverted facts must be material).

3. There Are No Remaining Issues of Material Fact as to Duty, Breach or Damages

Plaintiffs similarly argue that outstanding factual issues relating to the elements of a negligence cause of action should have prevented summary judgment. But the trial court was not required to address each element of Plaintiffs' negligence claim because the court determined that subsection 2 did not permit Plaintiffs to recover any of the damages they seek as a matter of Missouri law. Because Plaintiffs could not establish this element of their cause of action, there was no need for the Court to review other elements of the negligence claim.

CONCLUSION

Subsection 537.296.2 is constitutional. Missouri law provides for two categories of compensatory damages available to Plaintiffs here—loss of the fair rental value of their property and damages relating to documented medical conditions. *See* Mo. Rev. Stat. § 537.296.2 (2), (3). Plaintiffs do not seek either of these categories of damages. (LF355-364.)

Because Plaintiffs seek a remedy not allowed under Missouri law, the trial court correctly granted summary judgment. The Court should affirm the trial court's summary judgment decision.

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**RULE 84.06(c) CERTIFICATION
AND CERTIFICATE OF SERVICE**

I hereby certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains no more than 13,913 words. The font is Times New Roman, double-spacing, 13-point type. A compact disc containing the full text of this brief has been served on each party separately represented by counsel and is filed herewith with the clerk. The CD containing the Respondent's Brief is virus-free.

I hereby certify that true and correct copies of the foregoing and a compact disc containing the same was mailed, postage prepaid, this 26th day of June, 2014, addressed to the following:

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