
IN THE SUPREME COURT OF MISSOURI

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

vs.

BOHR FARMS, LLC, *et al.*, Respondents.

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

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

CORRECTED APPELLANTS' BRIEF

Charles F. Speer, MO 40713
Peter B. Bieri, MO 58061
SPEER LAW FIRM, P.A.
104 W. Ninth Street, Suite 400
Kansas City, MO 64105
Phone: (816) 472-3560
Fax: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

Anthony L. DeWitt, MO 41612
Bartimus, Frickleton, Robertson & Goza,
P.C.
715 Swifts Highway
Jefferson City, MO 65109
Telephone: (573) 659-4454
Facsimile: (573) 659-4460
aldewitt@sprintmail.com

Attorneys for Plaintiffs/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....9

JURISDICTIONAL STATEMENT.....21

STATEMENT OF FACTS.....22

POINTS RELIED UPON31

ARGUMENT.....35

 I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTIONS 26 AND 28 OF THE MISSOURI CONSTITUTION, AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE STATUTE SANCTIONS THE UNLAWFUL TAKING OF PROPERTY FOR PRIVATE USE AND IF NOT FOR PRIVATE USE, CONSTITUTES AN UNLAWFUL TAKING OF PROPERTY WITHOUT JUST COMPENSATION.....35

 A. Standard of Review35

 B. Legal Standards36

 1. Article I, Section 28 of the Missouri Constitution.....36

 2. Section 26, Article I of the Missouri Constitution and the Fifth Amendment to the United States Constitution.....36

3. In Missouri, There is a Constitutional Guaranty of the Right of Use and
 Enjoyment of Property, Which Cannot be Taken Without Due Process of Law.. 38

4. Summary of Common Law Nuisance Before and After the Promulgation of §
 537.296 RSMO. (2012)..... 38

C. Sections 537.296.2-5 Are an Unconstitutional Private Taking of the
 Constitutionally Guaranteed Right to Use and Enjoy Property. 44

D. Sections 537.296.2-5’s Distortion of Temporary and Permanent Nuisance
 Claims is an Unconstitutional Taking Because it is Equivalent to the Granting of an
 Easement. 46

E. Renters and Other Lawful Occupiers of Property are Unconstitutionally
 Deprived of Their Right to Full and Fair Compensation Under 537.296. 53

F. Even if the Takings Are Deemed for Public Use, Sections 537.296.2-5 Do Not
 Allow for Just Compensation. 56

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO
 DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS
 IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI
 CONSTITUTION, AND THE FOURTEENTH AMENDMENT OF THE UNITED
 STATES CONSTITUTION IN THAT THE STATUTE CREATES A SUSPECT
 CLASS OF PERSONS LIVING NEAR AGRICULTURAL OPERATIONS AND
 VIOLATES THEIR FUNDAMENTAL RIGHTS TO HOLD AND ENJOY THEIR
 PROPERTY. 59

A. Standard of Review 59

B. Legal Standards 59

C. Landowners Affected By the Statute are a Suspect Class..... 60

D. Strict Scrutiny is the Proper Standard Because the Statute Impinges on
Fundamental Rights..... 62

E. The State’s Interest is Not Compelling..... 67

F. The Statute Is Not Narrowly Tailored..... 70

G. The Statute Fails Even Rational Basis Review..... 73

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO
DEFENDANTS BECAUSE § 537.295 RSMO (2012) IS UNCONSTITUTIONAL AS
IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI
CONSTITUTION AND THE SUBSTANTIVE DUE PROCESS STANDARDS
INHERENT THEREIN IN THAT THE STATUTE DESTROYS THE GUARANTEE
OF THE RIGHT TO THE ENJOYMENT OF ONE’S OWN INDUSTRY AS
GUARANTEED BY THE MISSOURI CONSTITUTION..... 74

A. Standard of Review 74

B. Legal Standards 74

1. Overview..... 74

2. Explicit Legal Standards 75

C. The Right to Enjoy Property is Fundamental..... 77

D. The Deprivation of the Right to Enjoy Property Imposed on Rural Dwellers is Unconstitutional..... 78

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296.5 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE PERMITS THE LEGISLATURE TO IMPERMISSIBLY INTERFERE WITH THE JUDICIAL BRANCH’S CONSTITUTIONAL POWER AND EMPOWERS THE LEGISLATURE TO PERFORM THE DUTY OF DETERMINING STANDING, WHICH IS EXPRESSLY RESERVED TO THE JUDICIARY BY ARTICLE V. 83

A. Standard of Review 83

B. The Constitutional Provision..... 83

C. Section 537.296.5 violates Separation of Powers..... 83

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE I, SECTION 14 OF THE MISSOURI COURTS (THE “OPEN COURTS” PROVISION) IN THAT IT DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSORS AND OCCUPIERS OF LAND. 89

A. Standard of Review 89

B. Legal Standards 89

C. Sections 537.296 Violate Article I, Section 14 of the Missouri Constitution... 90

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION (THE “SPECIAL LAWS” PROVISION) IN THAT IT BENEFITS ONLY THE CORPORATE FARMING INDUSTRY WHILE DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSERS AND OCCUPIERS OF LAND..... 96

A. Standard of Review 96

B. Legal Standards 96

C. Why The History is Important 97

D. 537.296 Relies on Close Ended Classification and is Facially Special. 99

E. Even if 537.296 Were Open Ended It Fails Rational Basis Analysis..... 102

VII. THE TRIAL COURT ERRED IN DISMISSING THE LAWSUIT BECAUSE THE BARE SET OF FACTS PLEADED IN THE MOTION FOR SUMMARY JUDGMENT WERE INSUFFICIENT AS A MATTER OF LAW TO DEFEAT PLAINTIFFS’ NEGLIGENCE AND CONSPIRACY CLAIMS IN THAT THERE WERE NO FACTS IN THE SUMMARY JUDGMENT RECORD THAT REFLECTED AN ABSENCE OF CONTROL OF BOHR BY CARGILL AND

THERE WERE MULTIPLE MATERIAL FACTUAL DISPUTES THAT REQUIRED
RESOLUTION THROUGH A JURY TRIAL..... 104

A. Standard of Review 104

B. The Elements of Negligence..... 104

C. Plaintiffs Are Not Prohibited From Recovering Damages Under a Theory of
Negligence..... 106

1. The Legislature Did Not Sweep Negligence Into § 537.296..... 106

a. Respondents Argue Nuisance is Exclusive 106

b. Presumptions under the law 106

c. Negligence and Nuisance Co-Exist 107

2. Even if the Legal Basis for Summary Judgment Existed, the Summary
Judgment Record is Devoid of Facts and it is Axiomatic that Facts, Not
Argument, Control for Summary Judgment..... 109

3. Defendants Each Owed Duties of Care to Plaintiffs..... 110

4. Cargill Had A Duty to Plaintiffs Because It Had The Exclusive Right to
Control the Methods of Work Done by Bohr, and Bohr Was Accountable Under
the Contract for Far More Than The Results of the Work..... 110

5. Bohr Cannot Escape A Duty of Care and Summary Judgment Was Improper
117

6. Plaintiffs Need Not Allege Physical Harm in Order to Recover Damages Pursuant to its Claims of Negligence Against Defendants 117

CONCLUSION..... 118

CERTIFICATE OF SERVICE 120

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C) 121

TABLE OF AUTHORITIES

Cases

Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106
 (1980)..... 50

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106, 108-9 (1901)..... 84, 85

Aptheker v. Secretary of State, 378 U.S. 500, 508–09, 84 S.Ct. 1659, 12 L.Ed.2d 992
 (1964)..... 67

Arata v. Monsanto Chem. Co., 351 S.W.2d 717, 720-21 (Mo. 1961)..... 45

Asbury v. Lombardi, 846 S.W.2d 196, 199 (Mo. banc 1993) 85

Ascoli v. Hinck, 256 S.W.3d 592 (Mo. App. W.D. 2008)..... 116

Asselin v. Town of Conway, 135 N.H. 576, 577-78, 607 A.2d 132, 133 (1992)..... 66, 77

Baltimore & P.R. Co. v. Fifth Baptist Church, 108 U.S. 317 (1883)..... 45

Bargfrede v. American Income Life Insurance Company, 21 S.W.3d 157, 161 (Mo. App.
 2000)..... 116

Barkley v. Mitchell, 411 S.W.2d 817, 823 (Mo. App. 1967) 114

Batek v. Curators of the Univ. of Missouri, 920 S.W.2d 895, 899 (Mo. banc 1996)..... 102

Battlefield Fire Protection Dist. v. City of Springfield, 941 S.W.2d 491, 492 (Mo. banc
 1997)..... 86, 88

Bettendorf v. St. Croix County, 631 F.3d 421 (7th Cir. 2011)..... 49

Bizzell v. City of St. Peters, 1985 Mo. App. LEXIS 3194 *6 (Mo. Ct. App. March 12,
 1985)..... 47

Blake v. McClung, 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432 64, 76

Blaske v. Smith & Entzeroth, Inc., 821 S.W.2d 822 (Mo. banc 1991)..... 90, 97, 103

Boulch v. John B. Gutmann Constr. Co., 366 S.W.2d 21, 29–30 (Mo. App. 1963)..... 114

Bowman v. Kansas City, 233 S.W.2d 26, 32-33 (Mo. banc 1950)..... 46

Bradley v. Ray, 904 S.W.2d 302, 311 (Mo. App. W.D. 1995)..... 105

Bromwell v. Nixon, 361 S.W.3d 393, 400 (Mo. banc 2012) 75

Brown v. Cedar Creek Rod & Gun Club, 298 S.W.3d 14, 21 (Mo. App. W.D. 2009)40, 47

Brown v. City of Marshall, 228 Mo. App. 586, 71 S.W.2d 856, 858 (1934)..... 55

Bruns v. Green, 157 S.W.3d 368 (Mo. App. E.D. 2005) 47

Buchanan v. Warley, 245 U.S. 60, 74—79, 38 S.Ct. 16, 18—20, 62 L.Ed. 149 (1917).. 64,
77

Butchers’ Union Co. v. Crescent City Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585 .. 64,
76

City of Peerless Park v. Dennis, 42 S.W.3d 814 (Mo. Ct. App. E.D. 2001) 55

Clay Co. ex rel. Clay County Comm’n v. Bagues Inc., 988 S.W.2d 102 (Mo. Ct. App.
W.D. 1999) 49, 51

Clay County Realty Co. v. City of Gladstone, 254 S.W.3d 859 (Mo. 2008)..... 57

Comm. for Educ. Equality v. State, 294 S.W.3d 477, 484 (Mo. banc 2009) 86

Cook v. De Soto Fuels, Inc., 169 S.W.3d 94, 107 (Mo. Ct. App. E.D. 2005)..... 47

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3230..... 63, 76

Cross v. Drury Inns, Inc., 32 S.W.3d 632, 636 (Mo. App. E.D. 2000)..... 109

Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)..... 76

Detling v. Edelbrock, 671 S.W.2d 265 (Mo. banc 1984)..... 55

Dix v. Motor Market, Inc., 540 S.W.2d 927, 932 (Mo. App. 1976)..... 105

Doe v. Miller, 405 F.3d 700, 709 (8th Cir. 2005) 76

Doe v. Phillips, 194 S.W.3d 833 (Mo. banc 2006) 76

Doe v. Roman Catholic Diocese, 862 S.W.2d 338, 341 (Mo. banc 1993)..... 100

Elk City v. Rice, 286 P.2d 275 (Okla.1955)..... 68

Empson v. Mo. Hwy. & Trans. Comm’n, 649 S.W.2d 517, 522 (Mo. App. W.D. 1983)
 114, 115

Etling v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771, 774 (Mo. banc
 2003)..... 60

Felton Oil Co., L.L.C. v. Gee, 357 Ark. 421, (2004)..... 68

Foster v. Runnels, 554 F.3d 807, 814–15 and n. 5 (9th Cir. 2009)..... 78

Frank v. Environmental Sanitation Management, Inc., 687 S.W.2d 876 (Mo. banc 1985)
 48, 109

Fust v. Attorney General, 947 S.W.2d 424, 432 (Mo. banc 1997) 102, 103

Gardner v. Blahnik, 832 S.W.2d 919, 923 (Mo. App. W.D. 1992) 86

Geiger v. Bowersox, 974 S.W.2d 513, 516 (Mo. App. E.D. 1998)..... 105

George Ward Builders, Inc. v. City of Lee’s Summit, 157 S.W.3d 644, 650 (Mo. App.
 W.D. 2004) 47

Green v. City of St. Louis, 870 S.W.2d 795 (Mo. banc 1994)..... 55

Hanes v. Continental Grain Co., 58 S.W.3d 1, 3 (Mo. App. E.D. 2001) passim

Harrell v. Total Health Care, Inc., 781 S.W.2d 58, 62 (Mo. banc 1989)..... 94

Harris v. Missouri Dept. of Conservation, 755 S.W.2d 726, 730 (Mo. App. 1988)... 50, 51

Harris v. Missouri Gaming Comm’n, 869 S.W.2d 58, 65 (Mo. banc 1994)..... 97, 102

Henry v. Jefferson County Comm’n, 637 F.3d 269, 276 (4th Cir. 2011), cert. denied, 132 S. Ct. 399, 181 L. Ed. 2d 255 49

Herndon v. Tuhey, 857 S.W.2d 203, 211 (Mo. banc 1993) 67

Hoffmann v. Kinealy, 389 S.W.2d 745, 752–53 (Mo. banc 1965).....passim

Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)..... 86

Hutto v. Finney, 437 U.S. 678 (1972) 78

I.N.S. v. Chadha, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790–91, 77 L.Ed.2d 317 (1983). 85

In re Care and Treatment of Coffman, 225 S.W.3d 439 (Mo. banc 2007) 54, 59

In re Care and Treatment of Norton, 123 S.W.3d 170 (Mo. banc 2003)..... 67, 70

In re Kansas City Ordinance No. 39946, 298 Mo. 569, 252 S.W. 404, 408 (Mo. banc 1923) 45, 46

Isnard v. City of Coffeyville, 260 Kan. 2 (1996) 68

ITT Commercial Fin. Corp. v. Mid–America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993) 35, 109, 116

Jackson v. City of Blue Springs, 904 S.W.2d 322 (Mo. App. W.D. 1995) 107, 108, 117

Jefferson County Fire Protection Districts Ass’n v. Blunt, 205 S.W.3d 866 (Mo. banc 2006) 97, 98

Kaiser Aetna v. United States, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)..... 54

Kansas City v. Webb, 484 S.W.2d 817 (Mo. banc 1972)..... 73

Kay v. Vatterott, 657 S.W.2d 80 (Mo. App. E.D. 1983) 81, 101

Kellogg v. Malin, 50 Mo. 496, 503 (Mo. 1872). 48, 56

Kennedy v. City of St. Louis, 749 S.W.2d 427 (Mo. App. E.D. 1988)..... 63

Kilmer v. Mun, 17 S.W.3d 545, 547 (Mo. 2000)..... 90, 91, 94

Kind v. Johnson City, 478 S.W.2d 63, 66 (Tenn. Ct. App. 1970)..... 68

King v. City of Independence, 64 S.W.3d 335, 340 (Mo. App. W.D. 2002)..... 47

King v. Moorehead, 495 S.W.2d 65 (Mo. Ct. App. 1973) 55

KMS, Inc. v. Wilson, 857 S.W.2d 525, 529 (Mo. App. W.D. 1993) 86

Kugel v. Village of Brookfield, 322 Ill. App. 349, (Ill. App. 1 Dist. 1944)..... 68

Lane v. State Comm. of Psychologists, 954 S.W.2d 23, 24 (Mo. Ct. App. E.D. 1997) 75

Lee v. Pulitzer Pub. Co., 81 S.W.3d 625, 631 (Mo. App. E.D. 2002) 114

Lewis v. City of Potosi, 317 S.W.2d 623, 629 (Mo. Ct. App. 1958)..... 47

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 528, 125 S. Ct. 2074, 2076, 161 L. Ed. 2d
876, 876 (2005)..... 49

Longview of St. Joseph v. St. Joseph, 918 S.W.2d 364, 371–72 (Mo. App. 1996) 51

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433, 102 S.Ct. 3164,
3174–75, 73 L.Ed.2d 868 (1982)..... 54

Lowery v. Horvath, 689 S.W.2d 625, 627 (Mo. banc 1985); 105

Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972) 64, 65, 76

Lynn Mining Co. v. Kelly, 394 S.W.2d 755 (Ky. 1965) 68

M & P Enterprises, Inc. v. Transamerica Financial Services, 944 S.W.2d 154, 162 (Mo. banc 1997) 109

Maltz v. Jackoway Katz Cap Co., 336 Mo. 1000, 82 S.W. 909 (1934) 113, 115

Manzara v. State, 343 S.W.3d 656, 659 (Mo. banc 2011) 86

Marriage of Kohring, 999 S.W.2d 228, 231–32 (Mo. banc 1999) 60

McCracken v. Swift & Co., 265 S.W. 91 (Mo. 1924)..... 40

McGinnis v. Northland Ready Mix, Inc., 344 S.W.3d 804, 812 (Mo. App. W.D. 2011).. 91

McGuire v. Kenoma, LLC, 375 S.W.3d 157 (Mo. App. W.D. 2012)..... 40, 91

Miller v. McKenna, 23 Cal.2d 774, 147 P.2d 531 (1944) 66, 77

Minor v. Rush, 216 S.W.3d 210 (Mo. App. W.D. 2007) 81, 101

National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (1948)..... 75

Nollan v. California Coastal Com’n, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987)..... 51

Norton v. Smith, 782 S.W.2d 775, 777 (Mo. App. E.D. 1989) 105

O’Brien v. Ash, 169 Mo. 283, 69 S.W. 8 (1901) 64

O’Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993) 97

Owens v. Contigroup Companies, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011) passim

Pellegrino Food Prods. Co., Inc. v. City of Warren, 116 F. App'x 346, 347 (3d Cir. 2004) 66, 77

Pendergist v. Pendergrass, 961 S.W.2d 919, 923 (Mo. App. W.D. 1998)..... 105

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659
 (1978)..... 50

Pennsylvania v. Mahon, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922)..... 49

Peters v. Contigroup, 292 S.W.3d 380 (Mo. App. W.D. 2009)..... 40, 44, 47, 91

Poe v. Ullman, 367 U.S. 497 (1961) 75, 81

Prude v. Clarke, 675 F.3d 752 (7th Cir. 2012)..... 78

Reals v. Courson, 349 Mo. 1193, 164 S.W.2d 306, 307 (1942) 100

Rebel v. Big Tarkio Drainage District of Holt City, 602 S.W.2d 787, 794 (Mo. banc
 1980)..... 47, 48, 109

Reed v. McBride, 178 F.3d 849, 853–54 (7th Cir. 1999) 78

Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523
 (1985)..... 76

Reno v. Flores, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993)..... 76

Rentschler v. Nixon, 311 S.W.3d 783, 786 (Mo. banc 2010)..... 35

Rhodes v. Bell, 230 Mo. 138, 130 S.W. 465, 468 (1910)..... 84

Rodgers v. Kansas City, 327 S.W.2d 478, 482) 107

Roe v. Wade, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) 67

Rose v. Board of Zoning, 68 S.W.3d 507, 515 (Mo. Ct. App. 2001) 56

Rosenfeld v. Thoele, 28 S.W.3d 446, 451-52 (Mo. Ct. App. 2000) 103

Roy v. Mo. Dep’t of Corr., 23 S.W.3d 738, 746 (Mo. App. W.D. 2000)..... 75

Rychnovsky v. Cole, 119 S.W.3d 204, 210 (Mo. App. W.D. 2003)..... 108, 110, 117, 118

Sakabu v. Regency Const. Co., 392 S.W.2d 494 (Mo. App. E.D. 2012) 113, 115, 116

Scheehle v. Justices of Supreme Court of Ariz., 508 F.3d 887 (9th Cir. 2007)..... 49

Schnuck Markets, Inc. v. City of Bridgeton, 895 S.W.2d 163, 168 (Mo. App. 1995). 50, 51

Schwartz v. Mills, 685 S.W.2d 956, 958 (Mo. App. E.D. 1985)..... 47

Shaw v. Hunt, 517 U.S. 899 (1996)..... 69

Shellbarger v. Shellbarger, 317 S.W.3d 77, 84 (Mo. App. E.D. 2010)..... 109

Shelley v. Kraemer, 334 U.S. 1, 10, 68 S.Ct. 836, 841, 92 L.Ed. 1161 (1948)..... 64, 76

Sherrell v. Brown, 284 S.W.3d 164, 166 (Mo. App. E.D. 2009) 117

Simmons v. Cook, 154 F.3d 805, 808 (8th Cir. 1998) 78

Slaughter House Cases, 16 Wall. 75, 21 L. Ed. 394 63

Slaughterhouse Cases, 16 Wall. 75, 21 L. Ed. 394 76

Smith v. Inter-County Tel. Co., 559 S.W.2d 518, 521 (Mo. banc 1977) 114

Snodgras v. Martin & Mayley, Inc., 204 S.W.3d 638, 640 (Mo. banc 2006) 91

Spann v. City of Dallas, 111 Tex. 350, 355-357(1921)..... 66, 77

Spradlin v. Borough of Danville, No. 4:CV-02-2237, 2005 WL 3320788, at *8 (M.D. Pa. Dec. 7, 2005) 66, 77

State ex inf. Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. banc 1970) 84

State ex rel. Barrett v. Hedrick, 294 Mo. 21, 241 S.W. 402, 407 (1922)..... 100

State ex rel. Budd v. Hancock, 66 N.J.L. 133, 48 A. 1023, 1024 (1901) 100

State ex rel. Chilcutt v. Thatch, 359 Mo. 122, 221 S.W.2d 172, 176 (1949)..... 87

State ex rel. City of Blue Springs v. Rice, 853 S.W.2d 918, 921 (Mo. banc 1993)..... 97

State ex rel. City of St. Louis v. Baumann, 348 Mo. 164, 153 S.W.2d 31 (1941)..... 53, 92

State ex rel. Collector of Winchester v. Jamison, 357 S.W.3d 589 (Mo. banc 2012). 87, 88

State ex rel. Jackson v. Dolan, SC92717, at 6 (May 28, 2013 Slip Op.) 45

State ex rel. Missouri State Board of Registration v. Southworth, 704 S.W.2d 219, 223
(Mo. banc 1986) 60

State ex rel. Mo. Cities Water Co. v. Hodge, 878 S.W.2d 819, 820-21 (Mo. banc 1994) 45

State ex rel. Nixon v. Powell, 167 S.W.3d 702, 705 (Mo. banc 2005)..... 76

State ex rel. Nothum v. Walsh, 380 S.W.3d 557 (Mo. banc 2012)..... 106

State ex rel. U.S. Steel v. Koehr, 811 SW.2d 385, 388 (Mo. banc 1991)..... 56

State Tax Comm’n v. Administrative Hearing Comm’n, 641 S.W.2d 69, 73–74 (Mo. banc
1982)..... 84

State v. McManus, 718 S.W.2d 130, 131 (Mo. banc 1986) 60

Ste. Genevieve Sch. Dist. R–II v. Bd. of Alderman of the City of Ste. Genevieve, 66
S.W.3d 6, 10 (Mo. banc 2002) 86, 87

Stevinson v. Deffenbaugh Industries, Inc., 870 S.W.2d 851, 855 (Mo. App. W.D. 1993)91

Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780 (1927)..... 64

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S.
302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002) 49

*The Executive Board of the Mo. Baptist Convention v. Windemere Baptist Conference
Ctr.*, 280 S.W.3d 678, 694 (Mo. App. W.D. 2009)..... 91

Thompson v. Hodge, 348 S.W.2d 11, 15 (Mo. App. 1961)..... 91

Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997)..... 97

Town of Chesterfield v. Brooks, 126 N.H. 64, 67, 489 A.2d 600, 603-04 (1985)..... 66, 77

Treadway v. State, 988 S.W.2d 508, 511 (Mo. banc 1999) 97

United States v. Carolene Products Co., 304 U.S. 144, at 152-53 n.4 (1938)..... 61

United States v. Causby, 328 U.S. 256 (1946) 45

Warren v. City of Athens, 411 F.3d 697 (6th Cir. 2005) 49

Weinhold v. Wolff, 555 N.W.2d 454, (Iowa 1996)..... 68

Wheeler v. Briggs, 941 S.W.2d 512, 515 (Mo. banc 1997) 90

Wheeler v. Philadelphia, 77 Pa. 338, 348 (Pa. 1875)..... 100

White v. Smith, 440 S.W.2d 497 (Mo. App. S.D. 1969)..... 107

Wilkinson v. Vaughn, 419 S.W.2d 1 (Mo. 1967)..... 81, 93, 101

William Aldred’s Case, Mich. 8 Jacobi Regis (1610) 39, 91

Williams v. Board of Ed. Cass R–VIII School Dist., 573 S.W.2d 81 (Mo. App. 1978).... 63

Statutes

§ 1.010 RSMo. (2012) 54

§ 523.001 RSMo. (2012) 57, 72, 93

§ 537.296 RSMo. (2012) passim

Other Authorities

D. Barry, *When In Iowa, Don’t Forget to Duck*, CHICAGO TRIBUNE, Lifestyles, (Sep 3, 1995)..... 100

David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992) 90

G. Santayana, *Life of Reason, Volume I*, (1905) 98

H. Flack, *The Adoption of the Fourteenth Amendment* 75—78, 81, 90—97 (1908)..... 64

J. Adams, <i>A Defence of the Constitutions of Government of the United States of America</i> , in F. Coker, <i>Democracy, Liberty, and Property</i> 121—132 (1942)	66
J. Locke, <i>Of Civil Government</i> 82—85 (1924);.....	65
J. tenBroek, <i>The Antislavery Origins of the Fourteenth Amendment</i> (1951).....	64
M. De La Merced, <i>Dealbook</i> , New York Times, May 30, 2013.....	98
R. Vanderford, <i>Mo. Gov. Kills Bill Capping Farm Nuisance Damages</i> , Law 360, May 2, 2011	67
Sir Walter Scott, <i>The Lay of the Last Minstrel</i>	73
<i>The Science of Smell</i> , Iowa State University, May 2004.....	79
U.S. Census Bureau Statistical Abstract of the United States (2012)	62
W. Kennedy, <i>Barton County Farmer Challenging CAFO Bills; Lawmakers Say Legislation Will Protect Jobs</i> , JOPLIN GLOBE, (March 12, 2011).....	69, 73, 99

Rules

RULE 74.04(c)(6)	109
------------------------	-----

Treatises

1 W. Blackstone, <i>Commentaries</i> , *138—140.	66
2A-6 Nichols on Eminent Domain, § 6.01	48, 52
58 Am.Jur.2d Nuisances § 9 (1989)	107
65 C.J.S. Negligence s 1(10), p. 452	107
<i>Black's Law Dictionary</i> 1252 (8th ed. 2004)	38
Dobbs, <i>Handbook on the Law of Remedies</i> , § 5.4, p. 341 (1973).....	47

W. Blackstone, Commentaries on the Laws of England Book 3, Chapter 13 (1765; 1992 reprint) 39

Constitutional Provisions

Mo. CONST. Art. I, § 14..... 89, 95

Mo. CONST. Art. I, § 2..... 59

Mo. CONST. Art. I, § 26..... passim

Mo. CONST. Art. I, § 28..... 36, 56

Mo. CONST. Art. II, § 1. 83, 85

Mo. CONST. Art. III, § 40 96, 102

Mo. CONST. Art. V, § 3 21, 86, 87, 88

U.S. CONST. amend. V..... passim

U.S. CONST. amend. XIV 59, 63, 76, 88

JURISDICTIONAL STATEMENT

Article V, Section 3 of the Missouri Constitution provides that “The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity ... of a statute or provision of the constitution of this state....” This case involves the constitutionality, under both federal and state constitutional provisions, of a special law enacted for the protection of the pork industry in Missouri. It presents an issue of first impression of the constitutionality of the statute and therefore the question is more than simply colorable, and jurisdiction vests in this Court pursuant to MO. CONST. Art. V, § 3.

STATEMENT OF FACTS

This is a case about freedom, fresh air, quality of life, and unconstitutional Acts and takings. (LF409-458).

Plaintiffs filed two actions against Chris Bohr, Della Bohr, Chris Bohr and Della Bohr d/b/a Chris Bohr Farms, and John and Jane Doe in August 2011, one in Callaway County, Missouri – Case Number 11CW-CV00800, filed on August 25, 2011; and one in Montgomery County, Missouri – Case Number 11AA-CC00029, filed on August 26, 2011. The suit in Montgomery County was dismissed, and the suit in Callaway County was transferred to Boone County. That is the case on appeal before this Court. (LF066-089).

On June 26, 2012, Plaintiffs were given leave by the Circuit Court to Amend their Petition in order to add Defendant Cargill Pork, LLC and add Defendant Bohr Farms, LLC in lieu of the originally named Defendants, and an additional Plaintiff was added. On September 7, 2012, the Petition was further amended, without opposition, to add all of the allegations and claims originally raised in the Montgomery County case. (LF066-089). In sum, Plaintiffs allege that they have suffered significant injury and damages as a result of the operation of Defendants' Concentrated/Confined Animal Feeding Operation ("CAFO"). (LF066-089). Plaintiffs raised claims for temporary abatable nuisance, vicarious liability (against Cargill only), negligence, and conspiracy. (LF066-089).

On April 22, 2013, Defendants filed their Motion seeking summary judgment alleging that the damages available to Plaintiffs for agricultural nuisance, subsequent to

August 28, 2011, the effective date of Section 537.296.2,¹ are limited to loss of property rental value and damages relating to a documented medical condition shown to have been caused by the nuisance; specifically:

- (1) "reduction in the fair market value of the claimant's property caused by the nuisance" for a permanent nuisance;
- (2) "diminution in the fair rental value of the claimant's property caused by the nuisance" for a temporary nuisance;
- (3) as well as "compensatory damages arising from [a] medical condition" as long as "objective and documented medical evidence" shows that the nuisance has caused that medical condition. V.A.M.S. § 537.296.2.

(LF145-149).

Defendants offered six uncontroverted facts to establish their right to summary judgment. (LF150-151). Paraphrased briefly those facts were:

1. Section 537.296 became effective on August 28, 2011.
2. The Second Amended Petition was filed in Boone County on August 24, 2012.

¹ Although the summary judgment motion cited § 537.296.2, Defendant Bohr's affirmative defenses were predicated on the entire statute, § 537.296. (LF114). On the other hand, Defendant Cargill never raised § 537.296 or any of its subparts as an affirmative defense to Plaintiffs' Second Amended Petition. (LF 146-151).

3. The CAFO at issue began operating on September 8, 2011.
4. Plaintiffs do not seek compensatory damages for diminution in the fair rental value of their properties allegedly caused by Defendants' swine facility.
5. Plaintiffs have not sought medical treatment for any medical or health condition allegedly caused by Defendants' swine facility.
6. Plaintiffs do not have medical documentation of any medical problems arising from the facility.

(LF150-151).

Plaintiffs did not dispute any of the six facts contained in Defendants' Statement of Uncontroverted Material Facts. However, Plaintiffs provided the Circuit Court a Statement of Additional Uncontroverted Facts ("PSAUF") (LF412-415) that were relevant to the issues presented in Defendants' Motion and support the fact that Section 537.296 is unconstitutional:

1. All Plaintiffs in this action own or are rightful possessors of property in Callaway and Montgomery Counties in close proximity to where Defendants planned to, and do raise swine in the State of Missouri. *See* Exhibit 2, Plaintiffs' Second Amended Petition, paragraphs 10-23, attached to Plaintiffs' Unopposed Motion for Leave to File Second Amended Petition, which was granted by this Court on September 7, 2012. (LF412).

2. Plaintiffs Richard and Barbara Gotsch are rightful possessors of their property at issue in this action, but the actual owner of the property is Richard E. Gotsch Trust, et al. (LF412).
3. Plaintiff Sherry Yansky is a rightful possessor of property at issue in this action, but the actual owner of the property is Plaintiff Gary Albrecht. (LF412).
4. Plaintiff Pat Daugherty is a rightful possessor of property at issue in this action, but the actual owner of the property is his wife, Plaintiff Tammy Daugherty's trust, the Tammy Krumm Trust. (LF412).
5. Plaintiff Richard Zander is a rightful possessor of property at issue in this action, but the actual owner of the property is his wife, Plaintiff Susan Zander's trust, the Susan E. Zander Trust. (LF413).
6. Plaintiffs Thomas and Margaret Pickering are the rightful possessors of their property at issue in this action, but the actual owner of the property is the Thomas and Margaret Pickering Trust. (LF413).
7. Plaintiff Todd Pickering is the rightful possessor of his property at issue, but the actual owner of the property is his parents, Plaintiffs Thomas and Margaret Pickering's Trust, the Thomas and Margaret Pickering Trust. (LF413).
8. Plaintiffs Linda and Don LaBrayere are the rightful possessors of their property at issue in this action, but the actual owner of some of the property at issue is the Plaintiff entity known as Mo Lime # 6, LLC. (LF413).
9. Plaintiffs' Second Amended Petition, containing the allegations asserted by Plaintiffs in this case. (LF413).

10. In this case, Plaintiffs seek damages for temporary nuisance and loss of use and enjoyment of property due to the “Foul-smelling odors, [particulate matter], pathogens, hazardous substances, flies, other insects, and/or animal manure and urine have repeatedly and frequently escaped and continue to escape from Defendants’ swine factory onto the Plaintiffs’ property and thus have substantially impaired Plaintiffs’ use and quiet enjoyment of their property, including depriving Plaintiffs of the opportunity to continue to develop their respective properties.” (LF413).

11. Plaintiffs further assert that Defendants’ activities have impaired and substantially damaged Plaintiffs’ quality of life. (LF414).

12. The affidavit, report, and Curriculum Vitae of Dr. John Ikerd. (LF414).

13. Pursuant to the report of Dr. John Ikerd:

USDA statistics indicate that the total numbers of hogs in Missouri has been basically constant since the mid-1980’s, averaging around three million head . . . The percentage of Missouri hogs on mid-sized farms dropped from around 40% in the early 1990s to less than 10% by the late 1990s, as the percentage in large CAFOs increased from 60% to close to 90% . . . USDA Census of Agriculture shows the number of hog farms in Missouri declined by more than 80% between the late 1980s and late 2010s, the period of CAFO expansion. Thus, Missouri produced about the same number of hogs in CAFOs as before but with far few hog farmers. (LF414).

14. Cargill Pork must approve of the construction site for the facility. *See* Letter Agreement between Defendant Cargill Pork and Defendant Bohr to enter into the Feeder/Wean to Finish Agreement. (LF414, LF498-523).
15. The facility must meet Cargill Pork's Transportation checklist. (LF414, LF498-523).
16. The facility must meet Cargill Pork's standards *as supported by audit*. (LF414, LF498-523).
17. Cargill Pork has the right to place and control the number and size of pigs at such times as it determines. (LF414, LF498-523).
18. Cargill Pork is responsible for paying for all veterinary services for the pigs. (LF414, LF498-523).
19. "Feeder (Defendant Bohr) shall provide and maintain the Facilities to Contractor's (Cargill Pork) standards as supported by a periodic audit" (LF415, LF498-523).
20. "Feeder (Defendant Bohr) shall follow Contractor's (Defendant Cargill Pork) feeding and management policies and programs" (LF415, LF498-523).
21. "Contractor (Defendant Cargill Pork) shall have the right to physically verify any or all mortality that may occur." (LF415, LF498-523).
22. "Feeder (Defendant Bohr) shall keep no other swine at the Facilities or on the Feeder's (Defendant Bohr) premises where Contractor's (Defendant Cargill Pork) pigs are located." (LF415, LF498-523).

23. “Feeder (Defendant Bohr) shall maintain all manure and waste equipment and systems, including lagoons and application areas, to Contractor’s (Defendant Cargill Pork) standards. Feeder (Defendant Bohr) agrees that Contractor’s (Defendant Cargill Pork) representatives shall have the right to inspect Feeder’s manure and waste equipment systems, including lagoons and application areas, to ensure they meet Contractor’s standards.” (LF415, LF498-523).

24. “Feeder (Defendant Bohr) shall keep accurate daily, weekly, and monthly records as required by Contractor (Defendant Cargill Pork)” (LF415, LF498-523).

25. “Feeder (Defendant Bohr) shall participate in annual environmental training offered or approved by Contractor (Defendant Cargill Pork).” (LF415, LF498-523).

26. “Feeder (Defendant Bohr) shall furnish a certificate of insurance annually to Contractor (Defendant Cargill Pork) evidencing Feeder’s (Defendant Bohr) coverage for general liability insurance” (LF415, LF498-523).

Although the parties laudably distilled their factual argument to a small set of facts, the allegations of the petition set out a true horror story. The swine facility at the heart of this case is a building 71 feet by 565 feet, (LF067) or roughly one half the width and one and two-thirds the length of a standard football field. In that space 4,800 head of hogs are confined² and fed. (LF072). And of course, what goes into the hogs must come

² This is the principal difference between “industrialized” farming and small family farming. On a small family farm hogs are allowed to roam inside an outdoor

back out of the hogs, with the math equating to 2,164,450 gallons of urine and feces per year. (LF072). Beneath the building is a 39,200 square foot deep under-floor pit. (LF067). This pit is a true “Little Shop of Horrors” because the urine and hog feces from the animals referenced above is collected there. (LF068). The millions of gallons of hog manure and urine generated every year are stored here prior to land application. (LF068). The pit contains levels of nitrates, hydrogen sulfide, ammonia, sulfates, pathogens and other particulates and substances that pose a threat both to human health and the environment. (LF072). The pit generates exceptionally foul odors that affect the plaintiffs. (LF072). And the pit is only part of the problem.

The thousands of heads of hogs that are put through the facility every year make urine and feces. That material is rich in bacteria and it produces gases and other particulate matter that is noxious. (LF068). The gases are distributed by the naturally-occurring winds, but the bacteria have their own transportation system: flies. (LF068). Hundreds of thousands of flies feast on the scatological buffet and lay their larvae in it. These maggots mature and produce new generations of flies that repeat the process. These flies migrate to the surrounding properties in search of food sources,³ carrying their

pen. At a CAFO the confinement is thought to be necessary to reduce exercise and increase weight so as to minimize the time necessary to get the hog to maximum weight.

³ For an excellent description of the way in which house flies (*Musca Domestica*) eat, see this description of the mouth parts and eating habits of flies at

microbes with them, and intrude on the lives of the Plaintiffs. (LF068). The stench of the number of hogs confined at the facility is almost impossible to describe, although Plaintiffs' petition sets it out as best it can. (LF068). The animal composter⁴ is located on the site of the CAFO is another source of odor and flies. (LF068).

The Court conducted oral argument with the case submitted on the limited facts set out above. From a ruling granting the Defendants' motion for summary judgment as to all claims, Plaintiffs appeal.

<http://micro.magnet.fsu.edu/primer/techniques/phasegallery/houseflymouth.html>
a site sponsored by Florida State University. (Appendix at A06-A07).

⁴ Animal composters use a mixture of organic and inorganic matter to allow the naturally-existing bacteria to decompose dead animals. *See, e.g.,* the above-ground method on You Tube at <http://www.youtube.com/watch?v=ewNQkbZv0xs>

POINTS RELIED UPON

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTIONS 26 AND 28 OF THE MISSOURI CONSTITUTION, AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE STATUTE SANCTIONS THE UNLAWFUL TAKING OF PROPERTY FOR PRIVATE USE AND IF NOT FOR PRIVATE USE, CONSTITUTES AN UNLAWFUL TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

Mo. CONST., Article I, § 21

Mo. CONST. Article I, § 28.

U.S. CONST. amend. V.

U.S. CONST. amend. XIV

Hoffman v. Kinealy, 389 S.W.2d 745 (Mo. banc 1965)

Hanes v. Continental Grain Co., 58 S.W.3d 1 (Mo. Ct. App. E.D. 2001)

Owens v. Contigroup Companies, 344 S.W.3d 717 (Mo. Ct. App. W.D. 2011)

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION, AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE STATUTE CREATES A SUSPECT CLASS OF PERSONS LIVING NEAR AGRICULTURAL OPERATIONS AND

VIOLATES THEIR FUNDAMENTAL RIGHTS TO HOLD AND ENJOY THEIR PROPERTY.

Mo. CONST., Article I, § 2.

U.S. CONST., amend. XIV.

Lynch v. Household Finance Corp., 405 U.S. 538 (1972)

Etling v. Westport Heating & Cooling Service, Inc., 92 S.W.3d 771 (Mo. banc 2003)

Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780 (1927)

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.295 RSMO (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION AND THE SUBSTANTIVE DUE PROCESS STANDARDS INHERENT THEREIN IN THAT THE STATUTE DESTROYS THE GUARANTEE OF THE RIGHT TO THE ENJOYMENT OF ONE'S OWN INDUSTRY AS GUARANTEED BY THE MISSOURI CONSTITUTION.

Mo. CONST., Article I, § 2.

Poe v. Ullman, 367 U.S. 497 (1961)

Bromwell v. Nixon, 361 S.W.3d 393, 400 (Mo. banc 2012)

Hutto v. Finney, 437 U.S. 678 (1972)

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296.5 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE PERMITS THE LEGISLATURE

TO IMPERMISSIBLY INTERFERE WITH THE JUDICIAL BRANCH'S CONSTITUTIONAL POWER AND EMPOWERS THE LEGISLATURE TO PERFORM THE DUTY OF DETERMINING STANDING, WHICH IS EXPRESSLY RESERVED TO THE JUDICIARY BY ARTICLE V.

Mo. CONST., Article II, § 1.

State ex inf. Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. banc 1970)

Albright v. Fisher, 164 Mo. 56, 64 S.W. 106, 108-9 (1901)

Manzara v. State, 343 S.W.3d 656, 659 (Mo. banc 2011).

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE I, SECTION 14 OF THE MISSOURI COURTS (THE “OPEN COURTS” PROVISION) IN THAT IT DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSORS AND OCCUPIERS OF LAND.

Mo. CONST., Article I, § 14.

Kilmer v. Mun, 17 S.W.3d 545, 547 (Mo. 2000)

State ex rel. City of St. Louis v. Baumann, 348 Mo. 164, 153 S.W.2d 31 (1941)

Wilkinson v. Vaughn, 419 S.W.2d 1 (Mo. 1967)

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION (THE “SPECIAL LAWS” PROVISION) IN THAT IT BENEFITS ONLY THE

CORPORATE FARMING INDUSTRY WHILE DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSERS AND OCCUPIERS OF LAND

Mo. CONST., Article III, § 40, (28).

Mo. CONST., Article III, § 40, (30).

Tillis v. City of Branson, 945 S.W.2d 447, 449 (Mo. banc 1997)

O'Reilly v. City of Hazelwood, 850 S.W.2d 96, 99 (Mo. banc 1993)

Harris v. Missouri Gaming Comm'n, 869 S.W.2d 58, 65 (Mo. banc 1994)

VII. THE TRIAL COURT ERRED IN DISMISSING THE LAWSUIT BECAUSE THE BARE SET OF FACTS PLEADED IN THE MOTION FOR SUMMARY JUDGMENT WERE INSUFFICIENT AS A MATTER OF LAW TO DEFEAT PLAINTIFFS' NEGLIGENCE AND CONSPIRACY CLAIMS IN THAT THERE WERE NO FACTS IN THE SUMMARY JUDGMENT RECORD THAT REFLECTED AN ABSENCE OF CONTROL OF BOHR BY CARGILL AND THERE WERE MULTIPLE MATERIAL FACTUAL DISPUTES THAT REQUIRED RESOLUTION THROUGH A JURY TRIAL

Geiger v. Bowersox, 974 S.W.2d 513, 516 (Mo. App. E.D. 1998)

Jackson v. City of Blue Springs, 904 S.W.2d 322 (Mo. App. W.D. 1995)

Rychnovsky v. Cole, 119 S.W.3d 204, 210 (Mo. App. W.D. 2003)

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTIONS 26 AND 28 OF THE MISSOURI CONSTITUTION, AND THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE STATUTE SANCTIONS THE UNLAWFUL TAKING OF PROPERTY FOR PRIVATE USE AND IF NOT FOR PRIVATE USE, CONSTITUTES AN UNLAWFUL TAKING OF PROPERTY WITHOUT JUST COMPENSATION.

A. STANDARD OF REVIEW

All matters in this appeal involve summary judgment. The standard of review on appeal regarding summary judgment is essentially de novo. *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Summary judgment will be upheld on appeal if there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. *Id.*

“Constitutional challenges to a statute are reviewed de novo.” *Rentschler v. Nixon*, 311 S.W.3d 783, 786 (Mo. banc 2010). A person challenging the constitutionality of a Missouri law may overcome the presumption of constitutionality by demonstrating that “it clearly contravenes a constitutional provision.” *Rentschler*, 311 S.W.3d at 786.

B. LEGAL STANDARDS

1. *Article I, Section 28 of the Missouri Constitution*

Section 28, Article I of the Missouri Constitution provides the following bar on the taking of private property for private use:

*That private property shall not be taken for private use **with or without compensation**, unless by consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in the manner prescribed by law; and that when an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be public shall be judicially determined without regard to any legislative declaration that the use is public.*

MO. CONST. Art. I, § 28 (2012) (emphasis added).⁵

2. *Section 26, Article I of the Missouri Constitution and the Fifth Amendment to the United States Constitution*

⁵ Neither side is alleging that any of the exceptions to Section 28, Article I of the Missouri Constitution are applicable to this case.

Section 26, Article I of the Missouri Constitution mirrors the language of the Fifth Amendment of the United States Constitution⁶ and states the following with respect to the taking of private property for public use:

That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

⁶ Amendment V of the United States Constitution states that:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.** U.S. CONST., amend. V(emphasis added).

Mo. CONST. Art. I, § 26 (2012) (emphasis added).

3. *In Missouri, There is a Constitutional Guaranty of the Right of Use and Enjoyment of Property, Which Cannot be Taken Without Due Process of Law.*

The word “property” means “[a]ny external thing over which the rights of possession, use and enjoyment are exercised[.]” *Black’s Law Dictionary* 1252 (8th ed. 2004). To that end, the Missouri Supreme Court has defined property as follows:

Property is defined as including not only ownership and possession but also **the right of use and enjoyment for lawful purposes.** In fact, “[t]he substantial value of property lies in its use.” It follows that: **“[t]he constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands is a taking of private property without due process of law, which is inhibited by the Constitution.”**

Hoffmann v. Kinealy, 389 S.W.2d 745, 752–53 (Mo. banc 1965) (footnotes and citations omitted) (emphasis added). Further, as shown *infra*, the constitutional right to enjoy property is fundamental in Missouri and under the United States Constitution.

4. *Summary of Common Law Nuisance Before and After the Promulgation of § 537.296 RSMO. (2012).*

§ 537.296 RSMo. (2012) directly impacts private nuisance. Private nuisance dates back to the time of English common law. *William Aldred's Case*, Mich. 8 Jacobi Regis (1610). In 1765, William Blackstone explored the law of nuisance in his Commentaries, even providing the following poignant example:

Also, if a person keeps his hogs, or other noisome animals, so near the house of another, that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house.

W. Blackstone, Commentaries on the Laws of England Book 3, Chapter 13 (1765; 1992 reprint).

“A nuisance is a substantial interference with the use and enjoyment of one's property.” *Hanes v. Continental Grain Co.*, 58 S.W.3d 1, 3 (Mo. App. E.D. 2001). Prior to the promulgation of Section 537.296, Missouri courts consistently held that “[a] nuisance is temporary if it may be abated, and it is permanent if abatement is impracticable or impossible.” *Id.*⁷ Missouri Courts have long held that hog farms cannot be a permanent nuisance, but rather 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

⁷ Appellants are not aware of any states that do not apply a similar standard in determining whether a nuisance is temporary or permanent in character.

inherent quality of the property itself.” *Owens v. Contigroup Companies*, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011).

In the case of temporary nuisance, the defendant is legally obligated to terminate the injury and each day it continues is considered “a repetition of the original wrong, and **successive actions accrue as to each injury[.]**” *Id.* (emphasis added). Prior to the implementation of Section 537.296, an action for temporary nuisance allowed recovery for non-economic damages, including inconvenience, discomfort and loss of quality of life. *See, e.g., Brown v. Cedar Creek Rod & Gun Club*, 298 S.W.3d 14, 21 (Mo. App. W.D. 2009); *Peters v. Contigroup*, 292 S.W.3d 380 (Mo. App. W.D. 2009); *Owens v. Contigroup Companies*, 344 S.W.3d 717 (Mo. App. W.D. 2011); *McCracken v. Swift & Co.*, 265 S.W. 91 (Mo. 1924); *McGuire v. Kenoma, LLC*, 375 S.W.3d 157 (Mo. App. W.D. 2012).

Section 537.296 turns private nuisance law in Missouri completely onto its head by eliminating the traditional common law damages available for temporary nuisance and by melding temporary nuisance with permanent nuisance, stating in pertinent part as follows:

2. 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.

3. Concerning a private nuisance where the alleged nuisance emanates from property primarily used for crop or animal production purposes, if any claimant or claimant's successor with ownership interests brings any subsequent claim against the same defendant or defendant's successors for temporary nuisance related to a similar activity or use of the defendant's property, and such activity or use is deemed a nuisance, the activity or use of property at issue shall be considered a permanent nuisance and claimant and claimant's successor's shall be limited to and bound by the remedies available for a permanent nuisance.

4. If a defendant in a private nuisance case where the nuisance is alleged to emanate from property used for crop or animal production purposes demonstrates a good faith effort to abate a condition that is determined to constitute a nuisance, the nuisance shall be deemed to be not capable of abatement. Substantial compliance with a court order regarding such property shall constitute such a good faith effort as a matter of law.

5. Concerning a private nuisance where the alleged nuisance emanates from property primarily used for crop or animal production purposes, no person shall have standing to bring an action for private nuisance unless the person has an ownership interest in the property alleged to be affected by the nuisance.

6. Nothing in this section shall:

(1) Prohibit a person from recovering damages for annoyance, discomfort, sickness, or emotional distress; provided that such damages are awarded on the basis of other causes of action independent of a claim of nuisance; or

8. A copy of the final judgment in any action alleging a private nuisance shall be filed with the recorder of deeds in the county in which the final judgment was issued and shall operate as notice to any purchaser of the

claimant's property that the property was related to a previous claim for nuisance.

§ 537.296 RSMo. (2012).

In sum, Section 537.296 makes the following drastic changes to long-standing private temporary nuisance law in Missouri:

- Limits and caps compensatory damages in permanent nuisance cases to reduction of fair market value. § 537.296.2(1) RSMo. (2012).
- Limits and caps compensatory damages in temporary nuisance cases by limiting what the jury can award to the diminution in fair rental value. § 537.296.2(2) RSMo. (2012).
- In situations constituting permanent and temporary nuisance, allows compensatory damages for medical condition objectively shown to be caused by the nuisance by documented evidence. § 537.296.2(3) RSMo. (2012).
- Limits successive actions for temporary nuisance. The first case may be temporary nuisance, but the second case will be deemed permanent nuisance – preventing all further recovery. § 537.296.3. RSMo. (2012)⁸

⁸ Under the common law of temporary nuisance, “a repetition of the original wrong, and **successive actions accrue as to each injury**[.]” *Owens v. Contigroup Companies*, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011). (emphasis added).

- Defendant may claim “defense” of permanent nuisance by showing “good faith effort to abate condition.” Statute declares substantial compliance with court order regarding property means, as a matter of law, that nuisance is not capable of abatement. § 537.296.4 RSMo. (2012).⁹
- Eliminates standing in nuisance actions arising from agricultural operations, unless plaintiff has an ownership interest in the property, eliminating children and elders living with the owners from pursuing claims. § 537.296.5 RSMo. (2012).

In essence, Section 537.296 systematically violates in all ways traditional private nuisance law in Missouri.

C. SECTIONS 537.296.2-5 ARE AN UNCONSTITUTIONAL PRIVATE TAKING OF THE CONSTITUTIONALLY GUARANTEED RIGHT TO USE AND ENJOY PROPERTY.

The *Hoffman* case makes it clear that the Missouri Constitution guarantees the right of use and enjoyment of property and that such rights cannot be taken without due

⁹ “A nuisance is temporary if it may be abated, and it is permanent if abatement is impracticable or impossible.” *Peters v. ContiGroup*, 292 S.W.3d 380, 385 (Mo. App. W.D. 2009) (quoting *Hanes v. Cont'l Grain Co.*, 58 S.W.3d 1, 3 (Mo. App. E.D. 2001)). Section 537.296 therefore eliminates the requirement that abatement be impracticable or impossible, in exchange for a “good faith” standard.

process. *Hoffmann v. Kinealy*, 389 S.W.2d 745, 752–53 (Mo. banc 1965).¹⁰ Section 28, Article I of the Missouri Constitution absolutely forbids the taking of property by private entities for private uses.¹¹ Section 26 of Article I of the Missouri Constitution establishes that a taking may only be lawfully effectuated by the government. *State ex rel. Mo. Cities Water Co. v. Hodge*, 878 S.W.2d 819, 820-21 (Mo. banc 1994).” *State ex rel. Jackson v. Dolan*, SC92717, at 6 (May 28, 2013 Slip Op.) (“[u]nder Missouri law, the State statutorily may delegate the power of eminent domain to municipalities or other government subdivisions.”).

In other words, the government cannot delegate the power to take property rights to private corporations or individuals. As has been the law for decades, the power of eminent domain may always benefit private entities so long as there is some public gain. *In re Kansas City Ordinance No. 39946*, 298 Mo. 569, 252 S.W. 404, 408 (Mo. banc 1923); *Arata v. Monsanto Chem. Co.*, 351 S.W.2d 717, 720-21 (Mo. 1961) (citing *In re*

¹⁰ See also *United States v. Causby*, 328 U.S. 256 (1946) (low flights by federal government airplanes over private lands that are so frequent as to be a direct and immediate interference with the use and enjoyment of land are takings); See also *Baltimore & P.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883) (finding that railroad authorized by the government is liable for nuisance related to rumbling of train engines, blowing off of steam, ringing of bells, whistles, smoke, and offensive odors).

¹¹ Amendment V of the United States Constitution similarly forbids taking of private property for private use.

Kansas City Ordinance No. 39946, 252 S.W. at 408); *Bowman v. Kansas City*, 233 S.W.2d 26, 32-33 (Mo. banc 1950). But, in each of these cases, the taking was by and on behalf of a governmental agency, and the taking benefitted a private entity. In none of these cases did the legislature delegate its right to take property to a private party for exercise on its whim.

In this case, Sections 537.296.2-5 completely eliminate any right of recovery for loss of constitutionally guaranteed rights to use and enjoy property. However, instead of the government doing the taking, the statute effectively provides the right of eminent domain to private companies (in this case, Defendants Bohr Farms, LLC and Cargill Pork, LLC). Because the taking occurs here when the hog farm or other agricultural operation begins to create a nuisance (and not on the mere operation of an agricultural operation), the nuisance, and the injury inherent in it, arise from private actions, not from public uses or benefits. For this reason, there is no public use taking.

As such, because Sections 537.296.2-5 permit the private taking of Appellants' constitutionally guaranteed property rights, the statute is in direct violation of Article I, Section 28 of the Missouri Constitution and the Fifth Amendment to the United States Constitution.

D. SECTIONS 537.296.2-5'S DISTORTION OF TEMPORARY AND PERMANENT
NUISANCE CLAIMS IS AN UNCONSTITUTIONAL TAKING BECAUSE IT IS
EQUIVALENT TO THE GRANTING OF AN EASEMENT.

Prior to the promulgation of Section 537.296, “[a] nuisance is temporary if it may be abated, and it is permanent if abatement is impracticable or impossible.” *Hanes v. Continental Grain Co.*, 58 S.W.3d 1, 3 (Mo. App. E.D. 2001). The measure for damages for a *permanent* nuisance is the “difference in the land's market value immediately before and immediately after the injury.” *Bruns v. Green*, 157 S.W.3d 368 (Mo. App. E.D. 2005). Prior to the promulgation of Section 537.296, damages for temporary nuisance, as were asserted in this case, include “non-economic damages, including inconvenience, discomfort and loss of quality of life.” *See, e.g., Brown v. Cedar Creek Rod & Gun Club*, 298 S.W.3d at 21; *Peters v. Contigroup*, 292 S.W.3d at 385.

Perhaps more important than the measure of damages between temporary and permanent nuisance, “[t]he effect of characterizing a nuisance as permanent is to give the defendant, because of his wrongful act, the right to continue the wrong; a right equivalent to an easement.” *Cook v. De Soto Fuels, Inc.*, 169 S.W.3d 94, 107 (Mo. Ct. App. E.D. 2005); *see also, Bizzell v. City of St. Peters*, 1985 Mo. App. LEXIS 3194 *6 (Mo. Ct. App. March 12, 1985); *Schwartz v. Mills*, 685 S.W.2d 956, 958 (Mo. App. E.D. 1985); *Lewis v. City of Potosi*, 317 S.W.2d 623, 629 (Mo. Ct. App. 1958); *King v. City of Independence*, 64 S.W.3d 335, 340 (Mo. App. W.D. 2002), disapproved of on other grounds, *George Ward Builders, Inc. v. City of Lee’s Summit*, 157 S.W.3d 644, 650 (Mo. App. W.D. 2004). “[A]djudication of a permanent nuisance amounts to a grant of easement to the wrongdoer to continue to interfere with the land of plaintiff.” *Rebel v. Big Tarkio Drainage District of Holt City*, 602 S.W.2d 787, 794 (Mo. banc 1980) (*citing* *Dobbs*, *Handbook on the Law of Remedies*, § 5.4, p. 341 (1973)), disapproved of on

other grounds, *Frank v. Environmental Sanitation Management, Inc.*, 687 S.W.2d 876 (Mo. banc 1985). Further, an easement is an encumbrance that prevents the exclusive and absolute dominion over property, also preventing the full enjoyment of property. *Kellogg v. Malin*, 50 Mo. 496, 503 (Mo. 1872).

Sections 537.296.2-5, by only allowing damages for diminution in the fair rental value of property or the reduction in fair market value of the property, even though the nuisance is temporary,¹² mandates that all agricultural nuisance claims be considered permanent nuisances, effectively eliminating temporary nuisance claims in the agricultural context in Missouri. To that end, Sections 537.296.2-5, by converting all nuisance claims to permanent nuisance, allow an offending party the right to forever impair the property and rights of its neighbors without recourse, or in the parlance of Missouri courts, allow “a grant of easement to the wrongdoer to continue to interfere with the land of plaintiff.” *Rebel*, 602 S.W.2d at 794.

The just compensation provision of the Takings Clause of the Fifth Amendment is not limited in its application to acquisitions solely under the power of eminent domain. 2A-6 Nichols on Eminent Domain, § 6.01. Statutes that go “too far,” constitute a form of a regulatory taking necessitating compensation. *Lingle v. Chevron U.S.A. Inc.*, 544

¹² In Missouri, 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.” *Owens*, 344 S.W.3d at 728.

U.S. 528, 528, 125 S. Ct. 2074, 2076, 161 L. Ed. 2d 876, 876 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002); *Pennsylvania v. Mahon*, 260 U.S. 393, 43 S. Ct. 158, 67 L. Ed. 322 (1922); *Henry v. Jefferson County Comm'n*, 637 F.3d 269, 276 (4th Cir. 2011), cert. denied, 132 S. Ct. 399, 181 L. Ed. 2d 255; *Bettendorf v. St. Croix County*, 631 F.3d 421 (7th Cir. 2011)(regulatory taking occurs when government action deprives landowner of practical use of property); *Scheehle v. Justices of Supreme Court of Ariz.*, 508 F.3d 887 (9th Cir. 2007); *Warren v. City of Athens*, 411 F.3d 697 (6th Cir. 2005).

Federal and state court decisions confirm that various types of governmental and regulatory activities may create a compensable taking even in the absence of a formal legislative determination to invoke the power of eminent domain. *Bettendorf*, 631 F.3d 421 (declaring it well-settled that to establish regulatory taking for which just compensation is required under Fifth Amendment and under Wisconsin law where government regulation has “rendered the property practically useless for all reasonable purposes”). *Clay Co. ex rel. Clay County Comm’n v. Bagues Inc.*, 988 S.W.2d 102 (Mo. Ct. App. W.D. 1999) is instructive. In *Clay County*, the county commission directed farmers to apply for a conditional use permit under the zoning ordinances to build an expanded hog feeding operation. The landowners refused to apply citing a state statute that exempted farm buildings from local zoning regulations. The county sued to enjoin the building, and the landowners counterclaimed for injunctive relief and damages for an unconstitutional taking. *Id.*

The circuit court interpreted the zoning regulation as a regulatory taking because had the county enforced its zoning ordinance it would have (1) violated the state statute; and (2) deprived the landowners of some of the use of their property.

In interpreting the actions as a regulatory taking the Western District noted:

A regulatory taking occurs when a regulation enacted under the police power of the government goes too far. *Harris v. Missouri Dept. of Conservation*, 755 S.W.2d 726, 730 (Mo. App. 1988). When a court finds that a regulation has gone too far and constitutes a taking, it is essentially finding “that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest.” *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980).

Id. at 106. The Western District went on to note:

Missouri considers the same factors the Supreme Court has considered in making a determination of whether a taking has occurred under Article 1, § 26 of the Missouri Constitution. These factors are “(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 Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo. App. 1995) (citing *Penn Central*, 438 U.S. at 124, 98 S.Ct. at 2659). Missouri has also adopted the United States Supreme Court’s standard that a compensable taking occurs when the regulation does

not “substantially advance a legitimate state interest.” *Harris*, 755 S.W.2d at 731 (citing *Nollan v. California Coastal Com’n*, 483 U.S. 825, 834, 107 S.Ct. 3141, 3147, 97 L.Ed.2d 677 (1987)).

In Missouri, these standards have been applied in cases where the regulatory taking which did not deny the landowner all use of the property, i.e. the partial regulatory taking, was permanent, *see, e.g., Longview of St. Joseph v. St. Joseph*, 918 S.W.2d 364, 371–72 (Mo. App. 1996) and *Schnuck Markets*, 895 S.W.2d at 167–68, or in cases in which the permanency of the partial regulatory taking was not addressed, *see, e.g., Harris*, 755 S.W.2d at 727.

Id. at 107. Applying these principles here, it is apparent that there is a regulatory taking because (a) the statute goes too far in restricting private property rights; and (b) the statute imposes conditions on rural dwellers that effectively deny them the right to use and enjoy their property, all while advancing the interests solely of corporate farmers. The tests articulated in *Clay County* are easily met here.

The economic impact of the statutory taking here effectively imposes an easement on the landowners, making them sell some small part of their bundle of sticks to a corporate farming operation to advance the risk-management goals of the encroaching corporation. In short, by making the compensation available for an invasion of personal interests equivalent solely to the diminution in value of the land, the economic impact is to force either the sale of ancestral lands, or to accept meager cash payments in exchange for years of continued olfactory suffering.

Similarly, when rural dwellers purchased or inherited their lands, they expected to pass them on as a homestead to their children. They may have buried family members and/or pets on the land. They may have invested money to fix up the property so that they could live on the farm comfortably. All of these investments were made prior to the encroachment by the corporate farms. The statute gives no credence to the inherent and special value of lands passed between generations and containing not just soil, but sweat and blood equity.

The character of the government action is also questionable. Giving the right of eminent domain or inverse condemnation to private corporate interests cannot possibly advance a legitimate state interest. In essence the legislature has immunized an entire industry from any real accountability for its impact on rural Missourians¹³.

Sections 537.296.2-5 are therefore in direct violation of Article I, Section 28 of the Missouri Constitution and the Fifth Amendment to the United States Constitution.

¹³ It is worth noting that this statutory taking does not fall under the “nuisance exception” to the Takings doctrine:

The “nuisance exception” to the *Takings Clause* recognizes that a law which prevents one property owner from harming another does not constitute a taking if the law is designed to prevent a “noxious use” or “nuisance-like conduct.”

2A-6 Nichols on Eminent Domain § 1.06 (footnote omitted)

E. RENTERS AND OTHER LAWFUL OCCUPIERS OF PROPERTY ARE
UNCONSTITUTIONALLY DEPRIVED OF THEIR RIGHT TO FULL AND FAIR
COMPENSATION UNDER 537.296.

Section 537.296.5 also unconstitutionally disallows compensation for the taking of the property rights rightfully obtained by lease by renters or other rightful occupants who occupy property but do not own it.¹⁴ Prior to the promulgation of Section 537.296, “a person who **rightfully occupies** but does not own a home may sue for injuries caused by a temporary nuisance.” *Hanes v. Continental Grain Co.*, 58 S.W.3d at 5. (emphasis added).¹⁵ However, Section 537.296.5 mandates that property ownership, rather than

¹⁴ The statute also purports to deny standing to anyone who does not have an “ownership interest” in property. It defines this as “holding legal or equitable title to property in fee or, in a life, or in a leasehold interest;” Lessees will not have equitable title because that is defined as “the right in the party to whom [property] belongs to have the legal title transferred to him upon the performance of specified conditions.” *State ex rel. City of St. Louis v. Baumann*, 348 Mo. 164, 153 S.W.2d 31 (1941). Thus a lessee could never hold either legal or equitable title unless it was under a lease-purchase contract. *Id.*

¹⁵ “Prior decisions have made it clear, that the basis for a claim for a temporary nuisance is not the fact of ownership of the land in fee simple, but some sort of entitlement to rightful possession of the land and interference with the right to use

rightful occupation, is required to have standing to bring a private nuisance claim. Therefore, under Section 537.296.5, rightful occupants of property affected by a private nuisance, such as renters and members of the renters' household, may not bring a nuisance claim or be compensated for nuisance.

At oral argument before the Circuit Court the Defendants pointed out that ownership interest was designed to include renters, citing the language of the statute without analyzing it. The legislature is presumed to know the state of the law and enact statutes accordingly, *In re Care and Treatment of Coffman*, 225 S.W.3d 439 (Mo. banc 2007) and the plain language of a statute controls. § 1.010 RSMo. (2012).

A renter or other non-owner rightful occupant does not have an ownership interest in land as defined by the statute because a renter does not have "legal or equitable title." Yet, subject to the terms of his lease, he has the right to exclude others from the property. As the U.S. Supreme Court has noted, the right to exclude others from property is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 3174–75, 73 L.Ed.2d 868 (1982) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 100 S.Ct. 383, 391, 62 L.Ed.2d 332 (1979)).

Further, the Missouri Supreme Court has unequivocally held that "[p]roperty is defined as including not only ownership and possession but also the right of use and

and enjoy the land." *Owens v. Contigroup Companies*, 344 S.W.3d 717, 723 (Mo. App. W.D. 2011), citing *Hanes v. Cont'l Grain Co.*, 58 S.W.3d 1, 5 (Mo. App. E.D. 2001).

enjoyment for lawful purposes.” *Hoffmann*, 389 S.W.2d at 752–53. Given that a renter or other rightful occupant (such as a friend, son, daughter, or other family member residing on the property that does not technically own the property) obtains a portion of the land owner’s bundle of sticks through his leasehold, depriving him of a remedy for nuisance deprives him of valuable and constitutionally guaranteed property rights. Even under the doctrine of eminent domain, persons with leases and with options to purchase property have rights to compensation. *See, e.g., City of Peerless Park v. Dennis*, 42 S.W.3d 814 (Mo. Ct. App. E.D. 2001). Further, under Missouri law, a renter or other non-owner can be found liable for the creation or maintenance of a nuisance on land owned by another. *Brown v. City of Marshall*, 228 Mo. App. 586, 71 S.W.2d 856, 858 (1934)(“[o]ne who creates a nuisance, whether on his property or not, is liable for the damage caused thereby.”)

This outright abrogation of these property rights by statute is problematic from a constitutional perspective because, again, private property (in this case, the right to quiet use and enjoyment and the warranty of habitability inherent in leased residential property¹⁶) is being taken from a renter for private use, in violation of Article I, Section

¹⁶ *See, e.g., King v. Moorehead*, 495 S.W.2d 65 (Mo. Ct. App. 1973); *Detling v. Edelbrock*, 671 S.W.2d 265 (Mo. banc 1984) overruled on other grounds, *Green v. City of St. Louis*, 870 S.W.2d 795 (Mo. banc 1994).

28 of the Missouri Constitution and the Fifth Amendment to the United States Constitution.¹⁷

F. EVEN IF THE TAKINGS ARE DEEMED FOR PUBLIC USE, SECTIONS 537.296.2-5
DO NOT ALLOW FOR JUST COMPENSATION.

As asserted above, Article I, Section 28 of the Missouri Constitution and the Fifth Amendment to the United States Constitution prohibits the taking of private property for private use. However, even if the Court were to somehow conclude that the Plaintiffs' properties were taken for public use by private companies (Defendants Bohr Farms, LLC and Cargill Pork, LLC), Article I, Section 26 of the Missouri Constitution and the Fifth Amendment¹⁸ forbid the taking or damaging of private property for public use without just compensation. *State ex rel. U.S. Steel v. Koehr*, 811 SW.2d 385, 388 (Mo. banc 1991).

“When a taking occurs, the owner is entitled to be put in as good a position pecuniarily as if his property had not been taken.” *Clay County Realty Co. v. City of*

¹⁷ An easement is an encumbrance that prevents the exclusive and absolute dominion over property, also preventing the full enjoyment of property. *Kellogg v. Malin*, 50 Mo. 496, 503 (Mo. 1872).

¹⁸ Article I, Section 26 of the Missouri Constitution mirrors Amendment V of the United States Constitution in its prohibition against taking private property without just compensation. *Rose v. Board of Zoning*, 68 S.W.3d 507, 515 (Mo. Ct. App. 2001).

Gladstone, 254 S.W.3d 859 (Mo. 2008). Under 537.296.2-4, the maximum value an aggrieved party may receive for the taking of his or her property rights is the fair market value of the property.

In Missouri however, the mere actual fair market value of property is not the true measure of the value of property. In *Owens v. Contigroup Companies*, 344 S.W.3d 717 (Mo. App. W.D. 2011), a nuisance case involving a hog confinement with similar facts as the instant case, the jury awarded damages of \$825,000.00 each to thirteen of fifteen Plaintiffs and \$250,000.00 and \$75,000.00 to the remaining two Plaintiffs respectively. *Id.* On appeal, Defendants challenged the amount of damages because they exceeded the fair market value of the Plaintiffs' properties, arguing that "[a]ny award significantly exceeding the total value of the property is far more than necessary to compensate a plaintiff for the temporary impairment in the use of that property and is grossly excessive." *Id.* at 728. In rejecting this argument, the *Owens* Court stated that "[t]here is no authority for the proposition that a damage award is excessive if damages for the loss of the use and enjoyment of property exceed the actual market value of that property." *Id.*

Further, and even more poignant to the constitutional questions in the instant case, the *Owens* Court also held that the Missouri legislature "has recognized that there is an inherent additional value in a homestead that exceeds the fair market value of the property." *Id.*; See § 523.001 RSMo. (2012).

Sections 537.296.2-4 cap compensation in agricultural nuisance cases at the fair market value of the property. Sections 537.296.2-4 do not provide any compensation for

the “inherent additional value in a homestead that exceeds the fair market value of the property.” Section 537.296.5 bars all compensation to non-owning rightful occupiers of property. As such, even if the taking of Plaintiffs’ properties in this case was somehow deemed for “public use,” which is implausible, sections 537.296.2-5 statutorily bar the aggrieved party from receiving “just compensation” in plain and direct violation of Article I, Section 26 of the Missouri Constitution and the Fifth Amendment to the United States Constitution.

II. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION, AND THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE STATUTE CREATES A SUSPECT CLASS OF PERSONS LIVING NEAR AGRICULTURAL OPERATIONS AND VIOLATES THEIR FUNDAMENTAL RIGHTS TO HOLD AND ENJOY THEIR PROPERTY.

A. STANDARD OF REVIEW

Appellants adopt the standard of review from Point I, *supra*.

B. LEGAL STANDARDS

The legal standards regarding Equal Protection have been previously set out by this Court. The United States Constitution provides, “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. Article I, section 2 of the Missouri Constitution provides in pertinent part, “[A]ll persons are created equal and are entitled to equal rights and opportunity under the law.” Missouri’s equal protection clause provides the same protections as the United States Constitution. *In re Care and Treatment of Coffman*, 225 S.W.3d 439, 445 (Mo. banc 2007). When the constitutionality of a statute is attacked, constitutionality is presumed, *State ex rel.*

Missouri State Board of Registration v. Southworth, 704 S.W.2d 219, 223 (Mo. banc 1986), and the burden is upon the attacker to prove the statute unconstitutional. *State v. McManus*, 718 S.W.2d 130, 131 (Mo. banc 1986).

In deciding whether a statute violates equal protection, this Court engages in a two-part analysis. *Etlings v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003). First, the Court determines whether a classification of certain persons under the law “operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.” *Id.* (quoting *Marriage of Kohring*, 999 S.W.2d 228, 231–32 (Mo. banc 1999)) (citations omitted). If so, the classification is subject to strict scrutiny, and this Court must determine whether the classification is necessary to accomplish a compelling state interest. *Id.*

C. LANDOWNERS AFFECTED BY THE STATUTE ARE A SUSPECT CLASS.

Although suspect classes have traditionally been those involving race or illegitimacy, the crux of the suspect class inquiry has always been that those in the class need protection from the majority¹⁹ because their lack of political power makes it

¹⁹ As Justice Stone said:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten

impossible to effect the repeal of draconian legislation. *United States v. Carolene Products Co.*, 304 U.S. 144, at 152-53 n.4 (1938). Here small rural landowners and residents of small towns have been effectively marginalized as a suspect class. The legislation at issue here provides an economic benefit only to large mega-farm operations.²⁰ As shown, *infra*, it destroys the protections of the common law with regard to abatement of nuisance, and it treats those in rural areas differently than those in

amendments....It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment...Nor need we enquire ...whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."

United States v. Carolene Products Co., 304 U.S. 144, at 152-53 n.4 (1938).

²⁰ As noted *infra*, Section 537.296.3 requires that the second nuisance action filed against the owner of a small family farm creates a requirement that the family farmer pay the reduction in the fair market value of his neighbor's property. This would not operate as a benefit to a small family farm with 30 hogs, but would tend to favor only those operations to whom such a payout would be a mere pittance.

metropolitan areas. In a county like Cole County, where the majority of the county's population resides in incorporated cities, those residents may protect themselves from nuisance by creation of zoning ordinances. City dwellers have the power to push the nuisance away from their boundaries through the representative process. The family farm in an unincorporated section of the county has no city government to petition for redress, and should be considered a suspect class for purposes of constitutional review because they clearly require protection from the majority.²¹

D. STRICT SCRUTINY IS THE PROPER STANDARD BECAUSE THE STATUTE IMPINGES ON FUNDAMENTAL RIGHTS.

The right to own, hold and enjoy property is explicitly and specifically protected in both the United States Constitution and the Constitution of Missouri:

No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

²¹ In 2010 there were 108,000 farms in Missouri with an average acreage of 269 acres per farm. U.S. Census Bureau Statistical Abstract of the United States (2012), Table 825, at 536. Urban dwellers account for 69.6% of Missouri's population. *Id.*, Table 29, at 36. Available online at <http://www.census.gov/compendia/statab/2012/tables/12s0029.pdf>)

... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend XIV, § 1.

That ... all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law;

Mo. CONST. art I, § 2

In order to claim constitutional protection for a property interest, the property right must be vested. *Kennedy v. City of St. Louis*, 749 S.W.2d 427 (Mo. App. E.D. 1988); *Williams v. Board of Ed. Cass R–VIII School Dist.*, 573 S.W.2d 81 (Mo. App. 1978). Here the property rights of the landowners suing for nuisance are vested property rights.

The Missouri Supreme Court has unequivocally held that the right to use and enjoy property are fundamental rights:

It is perhaps more tedious than difficult to enumerate what these fundamental rights are. One of them, as the courts have frequently held, is **the right to acquire, hold, enjoy, and dispose of property, real or personal**. *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3230; *Slaughter House Cases*, 16 Wall. 75, 21 L. Ed. 394; *Butchers' Union Co. v.*

Crescent City Co., 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *Blake v. McClung*, 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432.

Stone v. City of Jefferson, 317 Mo. 1, 293 S.W. 780 (1927) (emphasis added); *See also O'Brien v. Ash*, 169 Mo. 283, 69 S.W. 8 (1901) (“The chief difficulty ... has been in the failure of appellants’ counsel to recognize the distinction between the right to own and hold property and the right to dispose of same by will. The one is a natural right of the citizen, which, when acquired under existing laws, becomes a vested right....”). No subsequent case has overruled the holdings of this Court in this regard. Thus, under the standard of review, this Court must apply strict scrutiny.

Further, the United States Supreme Court concurs with Missouri that rights to property are not only fundamental, but basic civil rights:

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.

Lynch v. Household Finance Corp., 405 U.S. 538, 545 (1972), quoting *Shelley v. Kraemer*, 334 U.S. 1, 10, 68 S.Ct. 836, 841, 92 L.Ed. 1161 (1948). *See also, Buchanan v. Warley*, 245 U.S. 60, 74—79, 38 S.Ct. 16, 18—20, 62 L.Ed. 149 (1917); H. Flack, *The Adoption of the Fourteenth Amendment* 75—78, 81, 90—97 (1908); J. tenBroek, *The Antislavery Origins of the Fourteenth Amendment* (1951). The Court further noted that

the rights Congress sought to protect via the Civil Rights Act of 1871 were described by the legislation's sponsor as "the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *Lynch*, 405 U.S. at 545.²²

The *Lynch* Court said this about the fundamental and important rights at issue in this appeal:

Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Id. at 552; J. Locke, *Of Civil Government* 82—85 (1924); J. Adams, *A Defence of the Constitutions of Government of the United States of America*, in F. Coker, *Democracy*,

²² "That the protection of property as well as personal rights was intended is also confirmed by President Grant's message to Congress urging passage of the legislation, and by the remarks of many members of Congress during the legislative debates." *Id.* at 546.

Liberty, and Property 121—132 (1942); 1 W. Blackstone, Commentaries, *138—140.²³

Because the rights at stake are fundamental, strict scrutiny applies.

²³ Many other jurisdictions have found that that the rights to use and enjoyment of property are fundamental under state constitutions and the Federal Constitution. For example, see *Town of Chesterfield v. Brooks*, 126 N.H. 64, 67, 489 A.2d 600, 603-04 (1985); see *Asselin v. Town of Conway*, 135 N.H. 576, 577-78, 607 A.2d 132, 133 (1992); See *Pellegrino Food Prods. Co., Inc. v. City of Warren*, 116 F. App'x 346, 347 (3d Cir.2004); see also *Spradlin v. Borough of Danville*, No. 4:CV-02-2237, 2005 WL 3320788, at *8 (M.D. Pa. Dec. 7, 2005); *Miller v. McKenna*, 23 Cal.2d 774, 147 P.2d 531 (1944); and *Spann v. City of Dallas*, 111 Tex. 350, 355-357(1921) (“Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. . . [t]he ancient and established maxims of Anglo-Saxon law which protects these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history—the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their

“To pass strict scrutiny review, a governmental intrusion must be justified by a ‘compelling state interest’ and must be narrowly drawn to express the compelling state interest at stake.” *In re Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2003) quoting *Herndon v. Tuhey*, 857 S.W.2d 203, 211 (Mo. banc 1993); See also *Roe v. Wade*, 410 U.S. 113, 155, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Aptheker v. Secretary of State*, 378 U.S. 500, 508–09, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964). Here there is neither a compelling state interest nor is the statute narrowly drawn.

E. THE STATE’S INTEREST IS NOT COMPELLING.

No legislative history or legislative findings were included in the bill and the record is devoid of any articulated state interest advanced by § 573.296, let alone a compelling one. Media reports from the time when the statute was passed suggest that proponents of the bill “claimed that it would protect farming operations from unwarranted legal threats and help keep business in the state.” R. Vanderford, *Mo. Gov. Kills Bill Capping Farm Nuisance Damages*, Law 360, May 2, 2011. Indeed, public statements by the bill’s sponsor reported in the media show this rationale:

Sen. Lager and Rep. Guernsey, in telephone interviews, said the legislation is needed to protect corporate farms, and some family farms, from “nuisance” lawsuits that they claim have cost companies millions of

liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.”).

dollars. Their fear, they say, is that big agricultural corporations that are doing business in Missouri will leave because their profit margins will be higher in adjoining states where the filing of multiple nuisance lawsuits are not permitted.²⁴

²⁴ Missouri jurisprudence allowing successive nuisance lawsuits in temporary nuisance cases is consistent with the law of surrounding states. *Isnard v. City of Coffeyville*, 260 Kan. 2 (1996). *Weinhold v. Wolff*, 555 N.W.2d 454, (Iowa 1996)(“where a nuisance is temporary, damages to property affected by the nuisance are recurrent and may be recovered from time to time until the nuisance is abated.”); *Elk City v. Rice*, 286 P.2d 275 (Okla.1955)(For temporary nuisance, statute of limitations will not begin to run until injury is suffered.); *Kugel v. Village of Brookfield*, 322 Ill. App. 349, (Ill. App. 1 Dist. 1944)(In temporary nuisance cases, “[s]uccessive actions * * * may be maintained for it from time to time as such damages are inflicted.”); *Felton Oil Co., L.L.C. v. Gee*, 357 Ark. 421, (2004); *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755 (Ky. 1965); *Kind v. Johnson City*, 478 S.W.2d 63, 66 (Tenn. Ct. App. 1970)(In a temporary nuisance case, “the very continuation of the nuisance is a new offense entitling complainants' to recover damages accruing within the statutory period next preceding, although more than the statutory period has elapsed since the creation of the nuisance.”). In fact, Appellants have not found a state that forbids successive claims in temporary nuisance cases.

W. Kennedy, *Barton County Farmer Challenging CAFO Bills; Lawmakers Say Legislation Will Protect Jobs*, JOPLIN GLOBE, (March 12, 2011) (available online at <http://www.joplinglobe.com/local/x1498150618/Barton-County-farmer-challenging-CAFO-bills-lawmakers-say-legislation-will-protect-jobs>). (Appendix at A01-A05).

While a state might have an interest in promoting agriculture, it would have no compelling interest in supporting large-scale corporate farming operations over small family-owned farms. If a small farmer creates a nuisance for a neighbor, that nuisance is often easily abated by reducing the number of animals or relocating the animals on the property. CAFOs, however, by their rather cruel design, concentrate the animals (and the corresponding odor, chemicals and particulate as well as other problems that arise therefrom) and are the only beneficiaries of this singularly industry-specific protective legislation.

Courts historically have looked at the rationales asserted by litigants and the legislative history to determine if there is a compelling state interest. In looking at legislative findings in the area of discrimination the United States Supreme Court has identified two tests for a compelling state interest. *Shaw v. Hunt*, 517 U.S. 899 (1996). In classifying on the basis of race a state legislature must possess evidence of past or present discrimination; and it must have had a strong basis in evidence to conclude remedial action was necessary. *Id.* at 909-10.

Applying that rationale from the Supreme Court by analogy to the legislation here, in order to burden the fundamental right of the enjoyment and ownership of private rural property, the legislature would have to identify with specificity that there is a problem

with corporate farms fleeing to other jurisdictions, and that the remedy imposed was capable of stopping the supposed problem. The legislature made no findings that corporations were abandoning the state for places where they could pollute the air and foul the land with hog feces without complaint, and more importantly, there is no evidence that there is a crisis in agribusiness as it relates to nuisance lawsuits. To the contrary, if there is any crisis in Missouri relating to hog farming, it results from the proliferation of hog CAFOs and their deleterious ecological, social, and economic impacts upon rural communities. (LF491-497). In fact, as critics of the legislation testified, this bill is aimed squarely at the family farmer who must endure conditions on his property that would be Eighth Amendment violations if imposed on prisoners in a state penal institution. As the legislators themselves admitted in statements to the media, the legislature based its action on fears and a manufactured alleged problem, not evidence. Thus this special legislation that benefits only the large-scale farming operations and burdens rural dwellers and family farmers does not advance a compelling state interest, if it advances any state interest (as opposed to a corporate interest) at all. (LF491-497).

F. THE STATUTE IS NOT NARROWLY TAILORED.

The statute is not narrowly tailored as required. *In re Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. banc 2003). Instead, it imposes a one-size-fits-no-one approach to limiting a nuisance plaintiff's damages to the diminution in fair market value of the property when the grievance that temporary nuisance addresses is not market value

but use and enjoyment. Further, it imposes on all rural landowners engaged in agricultural operations a “one chance to abate” rule and on any subsequent nuisance action, requires the landowner to pay for what amounts to a permanent easement.

Both these actions fly in the face of any compelling state interest in protecting agriculture because they only benefit corporate farms with large operations that can pay for such easements, and they destroy the resale value and inherent fundamental right of use and enjoyment of adjoining landowners²⁵.

Permanent nuisance is meant to address that situation where a situation on adjacent property had developed to the point that resale value is affected. In that situation, on disposition of the property the difference between the value of the land as it sat before the nuisance, and the value of the land after the nuisance can be easily calculated and is a fair compensatory mechanism because the persons affected by the nuisance have decided to sell. Temporary nuisance, on the other hand, is aimed at the use and enjoyment of property, not its fair market value,²⁶ and it reflects the damages

²⁵ In addition, because there is no recording of a constructive easement, there is no notice to subsequent purchasers who do not search the court record as opposed to the deed.

²⁶ “There is no authority for the proposition that a damage award is excessive if damages for the loss of the use and enjoyment of property exceed the actual market value of that property.” *Owens*, 344 S.W.3d at 728. Further, “there is an inherent

inherent in the human condition²⁷ from being required to tolerate conditions that are odious and unsafe.

Temporary nuisance reflects the common law understanding that a piece of land is more than a place to build a house and plant a crop. It is a person's home. It is their hearth. It is the result of their hard work, their history, and ultimately, their legacy. It is warm bread baking in the oven and the smell of Sunday supper on the stove. It is being able to open windows to enjoy a cool breeze. It is living in the house your grandfather built with his own two hands and seeing your grandchildren play under the trees that shaded you in your youth and beneath which, for the first time, you kissed their grandmother. It is more than a bundle of sticks, and more than a collection of memories. "Breathes there a man with soul so dead, that never to himself hath said, this is my own, my native land?"²⁸.

additional value in a homestead that exceeds the fair market value of the property."

Id.; *See also*, § 523.001, RSMo. (2012).

²⁷ Mere words lack the capacity to demonstrate the degree and depth of the impact on the human condition, but if the Court could imagine, it would be like spending hours a day inside the rankest outhouse, with the full complement of flies and disease-carrying insects frequently encroaching.

²⁸ Breathes there the man with soul so dead

Who never to himself hath said,

This is my own, my native land!

This is what Temporary Nuisance is meant to compensate for. For the legislature to change the remedy from actual damages to simply the diminution in value of the land is wrapping the law in a sheet and throwing it into the tomb: it is the antithesis of narrowly tailoring a remedy.

G. THE STATUTE FAILS EVEN RATIONAL BASIS REVIEW.

Even if this Court were to conclude that the right to hold and enjoy property is not a fundamental right (and thereby overrule a century's worth of state and federal precedent), the statute fails even rational basis review. The bulk of Missouri's agriculture comes from family farms, and family farms are the ones most impacted by the statute. *See, e.g.,* W. Kennedy, *Barton County Farmer Challenging CAFO Bills; Lawmakers Say Legislation Will Protect Jobs*, JOPLIN GLOBE, (March 12, 2011). When the legislature has in the past given special rights to corporate entities that were not extended to private citizens, this Court has overturned the statutes on equal protection grounds. *See, e.g., Kansas City v. Webb*, 484 S.W.2d 817 (Mo. banc 1972)(permitting corporations different juries in condemnation action violated equal protection).

Sir Walter Scott, *The Lay of the Last Minstrel*. Admittedly this was an appeal to nationalism, but Sir Walter Scott does evoke that emotion in all of us that calls us to be attached to a place we call home.

III. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.295 RSMO (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION AND THE SUBSTANTIVE DUE PROCESS STANDARDS INHERENT THEREIN IN THAT THE STATUTE DESTROYS THE GUARANTEE OF THE RIGHT TO THE ENJOYMENT OF ONE’S OWN INDUSTRY AS GUARANTEED BY THE MISSOURI CONSTITUTION.

A. STANDARD OF REVIEW

Appellant adopts the standard of review from Point I, *supra*.

B. LEGAL STANDARDS

1. Overview

(T)he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points priced out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also

recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Poe v. Ullman, 367 U.S. 497 (1961) (opinion dissenting from dismissal of appeal) (citations omitted). In the words of Justice Frankfurter, “Great concepts like . . . ‘liberty’ . . . were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged.” *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 646, 69 S.Ct. 1173, 1195, 93 L.Ed. 1556 (1948) (dissenting opinion).

2. *Explicit Legal Standards*

The doctrine of substantive due process protects individuals against certain government actions regardless of the fairness of the underlying procedures. *See Bromwell v. Nixon*, 361 S.W.3d 393, 400 (Mo. banc 2012). “[T]he doctrine of substantive due process ‘requires the state action which deprives one of life, liberty or property, be rationally related to a legitimate state interest.’ ” *Roy v. Mo. Dep’t of Corr.*, 23 S.W.3d 738, 746 (Mo. App. W.D. 2000)(quoting *Lane v. State Comm. of Psychologists*, 954 S.W.2d 23, 24 (Mo. App. E.D. 1997)). Substantive due process principles require invalidation of a substantive rule of law if it impinges on liberty interests that “are so fundamental that a State may not interfere with them, even with adequate procedural due

process, unless the infringement is ‘narrowly tailored to serve a compelling state interest.’ ” *Doe v. Phillips*, 194 S.W.3d 833 (Mo. banc 2006) citing *Doe v. Miller*, 405 F.3d 700, 709 (8th Cir. 2005), quoting, *Reno v. Flores*, 507 U.S. 292, 302, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); U.S. Const. amend. XIV. In such cases, the laws are invalid “regardless of the fairness of the procedures used to implement them.” *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986).

“[S]ubstantive due process rights are created only by the Constitution.” *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (Powell, J., concurring). To be considered a “fundamental” right protected by substantive due process, a right or liberty must be one that is “objectively, 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.” *State ex rel. Nixon v. Powell*, 167 S.W.3d 702, 705 (Mo. banc 2005). Certainly the right to hold, own and enjoy property is one such right, enshrined in two amendments to the U.S. Constitution and the Bill of Rights of the Missouri constitution and Missouri and federal cases.²⁹

²⁹ *Hoffmann v. Kinealy*, 389 S.W.2d 745, 752–53 (Mo. banc 1965); *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3230; *Slaughterhouse Cases*, 16 Wall. 75, 21 L. Ed. 394; *Butchers’ Union Co. v. Crescent City Co.*, 111 U. S. 746, 4 S. Ct. 652, 28 L. Ed. 585; *Blake v. McClung*, 172 U. S. 239, 19 S. Ct. 165, 43 L. Ed. 432; *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972), quoting *Shelley v. Kraemer*, 334 U.S. 1, 10, 68 S.Ct. 836, 841, 92 L.Ed. 1161 (1948).; See also, *Buchanan v. Warley*, 245 U.S. 60, 74—

Thus the question arising for judicial review in this case is whether the right to enjoy property – found in the constitutional sections and case law set out above – is subject to deprivation by legislative action that effectively removes a judicial remedy when the right to use and enjoy property is serially violated through the creation of a nuisance.

C. THE RIGHT TO ENJOY PROPERTY IS FUNDAMENTAL.

Beginning with the Jeffersonian pronouncement that all men are entitled to “life, liberty and the pursuit of happiness,” and ending with the specific guarantees of these rights enshrined in the founding documents of both the state and the nation, there can be no doubt that the right to enjoy property is a penumbra of the right to own and hold property. The analysis set out above in Points I and II and is incorporated here for authority that the right is fundamental.

79, 38 S.Ct. 16, 18—20, 62 L.Ed. 149 (1917); *Town of Chesterfield v. Brooks*, 126 N.H. 64, 67, 489 A.2d 600, 603-04 (1985); see *Asselin v. Town of Conway*, 135 N.H. 576, 577-78, 607 A.2d 132, 133 (1992); See *Pellegrino Food Prods. Co., Inc. v. City of Warren*, 116 F. App'x 346, 347 (3d Cir.2004); see also *Spradlin v. Borough of Danville*, No. 4:CV-02-2237, 2005 WL 3320788, at *8 (M.D.Pa. Dec.7, 2005); *Miller v. McKenna*, 23 Cal.2d 774, 147 P.2d 531 (1944); and *Spann v. City of Dallas*, 111 Tex. 350, 355-357(1921).

D. THE DEPRIVATION OF THE RIGHT TO ENJOY PROPERTY IMPOSED ON RURAL DWELLERS IS UNCONSTITUTIONAL.

One measure of fundamental rights deemed worthy of protection under the state and federal constitution are those rights that the state may not deprive an inmate of, even as a part of its penalogical pursuits. A state may not deprive an inmate of food, *Hutto v. Finney*, 437 U.S. 678 (1972)(1000 calories of “grue” a day cruel and unusual); *Prude v. Clarke*, 675 F.3d 752 (7th Cir. 2012)(“Nutribar” with foul taste and causing vomiting unconstitutional); *Reed v. McBride*, 178 F.3d 849, 853–54 (7th Cir. 1999)(depriving inmate of food for four days unconstitutional); *Foster v. Runnels*, 554 F.3d 807, 814–15 and n. 5 (9th Cir. 2009)(same); *Simmons v. Cook*, 154 F.3d 805, 808 (8th Cir. 1998)(same).

It thus cannot be constitutional for the legislature, by legislative action, to impose conditions on rural dwellers that are arguably worse than those that would violate the Eighth Amendment, particularly where those landowners have done nothing wrong! Plaintiffs in this action contend that the 4,800 head of hogs confined in the CAFO produce 2,164,450 gallons of hog manure and urine per year in close proximity to the homes of the Plaintiffs. (LF043; ¶ 1). If the production of these noxious substances through the feeding of animals was alone the issue, abatement through the use of odor-containment technologies could be deployed. But odor abatement costs money, and so instead of finding a way to safely and hygienically dispose of the hog waste, the CAFO spreads that waste – like a highly odorous buffet table for every disease-carrying, maggot-laying, feces-consuming insect in the surrounding area – on acres of crop land,

ostensibly as fertilizer. (LF044-045) The offensive and noxious odors resulting from the CAFO, as well as the toxic gases (hydrogen sulfide), and pathogen-carrying insects (millions of flies feeding on and depositing their maggots in the hog manure) create conditions that make it impossible to enjoy the plaintiffs' fruits of their own industry because the "fruits" of the hog industry make opening one's mouth or breathing the air unpleasant, unhealthy, and often undoable.³⁰

If hog manure alone were the issue, it would be horrible, but part of the smell is produced by a peculiarly barbaric practice called "animal composting." Animals are essentially buried above ground in a composter and bacteria are allowed to "digest" the dead pigs. The odors produced by this process, as well as the attraction of pathogen-carrying insects, make this process a health hazard as well as a nuisance.

³⁰ It is important for this Court to note that all smells are particulate. In order for a human to detect an odor, a molecule has to make physical contact with odor receptors. The nose contains about five million odor receptors. The chemical interplay between receptor and odorant is what's known as a lock-and-key reaction: each receptor has a particular shape, allowing only molecules of a particular corresponding shape to bind with it. When an odorant binds to a receptor, the neuron transmits a certain electrical signal to the brain via the olfactory bulb and olfactory nerve. *The Science of Smell*, Iowa State University, May 2004 (available online at <https://store.extension.iastate.edu/.../pm1963a-pdf>; and, <https://store.extension.iastate.edu/.../pm1963b-pdf>.) (Appendix at A08-A15).

The combined effect of animals being raised in close surroundings, the generation of large volumes of hog feces and hog urine, the spreading of these feces on local soil above-ground, and the composting of dead pig carcasses produces an odor so foul that words simply cannot capture the effect. But imagine living every waking hour surrounded by the scatological stench and smells of dead, decaying hogs? Then imagine how tasty any meal would be under those circumstances? Instead of the fresh morning air when you awake and stretch, you are met with stench. The best part of waking up might be Folgers in your cup, but if the smell of hog feces overwhelmed the smell of the coffee, and if one had to fight the flies to keep them off the table, a person might be compelled to look twice and hold their breath while drinking.

A state prisoner could not lawfully be sentenced to eat his meals in an environment where vermin and overwhelming stench would make it impossible for him to have the basic human dignity of a meal devoid of flies and pathogens. How then can the Legislature do this to rural citizens and those who enjoy life on small farms? Only the large corporate farming operations benefit.

The defense, of course, will say that the rural dweller is not forever sentenced to such conditions, that he or she may move and receive the value of their property as compensation. But this is no more than a private taking that is forbidden by the United States and Missouri Constitutions (*See Point I*). And it does not take into account the inherent value and unique character of land.

Specific performance is permitted as a remedy in contracts for the sale of land because the law recognizes that each piece of land is unique. *Wilkinson v. Vaughn*, 419

S.W.2d 1 (Mo. 1967) *Kay v. Vatterott*, 657 S.W.2d 80 (Mo. App. E.D. 1983); *Minor v. Rush*, 216 S.W.3d 210 (Mo. App. W.D. 2007). A piece of land may carry with it more than just the structures that exist and the crops that are grown thereon. The bones of ancestors and beloved pets may lie beneath the soil. Subjecting an individual to a choice between continuing to endure hydrogen sulfide, ammonia, and fecal odor or give up the land that has been handed down for generations, presents the rural dweller with a Hobson's choice. Because of these factors the legislature's action here impacts the liberty³¹ and property interests guaranteed by the Due Process Clause. *Poe*, 367 U.S. 497. Abridging the rights of Missouri's rural citizens is what is at issue here.

CAFOs were not in existence at the founding of this nation, or even the founding of this great State, and so the invasions of private interests they create cannot be said to be protected by the terms of specific constitutional guarantees. The state has sought to afford them protection through statute. Yet the state's protection of the corporate pork industry – the real purpose of the statute at issue here as confessed by its authors – directly abridges the rights of thousands of Missouri's rural citizens. The rights of those citizens are what the Courts routinely say “require[s] particularly careful scrutiny of the state needs asserted to justify their abridgment.” *Id.*

This Court should find that the Legislature's action in this regard amounts to a deprivation of liberty and property that could not be imposed on a state prisoner, and

³¹ The right to be free from smelling hog feces and dead animals on a frequent basis should be considered a fundamental liberty interest.

therefore, cannot possibly be imposed on a citizen who possesses the full panoply of rights guaranteed by the Constitution. *Id.*

IV. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296.5 RSMO. (2012) IS UNCONSTITUTIONAL AS IN VIOLATION OF ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, IN THAT THE STATUTE PERMITS THE LEGISLATURE TO IMPERMISSIBLY INTERFERE WITH THE JUDICIAL BRANCH'S CONSTITUTIONAL POWER AND EMPOWERS THE LEGISLATURE TO PERFORM THE DUTY OF DETERMINING STANDING, WHICH IS EXPRESSLY RESERVED TO THE JUDICIARY BY ARTICLE V.

A. STANDARD OF REVIEW

Appellants adopt the standard of review from Point I, supra.

B. THE CONSTITUTIONAL PROVISION

The powers of government shall be divided into three distinct departments--the legislative, executive and judicial--each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

MO. CONST. Art. II, § 1.

C. SECTION 537.296.5 VIOLATES SEPARATION OF POWERS.

Missouri's Supreme Court has consistently held that the doctrine of separation of powers, as set forth in Missouri's constitution, is "vital to our form of government," *State ex inf. Danforth v. Banks*, 454 S.W.2d 498, 500 (Mo. banc 1970), because it "prevent[s] the abuses that can flow from centralization of power." *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69, 73–74 (Mo. banc 1982). While "it was not the purpose [of the Constitution] to make a total separation of these three powers, [each branch of government] ought to be kept as separate from and independent from, each other as the nature of free government will admit, or as is consistent with that chain of connection which binds the whole fabric of the Constitution in one indissoluble bond of union and amity." *Rhodes v. Bell*, 230 Mo. 138, 130 S.W. 465, 468 (1910) (citations omitted).

In *Albright v. Fisher*, 164 Mo. 56, 64 S.W. 106, 108-9 (1901) this Court said the Missouri Constitution:

carefully divides the powers of government into three distinct and named departments; sedulously segregates each from the other; confides each to a separate magistracy; and then, not satisfied with such strict demarkation (sic) of the boundaries of their respective jurisdictions, peremptorily forbids either of such departments from passing the prohibitory precincts thus ordained by the exercise of powers properly belonging to either of the others, and then concludes by giving the sole exception to the unbending rule by saying, "except in the instances in this constitution expressly

directed or permitted.” ... Lacking such express direction or express permission, the act done must incontinently be condemned as unwarranted by the constitution.... Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon or interfere with the powers of the other; and our safety, both as to national and state governments, is largely dependent upon the preservation of the distribution of power and authority made by the constitution, and the laws made in pursuance thereof.

Id. There are two broad categories of acts that violate the constitutional mandate of separation of powers. “One branch may interfere impermissibly with the other’s performance of its constitutionally assigned [power] . . . [citations omitted]. Alternatively, the doctrine [of separation of powers] may be violated when one branch assumes a [power] . . . that more properly is entrusted to another. [citations omitted].” *I.N.S. v. Chadha*, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790–91, 77 L.Ed.2d 317 (1983). (Powell, J., concurring).

Although courts “presume that [a] statute is valid unless it clearly contradicts a constitutional provision,” *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993), the statute at issue here violates Article II, section 1 of the Missouri Constitution in each of the ways Justice Powell described in *Chadha*. First, the statute permits the legislature to interfere impermissibly with a co-equal department’s performance of its constitutional power, specifically, the determination of standing by Courts of competent jurisdiction. Second, the statute empowers the legislative department to perform a duty reserved

expressly to the judiciary by Article V, that being the determination of when a group of litigants has standing under MO. CONST. Art. V.

Standing is a creature of judicial construction. A party has the right to have access to the courts when it is free of any general disability, such as infancy or insanity. *Gardner v. Blahnik*, 832 S.W.2d 919, 923 (Mo. App. W.D. 1992), *overruled on other grounds by KMS, Inc. v. Wilson*, 857 S.W.2d 525, 529 (Mo. App. W.D. 1993). Standing to sue exists when a party has an interest in the subject matter of the suit that gives it a right to recovery, if validated. *Id.* The issue of standing cannot be waived. *Id.* “Standing is a question of law.” *Manzara v. State*, 343 S.W.3d 656, 659 (Mo. banc 2011). Parties seeking relief “bear the burden of establishing that they have standing.” *Id.* “Reduced to its essence, standing roughly means that the parties seeking relief must have some personal interest at stake in the dispute, even if that interest is attenuated, slight or remote.” *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman of the City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). To assert standing successfully, a plaintiff must have a legally protectable interest. *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 484 (Mo. banc 2009); *Battlefield Fire Protection Dist. v. City of Springfield*, 941 S.W.2d 491, 492 (Mo. banc 1997). A legally protectable interest exists if the plaintiff is affected directly and adversely by the challenged action. *Id.*

In *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), the United States Supreme Court stated that the “case or controversy” requirement of article III, section 2 of the United States Constitution is the root of the standing doctrine. Missouri’s Supreme Court has determined that, although

the Missouri Constitution does not have a parallel “case or controversy” requirement, Missouri courts must ensure that “an actual controversy exists between persons whose interests are adverse” and that those who stand to benefit from the litigation “have a *legally protectable interest* at stake.” *State ex rel. Chilcutt v. Thatch*, 359 Mo. 122, 221 S.W.2d 172, 176 (1949) (emphasis in original). Thus the determination of standing in Missouri under our Constitution is uniquely in the domain of the judiciary, not any other branch of government.

While a statute may *confer* standing to sue, no case has ever held that a statute may *deprive* a party with standing of that standing via legislation. In fact, where the legislature has attempted to do so it has run afoul of Article V, Section 3 of the Missouri Constitution. In *State ex rel. Collector of Winchester v. Jamison*, 357 S.W.3d 589 (Mo. banc 2012), the Supreme Court held that a statute which deprived cities of the right to act as a class representative in lawsuits against telecommunications companies was invalid. Charter Communications argued in that case that the statute was not an amendment of a statutory rule because it deprived the plaintiff of standing to sue. The Supreme Court disagreed. The law affected the procedural machinery for lawsuits and did not impact standing. As the court noted there:

Standing is a question of whether “the parties seeking relief ... have some personal interest at stake in the dispute.” *Ste. Genevieve Sch. Dist. R-II v. Bd. of Alderman of the City of Ste. Genevieve*, 66 S.W.3d 6, 10 (Mo. banc 2002). The personal interest at stake must be one that is “legally protectable.” *Battlefield Fire Protection Dist. v. City of Springfield*, 941

S.W.2d 491, 492 (Mo. banc 1997). A legally protectable interest exists if the plaintiff is affected directly and adversely by the challenged action or if the plaintiff's interest is conferred statutorily. *Id.*

Jamison, 357 S.W.3d. at 595. Thus, while a statute may confer standing, nothing permits a legislative act to strip standing to sue and access to the court from litigants whose legally protectable interests are at stake. This is because the determination of whether a party has a legally protected interest at stake must be determined after an opportunity for notice and hearing and by the judiciary, not the legislature.³² Article V, MO. CONST.

The Legislature has impermissibly trespassed into an area reserved by the Missouri Constitution to this Court and the judiciary. And while it may be proper in some circumstances to “forgive those who trespass against us,” in the context of this statute, this Court must not forgive. It must strike the statute as unconstitutional, and remand for a trial on the merits.

³² To the extent that the statute does attempt to strip those without an ownership interest of their right to sue, it is invalid as in violation of the Fifth and Fourteenth Amendments to the Constitution and the procedural due process safeguards in place there.

V. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE I, SECTION 14 OF THE MISSOURI COURTS (THE “OPEN COURTS” PROVISION) IN THAT IT DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSORS AND OCCUPIERS OF LAND.

A. STANDARD OF REVIEW

Appellants adopt the standard of review from Point I, *supra*.

B. LEGAL STANDARDS

Article I, Section 14 of the Missouri Constitution’s Bill of Rights provides for open access to courts for every person and a certain remedy for injury to person, property or character:

That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.

MO. CONST. Art. I, § 14 (2012).

C. SECTIONS 537.296 VIOLATE ARTICLE I, SECTION 14 OF THE MISSOURI CONSTITUTION.

An “open courts” provision has been in the Missouri Constitution since its first iteration in 1820 and its origins lie in the *Magna Carta*, “a document that evolved as the basic charter of English liberty after its original version was signed and sealed by King John of England in 1215.” *Kilmer v. Mun*, 17 S.W.3d 545, 547 (Mo. 2000). The “open courts” provision of the Missouri Constitution has been strengthened twice since its adoption in 1820, most notably by replacing the words “ought” and “should” with “shall,” which evidences its mandatory tone and substance. *Kilmer v. Mun*, 17 S.W.3d 545, 548 (Mo. banc 2000).

Although there has been some inconsistency in the decisions interpreting the “open courts” provision, Article I, Section 14 “prohibits any law that *arbitrarily or unreasonably* bars individuals or classes of individuals from accessing our courts in order to enforce *recognized* causes of action for personal injury.” *Kilmer*, 17 S.W.3d at 549 (emphasis in original) (citing *Wheeler v. Briggs*, 941 S.W.2d 512, 515 (Mo. banc 1997) (Holstein, C.J., dissenting)). The language of the Missouri Constitution supports the conclusion that article I, section 14, “applies against all impediments to fair judicial process, be they legislative or judicial in origin.” *Kilmer*, 17 S.W.3d at 548 citing David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1199 (1992). While a statute may modify or abolish a cause of action that had been recognized by common law or by statute, *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991), where a

barrier is erected in seeking a remedy for a recognized injury, the question with respect to this constitutional provision is whether it is arbitrary or unreasonable. *Kilmer*, 17 S.W.3d at 550.

This results in a three-part test for determining whether there is an open courts violation: (1) a party has a recognized cause of action; (2) that cause of action is being restricted; and (3) the restriction is arbitrary or unreasonable. *The Executive Board of the Mo. Baptist Convention v. Windemere Baptist Conference Ctr.*, 280 S.W.3d 678, 694 (Mo. App. W.D. 2009) (citing *Snodgras v. Martin & Mayley, Inc.*, 204 S.W.3d 638, 640 (Mo. banc 2006)).

As noted previously in this brief, the cause of action for nuisance has existed at common law since the 17th century. *William Aldred's Case*, Mich. 8 Jacobi Regis (1610). It has a vital history in Missouri and has been used to redress grievances against agricultural and industrial operations for creating living conditions that were unbearable. See, e.g., *McGuire*, 375 S.W.3d 157; *Peters*, 292 S.W.3d at 385; *McGinnis v. Northland Ready Mix, Inc.*, 344 S.W.3d 804, 812 (Mo. App. W.D. 2011); *Thompson v. Hodge*, 348 S.W.2d 11, 15 (Mo. App. 1961); *Stevinson v. Deffenbaugh Industries, Inc.*, 870 S.W.2d 851, 855 (Mo. App. W.D. 1993). Thus the first element of the Open Courts test is satisfied.

Similarly, there is no question that the right of access to the Courts is being restricted. The statute purports to eliminate judicial standing (and thereby erects a procedural barrier to access to the courts as well as intrudes into the area of the law

reserved to the judiciary). It does not purport to eliminate standing for all claimants, only for those without an “ownership interest.”

The definition of ownership interest is such that it precludes a large number of persons who may lawfully be on a person’s property from collecting damages for nuisance. Renters are excluded. Although § 527.296 defines ownership interest to purportedly include lessors, close examination of the language shows that it excludes all lessors who do not acquire legal or equitable title. Legal title may only be conferred by conveyance in fee simple or life estate, and equitable title is defined as “the right in the party to whom [property] belongs to have the legal title transferred to him upon the performance of specified conditions.” *State ex rel. City of St. Louis v. Baumann*, 348 Mo. 164, 153 S.W.2d 31 (1941). Thus, unless a leasehold interest included the right, upon certain conditions, to convey the property at some point, a lessor would never have an “ownership interest” as defined by the statute. Thus a person renting month-to-month, or with a tenancy that is not governed by a lease-purchase is excluded from bringing an action because the legislature has determined he or she has no standing. This effectively eliminates nuisance actions for renters of rural property.

But that is not all. At common law all who were affected by the nuisance could claim damages, including lawful possessors of property. Thus children living on the property, elders living with their adult children, extended family, and unmarried cohabitators are deprived of their right to sue for damages caused by the negligence. There can be no question that the right to access to the Courts is severely impaired for these classes of individuals.

The statute is arbitrary. It is arbitrary for two reasons. First because it draws distinctions between owners and lawful occupiers that would result in the person holding title to the property being able to sue for damages, but a spouse or other loved one who is a non-owner but still affected by intolerable conditions (conditions that, as noted, would violate the basic human rights of prisoners) cannot redress their injury. Second, it is arbitrary because it caps damages for temporary nuisance at the fair rental value of the property – a measure of damages that is not rationally or logically related to the invasion of a person’s right to own, hold and enjoy property – and thereby effectively eliminates damages for the quiet enjoyment of property.

The statute and its damages modification scheme ignores the value inherent in the land and homestead itself. One reason that specific performance is available as a remedy in real estate transactions is that land is deemed to be unique. *Wilkinson v. Vaughn*, 419 S.W.2d 1 (Mo. 1967)(“... a tract of land is regarded as unique, entitling purchaser to specific performance of a contract for its purchase, irrespective of special facts showing inadequacy of purchaser’s legal remedy). It also does violence to the common law applicable to other nuisance situations. *Owens*, 344 S.W.3d at 728 holds “that there is an inherent additional value in a homestead that exceeds the fair market value of the property.” *See also*, § 523.001, RSMo. (2012).

It is also unreasonable. It is unreasonable to think that a property owner would have more or different (or qualitatively more valuable damages) than someone lawfully

living on the property³³. It is unreasonable to limit the damages to the value of the property or to the diminution in the fair rental value because this small sum of money renders the Constitution's promise of a "certain remedy afforded for every injury to person, property or character" meaningless. It is also unreasonable because it singles out rural dwellers instead of applying across the board to all owners and occupiers of land. It effectively says that if you reside in rural Missouri you are not entitled to be free of disease-carrying vermin, breathe fresh air, hang your clothes out on a clothesline, or otherwise have the many freedoms that city residents enjoy by virtue of zoning laws and the ability of their city governments to regulate nuisances. It is unreasonable to force rural dwellers to live in what amounts to a porcine sewage collection center.

The test of whether the legislature's action is "arbitrary and unreasonable" was an important clarification of the Missouri Supreme Court's statement that "the right of access means simply the right to pursue in the courts the causes of action the substantive law recognizes." *Kilmer v. Mun*, 17 S.W.3d 545, 549 (Mo. 2000) (citing *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58, 62 (Mo. banc 1989)).

Summarizing from above, rightful occupants of property, such as renters, who are adversely affected by nuisance conditions from an agricultural operation, are similarly situated as property owners affected by such nuisances, but treated very differently under

³³ A landlord who owns five acres in Boone County and who rents those five acres and the home built thereon, and who herself resides in St. Louis County, suffers no damages from a temporary nuisance. But the tenant surely does.

Section 537.296.5. While compensation for property owners in a nuisance case is capped at the fair market value of the property, non-owner rightful occupiers are barred from bringing any such action in Court altogether. Section 537.296.5 therefore bars rightful occupiers the recognized cause of action of nuisance. To that end, such a bar is arbitrary and unreasonable as there is no reason to treat rightful occupiers of property who are adversely affected by an agricultural nuisance any differently than owners of property affected by an agricultural nuisance.

An example of the absurdity of such a scenario would be allowing a property owner to recover damages for nuisance, but to disallow any access to court or recovery for the property owner's spouse and children who have been equally affected by the nuisance, but simply do not have a legal ownership interest. Because Section 537.296.5 arbitrarily and unreasonably restricts a recognized cause of action for non-owner rightful occupants of property affected by an agricultural nuisance, it violates Article I, Section 14 of the Missouri Constitution's Bill of Rights guarantee of open access to courts. This Court must declare the statute unconstitutional and remand the cause of action for trial on the merits.

VI. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS BECAUSE § 537.296 IS UNCONSTITUTIONAL IN VIOLATION OF ARTICLE III, SECTION 40 OF THE MISSOURI CONSTITUTION (THE “SPECIAL LAWS” PROVISION) IN THAT IT BENEFITS ONLY THE CORPORATE FARMING INDUSTRY WHILE DENIES ACCESS TO THE COURTS TO LAWFUL POSSESSERS AND OCCUPIERS OF LAND.

A. STANDARD OF REVIEW

Appellants adopt the standard of review from Point I, *supra*.

B. LEGAL STANDARDS

The Missouri Constitution provides in Article III § 40:

Section 40. The general assembly shall not pass any local or special law:

(28) granting to any corporation, association or individual any special or exclusive right, privilege or immunity....

(30) where a general law can be made applicable, and whether a general law could have been made applicable is a judicial question to be judicially determined without regard to any legislative assertion on that subject.

MO. CONST. Art. III, § 40

A law is facially special if it is based on close-ended characteristics, such as historical facts, geography, or constitutional status. *Tillis v. City of Branson*, 945 S.W.2d

447, 449 (Mo. banc 1997). A facially special law is presumed to be unconstitutional. *O'Reilly v. City of Hazelwood*, 850 S.W.2d 96, 99 (Mo. banc 1993). “The party defending the facially special statute must demonstrate a ‘substantial justification’ for the special treatment.” *Harris v. Missouri Gaming Comm’n*, 869 S.W.2d 58, 65 (Mo. banc 1994).

A law based on open-ended characteristics is not facially special and is presumed to be constitutional. *O'Reilly*, 850 S.W.2d at 99. Population classifications are open-ended in that others may fall into the classification. *State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 921 (Mo. banc 1993). Such laws are not special if the classification is made on a reasonable basis. *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 831 (Mo. banc 1991). The test for whether a statute with an open-ended classification is special legislation under article III, section 40 of the Missouri Constitution is similar to the rational basis test used in equal protection analyses. *Id.* at 832. 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. *Treadway v. State*, 988 S.W.2d 508, 511 (Mo. banc 1999).

C. WHY THE HISTORY IS IMPORTANT

This Court provided an exceptionally detailed review of the history of the prohibition on special legislation in *Jefferson County Fire Protection Districts Ass’n v. Blunt*, 205 S.W.3d 866 (Mo. banc 2006). As this Court noted there, “special legislation”

refers to *inter alia*, “statutes that benefit individuals³⁴ rather than the general public.” *Id.* at 869 (citation omitted) Special legislation made up 87% of state legislation passed in Missouri before 1859. *Id.* (citation omitted)

There were numerous problems with special legislation including the volume of the legislation and the practice of logrolling. As this Court noted in *Jefferson County*, “Any legislator who dared challenge a particular piece of special legislation risked ostracism.” *Id.* at 869 (citation omitted). Likewise, “[t]he prevalence of special legislation led to extremely powerful lobbyists and sometimes outright corruption.” *Id.* George Santayana was correct when he remarked that history tends to repeat itself. G. Santayana, *Life of Reason, Volume I*, (1905). In *Jefferson County* this Court noted that “The general public seldom received notification of pending special legislation and generally learned of it only after it was enacted.” *Id.* at 869. Surely had the rural electorate known that their right to object to industrial farming was being purchased by foreign interests³⁵ they

³⁴ Logically a statute that is intended to, and does benefit only one industry (CAFO-oriented pork production) is special legislation.

³⁵ In 2013 one of the largest pork producers and CAFO operations, Smithfield Foods, sold its US operations to Shuanghui International, a Chinese company. M. De La Merced, *Dealbook*, New York Times, May 30, 2013 (available online at http://dealbook.nytimes.com/2013/05/30/a-mystery-of-smithfields-big-china-deal-what-continental-grain-will-do/?_php=true&_type=blogs&_r=0). (Appendix at A16-A17).

would have vociferously objected. The Missouri Constitution has prohibited special legislation where general legislation can be made applicable since 1875. *Id.* at 870.

D. 537.296 RELIES ON CLOSE ENDED CLASSIFICATION AND IS FACIALLY SPECIAL.

That this legislation is purely protective of the CAFO industry is made plain by the statements of the very legislators who sponsored it and applied a little bacon grease to the skids for its passage. These legislators said the legislation was needed to “protect corporate farms,” and that “nuisance lawsuits” had “cost companies millions of dollars.” W. Kennedy, Barton County Farmer Challenging CAFO Bills; Lawmakers Say Legislation Will Protect Jobs, JOPLIN GLOBE, March 12, 2011). A clearer confession of special legislation is difficult to find.

Moreover, the classifications are close ended. By definition the statute affects compensatory damages “where the alleged nuisance emanates from property primarily used for crop or animal production purposes.” § 537.296. Thus the first and most important classification applies to the class of tortfeasor granted this special immunity – those engaged in crop³⁶ or animal production – and affects only these operations. This is

³⁶ The Court may wonder why “crop” is inserted into the statute here if only the Pork industry was being given a free pass to pollute. Because those gallons of manure quickly fill up the pit and must be taken away, they are often given to crop producers as “fertilizer.” Often this is done with cannons that spray the sewage over large areas. For a humorous look at this practice see D. Barry, *When In Iowa, Don't Forget to Duck*, CHICAGO TRIBUNE, Lifestyles, (Sep 3, 1995)(available online at

the historical definition of a special law. It is a closed-ended classification because it classifies on the basis of who the tortfeasors are, not on some neutral or open-ended classification like the size of the county, etc. “Regardless of legislative intent, it should be obvious that a statute cannot supersede a constitutional provision.” *Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 341 (Mo. banc 1993).

This Court has always analyzed the distinction between general and special laws so as to focus on the classification. A general law is a “statute which relates to persons or things as a class.” *Reals v. Courson*, 349 Mo. 1193, 164 S.W.2d 306, 307 (1942), quoting, *Wheeler v. Philadelphia*, 77 Pa. 338, 348 (Pa. 1875). However, “a statute which relates to particular persons or things of a class is special.” *Id.* at 307–08, quoting *Wheeler*, 77 Pa. at 338 (emphasis added). Here the classification relates to particular persons (those engaged in crop and animal production) and purports to give them a free pass. As this Court has wisely noted “[t]he vice in special laws is that they do not embrace all of the class to which they are naturally related.” *Id.* at 308. This Court has said that “the question in every case is whether any appropriate object is excluded to which the law, but for its limitations, would apply.” *State ex rel. Barrett v. Hedrick*, 294 Mo. 21, 241 S.W. 402, 407 (1922), quoting, *State ex rel. Budd v. Hancock*, 66 N.J.L. 133, 48 A. 1023, 1024 (1901). That is surely the case here. This can be seen both from the

(http://articles.chicagotribune.com/1995-09-03/features/9509030228_1_manure-spill-hog-manure-huge-waste-lagoons). (Appendix at A18-A19)).

examples set out in Points I - V above as well as the damages classifications discussed below.

The damages classifications are close-ended. By classifying and limiting damages to fair rental value lost (temporary nuisance) and diminution in fair market value (permanent nuisance) the legislature has classified based on two very limited measures of the value of land. The value of the use and enjoyment of land (acres to hike, ponds to teach children to fish in, appreciating a sunrise with a hot cup of coffee and watching the mist through the trees, etc.) is not limited to its fair market value.³⁷ As noted previously, that is why the doctrine of specific performance is available in equity. *Wilkinson*, 419 S.W.2d 1; *Kay*, 657 S.W.2d 80; *Minor*, 216 S.W.3d 210.

Finally, the statute purports to classify on the basis solely of ownership and the holding of “legal or equitable title.” This classification is also closed-ended. Even though a dozen people living on a family farm may be affected by the horrific odors, only one can sue³⁸. Unlike county population, which can change, it omits those who are rightful occupiers of property but who do not hold title.

³⁷ *Owens v. Contigroup Companies*, 344 S.W.3d 717, 728 (Mo. App. W.D. 2011).

³⁸ No provision is made in the statute for anyone else to be capable of getting damages. Moreover, some farms are now held in trusts, and a trust as a legal entity cannot have the kinds of damages related to the destruction of a way of life that a human being can.

For all these reasons the statute is facially special and, in this situation, the defender “must demonstrate a ‘substantial justification’ for the special treatment.” *Harris*, 869 S.W.2d at 65. Simply put, there is no such justification. Numerous abatement technologies exist to control odor from CAFOs. They require some capital expenditure and a sincere desire to control odor, but they are available. Passing this protective legislation forces rural dwellers to conduct their lives with the omnipresent odor of hog sewage rather to prevent CAFOs from spending the money necessary to take the odor out of the air, and keep the flies from the manure. There is, simply put, no substantial justification for this statute.

E. EVEN IF 537.296 WERE OPEN ENDED IT FAILS RATIONAL BASIS ANALYSIS.

As noted the classifications in the statute focus on immutable characteristics and are facially special. Its sponsors openly acknowledged it was a pork industry protection bill. Yet, even if this Court were to give the legislators the benefit of the doubt, common sense and reason show that it fails to meet the rational basis standards. By treating non-owners differently from owners, Section 537.296.5 violates Article III, Section 40 of the Missouri Constitution. A special law, prohibited by Article III, Section 40 of the Missouri Constitution “includes less than all who are similarly situated...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.” *Fust v. Attorney General*, 947 S.W.2d 424, 432 (Mo. banc 1997) (citing *Batek v. Curators of the Univ. of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996)).

The test for legislation under article III, sec. 40 that is not facially special involves the same principles and considerations that are involved in determining whether the statute violates equal protection in a situation where neither a fundamental right nor suspect class is involved, i.e., a rational basis test applies. *Fust*, 947 S.W.2d at 432 (citing *Blaske*, 821 S.W.2d at 932.).

Section 527.296 plainly excludes non-owners even though they are similarly, if not identically, situated as property owners. As stated above, there is simply no rational basis to treat rightful occupants of property, such as renters, who are adversely affected by nuisance conditions from an agricultural operation, and otherwise identically situated as property owners affected by such nuisances, so drastically different under the statute. The statute's discrimination against non-owner rightful occupants plainly fails the rational basis test and therefore violates the Missouri constitutional protections against special legislation.

A person renting agricultural property is protected by the clear dictates of the statute if he creates an agricultural nuisance. Under Missouri common law a renter could be found liable for nuisance. *Rosenfeld v. Thoele*, 28 S.W.3d 446, 451-52 (Mo. Ct. App. 2000). Yet a person renting the property right next door is barred from the remedies of the statute because – and solely because – he does not have an ownership interest in property. If the person causing the nuisance need not have an ownership interest in property to obtain protection, then it makes precious little sense for the person who is forced to live with the odor and flies attending such a nuisance to lose a remedy simply because they hold the property subject to a lease.

VII. THE TRIAL COURT ERRED IN DISMISSING THE LAWSUIT BECAUSE THE BARE SET OF FACTS PLEADED IN THE MOTION FOR SUMMARY JUDGMENT WERE INSUFFICIENT AS A MATTER OF LAW TO DEFEAT PLAINTIFFS' NEGLIGENCE AND CONSPIRACY CLAIMS IN THAT THERE WERE NO FACTS IN THE SUMMARY JUDGMENT RECORD THAT REFLECTED AN ABSENCE OF CONTROL OF BOHR BY CARGILL AND THERE WERE MULTIPLE MATERIAL FACTUAL DISPUTES THAT REQUIRED RESOLUTION THROUGH A JURY TRIAL.

A. STANDARD OF REVIEW

Appellants adopt the standard of review from Point I, *supra*.

B. THE ELEMENTS OF NEGLIGENCE

The elements of a negligence claim are:

- the existence of a duty on the part of the defendant to protect the plaintiff from injury,
- breach of that duty,
- an injury to plaintiff which was proximately caused by the defendant's breach, and
- injury to the plaintiff.

Geiger v. Bowersox, 974 S.W.2d 513, 516 (Mo. App. E.D. 1998); *Pendergist v. Pendergrass*, 961 S.W.2d 919, 923 (Mo. App. W.D. 1998). In their Second Amended Complaint, Plaintiffs pleaded duties, breach, causation, and damages in addition to a count for conspiracy. (LF081-085).

In Missouri, before one can be held liable to another for negligence, there must exist a duty to the individual complaining. *Dix v. Motor Market, Inc.*, 540 S.W.2d 927, 932 (Mo. App. 1976). “Before liability may be imposed for an act, the prevision of a reasonable person must be able to recognize a danger of harm to the plaintiff or one in the plaintiff's situation.” *Id.* See, also, *Norton v. Smith*, 782 S.W.2d 775, 777 (Mo. App. E.D. 1989).

As a legal construct, duty is a function of foreseeability. “The duty owed is generally measured by whether or not a reasonably prudent person would have anticipated danger and provided against it.” *Geiger v. Bowersox*, 974 S.W.2d 513, 516 (Mo. App. E.D. 1998) . “[A] duty of care which is imposed by the law of negligence arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury.” *Lowery v. Horvath*, 689 S.W.2d 625, 627 (Mo. banc 1985); *Bradley v. Ray*, 904 S.W.2d 302, 311 (Mo. App. W.D. 1995). “In such cases, the duty does not arise out of any ‘special relationship’ between the parties, but rather arises ‘out of the defendant’s knowledge of a dangerous condition, which imperils the plaintiff, as well as time and ability to prevent the [harm].’” *Id.*

C. PLAINTIFFS ARE NOT PROHIBITED FROM RECOVERING DAMAGES UNDER A THEORY OF NEGLIGENCE.

1. *The Legislature Did Not Sweep Negligence Into § 537.296*

a. Respondents Argue Nuisance is Exclusive

Defendants jointly moved for summary judgment. The summary judgment record submitted contained six (6) facts. (LF150-151) Respondents argued before the trial court that Plaintiffs' negligence claims sound in agricultural nuisance and, therefore, were limited solely to the class of remedies available pursuant to Section 537.296. Their claim was that nuisance – and only nuisance – provided a means by which to address the wrongs done to the plaintiffs. The gestalt of their memorandum in support of their motion for summary judgment was that nuisance and negligence are mutually exclusive. But that is not what a review of the law teaches. Respondents also argue that the Legislature swept negligence within the ambit of § 537.296 and intended to bar all claims arising out of agricultural use of land. This also asks too much of the words the legislature used.

b. Presumptions under the law

As this Court reaffirmed only last year in *State ex rel. Nothum v. Walsh*, 380 S.W.3d 557 (Mo. banc 2012) “It is a cardinal rule of statutory interpretation that ‘[t]he legislature is presumed to know the existing law when enacting a new piece of legislation.’” As Missouri courts have long observed negligence and nuisance may and

frequently do coexist. *White v. Smith*, 440 S.W.2d 497 (Mo. App. SD 1969); *Rodgers v. Kansas City*, 327 S.W.2d 478, 482; 65 C.J.S. Negligence s 1(10), p. 452. Often the allegations of negligence lead to insurance coverage. *White*, 440 S.W.2d at 509, fn 19. Thus, had the legislature meant to sweep negligence causes of action within the ambit of § 537.296, it would have said so directly. Yet, in §§ 1 – 5 of the act, negligence is not mentioned. Only private nuisance is mentioned.

c. Negligence and Nuisance Co-Exist

The law in Missouri is that negligence and nuisance coexist. *Jackson v. City of Blue Springs*, 904 S.W.2d 322 (Mo. App. W.D. 1995). Not all negligent actions result in a nuisance and proof of negligence is not necessarily required for a finding of nuisance. *Id.* citing 58 Am.Jur.2d Nuisances § 9 (1989). Rather, negligence is merely one type of conduct which may give rise to a nuisance, and liability for nuisance depends upon the existence of negligence only if the claim of nuisance is based upon negligence. *Id.* § 82. Nuisance which is premised upon negligence is distinguishable from the underlying negligence in that the nuisance “is a condition that is the result of wrongdoing, surviving the negligent act, while the [negligence] involves the wrongdoing itself.” *Id.* § 11. Jackson permitted both negligence and nuisance causes of action to go forward. This is because proof of negligence is not required for a finding of nuisance, but it is required to prove a negligence cause of action. And the cases speak about “causing harm” not necessarily causing physical injury.

d. Statutory Plain Language Exempts Negligence

The contention that § 537.296 brings within it causes of action for negligence is also answered squarely in the plain language of the statute that Defendants have relied upon throughout the case for their primary defense. The statute says:

6. Nothing in this section shall:

(1) Prohibit a person from recovering damages for annoyance, discomfort, sickness, or emotional distress; provided that such damages are awarded on the basis of other causes of action independent of a claim of nuisance;

537.296.6 RSMo. (2012).

Thus the statute's plain terms do not apply when another cause of action – in this case, negligence – is brought on behalf of the Plaintiffs.

Defendants claimed that Plaintiffs were limited to recovering for the damages sustained under a nuisance theory. This position is not supported by firmly-established Missouri law. A defendant may be liable for damage to the property of others, under both negligence and nuisance theories in Missouri, and neither cause of action is exclusive of the other. *See Rychnovsky v. Cole*, 119 S.W.3d 204, 210 (Mo. App. W.D. 2003) (allowing causes of action for negligence and nuisance to proceed when plaintiff sufficiently pleaded that defendant had control over the sewer lines that leaked and caused damage to plaintiff); *Jackson v. City of Blue Springs*, 904 S.W.2d 322 (Mo. App. W.D. 1995) (holding that Plaintiffs could pursue action against landowner under both negligence and nuisance theories); *Frank v. Environmental Sanitation Mgmt., Inc.*, 687 S.W.2d 876, 882

(Mo. banc 1985); *Rebel v. Big Tarkio Drainage District*, 602 S.W.2d 787 (Mo. App. 1980).

2. *Even if the Legal Basis for Summary Judgment Existed, the Summary Judgment Record is Devoid of Facts and it is Axiomatic that Facts, Not Argument, Control for Summary Judgment.*

In *ITT*, this Court made it clear that it was not the absence of a factual dispute that controlled for purposes of summary judgment, but rather, the right to judgment as a matter of law. RULE 74.04(c)(6). *ITT*, 854 S.W.2d at 382. However, in order to establish this right to judgment as a matter of law, Defendants – in their opening statement of facts – must set forth those facts upon which they rely to defeat the Plaintiffs’ claims. “Therefore, where the trial court, in order to grant summary judgment, must overlook material in the record that raises a genuine dispute as to the facts underlying the movant’s right to judgment, summary judgment is not proper.” *ITT*, 854 S.W.2d at 378. Summary judgment facts cannot be supplied by argument. *Cross v. Drury Inns, Inc.*, 32 S.W.3d 632, 636 (Mo. App. E.D. 2000). *M & P Enterprises, Inc. v. Transamerica Financial Services*, 944 S.W.2d 154, 162 (Mo. banc 1997). *Shellbarger v. Shellbarger*, 317 S.W.3d 77, 84 (Mo. App. E.D. 2010). Respondent only put forth six (6) facts in support of summary judgment (See LF0150-151). None of these facts establish the right to judgment as a matter of law on the issue of independent contractor status or lack of duty. None of them addressed the negligence or conspiracy claims. Summary judgment on this record was improper.

3. *Defendants Each Owed Duties of Care to Plaintiffs.*

Defendants also argued that they did not owe Plaintiffs a duty and, therefore, Plaintiffs' negligence claims failed. Defendant Cargill Pork argued that it had no control over Defendant Bohr's hog farm operations and, correspondingly, did not owe Plaintiffs a duty of care. But, its statement of facts did not establish this. It offered only argument, and no set of facts, to establish this. Defendant Bohr suggested it "had no legal duty because a possessor of land does not have a legal duty for the types of harms alleged here." (LF396) Like Cargill, it offered no facts to establish this. More importantly, Defendants' arguments miss the mark and the Court overlooked the basics of negligence law when it ruled in their favor.

4. *Cargill Had A Duty to Plaintiffs Because It Had The Exclusive Right to Control the Methods of Work Done by Bohr, and Bohr Was Accountable Under the Contract for Far More Than The Results of the Work*

A duty arises when a defendant has control over the instrumentality alleged to have caused damage to plaintiff. *Rychnovsky v. Cole*, 119 S.W.3d 204, 210 (Mo. App. W.D. 2003). Here, Defendant Cargill Pork had nearly unfettered control over all aspects of the hog farm at issue. Defendant Cargill Pork claims that it merely had a contractual relationship with Defendant Bohr and owned the hogs, but otherwise possessed no control over the hog farm operations. Respondents put nothing into the summary judgment record in support of this contention. (LF150-151) Also, this argument is belied

by the very contract to which Defendants refer the Court. Pursuant to the contract between Defendants, Defendant Cargill Pork has supervisory control over the following aspects of the CAFO at issue:

- Cargill Pork must approve of the construction site for the facility (LF507);
- Cargill Pork will audit compliance with the condition of the physical plant. (LF507);
- Cargill dictates the feeding and management policies. (LF508);
- Cargill dictates monitoring and minimum weights for market of the hogs. (LF508);
- Cargill dictates that signs be posted proclaiming Cargill, and not Bohr Farms, owns the pigs. (LF508);
- The facility must meet Cargill Pork's Transportation checklist. (LF522);
- The facility must meet Cargill Pork's standards *as supported by audit*. (LF519);
- Cargill Pork has the right to place and control the number and size of pigs at such times as it determines. (LF506);
- Cargill Pork is responsible for paying for all veterinary services for the pigs. (LF507);
- "Feeder (Defendant Bohr) shall provide and maintain the Facilities to Contractor's (Cargill Pork) standards as supported by a periodic audit" (LF507);

- “Feeder (Defendant Bohr) shall follow Contractor’s (Defendant Cargill Pork) feeding and management policies and programs . . .”(LF508);
- “Contractor (Defendant Cargill Pork) shall have the right to physically verify any or all mortality that may occur.” (LF508);
- “Feeder shall dispose of all dead pigs in accordance with recognized animal husbandry practices in compliance with all applicable health, sanitation and environmental laws, regulations and permits and using an “Environmentally Friendly” system as set forth in Contractor’s policies. (LF509);
- “Feeder (Defendant Bohr) shall keep no other swine at the Facilities or on the Feeder’s (Defendant Bohr) premises where Contractor’s (Defendant Cargill Pork) pigs are located.” (LF509);
- “Feeder (Defendant Bohr) shall maintain all manure and waste equipment and systems, including lagoons and application areas, to Contractor’s (Defendant Cargill Pork) standards. Feeder (Defendant Bohr) agrees that Contractor’s (Defendant Cargill Pork) representatives shall have the right to inspect Feeder’s manure and waste equipment systems, including lagoons and application areas, to ensure they meet Contractor’s standards.” (LF509);
- “Feeder (Defendant Bohr) shall keep accurate daily, weekly, and monthly records as required by Contractor (Defendant Cargill Pork)” (LF511);

- “Feeder (Defendant Bohr) shall participate in annual environmental training offered or approved by Contractor (Defendant Cargill Pork).” (LF512); and
- “Feeder (Defendant Bohr) shall furnish a certificate of insurance annually to Contractor (Defendant Cargill Pork) evidencing Feeder’s (Defendant Bohr) coverage for general liability insurance” (LF512).

(LF498-523).

The agreement between Cargill and Bohr asserts that it is an “independent contractor” arrangement for a “service agreement.” (LF513) Yet, under Missouri law, the test for whether a person is an independent contractor is and always has been fact specific, depends upon the right of control, and looks at the substance, not the form.

The rule in relation to independent contractor has been expressed in a variety of forms, all the same in substance, and oftentimes thus: “An ‘independent contractor’ is one, who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work.”

Maltz v. Jackoway Katz Cap Co., 336 Mo. 1000, 82 S.W. 909 (1934). Although the phrasing is somewhat less formalistic, modern cases hold the same. In *Sakabu v. Regency Const. Co.*, 392 S.W.2d 494 (Mo. App. E.D. 2012) the issue, much like here, involved tort liability where the subcontractor was purportedly independent of the general contractor under the terms of the contract between the two alleged joint tortfeasors. Like

the situation in the case at bar, the general contractor had hired the subcontractor to perform work on a house the general contractor was building. The subcontractor started a fire, and the general contractor was sued for negligence. The general contractor, like Cargill here, disclaimed liability because the subcontractor was supposedly independent. This was stated in the contract between the two. The Eastern District explained that subcontractors are not necessarily independent contractors when it comes to the application of tort law:

The terms subcontractor and independent contractor are not necessarily synonymous, *Barkley v. Mitchell*, 411 S.W.2d 817, 823 (Mo. App. 1967), and the trial court was required to perform an analysis for whether Kirsch was an independent contractor before determining liability on that basis, see *Lee v. Pulitzer Pub. Co.*, 81 S.W.3d 625, 631 (Mo. App. E.D. 2002). While the cases Regency points to demonstrate that Missouri courts do sometimes use the terms interchangeably, in each of those cases the court made a specific finding that the subcontractor was in fact an independent contractor. *Smith v. Inter-County Tel. Co.*, 559 S.W.2d 518, 521 (Mo. banc 1977)(evidence that general contractor exercised no control over how job was done supported independent-contractor/general contractor, not master/servant, relationship); *Boulch v. John B. Gutmann Constr. Co.*, 366 S.W.2d 21, 29–30 (Mo. App. 1963) (same); cf. *Empson v. Mo. Hwy. & Trans. Comm'n*, 649 S.W.2d 517, 522 (Mo. App. W.D. 1983) (contract that designated independent-contractor relationship along with evidence

that general contractor had no control over job supported finding of independent-contractor/general contractor, not agency/principal, relationship). As the court in *Empson* noted, simply characterizing a party an independent contractor does not make it so; rather, a court must make a factual determination of independent-contractor status. 649 S.W.2d at 521.

Sakabu v. Regency Const. Co., 392 S.W.2d 494 (Mo. App. E.D. 2012).

As *Sakabu* pointed out, simply calling a party an “independent contractor” does not make it so. The Circuit Court failed to make a factual determination, on the basis of the facts before it, that Bohr was truly an independent contractor, and the facts as set out above would not have permitted it. The only fact that supports the supposed “independent contractor” status is the assertion that it exists in the contract. The contract, however shows a different intent and mandates a different result. Cargill controlled everything that went into the hogs (the food, the quality of the water, the antibiotics), everything that was done to the hogs (it paid the veterinary bills and oversaw the health of the hogs), required exclusivity (the CAFO could only be used for its hogs), and required daily, weekly and monthly records. These facts alone make the claim of independent contractor mendacious at best.

If an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer except as to the result of his work and if “the ultimate and decisive test, [is the] right of control.” *Maltz*, 82 S.W. at 919, then a finding that Bohr is an independent contractor flies in the face of the evidence of Cargill’s extensive

contractually-mandated control laid out in painstaking detail in the terms of the very contract Cargill asserts makes Bohr an independent contractor. Appellants put this document into the summary judgment record specifically to establish the level of control (LF0415). Respondents never offered up one single fact that established an independent contractor relationship. (LF0150-151).

The facts set out above and in the Plaintiffs' Statement of Additional Undisputed Facts (See LF415, 498-523) demonstrate that Defendant Cargill controls almost every aspect of the hog facility at issue in this case. This listing is not exhaustive, but is merely intended to demonstrate that, at a minimum, there are issues of fact regarding whether Defendant Cargill exercised sufficient control over the hog farm operations at issue in this case to be subject to liability for negligence. Whether an entity is an independent contractor is a question of fact to be determined by a fact-finder. *Bargfrede v. American Income Life Insurance Company*, 21 S.W.3d 157, 161 (Mo. App. 2000). *Ascoli v. Hinck*, 256 S.W.3d 592 (Mo. App. W.D. 2008). Further, there are genuine issues of material fact as to breach and damages. The circuit court can decide the issue only when no material facts giving rise to the determination is genuinely in dispute and when only one conclusion is reasonable. *Id.* As the party seeking summary judgment, Respondents bore the burden of establishing Bohr was an independent contractor in order to establish both a legal right to judgment and the absence of any genuine issue of material fact. *ITT Commercial Fin. Corp.*, 854 S.W.2d at 378. This burden was not met, and the trial court erred in granting summary judgment in favor of Respondents. *Id.*, *See also, Sakabu*, 392 S.W.3d at 499-500. Therefore, because Respondents cannot seriously dispute that

Defendant Cargill Pork exercised at least some degree of control over Defendant Bohr's hog farm operations, Defendant Cargill Pork is under a corresponding duty to prevent the damages suffered by Plaintiffs. *See Rychnovsky*, 119 S.W.3d at 210.

5. *Bohr Cannot Escape A Duty of Care and Summary Judgment Was Improper*

Similarly, Defendant Bohr argued it did not owe a duty, but it offered no set of facts in support of this argument. (LF150-151). Respondent Bohr owed Plaintiffs a duty of reasonable care to prevent the injuries sustained by Plaintiffs. *See Sherrell v. Brown*, 284 S.W.3d 164, 166 (Mo. App. E.D. 2009) ("The possessor of property must use and maintain the property in such a manner as not to create an unreasonable risk of harm to others."); *see also, Jackson*, 904 S.W.2d 322 (finding that landowners owed duty to passersby to for harm caused by artificial conditions on the land).

Here Bohr defended on the assertion that the statute controlled. The Statement of Facts at LF150-151 does not contain a single fact that would establish that Bohr did not have a duty, or that controverted any of Plaintiffs' allegations of negligence in any way. Respondent's arguments fail for lack of factual support and are contrary to Missouri law. The same argument applies to Plaintiffs' conspiracy claims.

6. *Plaintiffs Need Not Allege Physical Harm in Order to Recover Damages Pursuant to its Claims of Negligence Against Defendants*

Defendants also asserted that because Appellants do not allege any physical harm that they cannot recover under a theory of negligence. However, contrary to Defendants'

assertion, Plaintiffs need only plead and prove that they sustained damages as a result of Defendants' breach of their duty owed to Plaintiffs and need not necessarily prove physical harm. *See Rychnovsky*, 119 S.W.3d at 213 (plaintiff sufficiently pleaded negligence claim when plaintiff alleged he sustained damages from defendants' negligent failure to maintain sewer lines and prevent the leaks which damaged plaintiff's property).

This Court should reverse and remand for trial on the merits.

CONCLUSION

Missourians count on this Court to be faithful to the principle that all persons are equal in the eyes of the law and are treated the same under the law. The prince should receive the same treatment as the pauper, and the corporate farm should enjoy no more special privilege in its operation than the family farm.

Missourians also count upon this Court to hold the Legislature accountable to the dictates of the Missouri Constitution. Simply because the majority can command enough votes to pass special legislation that protects the pork industry does not mean that this Court should ignore the impact of that legislation on the small farmer and rural dwellers who simply seek to live in peace in the quiet countryside of Missouri.

The statute at issue here is unconstitutional because it effects a regulatory taking. It is a special law in violation of the Missouri Constitution. It violates the Equal Protection Clause of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitutions. By eliminating the ability to live quietly and peacefully in the country, it destroys the right of enjoyment of one's own industry as protected by the Missouri Constitution. By making a legislative determination of what

class of litigants will have standing to challenge the law and therefore to be free from nuisance, the Legislature has impermissibly tread into an area reserved to this Court and the judicial in violation of the Separation of Powers doctrine. By denying standing and relief to lawful occupiers of land, it violates Article I, Section 14 of the Missouri Constitution or the “open courts” provision. Finally, by making a determination that a nuisance cause of action was barred when there were no facts established in the statement of uncontroverted facts that went to this issue, the Court failed to test for factual issues and improvidently granted Summary Judgment.

There are numerous legitimate reasons to declare this special interest legislation by the protectors of the pork industry unconstitutional. But chief among them, from a factual point of view, is that the Legislature could not impose a sentencing scheme in the criminal law that required an inmate to take his meals in unsanitary conditions or breathe the foul-smelling, noxious-gas-filled air in the area surrounding this CAFO. It would be cruel and unusual punishment to inflict on all prisoners the inability to enjoy a simple meal without fighting off hordes of flies. It would be cruel and unusual to ask them to breathe the overpowering stench of swine feces on a twenty-four hour a day, seven day a week basis. And yet, this is what the Legislature asks of rural Missourians whose only crime is to want to keep the family farm in the family.

This is a Court of justice! It must do what justice demands and declare the statute unconstitutional and reverse this case for trial on the merits.

Respectfully submitted,

/s/ Charles F. Speer

Charles F. Speer # 40713
Peter B. Bieri # 58061
Speer Law Firm, P.A.
104 West 9th Street, Suite 400
Kansas City, Missouri 64105
Telephone: (816) 472-3560
Telecopier: (816) 421-2150
cspeer@speerlawfirm.com
bbieri@speerlawfirm.com

Edward D. Robertson, Jr., # 27183
Mary Doerhoff Winter # 38328
Anthony L. DeWitt # 41612
BARTIMUS, FRICKLETON, ROBERTSON &
GOZA, P.C.
715 Swifts Highway
Jefferson City, MO 65109
(573) 659-4454
(573) 659-4460 Fax

CERTIFICATE OF SERVICE

The undersigned hereby certifies that this brief was served in full compliance with all rules regarding service of briefs in the Supreme Court, including the mailing of service copies to the Respondent upon acceptance by this Court of the electronic brief.

/s/ Charles F. Speer

CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

Undersigned counsel hereby certifies that this brief complies with the requirements of Missouri Rule 84.06(c) and, in that the brief contains 27,003 words as directed by Rule 84.06(c). The word count was derived from Microsoft Word.

/s/ Charles F. Speer

Charles F. Speer