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## INTRODUCTION

Appellant/Cross Respondent Estate of Max Overbey and Glenna Overbey (the Overbeys) brought a petition under Section 407.025<sup>1</sup> of the Missouri Merchandising Practices Act (MMPA) against Respondent/Cross-Appellant Chad Franklin (Franklin) and Chad Franklin National Auto Sales North, LLC<sup>2</sup> (National Auto Sales). A Clay County jury awarded the Overbeys \$4,500 in actual damages and \$1,000,000 in punitive damages against Franklin and \$76,000 in actual damages and \$250,000 in punitive damages against National Auto Sales. Franklin filed a Motion to Reduce the Punitive Damages by Remittitur or section 510.265. The Overbeys filed a response and challenged the constitutionality of section 510.265. The trial court granted Franklin's motion in accordance with section 510.265 and reduced the punitive damages to \$500,000, the statutory maximum as provided in section 510.265, and denied the Overbeys' motion that section 510.265 violated the Constitutions of Missouri and the United States.

The Overbeys' challenge to the constitutionality of section 510.265 is a matter of first impression for this Court.

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<sup>1</sup>All references to RSMo, Supp. 2008 unless otherwise noted.

<sup>2</sup> Chad Franklin, individually, and Chad Franklin National Auto Sales North, LLC were the named defendants at trial. National Auto Sale did not appeal the verdict rendered against it.

## **JURISDICTIONAL STATEMENT**

This appeal is from a jury trial in the Circuit Court of Clay County that found Franklin and National Auto Sales violated section 407.025 of the MMPA and awarded the Overbeys actual and punitive damages. In post-trial motions, Franklin moved the trial court to reduce the punitive damages of \$1,000,000 by remittitur or pursuant to section 510.265. LF 233-235, App. 11-13. The Overbeys filed a response to the reduction of punitive damages by remittitur or section 510.265 and challenged the constitutionality of section 510.265 as violation of the separation of powers, the right to trial by jury, equal protection, due process, and special legislation. LF 258-297, App. 14-53. The trial court reduced the punitive damage award against Franklin in accordance with section 510.265 to the \$500,000 maximum amount allowed by the statute. LF 300-304, App. 54-58. The trial court also denied the Overbeys' motion that section 510.265 is unconstitutional. LF 300-304, App. 54-58. The Overbeys filed a Motion to Set Aside, Vacate, or Correct the First Amended Judgment or Alternative Relief seeking the judgment be set aside if the trial court reduced the award by statutory remittitur and Rule 78.10, but if the punitive damages was reduced in accordance with section 510.265 (which it appears what the trial court did), to challenge the constitutionality of the statute. LF 305, App. 59-86. The trial court did not rule on this motion. LF 305, App. 59-86. The Overbeys' appeal the reduction of punitive damages pursuant to section 510.265 as unconstitutional as violation of the separation of powers, the right to trial by jury, equal protection, the rule against special legislation, and violation of the right to open courts. LF 337-338, App. 87-91.

Jurisdiction is within the exclusive jurisdiction of the Missouri Supreme Court as the constitutionality of a Missouri statute is challenged. Mo. Const. article V, section 3.

## **STATEMENT OF FACTS**

The Overbeys brought a two count lawsuit against Chad Franklin and National Auto Sales for violating the MMPA. TR 9-10. The lawsuit alleged that Franklin and National Auto Sales misrepresented and omitted material facts in connection with the sale and/or advertisement of a 2007 Suzuki sports utility vehicle the Overbeys purchased on September 15, 2007. LF 16. The misrepresentation and omission of material facts was that the Overbeys could purchase a motor vehicle with a low monthly payment of about \$43 per month for six months and that after six months they could bring the car back and trade it in for another motor vehicle. TR 51-71.

A jury trial was held August 9-12, 2010 in Clay County Circuit Court which resulted in a jury award to the Overbeys of \$4,500 in actual damages and \$1,000,000 in punitive damages against Franklin and \$76,000 in actual damages and \$250,000 in punitive damages against National Auto Sales. LF 209-10.

The Overbeys purchased the 2007 Suzuki for their grandson Michael and his wife Mashele for her to drive back and forth from their home in Urich to college in Warrensburg. TR 50. The Overbeys would make the monthly payments until Mashele graduated. TR 50. The Overbeys went to National Auto Sales to buy a vehicle after seeing commercials representing "\$43 a month payments," "drive a different vehicle every single year," "bring it back, pick out another," "monthly payment will never change," and "cancel your membership whenever you want," and a "performance test drive" where the dealership paid for gas. TR 52-53, 106. Michael called National Auto Sales to ask about the "test market

deal" advertised on television, and an employee said "they could absolutely do anything from that location." TR 58. Michael told the salesman Phil they were "really, really interested in the test market thing they had going on the television." TR 60. Phil said "that he could make that happen just pretty easy," and the "test market deal" could be done with any car at the dealership. TR 60. Michael and Mashele wanted to keep the cost under \$20,000 and National Auto Sales needed the mileage to be under 15,000 so the dealership could sell it at the end of the six months to make money off of it. TR 62-63,107-109. Nick, another National Auto Sales employee, told the Overbeys the monthly payments would be \$49, National Auto Sales would write the Overbeys a check to cover the difference of the monthly payment of \$719, and National Auto Sales would provide the Overbeys with free gasoline for six months. TR 62-63, 73-74. National Auto Sales told the Overbeys they would give them a gas card that would cover their fuel expenses for the first six months. TR 62-3. During the sale, the Overbeys learned they were required to pay sales tax and a membership fee as part of the sale. TR 63-4. The Overbeys told National Auto Sales they could not afford to pay both the sales tax and the \$500 membership fee. TR 63-4. Max Overbey paid the membership fee to be a part of the test offer and National Auto Sales agreed to pay half of the sales tax. TR 227-28. This agreement was reached because the Overbeys were not initially told they had to pay the membership fee. TR 63-5, 229. Six hours after first arriving at the dealership, the Overbeys left National Auto Sale without completing the sale and the employees started drinking beer. TR 71.

The Overbeys returned three days later with Glenna to complete the purchase of the car. TR 71. Glenna questioned the figures and how the program worked, but National Auto Sales told her they would work it out and she needed to trust the dealership. TR 71-73, 147-48. The Retail Buyers Order stated a price of \$37,191.28, and National Auto Sales said the amount "meant nothing" and was "for our records only." TR 153, 147-48. The Overbeys were told they would not have to pay more than \$49 a month until the vehicle was traded in. TR 148. The Overbeys signed the papers to complete the sale after being told by National Auto Sales that the Overbeys would not be responsible for the papers signed. TR 71-73. National Auto Sales wrote the Overbeys a check for \$3,253 to make up the difference in the monthly payments, and the Department of Revenue \$1,189.83 for the sale tax. TR 73-74. Using the funds from the \$3,253 check, the Overbeys made the \$719 monthly car payment for the next six months. TR 68-70.

After six months the reimbursement funds had been exhausted the Overbeys tried to return the 2007 Suzuki to National Auto Sales. TR 81-82. National Auto Sales said they had no knowledge of the deal and the individuals who helped the Overbeys were no longer employed there. TR 81-82. The Overbeys were stuck with the vehicle and the monthly payments rose from an out of pocket payment of \$49 a month to \$719 a month with an interest rate of 11.24%. TR 81-82, 159. When the Overbeys returned to the dealership they had no personal contact with Franklin, however a National Auto Sales employee represented that he was speaking with Franklin on the telephone discussing the sale in front of Michael. TR 98-100.

Although called as witnesses, Franklin and a designated representative of National Auto Sales did not appear at trial. TR 44-5. The Overbeys read and admitted into evidence request for admissions to Franklin and National Auto Sales. TR 41. National Auto Sales admitted to selling the vehicle to the Overbeys; its agents and employees represented to the Overbeys that they would receive two checks; that free gasoline was not provided to the Overbeys; and that National Auto Sales profited from the sale of the vehicle, service contract, and gap insurance. TR 42-3. National Auto Sales also admitted that Franklin was the sole owner of National Auto Sale in 2007, when the Overbeys purchased the sports utility vehicle. TR 43-4. Franklin admitted that he was the sole owner of National Auto Sales on the date the 2007 Suzuki motor vehicle was sold to the Overbeys and that he was the sole owner of another car dealership in Kansas City, Kansas, CFS Enterprises, Inc. d/b/a Chad Franklin Suzuki. TR 44.

A DVD of television commercials produced by Franklin, National Auto Sales, and Franklin's other car dealership were received as evidence. TR 46-48. The Overbeys testified that they saw these advertisements and Franklin himself appeared in the advertisements as the owner. TR 102-106,223-225.

Evidence of seventy-three similar complaints made to the Missouri Attorney General's Office about Franklin and National Auto Sale were admitted into evidence. Shelly Land, a special investigator with the Missouri Attorney General's Office, testified about these similar complaints. TR 132. Four individuals who made complaints to the Attorney General's Office testified at trial that they had purchased cars under the same promotion and advertisement

and were left with high monthly payments after the six month period. TR 198-217. Thirty-five of the complaints to the Attorney General's Office were about financing for low payments in the test drive program or similar programs at National Auto Sales. TR 134-36. A summary of National Auto Sales' sales data and sales reports was admitted into evidence. TR 240.

Franklin and National Auto Sales did not present any evidence at trial. TR 240.

The jury was instructed using a not in MAI verdict director based on section 407.020 and corresponding regulations. LF 203, 206, App. 1-4. The jury returned a verdict in favor of the Overbeys. The verdict awarded the Overbeys \$4,500 in actual damages and \$1,000,000 in punitive damages against Franklin and \$76,000 in actual damages and \$250,000 in punitive damages against National Auto Sales. LF 209-210, App.5-6.

Franklin filed a Motion for Judgment Notwithstanding the Verdict or for a New Trial, or, in the Alternative, for Remittur, specifically addressing the \$1,000,000 in punitive damages entered against Franklin. LF 233, App. 11-13. Max E. Overbey died on September 8, 2010. The Overbeys filed Suggestions in Death and moved for a substitution of parties. LF 255, 256, 298. The Overbeys filed a response opposing Franklin's motion and challenged the constitutionality of section 510.265 as unconstitutional. LF .258, App. 14-53. The trial court denied Franklin's Motion for Judgment Notwithstanding the Verdict and the Overbeys' constitutional challenge, and in accordance with section 510.265 reduced the punitive damage award to \$500,000 per section 510.265. LF 300, App. 54-58. Attorney fees and interest were also awarded to the Overbeys' counsel. LF 215, 300. The Overbeys filed a

Motion to Set Aside, Vacate, or Correct First Amended Judgment or Alternative Relief not ruled on. LF 305-332, App. 59-86. Trial court did not rule on this motion. (The trial court by its First Amended Judgment reduced the punitive damages award in accordance with section 510.265 and not under the remittitur rule. This motion was filed by Appellants in an abundance of caution to preserve this issue.)

The Overbeys appealed the constitutionality of section 510.265 and Franklin cross appeals the denial of his motion for Judgment Notwithstanding the Verdict. LF 333, 337.

**POINTS RELIED ON**

**I. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the constitutional separation of powers prescribed by article II, section 1 of the Missouri Constitution, in that the trial court's reduction of the jury's punitive damage award of \$1,000,000, as required by section 510.265, relinquished the judiciary's discretion to remit damages based on the evidence, invaded the providence of the jury to assess damages, and authorized the executive branch to determine if the Overbeys were exempt from the statutory limitation by Franklin being convicted of a felony, thereby making the final punitive damage award inadequate as the award was not based on this particular case but on arbitrary reasons as statutorily mandated.**

*Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010)

*Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639 (Mo. App. W.D. 1997)

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

*Best v. Taylor Machine Works*, 689 N.E. 1057 (Ill. 1997)

**Section 510.265**

**Section 537.068**

**Rule 78.10**

**Missouri Constitution article II, section 1**

**II. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the Overbeys' right to trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that the trial court's reduction of the punitive damage award of \$1,000,000, as required by section 510.265, prevented the Overbeys from having the jury's determination of punitive damages be the amount awarded, thereby making the final award inadequate as the jury's award of punitive damages was substituted by the legislature's mandated maximum of punitive damages allowed.**

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

*State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo. banc 2003)

*Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010)

*Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218 (Ga. 2010)

**Section 510.265**

**Missouri Constitution article 1, section 22(a)**

**III. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the Overbeys' right to equal protection provided by article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that under a strict scrutiny review the Overbeys have a fundamental right to a trial by jury and there is not a compelling state reason for the statute to be narrowly tailored to exempt three classes from the statutory limitation on punitive damages, nor under a rational basis review is there a rational reason to exclude three classes from the statutory limitation to achieve a legitimate end, thereby making the Overbeys' final award of punitive damages inadequate as the Overbeys are not treated as similarly situated individuals by the mandate of section 510.265.**

*Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752 (Mo. banc 2010)

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

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

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

**Section 510.265**

**Missouri Constitution article I, section 2**

**United States Constitution Fourteenth Amendment**

**IV. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the prohibition against special legislation prescribed by article III, section 40 of the Missouri Constitution, in that section 510.265 is a special law based on arbitrary classifications and the legitimate purpose may best be served by a general law applying to all classes, thereby the Overbeys' final punitive damage award is inadequate as the statute arbitrary exempts three classes from the statutory limitation on punitive damages.**

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

*City of Springfield v. Sprint Spectrum, L.P.*, 203 S. W.3d 177 (Mo. 2006)

*Batek v. Curators of University of Missouri*, 920 S.W.2d 895 (Mo. banc 1996)

**Section 510.265**

**Missouri Constitution article III, section 40**

**V. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the due process clause of article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that the due process analysis to determine if the punitive damages are excessive is bypassed by section 510.265 imposing a mandatory and arbitrary limitation of the punitive damages, thereby making the Overbeys' final damage award inadequate as it was not deemed excessive under the due process standards.**

*BMW of North America v. Gore*, 517 U.S. 559 (1995)

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

*State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408 (2003)

*Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672 (7th Cir. 2003)

**Section 510.265**

**Missouri Constitution article I, section 10**

**United States Constitution Fourteenth Amendment**

**VI. The trial erred in reducing the jury's award of punitive damages pursuant to section 510.265, because the Overbeys where acting as private attorney generals in bringing their MMPA claim, in that the State of Missouri exception found in section 510.265 applies to the Overbeys as private attorney generals and therefore the reduction of jury's punitive damages award was improper.**

*Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo. banc 2007)

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

*Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo. banc 2009)

**Section 407.025**

**Section 510.265**

**VII. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the right to open courts prescribed in article I, section 14 of the Missouri Constitution, in that section 510.265 limits the Overbeys ability to obtain counsel when Franklin was not convicted of a felony arising out of the Overbeys' claim, thereby making the reduction of the Overbeys punitive damage award inadequate as their right to the courts were affected by section 510.265.**

*Weigand v. Edwards*, 296 S.W.3d 453 (Mo. banc 2009)

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

*Mo. Alliance for Retired Americans v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670 (Mo. banc 2009)

**Section 510.265**

**Missouri Constitution article I, section 14**

## ARGUMENTS

**I. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the constitutional separation of powers prescribed by article II, section 1 of the Missouri Constitution, in that the trial court's reduction of the jury's punitive damage award of \$1,000,000, as required by section 510.265, relinquished the judiciary's discretion to remit damages based on the evidence, invaded the providence of the jury to assess damages, and authorized the executive branch to determine if the Overbeys were exempt from the statutory limitation by Franklin being convicted of a felony, thereby making the final punitive damage award inadequate as the award was not based on this particular case but on arbitrary reasons as statutorily mandated.**

**A. Standard of Review**

This Court reviews constitutional challenges *de novo*. *City of Arnold v. Tourkakis*, 249, S.W.3d 202, 204 (Mo. banc 2008). It is presumed a statute is constitutional and is unconstitutional if it “clearly contravenes some constitutional provision.” *Franklin County ex rel. Parks v. Franklin County Comm'n*, 269 S.W.3d 26,29 (Mo. banc 2008). The party challenging the constitutionality of the statute bears the burden proving the statute “clearly and undoubtedly violates the constitutional limitations.” *Id.*

**B. Article II, section 1 guarantees the separation of powers.**

Section 510.265 violates the constitutional separation of powers prescribed in article II, section 1 of the Missouri Constitution by requiring punitive damages not to exceed \$500,000 or five times the actual damages. *See* section 510.265. Section 510.265 is an arbitrary cap and an attempt at legislative remittitur that invades the judiciary's discretion of remittitur and usurps the jury's function by imposing a cap on punitive damages awarded regardless of the weight of the evidence and the facts of a particular case.

**1. Section 510.265 violates the constitutional guarantee of separation of powers as the legislature infringes on the judiciary's discretion of remittitur.**

Article II, section 1 of the Missouri Constitution provides for "three distinct departments" and prohibits one branch from exercising the powers designated to another branch. This separation of power is essential to our government by preventing abuse from centralized power. *Mo. Coalition for the Env't v. Joint Comm. on Admin. Rules*, 948 S.W.2d 125, 132 (Mo. banc 1997). The three branches should be as separate and independent as possible. *Id.* at 132-33. The judiciary is the only branch with the ability to determine what the law is. *Id.* at 132 (citing *Marbury v. Madison*, 5 U.S. 137 (1803)). The judiciary's discretion "cannot be entirely exclude[d]" by the legislature as it is an encroachment upon the judiciary's function. *Kyger v. Koerper*, 207 S.W.2d 46,49 (Mo. banc 1946).

Section 510.265's statutory limitation of punitive damages conflicts with the statutory remittitur found in section 537.068 and Rule 78.10. The Overbeys recognize that when

statutes conflict and cannot be harmonized, statutory construction requires the specific statute to prevail over the general statute and be the exception to the rule. *South Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). However, "rules of statutory construction cannot be rigidly applied. Most often, for every rule suggesting one resolution, another rule exists that suggests the contrary." *Id.* (referencing Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L.REV. 395,401-06 (1950)). While it is clear that sections 510.265 and 537.068 conflict and section 510 .265 will prevail, the analysis of the two statutes is important to understand how section 510.265 violates the separation of powers doctrine.

Remittitur "constitutes a ruling upon the weight of the evidence." *Firestone v. Crown Center Redevelopment Corp.*, 693 S.W.2d 99, 108 (Mo. banc 1985). The purpose of remittitur is to make the award equitable and eliminate retrials. *Woods v. Friendly Ford, Inc.*, 248 S.W.3d 665, 678 (Mo. App. S.D. 2008). The trial court may grant remittitur after reviewing the evidence supporting the award and finding the award exceeds "fair and reasonable compensation" of the damage sustained. *Gomez v. Construction Design, Inc.*, 126 S.W.3d 366, 375 (Mo. banc 2004). Broad discretion is afforded to the trial court because it is in the best position to consider the evidence, and the appellate courts interfere with a jury's award only when the award is manifestly unjust. *Woods*, 248 S.W.3d at 678. A verdict is deemed excessive when the "jury makes an honest mistake in weighing the evidence" and determining damages, which is remedied by remitting the damages without a new trial, or

trial misconduct creates jury bias resulting in excessive damages, which is remedied by a new trial. *Id.*

Remittitur is governed by section 537.068 and Rule 78.10. Rule 78.10 was "modeled on common law practice, that premises remittitur on the court's authority to grant a new trial, a practice consistent with the understanding at common law of the judge's power to control verdicts at the time of the Missouri Constitution was adopted." *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 778 (Mo. banc 2010) (Wolff, J., concurring) (discussing the temporary end to remittitur practice as set forth in *Firestone*, 693 S.W.2d at 110, the legislature's response by enacting section 537.068, and the common law remittitur procedure of Rule 78.10.) Common law remittitur allows the trial court to remit an award when it "exceeds fair and reasonable compensation" for the damages sustained based on the evidence. Section 537.068. If remittitur is granted, the party opposing the remittitur may accept the remittitur or have a new trial. Rule 78.10(b). Remittitur is only allowed one time when the "damages are against the weight of the evidence." Rule 78.10(e).

Appellate review of a remitted award can only be brought by the party seeking remittitur if less than the requested amount is awarded. Rule 78.10(c). The party opposing remittitur cannot appeal the remittitur and is only allowed to address the remittitur in the other party's appeal. Rule 78.10(d). On appeal, the standard of review for remittitur is whether in the light most favorable to the verdict, the evidence supports the award. *Wiley v. Homfeld*, 307 S.W.3d 145, 148-49 (Mo. App. W.D. 2010).

Section 510.265 violated the constitutional guarantee of separation of powers as demonstrated in the Overbeys' trial. A jury awarded the Overbeys \$1,000,000 in punitive damages. The trial court then in accordance with section 510.265 reduced the punitive damages to \$500,000, the maximum amount allowed by the statute. The trial court was allowed no discretion to consider the weight of the evidence as permitted by section 537.068 or Rule 78.10, if the punitive damages are appropriate under a due process standard, or what would be an appropriate amount to punish or deter Franklin. Instead the legislature mandated what they deemed a maximum amount of punitive damages in the Overbeys' case.

Judge Wolff took note of the general concept of statutory limitation of damages in his concurring opinion in *Klotz*, 311 S.W.3d at 772. Judge Wolff argued that the statutory limitation on noneconomic damages is not a "legislative remittitur" because the plaintiff is denied the opportunity to have a new trial and no weight is given to the weight of the evidence, which is the underlying purpose of remittitur. *Klotz*, 311 S.W.3d at 781 n.23. (Wolff, J., concurring.)

The Illinois Supreme Court found the Illinois statutory limitation on damages "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive" by "undercut[ing] the power, and obligation, of the judiciary to reduce excessive verdicts," and is a "legislative remittitur" which "disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their cause of action." *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1080 (Ill. 1997). The Illinois Supreme Court continued to explain that the statutory

limitation "forces the successful plaintiff to forgo part of his or her jury award without the plaintiff's consent, in clear violation of the well-settled principle that a trial court does not have authority to reduce a damages award by entry of a remittitur if the plaintiff objects or not consent." *Id.* The Illinois Supreme Court reaffirmed this decision in *Lebron v. Gottlieb Memorial Hospital*, 930 N.E.2d 895, 914 (Ill. 2010), by holding the cap on noneconomic damages in medical malpractice cases violated the separation of powers.

The trial court's reduction of the punitive damages awarded in the Overbeys' case is the same as in *Chapman v. New Mac Electric Cooperative, Inc.*, 260 S.W.3d 890, 894 (Mo. App. S.D. 2008), where the trial court reduced the verdict by using the term "remittitur" to address an evidentiary issue left unanswered during trial. The Southern District found the trial court "cannot substitute its verdict for that of the jury" and is "powerless to substitute its own assessment of amount of recovery" after the judgment was entered. *Id.* at 895-96. In the Overbeys' trial, the trial court substituted the jury's verdict for the legislature's verdict, the statutory limitation on punitive damages.

Section 510.265 is distinguished from *Fust v. Attorney General for Mo.*, 947 S.W.2d 424,430-31 (Mo. banc 1997), where this Court found section 537.675.3<sup>3</sup> did not violate the separation of powers as it was a "reasonable limitation" on a common law cause of action and did not interfere with the judiciary's role. Section 510.265 is not a limitation of a common

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<sup>3</sup>Section 537.675.3 requires fifty percent of a punitive damage award to go to the State for the Tort Victims' Compensation Fund.

law cause of action, it is a restriction on a plaintiff's ability to recover the punitive damages awarded by the jury in situations not arbitrarily decided by the legislature.

The judiciary does not have the discretion to remit the punitive damage award based on the evidence presented, as the legislature took away the judiciary's power by enacting section 510.265. It is easy to see how the judiciary becomes entangled in a state of conflict and confusion in determining how to apply the statutory limitation of section 510.265 based on general legal principles. Under section 510.265 the judiciary is required to cap punitive damages when the punitive damages exceeds \$500,000 or five times the compensatory damages, but under section 537.068 and Rule 78.10 the judiciary has discretion to remit an award if the evidence does not support the award and the plaintiff elects the remitted amount over a new trial. The application of section 510.265 does not allow the trial court to consider the weight of the evidence or allow the plaintiff the option of election. The trial court has no discretion in the application of section 510.265 and this violates the separation of powers doctrine.

Section 510.265 infringes on the judiciary's power by disregarding the role of the judiciary to weigh the evidence presented in awarding punitive damages. Section 510.265 gives the trial court no power to review the evidence to see if the punitive damage award is a "fair and reasonable compensation" of the damage or the appellate court no power to determine if the punitive damage award is "manifestly unjust." The mandatory language of section 510.265 completely strips the judiciary of its power to determine if a punitive damage award is excessive based on the weigh the evidence presented, which is the critical aspect in

awarding punitive damages. Unlike the practice of remittitur by the judiciary, section 510.265 is based on an arbitrary amount or the compensatory damages, not on the weight of the evidence.

Section 510.265 clearly contravenes the constitutional provision ensuring the separation of powers and should be declared unconstitutional.

**2. Section 510.265 violates the constitutional guarantee of separation of powers as the legislature infringes on the jury's function to assess damages.**

A primary function of the jury is to assess damages. *Woods*, 248 S.W.3d at 678. The jury is the finder of fact and is an agent for the judicial branch of government during a trial. The jury is given "considerable latitude" to award punitive damages but the award must be acceptable under a due process analysis. *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 661-62 (Mo. App. W.D. 1997). There is no brightline test to determine if a punitive damage award is excessive because of the "unique facts and circumstances of each case" which determine the appropriate award. *Id.* at 661.

Section 510.265's statutory limitation on punitive damages infringes on the jury's function to award punitive damages. When the trial court applies section 510.265 to the jury's punitive damage award, the jury's "considerable latitude" in determining the award is eliminated. The punitive damage award is not evaluated by the courts under due process standards, the weight of the evidence, or the defendant's knowledge of the circumstances contributing to the damages. Section 510.265 completely disregards the jury's assessment of

punitive damages based on the facts of the particular case. Section 510.265 clearly violates the separation of powers in regards to the jury by mandating a maximum amount of damages regardless of the jury's assessment of damages.

**3. Section 510.265 violates the constitutional guarantee of separation of powers as the executive infringes on the legislature by establishing if a statutory exemption exists.**

The executive branch may also infringe on the power of the legislature. This Court struck down a dram shop liability law requiring a criminal conviction for a civil cause of action because the legislature or common law, not the executive branch through the prosecuting attorney or Attorney General, determines if a civil cause of action exists. *Kilmer v. Mun*, 17 S.W.3d 545, 552-53 (Mo. banc 2000).

In the Overbeys' case, the executive branch infringed on the power of the legislature to determine when punitive damages will be limited pursuant to section 510.265. The legislature provided an exception to the statutory cap when the defendant is convicted of or pleads guilty to a felony crime arising out of the civil cause of action. Section 510.265. This exception takes the ability to assess punitive damages out of the hands of the jury and judiciary and places it in the hands of the prosecuting attorney or Attorney General as to whether a limitation on the amount of punitive damages should apply. Section 407.020.4. The plaintiff's ability to be an exception to the statutory limitation of punitive damages is completely dependent on the discretion of the prosecuting attorney or Attorney General to file charges and obtain a conviction. The prosecuting attorney or Attorney General has no

role in the civil matter brought by private citizens, yet the prosecuting attorney or Attorney General alone determines whether the statutory exemption for the limitation on punitive damages applies. It is also important to note the differences in civil and criminal law, specifically the higher burden of proof required in a criminal case. Section 510.265 places a higher burden of proof on civil plaintiffs to obtain a punitive damage in excess of the statutory limitation by requiring a criminal burden of guilty beyond a reasonable doubt instead of the civil burden of preponderance of the evidence.

The Attorney General's Office filed a civil lawsuit against Franklin and National Auto Sales for violating the MMPA in 2008. App. 92-110. The Attorney General's Office Consumer Protection Division was aware, by the testimony of Shelly Land, of seventy-three similar citizen complaints against Franklin. TR 134-36. The Attorney General has concurrent jurisdiction to file criminal charges, see section 407.020.4, but declined to do so.<sup>4</sup> This decision of the Attorney General, for whatever reason, thereby prohibited the trial court from entering the jury's verdict of \$1,000,000 against Franklin because a felony criminal conviction was not obtained, and thus, deprived the Overbeys of the full measure of damages awarded by the jury.

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<sup>4</sup>The Attorney General has, in the past, exercised concurrent jurisdiction and filed criminal charges against defendants in Clay County for violations of the MMPA. *See State v. Simpson*, 7CRI98001115, and *State v. Estes*, 7CRI98001116, Circuit Court of Clay County, Seventh Judicial Circuit.

Section 510.265 clearly violates the constitutional guarantee of separation of powers by allowing the executive branch to determine if the statutory cap on punitive damages will apply.

**C. Conclusion**

Section 510.265 "clearly and undoubtedly" violates a guarantee of separation of powers in article II, section 1 by restricting the judiciary's power to remit damages based on the evidence presented, in invading the providence of the jury, and allowing the prosecuting attorney or Attorney General the discretion to file criminal charges to provide a statutory exemption for the limitation on punitive damages.

**II. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the Overbeys' right to trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that the trial court's reduction of the punitive damage award of \$1,000,000, as required by section 510.265, prevented the Overbeys from having the jury's determination of punitive damages be the amount awarded, thereby making the final award inadequate as the jury's award of punitive damages was substituted by the legislature's mandated maximum of punitive damages allowed.**

**A. Standard of Review**

This Court reviews constitutional challenges *de novo*. *City of Arnold*, 249 S.W.3d at 204. It is presumed a statute is constitutional and is unconstitutional if it "clearly contravenes some constitutional provision." *Franklin County*, 269 S.W.3d at 29. The party challenging the constitutionality of the statute bears the burden proving the statute "clearly and undoubtedly violates the constitutional limitations." *Id.*

**B. Article I, section 22(a) guarantees the right to trial by jury remain inviolate.**

The right to a "trial by jury as heretofore enjoyed shall remain inviolate," Mo. Const. article 1, section 22(a), applies to statutory causes of action "analogous to" actions entitled to a jury trial under the 1820 Constitution, *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 86 (Mo. banc 2003). This constitutional right applies to statutory actions where damages are the remedy sought because it is a civil action. *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d

140, 142 (Mo. banc 2005). This Court has specifically held that punitive damages under the MMPA are to be determined by a jury, a constitutional guarantee. *Id.* at 143.

This Court should not follow the precedent established in *Adams v. Children's Mercy*, 832 S.W.2d 898 (Mo. banc 1992), where the statutory limitation on noneconomic damages did not violate the right to trial by jury. In *Adams*, this Court found the limitation of damages was a legal issue outside of the purview of the jury and the legislature may limit recovery in statutory created actions. *Id.* at 907. This Court should follow *Diehl*, where the right to a jury trial under the Missouri Human Rights Act was upheld because the right to trial by jury, is a "constitutional right and applies 'regardless of any statutory provision' and is 'beyond the reach of hostile legislation.'" *Diehl*, 95 S.W.3d at 92.

The Georgia Supreme Court found the state's limitation on noneconomic damages in medical malpractice cases violated the right to trial by jury. *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 691 S.E.2d 218, 220 (Ga. 2010). The reduction of the jury's award of damages as required by a statute, "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function" and infringes on the right to a jury trial. *Id.* at 223.

**C. Section 510.265 violates the constitutional guarantee of the right to trial by jury because the jury's determination of punitive damages was usurped by the statutory maximum of punitive damages.**

The statutory limitation on punitive damages in section 510.265 unconstitutionally violates the inviolate right to trial by jury. Section 510.265 was created by the legislature, but

as this Court ruled in *Scott*, the jury has the right to determine punitive damages. The right of trial by jury "shall remain inviolate" guarantees a right. It does not restrict a right. *Diehl*, 95 S.W.3d at 84. This Court should take this inviolate right one step further by allowing the trial court to enforce the jury's full award, not a reduction of that award.

Section 510.265 is also an unconstitutional procedure which infringes on a plaintiff's right to a jury trial. *See Scott*, 176 S.W.3d. at 142. As Judge Wolff wrote in his concurring opinion in *Klotz*, when a statute mandates "grant[ing] remittitur on a wholesale basis without regard to the evidence and without the option of a new jury trial," violates the right to trial by jury. 311 S.W.3d 780 (Wolff, J., concurring). Judge Teitelman specifically addressed limiting punitive damages in his concurring opinion in *Scott* as:

Because each case must be assessed on its own facts, no court has imposed inviolable constitutional limits on the ratio between punitive and compensatory. To do so. would require the courts to supplant the jury's considered decision in favor of an arbitrary limit that may have no relationship whatsoever to the extent and severity of the defendant's misconduct.

...

There is nothing in the law that vests appellate courts with a license to toss aside considered jury verdicts based upon arbitrary ratios or mathematical formulae. To do so would undermine the essential deterrent effect provided by properly awarded punitive damages.

*Scott*, 176 S.W.3d. at 144, (Teitelman, J., concurring).

The right to trial by jury is "always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it" William Blackstone, Commentaries on the Laws of England 350 (U. of Chicago Press 2002). Yet the Overbeys' inviolate right to a trial by jury in regards to this award of punitive damages was violated. The Overbeys had a jury trial and the jury assessed damages, including punitive damages. But the trial court followed the legislature's mandate and reduced the punitive damages to the statutory maximum as provided for in section 510.265. The jury's verdict was not followed, not because of the evidence presented to support it, but because the legislature created an unconstitutional procedure to infringe on the Overbeys' constitutional inviolate right to a trial by jury.

#### **D. Conclusion**

Section 510.265 clearly violates the Overbeys' constitutional right to a trial by jury. The jury's assessment of punitive damages was usurped by the legislature's determination of the maximum amount of punitive damages allowed.

**III. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the Overbeys' right to equal protection provided by article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that under a strict scrutiny review the Overbeys have a fundamental right to a trial by jury and there is not a compelling state reason for the statute to be narrowly tailored to exempt three classes from the statutory limitation on punitive damages, nor under a rational basis review is there a rational reason to exclude three classes from the statutory limitation to achieve a legitimate end, thereby making the Overbeys' final award of punitive damages inadequate as the Overbeys are not treated as similarly situated individuals by the mandate of section 510.265.**

**A. Standard of Review**

This Court reviews constitutional challenges *de novo*. *City of Arnold*, 249, S.W.3d at 204. It is presumed a statute is constitutional and is unconstitutional if it "clearly contravenes some constitutional provision." *Franklin County*, 269 S.W.3d at 29. The party challenging the constitutionality of the statute bears the burden proving the statute "clearly and undoubtedly violates the constitutional limitations." *Id.*

**B. Article I, section 2 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution guarantees equal protection.**

The Equal Protection Clauses of the Missouri Constitution, article I, section 2, and the Fourteenth Amendment of the United States Constitution, provide that similarly situated

people cannot be treated differently without justification. *Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006). A statute violates the equal protection clause when it creates classifications "wholly irrelevant" to the statute's objective that "invidious" discriminate or targets a fundamental right. *Id.* at 846. A classification is constitutional if "any state of facts reasonably may be conceived to justify it." *Id.* at 845.

**1. The Overbeys were denied Equal Protection under a strict scrutiny standard of review as there is not a compelling state interest to narrowly tailor section 510.265.**

A statute involving a suspect class or fundamental right is reviewed under a strict scrutiny standard to determine if the statute is narrowly tailored to achieve a compelling state interest. *Doe*, 194 S.W.3d at 845. A fundamental right is one "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." *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 489-490 (Mo. banc 2009). A fundamental right is any right "explicitly or implicitly guaranteed by the Constitution." *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). Missouri courts have traditionally followed the federal courts determination of fundamental rights, but other provisions may be contained in the Missouri Constitution. *Comm. for Educ. Equality*, 294 S.W.3d at 489-90.

Section 510.265 is subject to strict scrutiny review. The right to a trial by jury is a fundamental right. The right to a trial by jury is explicitly guaranteed by the Missouri and United States Constitutions. While this Court has never expressly held the right to a jury trial

is a fundamental right, Judges Teitelman and Wolff argued in their concurring opinions in *Klotz* that a jury trial is a fundamental right. *Klotz*, 311 S.W.3d at 779, 782 (Wolff, J., concurring; Teitelman, J., concurring). Judge Teitelman argued:

The practical corollary to the denial of full compensation to the young and economically disadvantaged is that, in a case of any complexity, their claims effectively will be extinguished. It takes money to prove medical negligence. Few lawyers will take a complex case of medical negligence on behalf of a poor person whose damages are disproportionately non-economic.

*Id.* at 782 (Teitelman, J., concurring).

This same logic applies to cases like the Overbeys' MMPA claim where there are little compensatory damages but potential for large punitive damages. Individuals in the Overbeys' situation would be less likely to have an attorney represent them with the possibility of little compensatory damages and a limitation in punitive damages.

Section 510.265's limitation on punitive damages does not meet the strict scrutiny standard as it is not narrowly tailored to achieve a compelling state interest. The statute is narrowly tailored, to exclude three specific groups: (1) the State of Missouri, (2) defendants convicted of a felony arising out of the civil lawsuit, or (3) selected housing discrimination victims under the Missouri Human Rights Act. Section 510.265. However there is no compelling state interest to exclude these three groups from the statutory limitation on punitive damages.

There is no compelling reason that (1) the State as a plaintiff, (2) when the defendant was convicted of a felony arising out of the civil lawsuit, or (3) victims of housing discrimination claim, should be allowed to collect the full amount of punitive damages awarded by the jury. Yet, the Overbeys' victory of consumer fraud and pursuing a claim under the MMPA cannot claim the full punitive damages awarded. There is no compelling state reason that the defendants in the three exceptions engaged in more willful, wanton, or outrageous conduct or recklessly acted compared to non-exempt defendants to warrant a higher punitive damages award.

Section 510.265 violated the Overbeys' right to equal protection in three ways.

First, the Overbeys should be classified under the State exemption as they are private attorney generals in bringing their MMPA claim. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007). The rationalization of the "private attorney general" concept is that the "government cannot do everything" and that individuals directly involved with a matter may be in the best position to enforce certain provisions of the statute. *Stiffelman v. Abrams*, 655 S.W.2d 522, 530 (Mo. banc 1983) (referring to the Omnibus Nursing Home Act). The Overbeys in acting as private attorney generals should be exempt from the statutory limitations of section 510.265 as they are in fact representing the State and punitive damages is the only means a private citizen has the punish and deter a defendant. Second, there was the possibility of Franklin facing a felony conviction for actions arising out of the Overbeys' claim. The Attorney General received seventy-three complaints of alleged violations of the MMPA and filed a civil injunction against Franklin. Even though

the Attorney General had authority to file criminal charges, they did not. If a criminal conviction would have been obtained by the Attorney General, the Overbeys would not be subject to the statutory limitation on punitive damages. *See* sections 407.020, 510.265. The Overbeys' right to equal protection was violated as section 510.265 makes an exception for a defendant criminally convicted, but the Overbeys lacked the ability and discretion to file charges and obtain a conviction.

Third, the Overbeys brought a claim under the MMPA. This action is very similar to a housing discrimination claim because of the small compensatory damages. *See Scott*, 176 S.W.3d at 144. There is no compelling reason why victims of housing discrimination do not have a statutory limitation on their punitive damages while victims of consumer fraud bringing a MMPA claim are limited to the punitive damages awarded by the jury.

Section 510.265 is not narrowly tailored to serve a compelling state interest. It is unconstitutional under the strict scrutiny standard of review.

- 2. Alternatively, the Overbeys were denied Equal Protection under a rational basis standard of review as there is not a rational relationship between the statutory exemptions in section 510.265 to achieve a legitimate end.**

If this Court should find a rational basis is the appropriate standard, section 510.265 is also unconstitutional. The rational basis standard determines if the statute has a rational relationship to achieve a legitimate end. *Doe*, 194 S. W3d at 845. The underlying social or economic policies of a statute are not questioned. *Comm. for Educ. Equality*, 294 S.W.3d at

489-490. Again, there is no rational relationship between excluding three specific groups from the statutory limitation on punitive damages and a legitimate end. The only purpose the statutory limitation on punitive damage serves is to limit how much a defendant would have to pay. The statutory limitation does not consider the purpose of punitive damages, which is to punish a defendant for their wanton, willful, outrageous, and reckless actions and deter them from continuing to engage in this conduct. By placing a statutory limitation on punitive damages, the only purpose is to protect the defendant not the victim, who has already suffered. There is no legitimate purpose to have the statutory limitation protect the defendant in every type of lawsuit except the three exemptions set forth in the statute section 510.265.

**C. Conclusion**

Section 510.265 clearly violates the Equal Protection Clauses of the Missouri and United States Constitutions by treating similarly situated individuals differently without a compelling state purpose or a legitimate reason.

**IV. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the prohibition against special legislation prescribed by article III, section 40 of the Missouri Constitution, in that section 510.265 is a special law based on arbitrary classifications and the legitimate purpose may best be served by a general law applying to all classes, thereby the Overbeys' final punitive damage award is inadequate as the statute arbitrary exempts three classes from the statutory limitation on punitive damages.**

**A. Standard of Review**

This Court reviews constitutional challenges *de novo*. *City of Arnold*, 249 S.W.3d at 204. It is presumed a statute is constitutional and is unconstitutional if it "clearly contravenes some constitutional provision." *Franklin County*, 269 S.W.3d at 29. The party challenging the constitutionality of the statute bears the burden proving the statute "clearly and undoubtedly violates the constitutional limitations." *Id.*

**B. Section 510.265 violates the prohibition against special legislation as guaranteed by article III, section 40(30).**

Article III, section 40(30) prohibits special laws "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. article III, section 40(30). A two part prong test applies. It must be determined if the

law is a general or special law, and if so whether a general law could apply. *Treadway v. State*, 988 S.W.2d 508,511 (Mo. banc 1999).

A general law "relates to persons or things as a class" *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177, 184 (Mo. banc 2006), and any classification has a rational basis. *Batek v. Curators of University of Missouri*, 920 S.W.2d 895, 899 (Mo. banc 1996). A general law is considered open-ended if the classification is not permanent. *City of Springfield*, 203 S.W.3d at 184. A special law "includes less than all who are similarly situated." *Batek*, 920 S.W.2d at 899. A special law contains arbitrary classification or does not have a "rational relationship to a legislative purpose." *Treadway*, 988 S.W.2d at 511.

The burden is on the party challenging the special law to show the law is "wholly irrational." *Treadway*, 988 S.W.2d at 511. The test for whether a statute is a special law is whether "the vice that is sought to be corrected so unique to the persons, places, or things classified by the law that a law of general applicability could not achieve the same result." *Id.*

Section 510.265 is a special law. Under the first prong, section 510.265 is a special law for all three of the exemptions: (1) the State as a plaintiff, (2) a felony conviction, and (3) housing discrimination victims under the Missouri Human Rights Act. The exemption for the State as a plaintiff excludes other similarly situated plaintiffs raising similar claims as the State. The Overbeys in bringing an MMPA claim were acting as a private attorney general. In their situation, the Overbeys were in the better position to bring the cause of action than the State, and the Attorney General has been slow and unwilling to actively pursue the

Overbeys' claim through the injunction. This exemption does not include all individuals who are equally situated by preventing the Overbeys as private attorneys generals to be exempt from the statutory limitation on punitive damages. There is no conceivable legitimate purpose to exclude the State from the statutory limitation on punitive damages. A defendant sued by the State does not necessary engage in more willful, wanton, outrageous, or reckless conduct then a defendant sued by a private citizen. There is no legitimate reason that the State should get a greater punitive damage award to get into their coffer then a private citizen. Especially since fifty percent of all punitive damages are required to go into the Tort Compensation Fund, section 537.675.

The exemption for a defendant convicted of a felony arising out of the civil matter excludes defendants who have engaged in illegal actions but have not been criminally convicted. Section 510.265 treats civil defendants differently based on whether the prosecuting attorney or the Attorney General choose to pursue a felony charge and can obtain a conviction. This distinction is based on whether there is probable cause to charge a felony - which would involve different elements then the civil lawsuit, and whether sufficient evidence to prove beyond a reasonable doubt the defendant committed the felony. The civil plaintiff has no role in deciding whether criminal charges will be filed, but it is the civil plaintiffs punitive damages which . are subject to statutory limitation. Section 510.265 treats defendants in the civil matter who have also allegedly violated a criminal law differently based on whether criminal charges are filed and the matter is disposed of favorably to the State, by protecting defendants who have not been convicted of a felony from paying

punitive damages in excess of the statutory limitation. There is no legitimate reason for a convicted defendant to be subject to higher punitive damages than a non convicted defendant. Just because a prosecuting attorney or the Attorney General did not file charges does not mean the non convicted defendant did not break the law, it only means that he was not charged and convicted. As Judge Posner wrote in *Mathias*, 347 F.3d at 670 (7th Cir. 2003):

The award of punitive damages in this case thus serves the additional purpose of limiting the defendants' ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits a tort, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

*Mathias*, 347 F.3d at 670.

Section 510.265 only rewards defendants who break the law but are not charged by limiting the amount of punitive damages they must pay. This is not a legitimate reason to have such a class of people exempted.

The last exemption for housing discrimination victims under the Missouri Human Rights Act excludes other victims of statutory created laws and other plaintiffs who have low compensatory or actual damages. The Overbeys brought a MMP A claim and they have low compensatory damages, \$4,500, against Franklin. The Overbeys are like housing discrimination victims in that the legislature created both causes of action, but different in that housing discrimination victims are statutory exempt from the statutory limitation on punitive damages. A housing discrimination victim could rightfully bring a companion

MMPA claim arising out of their housing discrimination claim as the purchase or lease of real estate is protected by the MMPA. There is no legitimate reason why housing discrimination victims are different from other victims, specifically MMPA victims. There is no reason why this one class was carved out as an exemption.

Section 510.265 is a special law in that all three exemptions are based on arbitrary classifications and have no relationship to a legitimate purpose.

Under the second prong, a general law can achieve the same purpose of the special law. If the purpose of the statutory limitation on punitive damages is to ensure the punitive damage award is appropriate, remittitur under section 537.068 and Rule 78.10 serves that purpose. Due process standards also serve that purpose. If the underlying purpose is to appropriately punish and deter a particular defendant, remittitur under section 537.068 and Rule 78.10 serves that purpose. If the underlying purpose is to allow certain plaintiffs to reap punitive damages in excess of the statutory limitation, or to protect certain defendants from punitive damage awards, there is no rational purpose provided to explain why the three classes are exempt.

**C. Conclusion**

Section 510.265 clearly violates the prohibition against special legislation. The statute makes arbitrary classification which serves no legitimate purpose.

**V. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the due process clause of article I, section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution, in that the due process analysis to determine if the punitive damages are excessive is bypassed by section 510.265 imposing a mandatory and arbitrary limitation of the punitive damages, thereby making the Overbeys' final damage award inadequate as it was not deemed excessive under the due process standards.**

**A. Standard of Review**

This Court reviews constitutional challenges *de novo*. *City of Arnold*, 249, S.W.3d at 204. It is presumed a statute is constitutional and is unconstitutional if it "clearly contravenes some constitutional provision." *Franklin County*, 269 S.W.3d at 29. The party challenging the constitutionality of the statute bears the burden proving the statute "clearly and undoubtedly violates the constitutional limitations." *Id.*

An award of punitive damages is reviewed for abuse of discretion. *Barnett*, 963 S.W.3d at 661. An abuse of discretion is when the punitive award is "so disproportionate to the relevant factors that it reveals improper motives or a clear absence of the honest exercise of judgment." *Id.* The appellate courts reduce or interfere with punitive damage award when it is "manifestly unjust." *Id.* In reviewing whether an award is "manifestly unjust," the evidence is viewed in the "light most favorably to the verdict" by considering the specific

facts of the case and whether the award "fairly and reasonably compensates" the party for its damages. *Gomez v. Construction Design, Inc.*, 126 S.W.3d 366, 375-76 (Mo. banc 2004).

**B. Due process prohibits punitive damages awards which are excessive.**

Due process limits punitive damages awards by requiring "adequate standards and controls" exist to prevent property from being arbitrary deprived. *Call v. Heard*, 925 S.W.2d 840, 848 (Mo. banc 1996). "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition". *BMW of North America v. Gore*, 517 U.S. 559, 568 (1995).

While the jury is primarily responsible for awarding punitive damages, the appellate court reviews punitive damages to ensure the award is not excessive within the due process clause. *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 850 (Mo. App. E.D. 2007). The factors considered by the courts as to whether punitive damages are excessive are: "(1) the reprehensibility of the defendant's misconduct; (2) the disparity between the harm and the punitive award; and (3) the difference between the punitive award and penalties authorized or imposed in comparable cases." *Scott*, 176 S.W.3d at 144 (Teitelman, J., concurring) (quoting *Gore*, 517 U.S. 559). As for reprehensibility, the factors considered are whether (1) the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

The Overbeys' case illustrates a situation where a "particularly egregious act has resulted in only a small amount of economic damages," but the ratio between punitive damages and compensatory damages exceed the single digit ratio while within due process standards. *State Farm Mutual*, 538 U.S. at 425. The judiciary has opposed setting arbitrary ratios to determine when punitive damages exceed due process standards because the courts "view the evidence and all reasonable inferences in the light most favorable to the verdict and disregard all contrary evidence and inferences" *Gore*, 517 U.S. at 576, and the "State's legitimate interest in punishing wrongful conduct and deterring its repetition" *Scott*, 176 S.W.3d at 144. The punitive damage award must also punish and deter the wrongdoer.

The judiciary has also opposed statutory limitations on punitive damages because it would require the judiciary to supplement the jury's decision in favor of an arbitrary limit that may have no relationship whatsoever to the extent and severity of the defendant's misconduct. "Infliction of economic injury, especially when done intentionally through affirmative acts of misconduct or when the target is financially vulnerable, can warrant a substantial penalty." *See Gore*, 517 U.S. at 576. Judge Teitelman best articulated the purpose of not statutorily limiting punitive damages as:

Because each case must be assessed on its own facts, no court has imposed inviolable constitutional limits on the ratio between punitive and compensatory. To do so would require the courts to supplant the jury's considered decision in favor of an arbitrary limit that may have no relationship whatsoever to the extent and severity of the defendant's misconduct.

*Scott*, 176 S.W.3d at 144. (Teitelman, J., concurring).

The Overbeys' case, like many consumer cases, has lower compensatory damages but warrant larger punitive damages. As Judge Teitelman argued in his concurring opinion in *Scott* "the possibility of punitive damages provides one of the most effective deterrents of future misconduct by a defendant or by the others who may be similarly tempted to engage in fraudulent business practices." *Scott*, 176 S.W.3d at 143 (Teitelman, J., concurring). The jury's award of \$1,000,000 in punitive damages against Franklin appropriately punished him for his actions, deterred him from engaging in similar misconduct, and deters others from engaging in similar conduct. *See Burnett v. Griffith*, 769 S.W.2d 780 (Mo. banc 1989).

The \$1,000,000 punitive award is appropriate under due process standards. The degree of Franklin's behavior was reprehensible. Franklin targeted the financially vulnerable by luring customers with the incentive to buy a brand new car with monthly payments of \$43 a month, numerous advertisements, free gasoline, high pressure sales, and promises that payments would remain low for life. Franklin's conduct was repeated many times as evident by the seventy-three complaints filed with the Attorney General's Office and four witnesses who testified at the Overbeys' trial about their experience with Franklin and National Auto Sales. Franklin's conduct was also intentional and deceitful, not only was Franklin aware that the customer would not continue to pay \$43 a month for car payments for new cars but he used arbitration agreements to prevent himself from being sued.

The actual losses were modest. The Overbeys had \$4,500 in actual damages on the claim against Franklin (\$76,000 actual damages against National Auto Sales). Considering

the totality of the case, the ratio between the actual damages and the punitive damages awarded does not interfere with due process standards and the reduction of the award in accordance with section 510.265 deprived the Overbeys of the full measure of their damages and deprived them of due process of law. This is in line with other punitive damages upheld by Missouri<sup>5</sup> and other courts.<sup>6</sup> Courts have upheld large punitive damages based on small

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<sup>5</sup> *Bowers v. S-H-S Motor Sales Corp.*, 481 S.W.2d 584 (Mo. App. W.D. 1972) (\$225.00 in actual damages and \$10,000.00 in punitive damages, a 44 to 1 ratio); *Smith v. New Plaza Pontiac Co.*, 677 S.W.2d 941 (Mo. App. W.D. 1984) (\$400.00 in actual and \$30,000.00 in punitive damages, a 75 to 1 ratio); *Freeman v. Myers*, 774 S.W.2d 892 (Mo. App. W.D. 1989) (\$7,559 in actual damages and \$1,000,000 punitive damages, a 13 to 1 ratio); *DeLong v. Hilltop Lincoln-Mercury, Inc.*, 812 S.W.2d 834 (Mo. App. E.D. 1991) (\$3,000.00 in actual damages and \$75,000.00 in punitive damages, a 25 to 1 ratio); *Krysa v. Payne*, 176 S.W.3d 150 (Mo. App. W.D. 2005) (\$18,449.53 in actual damages and \$500,000.00 in punitive damages).

<sup>6</sup> *Kemp v. American Telephone & Telegraph Co.*, 393 F.3d. 1354 (11th Cir. 2004) (\$115.05 in compensatory damages and \$250,000 in punitive damages, a ratio of 2,172 to 1, for deceptive billing practices). *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672 (7th Cir. 2003) (\$5,000 in compensatory damages and \$186,000 in punitive damages for customers of hotel renting rooms infested with bed bugs); *Parrott v. Carr Chevrolet, Inc.*, 17 P.3d 473 (Or. 2001) (\$11,496 in compensatory damages and \$1,000,000 in

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punitive damages under the state's unlawful merchandise practice act); *TXO Production Corp. v. Alliance Resources Corporation*, 509 U.S. 443 (1993) (actual damages of \$19,000.00 and punitive damages of \$10,000,000.00, a 526 to 1 ratio); *Bishop v. Mid-America Auto Auction, Inc.*, 807 F.Supp. 683 (D. Kan. 1992) (actual damages of \$5,000.00 and punitive damages of \$250,000.00, a 20 to 1 ratio, and actual damages of \$5,000 and punitive damages of \$1,000,000, a ratio of 50 to 1) *Rodriguez-Torres v. Caribbean Forms Mfg.*, 399 F.3d 52 (1st Cir. 2005) (punitive damages award of \$199,999, compensatory damages \$1 for a ratio of 199,999:1 ratio in a Title VII discrimination claim); *Romanski v. Detroit Entertainment, LLC*, 428 F.3d 629 (6th Cir. 2005) (punitive damages of \$600,000 and economic damages of \$279.05 for 2,150:1 ratio, for false arrest and confiscation of lunch voucher by casino security officer); *Deters v. Equifax Credit Information Services*, 202 F.3d 1262 (10th Cir. 2000) (punitive damages of \$295,000; compensatory damages of \$5,000, for 59:1 ratio, for sexual harassment claim); *Goff v. Elmo Greer & Sons Const. Co., Inc.*, 297 S.W.3d 175, 196 (Tenn. 2009) (punitive damages of \$500,000; compensatory damages of \$3,305, for 151:1 ratio, in common-law nuisance action); *State v. Carpenter*, 171 P.3d 41 (Alaska 2007) (punitive damages of \$150,000; economic damages of \$5,042, for 30:1 ratio, in spoliation of evidence claim); *Myers v. Workmen's Auto Ins. Co.*, 95 P.3d 977 (Idaho 2004) (punitive damages of \$300,000; compensatory damages of \$735, for 408:1 ratio, in breach of contract case); *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E.2d 742 (Ga. Ct. App. 2003) (punitive

compensatory damages because it was necessary to deter and punish the defendant. *See Kemp v. American Telephone and Telegraph Company*, 393 F.3d. 1354, 1363-1365 (11th Cir. 2004); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672 (7th Cir. 2003). *See also Hamlin v. Hampton Lumber Mills, Inc.*, 349 OR. 526, WL317781 (Or. 2011), in which the Supreme Court of Oregon reinstated a punitive damage award holding that the amount of compensatory damages, even though small, was still permissible under due process standards and served the state's interest in deterring and punishing violations of the Oregon statute that was in question.

The punitive damage award is also not excessive based on applicable civil penalties and other punitive damages awarded in similar cases. The MMPA allows the State to seek civil penalties of \$1,000 per violation of the MMPA. Based on the fact that seventy-three citizens filed complaints with the Attorney General and 1,056 cars were sold during this time at a net selling price of \$13,715,724 (TR 218-19,239-40), a punitive damage award of \$1,000,000 is not excessive. As Judge Posner of the Seventh Circuit wrote in *Mathias*, punitive damages are an alternative to criminal prosecution especially when outrageous conduct results in slight compensatory damages. 347 F.3d at 676 (7th Cir.2003).

What follows from these principles, however, is that punitive damages should be ad-measured by standards or rules rather than in a completely ad hoc

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damages of \$200,000; compensatory damages of \$8,801 for 22:1 ratio, for car accident caused by intoxicated driver).

manner, and this does not tell us what the maximum ratio of punitive to compensatory damages should be in a particular case. To determine that, we have to consider why punitive damages are awarded in the first place. And still today one function of punitive-damages awards is to relieve the pressures on an overloaded system of criminal justice by providing a civil alternative to criminal prosecution of minor crimes.

*Mathias*, 347 F.3d at 676.

Franklin should be subject to severe punitive damage because he engaged in this conduct on numerous occasions but has only received one judgment in Missouri. "If a tortfeasor is caught only half the time he commits a tort, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away." *Mathias*, 347 F.3d at 670.

Missouri allows a defendant subjected to multiple punitive damage awards arising from the same conduct to receive credit for previously paid punitive damages. Section 510.263.4. Thus, if Franklin would receive another punitive damage judgment, the punitive damages paid to the Overbeys would be credited against the future judgments.

The punitive damage awarded against Franklin does not violate due process standards.

**C. Section 510.265 violates due process by prohibiting the judiciary from considering the due process standards in determining if a punitive damage award is excessive.**

Section 510.265 violates due process as it arbitrarily imposes a statutory limitation on punitive damages. "[A] jury has great discretion in fixing the amount of punitive damages,

and that determination is not to be disturbed unless it is the product of bias or prejudice or is otherwise an abuse of discretion." *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346, 365 (Mo. App. E.D. 1993). However, the judiciary is not authorized to consider the due process factors and determine if the jury's award was a product of bias or prejudice when the punitive damages exceed \$500,000 or five times the actual damages, because section 510.265 requires the punitive damages to be reduced except in the three exceptions. This mandate does not allow the judiciary to account for the specific facts of the case or to determine what an appropriate amount is to deter and punish the particular defendant.

Safeguards are in place to prevent excessive verdicts without having section 510.265. Due process ensures a punitive damage award is reviewed to prevent excessive awards. Rule 78.10 and section 537.068 also allow remittitur motion practice. Section 510.263.4 allows punitive damage awards based on the same conduct to be credited, thereby preventing a defendant from having multiple large punitive damage judgments.

Section 510.265 violates due process by eliminating the judiciary's ability to evaluate a punitive damage award for the due process factors.

#### **D. Conclusion**

The purpose of punitive damages is to punish and deter and by statutory limiting the amount of punitive damages, it cannot punish or deter. Section 510.265 violates the due process clause by infringing on constitutional standards to assess whether punitive damages are excessive. In reviewing the evidence in the light most favorable to the Overbeys' verdict,

the punitive damage award by the jury is not manifestly unjust, and in the Overbeys' case, the punitive damage award of \$1,000,000 is not excessive.

**VI. The trial erred in reducing the jury's award of punitive damages pursuant to section 510.265, because the Overbeys were acting as private attorney generals in bringing their MMPA claim, in that the State of Missouri exception found in section 510.265 applies to the Overbeys as private attorney generals and therefore the reduction of jury's punitive damages award was improper.**

**A. Standard of Review**

This Court reviews statutory interpretations *de novo*. *In re Care and Treatment of Coffman*, 225 S.W.3d 439,442 (Mo. banc 2007). A statute is read as consistent with the constitution when possible. *Id.*

**B. The Overbeys are private Attorney Generals and their punitive damage award should not be limited as they fall within the exception for the State in section 510.265.**

The statutory limitation on punitive damages in section 510.265 does not apply when the State is the plaintiff seeking punitive damages. Section 510.265. A civil plaintiff bringing a MMPA claim is deemed to be a private attorney general. *Hess*, 220 S.W.3d at 769. The rationalization of the "private attorney general" concept is that the "government cannot do everything" and that individuals directly involved with a matter may be in the best position to enforce certain provisions of the statute. *Stiffelman*, 655 S.W.2d at 530.

The Overbeys are advancing state interests and are acting as private attorney generals in their claim against Franklin, as such, the punitive damages award against Franklin should

not be reduced by operation of section 510.265 because the State of Missouri exception in section 510.265 applies to MMPA private attorney generals such as the Overbeys.

The rationale of the "private attorney general" concept is that the "government cannot do everything" and that individuals directly involved with a matter may be in the best position to enforce certain provisions of the statute. *Stiffelman*, 655 S.W.2d at 530. The Overbeys in acting as private attorney generals should be exempt from the statutory limitations of section 510.265.

The MMPA was enacted in 1967 with the Attorney General having sole authority to bring a MMPA claim by injunctions and voluntarily compliance. William Webster, Missouri Attorney General, *Combating Consumer Fraud In Missouri: The Development of Missouri's Merchandising Practices Act*, 52 Mo. L. Rev. 365, 378 (1987). In 1973 section 407.025 was enacted to allow a private cause of action under the MMPA, *Id.* at 376, allowing private citizen to seek actual damages, punitive damages, and attorney's fees, section 407.025. The private cause of action allowed private citizens to act as private attorney generals to enforce the provisions of the MMPA.

When section 510.265 was enacted in 2005, the MMPA already had a long and rich history of private citizens acting as private attorney generals to further the public policy of the MMPA of protecting consumers through their litigation activities. *See Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667, 669 (Mo. banc 2007). When interpreting the MMPA, the guiding principal is the protection of consumers. *Id.* The MMPA provides the trial court broad powers to interpret the "meaning of the statute and . . . leave[s] the court in each

particular instance the determination whether fair dealings ha[ve] been violated." *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009). The courts have broad discretion in applying the MMPA's private attorney general doctrine in applying the exemption for the State in punitive damages under section 510.265.

The Overbeys' litigation activities further the fundamental purpose of the MMPA of consumer protection. The Overbeys' litigation activities benefit the public and all Missouri consumers as the putative damage award will deter wrongdoing by Franklin and others. Punitive damages are the only way a private citizen may punish a defendant. In bringing their MMPA claims against Franklin, the private interests of the Overbeys are the same the State. In fact, both the Overbeys and the State filed a MMPA claim against Franklin in Clay County. The Overbeys filed suit on December 19, 2008, and received a judgment on August 11, 2010. *See Max Overbey v. Capital Finance/Chad Franklin*, 08CY-CVI2436. App. 7-10. The Missouri Attorney General filed a separate MMPA suit against Franklin on August 22, 2008 and it is set for trial in December 2011. *See of State ex rel v. Chad Franklin*, 08CY-CV08140. App. 92-110. The Overbeys, in turning their MMPA claim into a judgment for punitive damages, have advanced the State's interests and the fundamental purpose and public policy of the MMPA, which is the protection of Missouri consumers. The Overbeys, as private attorney generals, were able to bring their MMPA claim to bear on Franklin far faster than the State. In doing so, they supplemented the State's enforcement of the MMPA, where the State, for whatever reason, would not or could not do so.

The State of Missouri exception found in section 510.265 should include private attorney generals like the Overbeys and their MMP A claim should be viewed as being encompassed within the exception for the State in section 510.265 in order to advance the fundamental purpose of the MMPA of the protection of consumers. This is especially true here were both the Overbeys, again acting as private attorney generals, and the State have the same MMPA claims, arising out of the same conduct, but the Overbeys are not entitled to the same punitive damages award. In considering the State's interest in its case against Franklin and the public policy and fundamental purpose of the MMPA with the fact that the Overbeys, acting as private attorney generals, were able to advance these important State interests forward, they should not have their award capped by section 510.265.

**C. Conclusion**

The Overbeys should be included under the State exception in section 510.265. The Overbeys were acting as private attorney general and advancing the State's interest by bringing their MMPA claim. The trial court should interpret the State exception in section 510.265 to include private attorney generals who bring a MMPA claim.

**VII. The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the right to open courts prescribed in article I, section 14 of the Missouri Constitution, in that section 510.265 limits the Overbeys ability to obtain counsel when Franklin was not convicted of a felony arising out of the Overbeys' claim, thereby making the reduction of the Overbeys punitive damage award inadequate as their right to the courts were affected by section 510.265.**

**A. Standard of Review**

A constitutional challenged not raised at the first opportunity can be reviewed for plain error if the error was outcome determinative. *State v. Baxter*, 204 S.W.3d 650,652 (Mo. banc 2006). Plain error occurs when there has been a miscarriage of justice or manifest injustice, based on the facts of the case. *Id.* The Overbeys did not raise this argument in the Plaintiffs' Objection and Challenge to Remittitur Under Section 510.265. The Constitutional argument that section 510.265 violates the open court provision should be reviewed for plain error. The application of section 510.265 is outcome determinative as the statute prevents the jury's award from having its full and intended effect. The application of section 510.265 creates manifest injustice for the Overbeys by limiting the entire punitive damage award from being enacted.

**B. Section 510.265 restricts open access to the courts by imposing limitation on the amount of punitive damages available.**

Article I, section 14 of the Missouri Constitution provides "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." The open courts provision is violated when a statute "arbitrarily or unreasonably bars individuals or classes of individuals from accessing our courts in order to enforce recognized causes of action" violates the open courts provision." *Weigand v. Edwards*, 296 S.W.3d 453, 461 (Mo. banc 2009). The open court provision is a "procedural safeguard that ensures a person has access to the courts when that person has a legitimate claim recognized by law," not a substantive right. *Mo. Alliance for Retired Americans v. Dep't of Labor and Indus. Relations*, 277 S.W.3d 670, 675 (Mo. banc 2009).

In *Kilmer*, this Court held "the prerequisite of a criminal conviction, in order for a plaintiff to proceed with a civil action is ... both arbitrary and unreasonable" 17 S.W.3d at 553. In *Kilmer*, the dram shop law required a criminal conviction before a civil lawsuit could be filed, which was unconstitutional because the civil lawsuit was dependent on a criminal case. *Id.* at 551, 554.

*Adams v. Children's Mercy*, is distinguishable from the present situation. In *Adams*, the open courts provision was not violated by the enacted of statutory limitations on noneconomic damage because it was a refinement of substantive law. 832 S.W.2d at 905-06.

In the Overbeys situation, section 510.265 is a procedural bar by restricting which plaintiffs are exempt from the statutory limitation on punitive damages.

Section 510.265 is a procedural bar as the ability to obtain counsel is limited by section 510.265. A plaintiff with small compensatory damages and the statutory limitation on punitive damages may have a hard time finding an attorney to take the case and dispose of the case in the plaintiffs best interest. *See Klotz*, 311 S.W.3d at 782 (Teitelman, J., concurring). Section 510.265 procedurally limits a plaintiffs ability to find an attorney to represent them and strive to achieve their best interest.

Section 510.265, like in *Kilmer*, makes a civil lawsuit dependent on a criminal conviction for punitive damages in excess of the statutory limits to be awarded. The punitive damages available and awarded by the jury is limited because the prosecuting attorney or Attorney General did not file charges and obtain a conviction. This is a clear procedural violation. The Overbeys have no role in the prosecuting attorney or Attorney General's discretion to file charges, negotiate a plea, or win a trial. The civil and criminal causes of action are separate and distinct; it involves different statutes, different burdens of proof, and different constitutional standards. Restricting a plaintiff s right to receive the punitive damages awarded based on a separate criminal charge is an unconstitutional violation of the right to access the courts.

**C. Conclusion**

The application of section 510.265 to the Overbeys is subject to a plain error review. By requiring Franklin to be convicted of a felony associated with the Overbeys' MMPA claim limits the amount of punitive damages available. This is clearly outcome determinative as the final award is affected by section 510.265. It is a miscarriage of justice to determine the amount of punitive damages by whether a criminal conviction has been obtained.



**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this Brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft WordPerfect program, the undersigned certifies that the total number of words contained in this Brief is 16,068 and has been prepared using WordPerfect X3 in 13 pt. Times New Roman font, and includes a CD ROM which has been scanned for viruses by a Symantec anti-virus program and been found to be virus free.

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DOUGLASS F. NOLAND

**CERTIFICATE OF SERVICE**

I hereby certify that on February 22, 2011, two copies of the Brief of Appellants Estate of Max E. Overbey, Deceased and Glenna J. Overbey, two copies of the Appendix, and one CD ROM containing the Brief was served by first class mail, postage prepaid, to:

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