

Summary of SC94115, *City of Harrisonville v. McCall Service Stations d/b/a Big Tank Oil, et al., The Missouri Petroleum Storage Tank Insurance Fund*

Appeal from the Cass County circuit court, Judge Jacqueline A. Cook

Argued and submitted February 24, 2015; opinion issued August 23, 2016

Attorneys: The city was represented by Steven E. Mauer and Heather S. Esau Zerger of Zerger & Mauer LLP in Kansas City, (816) 759-3300. The fund was represented by Solicitor General James R. Layton and Timothy Duggan of the attorney general's office in Jefferson City, (573) 751-3321. The service station owners were represented by Glenn E. Bradford and Nancy L. Skinner of Glenn E. Bradford & Associates PC in Kansas City, (816) 283-0400.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: This appeal arises from a case in which a city sued the owners of a service station and a state fund for damages it alleges it sustained from petroleum contamination of soil in the city's sewer easement. In a per curiam decision that cannot be attributed to any particular judge, the Supreme Court of Missouri affirms the judgment with respect to the damages awarded against the service station owners and affirms the judgment as to the fund except with respect to the punitive damages awarded against the fund. The Court reverses that portion of the judgment and remands (sends back) the case in the interest of fairness of justice.

All seven judges agree the nuisance and trespass instructions the trial court submitted to the jury were not erroneous and did not give the jury an opportunity to award improper economic damages against the service station owners. The judges all agree the trial court did not err in overruling the service station owners' motion for directed verdict or motion for judgment notwithstanding the verdict because competent evidence in the record supported the compensatory damages award. All seven judges agree the trial court did not abuse its discretion in refusing to reduce the compensatory damages awarded against the service station owners because substantial evidence in the record supported the compensatory damages award. The judges all agree the trial court did not err in overruling the fund's motion for judgment notwithstanding the verdict because the city presented evidence that it relied to its detriment on the representations of the fund's third-party administrator sufficient to support the city's fraudulent misrepresentation claim.

Four judges agree the punitive damages award against the fund was erroneous. Under its statutory scheme, the fund is merely an account in the state treasury and has no conduct for which it can be liable – it is administered and operated by a board of directors. As such, the punitive damages award against the fund is reversed. Four judges agree that, because the jury rendered its verdict before the fund raised the argument that the fund's trustees, and not the fund itself, are the proper parties and because the allegations in the city's petition may state a cause of action against the fund's board of trustees for the actions of its agents, the case is remanded in the interest of justice and fairness.

Judge Zel M. Fischer concurs in part and dissents in part. He would hold the fund failed to preserve its claims that it statutorily was barred from paying punitive damages and that it was not the proper party defendant. He further would hold the city failed to preserve its argument that the statutory cap on damages violates the state constitution and would apply the cap to reduce the jury's award. The city filed its lawsuit after the cap became effective, and in any event, the city has no constitutional right to be free from a law retrospective in operation because this constitutional provision protects only citizens.

Judge Paul C. Wilson concurs in part. Because the fund is not a legal entity and cannot be sued, any judgment resulting from such a suit is a nullity. He would hold the Court has the authority and duty to identify and act upon such a fundamental defect and would vacate the judgment against the fund in its entirety.

Judge Richard B. Teitelman concurs in part and dissents in part. He would reverse the trial court's judgment to the extent it reduces the punitive damages award and would affirm the remainder of the judgment. He would hold the fund waived the claim that it could not be sued, and the statute governing the fund does not define or limit the fund's liability for its own actions. He also would hold the statutory cap on punitive damages does not apply here and that the trial court erred in reducing the punitive damages award on due process grounds.

Facts: The Missouri Petroleum Storage Tank Insurance Fund is a special trust fund created by section 319.129, RSMo, to provide insurance to service station owners for cleanup costs associated with spills and leaks from underground petroleum storage tanks. In September 1997, the owner of a service station in Harrisonville discovered the station's underground petroleum storage tank system was leaking. The owner submitted notice of its claim against the fund. Fund representatives investigated the leak and determined a significant amount of gasoline had leaked into the soil surrounding the tank system. The station owner and the fund's board of trustees hired environmental engineer Bob Fine to determine the extent of the leak. After he discovered the contamination from the leak had migrated offsite toward a nearby creek, he prepared a plan to contain the leak by installing monitoring wells on the streets contiguous to the service station, which subsequently sold to another owner.

In 2003, Harrisonville residents approved a bond issue for a multimillion-dollar project to upgrade the city's sewer system. The city hired an engineering firm to design the project, and Rose-Lan Construction won a competitive bidding process to complete the project. During construction, Rose-Lan found contaminated soil adjacent to the service station. Because it did not have expertise in remediating contaminated soil, it could not complete that portion of the sewer project. The city notified the department of natural resources about the contaminated soil and learned the fund's board of trustees had hired Fine to monitor the contamination since 1997. The board then hired Fine to determine whether gasoline from the service station was responsible for the soil contamination in the city's sewer easement. Fine confirmed it was, and the city began discussions with him about how to address the contaminated soil and complete the project.

The city's engineer estimated it would cost more than \$500,000 to remove and replace the contaminated soil completely. On behalf of the fund, Fine suggested a more cost-effective approach would be to leave the contaminated soil in place and to install petroleum-resistant pipe

and fittings. A company submitted a bid to do the work, but the fund's third-party administrator concluded the bid was too high and made efforts to find a cheaper bid. The administrator contacted multiple companies, determined Midwest Remediation was best suited for the project and helped Midwest's project manager prepare the bid by making suggestions about specific cost items. Midwest's bid ultimately was more than \$15,000 lower than the other company's prior bid. In April 2004, the administrator forwarded Midwest's bid to the executive director of the fund's board of trustees. He discussed the fund's exposure with the executive director and told her he would tell the city that Midwest's costs were reasonable. After a meeting with all relevant parties two days later, the city's administrator and engineer and a Rose-Lan representative left with the understanding that the fund's third-party administrator wanted the city to hire Midwest for the remediation project and that the fund would reimburse the city for the cost of Midwest's work, less the amount the city otherwise would have paid Rose-Lan for the affected portion of the sewer project. After further discussions between the city and the fund's third-party administrator, the city in August 2004 authorized Rose-Lan to subcontract with Midwest to install the petroleum-resistant pipes. The city attorney sent the administrator a letter advising the city was going forward in reliance on the administrator's promise that the fund would pay the full amount of Midwest's costs.

When the city was not so reimbursed, it sued the fund for fraudulent and negligent representation and it sued the service station owners for nuisance and trespass. During trial, the trial court granted the city's motion for a directed verdict regarding the owners' liability. The jury returned a verdict in favor of the city on all claims. It awarded approximately \$172,100 in compensatory damages against the service station owners and the fund. It also awarded \$100 in punitive damages against the service station owners and \$8 million in punitive damages against the fund. The trial court entered judgment accordingly. In ruling on post-trial motions, the court found the city's cause of action accrued before the legislature enacted a statutory cap on punitive damages, but the court nevertheless remitted (reduced) the punitive damages award to \$2.5 million on due process grounds. This appeal follows.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.

Court en banc holds: (1) The nuisance and trespass instructions the trial court submitted to the jury were not erroneous. Because the service station owners cite no authority to support their claim that consequential damages are not recoverable in a common law nuisance action, they abandoned their argument with respect to the nuisance instruction. Because the jury awarded consequential damages under the nuisance claim, no prejudice resulted from the trespass instruction also including the consequential damages language. The owners also failed to establish that the nuisance and trespass instructions gave the jury a "roving commission" on damages (by failing to provide the jury meaningful guidance as to what facts, if found by the jury, would allow it to impose liability). The testimony at trial made clear precisely what damages the city was seeking to collect as a result of the petroleum contamination – those caused by and directly attributable to the trespass of contaminants into its sewer easement. In addition, an isolated excerpt from one witness's testimony did not establish that the instructions permitted the city to seek "benefit of the bargain" damages or otherwise gave the jury an opportunity to award improper economic damages.

(2) The trial court did not err in overruling the service station owners' motion for directed verdict or motion for judgment notwithstanding the verdict because competent evidence in the record supported the compensatory damages award. Even if one witness's testimony was viewed as inconsistent with other evidence the city presented, any inconsistency was for the jury to resolve.

(3) The trial court did not abuse its discretion in refusing to reduce the compensatory damages awarded against the service station owners. Substantial evidence in the record supported the compensatory damages award.

(4) The trial court did not err in overruling the fund's motion for judgment notwithstanding the verdict because the city presented sufficient evidence to support its fraudulent misrepresentation claim. The city presented evidence that it relied to its detriment on the representations of the fund's third-party administrator that promised the cost of Midwest's work would be paid from the fund. The city presented testimony that it incurred additional costs when it hired and paid Midwest to complete the portion of the sewer project in the section contaminated by petroleum that the city otherwise would not have incurred had it demanded that fund representatives remove all contaminated soil so Rose-Lan could complete the sewer project as initially planned.

(5) The award of punitive damages against the fund was erroneous because the city's claims are not permitted against the fund. Creatures of statute like the fund can operate only in accordance with their enabling statutes. The fund's enabling statute, section 319.131, outlines two instances permitting coverage from the fund – for its participants' cleanup costs and for third-party claims involving property damage or bodily injury. There is no authority for payment from the fund of any other types of claims. Moreover, the fund cannot be liable for its own conduct. Under its statutory structure, the fund is merely an account within the state treasury. As such, the fund cannot provide coverage, pay claims or take any other action – instead, some person or entity must be authorized to do these things using the fund. Section 319.129 provides that the fund is administered and operated by a board of trustees. The city, however, sued the fund, not its board of trustees. This Court reverses the punitive damages award against the fund but not the compensatory damages award because the fund did not appeal the compensatory damages award.

(6) Because the jury rendered its verdict before the fund raised the claim that the fund's trustees – and not the fund itself – are the proper parties, and because the allegations in the city's petition may state a cause of action against the fund's board of trustees for the actions of its agents, the cause is remanded in the interest of fairness and justice.

Opinion concurring in part and dissenting in part by Judge Fischer: The author dissents from the Court's holdings described in paragraphs 5 and 6, above, but concurs in its other holdings.

(1) The author disagrees with the per curiam opinion's recharacterization of the fund's position on appeal as a failure to state a claim for which relief can be granted because that was not the fund's position at trial or on appeal. Further, the fund failed to preserve its claims that it statutorily was barred from paying punitive damages and that it was not the proper party defendant. It appeals only the trial court's denial of its motion for judgment notwithstanding the verdict, but it did not raise either of these claims in that motion, or in its earlier motion to

dismiss, or as an affirmative defense. Rather, it asserted its legal defense for the first time in its motion for a new trial. The two motions are distinct. A party that moves for a directed verdict at the close of all evidence later may move to have the verdict set aside and to have judgment entered in accordance with the motion for directed verdict. A new trial, however, is available only when trial error or misconduct by the prevailing party incited prejudice in the jury. Rule 72.01(b). The fund did not allege either basis in its motion for judgment notwithstanding the verdict, and, therefore, these claims are waived.

(2) Because it did not raise it in the trial court, the city failed to preserve its argument that the statutory cap on damages violates the right to a jury trial found in article I, section 22(a) of the Missouri Constitution. In the trial court, the city argued only that it was exempt from the reduction in damages required by the statutory cap because the city was “the state of Missouri” and, therefore, explicitly exempt from the statute.

(3) Application of the statutory cap on punitive damages to the damages awarded to the city does not violate the ban on retrospective laws in article I, section 13 of the Missouri Constitution. The statute applies to “all causes of action filed after August 28, 2005,” and the city did not file its lawsuit until November 2005. The trial court held application of the damages cap violated the fund’s due process rights. The fund, however, is a not citizen and, therefore, does not have due process rights. Just as the fund has no due process rights, the city has no constitutional right to be free from a law retrospective in operation. The constitutional provision only protects citizens. The statutory cap, therefore, should be applied to reduce the jury’s award.

Opinion concurring in part by Judge Wilson: The author concurs in the result the Court reaches and much of its reasoning. He writes separately because the fund, simply stated, is not a legal entity. Because it cannot be sued, any judgment resulting from such a suit is a nullity. Regardless of when or how such a defect is pointed out, it is inescapable. He would hold the Court has the authority and duty to identify and act upon such a fundamental defect and would vacate the judgment against the fund in its entirety.

Opinion concurring in part and dissenting in part by Judge Teitelman: The author dissents from the Court’s opinion to the extent it reverses the award of punitive damages against the fund and in favor of the city. The fund never raised the issue that the city should have sued the trustees rather than the fund and, therefore, waived this issue. It has litigated this case for more than a decade, presumably authorized by its trustees. Although section 319.131 govern the fund’s “coverage,” it contains no language defining or limiting the fund’s liability for its own actions. As such, the author would hold the fund cannot engage in fraud and misrepresentation without impunity. The author also would hold the statutory cap on punitive damages does not apply because retroactively limiting the city’s damages after its cause of action accrued violates article I, section 13’s ban on retrospective laws. He further would hold the trial court erred in reducing the punitive damage award to \$2.5 million on due process grounds, as the fund is not a person and, therefore, does not have due process rights. He would reverse the judgment to the extent it reduces the punitive damages award and would affirm the remainder of the judgment.