

IN THE SUPREME COURT OF MISSOURI

APPEAL NO. SC92072

**AMERICAN EAGLE WASTE INDUSTRIES LLC, *et al.*,
Respondents/Cross-Appellants,**

v.

**ST. LOUIS COUNTY, MISSOURI,
Appellant/Cross-Respondent.**

**APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY
DIVISION 13
HON. BARBARA WALLACE**

Brief of Appellant/Cross-Respondent St. Louis County, Missouri

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JURISDICTIONAL STATEMENT

This action involves *inter alia* the question of whether S.B. 54 (2007), which amended Section 260.247 RSMo to create a requirement that political subdivisions provide two years' notice to existing waste haulers prior to expanding solid waste collection services into a new area, was enacted in violation of Mo. Const. Art. III, Section 23 which requires that no bill shall contain more than one subject which shall be clearly expressed in its title. S.B. 54 purported in its title to relate to "environmental regulation" but has been interpreted by the Missouri Court of Appeals, Eastern District, as instead relating to the protection of business interests; hence, this appeal involves the validity of a statute of this State and the Supreme Court of Missouri has exclusive jurisdiction under Mo. Const. Art. V, Section §3.

STATEMENT OF FACTS

Summary

Plaintiffs American Eagles Waste Industries LLC, Waste Management of Missouri Inc., and Meridian Waste Services LLC (“Haulers”), seek \$23 million in damages because they claim they did not receive proper notice of the St. Louis County waste collection program (“Program”) which went into effect on **October 1, 2008**.¹ *Plaintiffs’ First Amended Petition for Declaratory Judgment and Damages (“First Amended Petition”), Legal File (“LF”) pp. 47-65; Exhs. 3, 4, 5.* County’s Program had been authorized by an ordinance adopted by the St. Louis County Council nearly two years earlier on **December 12, 2006**, *Exh. A p. 56*, and Haulers acknowledge that they were immediately aware of the Program authorized therein. *Exhs. D-1 through D-3 (Answer #13).* Haulers each submitted one or more bids to participate in the Program. *Defendants’ Statement of Undisputed Material Facts (“Defts’ Statement”), LF pp. 87, 93; Exh. B to Defts’ Statement, LF p. 90.*

Haulers contend that they were entitled under Section 260.247 RSMo (2007) to notice by certified mail of County’s Program, two years in advance of the Program’s initiation; County contends that the notice requirements of Section 260.247 RSMo were not applicable to County’s Program and created no rights in Haulers. The trial court entered partial summary judgment in Haulers’ favor on liability for breach of implied-in-law contract, *LF p. 121; Appendix A1*, and then entered judgment in Haulers’ favor in the

¹ Service in one of the eight waste collection areas began earlier, on July 1, 2008. *LF 54.*

amount of \$1,159,903.90 after bench trial on May 31, 2011. *LF p. 160; Appendix A9.*

Relevant Facts

On December 12, 2006, the St. Louis County Council passed Ordinance No. 23,023. *Exh. A, p. 56.* Sections 607.1300 and .1310 of that ordinance directed the County Executive to establish waste collection areas within unincorporated St. Louis County by January 15, 2008, and directed the award of contracts by the County Council for waste collection services in those areas. *Exh. A, p. 56; Appendix A17.*

All three Haulers first became aware of Ordinance 23,023 “on the day it was enacted.” *Exhs. D-1, D-2, D-3 (Answer #13).* Twenty-five days later, Haulers were again informed of the impending Program when County’s Solid Waste Program Manager, by letter dated January 8, 2007, advised each Hauler that County’s Waste Management Code had been amended to impose new requirements with respect to waste collection services. *Exhs. G-1, G-2, G-3.* The letter also informed Haulers that “[t]rash collection districts for unincorporated St. Louis County are to be established and contracts in place by January 15, 2008.” *Id.* Haulers were directed to the website at which the entire ordinance was available, and were invited to attend a meeting on January 17, 2007, “to discuss compliance with the Code.” *Id.* They were asked to “come with your ideas of how we can better implement these new provisions and any obstacles you foresee.” *Id.* Each Hauler admits to having received the January 8, 2007 letter sent by County’s Solid Waste Program Manager. *Transcript (“Tr.”) pp. 136-37.*

Throughout 2007 and 2008, Haulers through their representatives appeared numerous times at County Council meetings to express their opinions about and make

suggestions for the Program. *Exh. B to Defts' Statement, LF pp. 90-91.* Charles Barcom of Hauler Meridian Waste Services met with various County officials, including County's Director of Public Works, to express concern about the proposed bonding requirement, and County subsequently reduced the amount of the required bond to accommodate Meridian Waste and other smaller haulers. *Id.* Haulers all attended two separate pre-bid meetings, at which they were given the opportunity to ask questions and give comments with respect to the proposed County bid package. *Id.*

As County was moving forward with implementation of the Program it had announced in 2006, then-Governor Matt Blunt signed into law S.B. 54 (2007). That law, which had an effective date of January 1, 2008, was titled "An Act To repeal sections 260.200 [et seq.] RSMo, and to enact in lieu thereof thirty-nine new sections relating to environmental regulations, with an effective date and penalty provisions." *Exh. B. pp.1, 57.* Included in S.B. 54 was an amendment to Section 260.247 RSMo to require that:

Any . . . political subdivision which expands solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities . . . shall notify the private entity or entities of its intent to provide solid waste collection services in the area by certified mail . . . [and] shall not commence solid waste collection in such area for at least two years from . . . the effective date of the notice . . .²

² Political subdivisions can be relieved of the obligation to give notice if they contract with existing providers to continue services for the two-year period and pay what the

Exh. B, p. 15; Appendix A18.

Thereafter, County continued with implementation of the Program of which Haulers had received actual notice in December of 2006. Invitations for bids to provide Program services in each of the eight collection areas were published following the pre-bid meetings. *First Amended Petition, LF pp. 54-55; Exh. B to Defts' Statement.* Each of the Haulers submitted one or more bids to provide waste collection services under County's Program, *Defts Statement, LF pp. 87, 93; Exh. B to Defts' Statement, LF p. 90,* but each Hauler failed to submit the lowest responsible bid in any of the eight collection areas. *Exh. B to Defts' Statement, LF p. 90.* Exactly one day after all the bids for services had been opened and it was evident that Haulers had not submitted any low bids, Haulers filed this lawsuit on May 29, 2008. *LF pp. 1, 18.* Other companies were ultimately awarded waste collection contracts for each of the eight collection areas. *First Amended Petition, LF p.55.*

As originally filed, Haulers' petition sought declaratory relief but did not contain a request for damages.³ *LF p. 18-29.* Claiming superior constitutional authority with

providers would have received, if the services provided are substantially the same. *Exh. B, p. 57.*

³ Haulers' petition also included a count for mandamus, which was denied and is not germane to this appeal. *LF p. 1.* Both the original and amended petitions named County's Purchasing Director as a defendant, but she was later voluntarily dismissed by Haulers. *LF pp. 18, 47, 13.*

respect to municipal functions such as trash collection, County moved to dismiss Haulers' petition for failure to state a claim for which relief could be granted. *LF p. 30.* County's motion was granted and judgment for County was thereafter entered by the trial court. *LF pp. 32-34.* The Eastern District, however, reversed the trial court for the reason that "by engaging in a determination of the merits, the trial court implicitly acknowledged that Haulers had adequately stated a claim" for a declaration of their rights under Section 260.247 RSMo. *State ex rel. American Eagle Waste Industries v. St. Louis County*, 272 S.W.3d 336, 340-41 (Mo. App. 2008) ("*American Eagle*"), *LF p. 35-45.* In addition to overruling the dismissal, the Eastern District volunteered its opinion, "in order to guide the court's determination on remand," *LF p. 41*, that Section 260.247 RSMo had "nothing to do" with trash collection but instead accommodated "the state policy of protecting private entities" whose business was trash collection.⁴ *LF p. 43-44.* The Eastern District acknowledged that County was authorized under Art. VI Section 18(c) of the Missouri Constitution "to enter the business of trash collection, and even to take it out of the hands of private collectors." *LF p. 10.*

By the time the Eastern District issued its opinion in December of 2008, County's

⁴ The court went so far as to state that it would be impermissible for County to enact an ordinance which did not require the statutory notice period, even though County had not yet raised its affirmative defenses and the parties had not briefed the question whether there might be other defenses that would preclude application of newly amended Section 260.247 RSMo to County. *American Eagle*, *LF p. 44.*

Program had been fully implemented in all eight collection districts. *First Amended Petition*, LF p. 55. Haulers filed a First Amended Petition requesting damages in addition to declaratory relief in their five-count petition for: declaratory judgment (Count I), LF pp. 57-59; breach of implied contract (Count II), LF pp. 59-60; anti-trust violation (Count III), LF pp. 60-62; taking of private property without just compensation (Count IV), LF pp. 62-63; and violation of due process (Count V), LF pp. 63-65. County removed the lawsuit to federal court, LF p. 4, and moved to dismiss Haulers' First Amended Petition as moot (Count I) and for failure to state a claim (Counts II-V). LF p. 66. The district court dismissed Haulers' federal due process count for failure to state a claim, dismissed Haulers' federal taking of property count without prejudice as being not yet ripe, and remanded the remaining counts to State court. *Memorandum and Order*, LF pp. 96-107.

Back in State court, County again moved to dismiss Haulers' First Amended Petition due to mootness (Count I) and failure to state a claim (Counts II and III). LF p. 108. The trial court held that Count I was moot but declined to dismiss it, LF pp. 109-113; granted County's motion to dismiss Haulers' antitrust count, LF p. 110; and denied County's motion to dismiss Haulers' implied-in-law contract claim after finding that "County was in fact benefited in that it fully implemented its trash collection program without having to pay the existing haulers." *Id.*

On September 23, 2010, the trial court granted Haulers' Motion for Partial Summary Judgment as to liability for breach of implied-in-law contract, rejecting County's defenses that Haulers had actual notice of County's Program; that Haulers had

waived any objection to the Program by participating in the implementation process and submitting bids; that S.B. 54 enacting the notice requirement violated the single-subject requirement and was unconstitutional; that County had substantially complied with the statutory notice requirements; that the notice requirement should not be applied retrospectively to County's Program; that County's superior legislative authority meant County was not required to comply with the notice provisions of Section 260.247 RSMo; and that County had not accepted and unjustly retained any benefit from Haulers that would give rise to a claim for breach of implied-in-law contract.⁵ *LF pp. 115-121; Appendix A1.*

Following entry of partial summary judgment for Haulers on their claim for contract implied in law, the court rejected restitution as a measure of damages and ruled

⁵ The trial court declined to address Count I for declaratory relief in ruling on Plaintiffs' Motion for Partial Summary Judgment because "the Court has already ruled Plaintiffs' request for declaratory relief is moot," *LF p. 115*, and there was no reference to Count I in the trial court's final judgment entered on September 2, 2011. *LF pp. 156-160.*

Notwithstanding this technical omission, it appears that the court viewed Count I as resolved and intended its September 2nd order to serve as "the determination of rights of the parties to an action and [to show] in intelligible language the relief granted." *Paulson v. Dir. of Revenue*, 724 S.W.2d 511, 513 (Mo. banc 1987), quoting *Stith v. J.J. Newberry Co.*, 79 S.W.2d 447, 461 (Mo. 1934). None of the parties have appealed as to Count I.

that County would be liable to Haulers for the amount of revenues the Haulers would have received for the two-year period beginning when County signed service contracts with its Program haulers. *Order/Judgment, LF pp. 123-127; Appendix A9*. In accordance with her determination that only (gross) revenues were relevant, the court also rejected County's motion to compel discovery of the expenses Haulers would have incurred in producing those revenues, because the trial court believed that "information regarding expenses or net profit is not reasonably calculated to lead to discovery of admissible evidence of Plaintiffs' damages." *LF pp. 128-29*.

County moved for reconsideration of the court's decision granting Haulers' Motion for Partial Summary Judgment and asked that judgment be entered on the pleadings in County's favor. *LF p. 144*. The trial court denied County's motion on April 6, 2011. *LF p. 146*. County immediately sought a writ of prohibition from the Missouri Supreme Court on April 12th, *LF p. 14*, but County's petition was denied on May 2nd. *LF p. 15*. Trial was held on May 31, 2011, for determination of damages owed to Haulers under Count II for breach of implied-in-law contract. *LF p. 16*.

Before trial started, County stressed its objection to using any measure of damages other than for breach of implied-in-law contract:

MS. REDINGTON: [B]efore the case begins I wanted to put on the record that the County is not consenting to try the case as a statutory tort. We believe it's been pled as an implied contract and so that -- the only testimony that would be relevant would be what benefits were conferred by the Plaintiffs on St. Louis County and what benefits were unjustly retained by the

County. That is in contradiction with what the Court has said in its order of damages, and I just don't want to waive that objection by cross-examining on the measure of damages as the Court has set out.

Tr. p. 5. County then objected at trial to Haulers' retained accountant being allowed to testify (without any supporting documentation or testimony having been introduced into evidence) about damages based on lost revenues rather than the value of any benefit conferred upon County by Haulers, *Tr. p. 14*, which objection was overruled but allowed to run as a continuing objection. *Tr. p. 15.* Haulers did not present any evidence that they conferred a benefit of value upon County or that County unjustly retained any benefit of value which should be disgorged and returned to Haulers.

Haulers did not testify at trial or introduce any records of lost customers or lost revenues, either net or gross. *Tr. p. 2.* Their only witness was a Certified Public Accountant, Eric Ficken ("Accountant"). Accountant testified - over County's objections that his testimony lacked foundation and was based on documents and evidence which had not been admitted at trial - that "I measured a total of \$23 million [in damages] for all three companies related to the loss of revenue associated with the districting." *Tr. pp. 14-15; Pltfs' Exhs. 3, 4, 5.*

Accountant acknowledged that he had never in the past used gross revenues as a measure of business losses, *Tr. p. 108*, that it would have been impossible for Haulers to have generated revenues for waste collection services without having incurred expenses for labor and equipment, *id.*, and that his estimate of lost revenues was based on those revenues that Haulers claimed they would have billed rather than those that they would

actually have received. *Tr. pp. 97-98*. He further admitted that his opinion was based entirely on unaudited information provided to him by those same Haulers who stood to benefit from Accountant's testimony on their behalf:

Q. Let's get back to the Plaintiff as a group.

None of your testimony today is based on financial statements that you or your company have audited, is that correct?

A. That is correct.

Q. Your opinion of lost revenues is only as solid as the information that the Plaintiffs gave you?

A. That is correct.

Tr. p. 90.

County moved to strike Accountant's testimony, *Tr. pp. 112, 119*, objected to the admission of Accountant's reports on lost gross revenues, *Tr. pp. 63-65*, and moved for judgment at the close of Haulers' case based in part on Haulers' failure of proof. *Tr. p. 120, Motion for Judgment, LF p. 152*. The trial court reiterated its rejection of County's defenses, *Tr. p. 120*, overruled County's Motion for Judgment, *id.*, and entered judgment for Haulers in the total amount of \$1,159,903.90.⁶ *LF p. 160*. This appeal, and Haulers'

⁶ Although the court had previously stated that Section 260.247 RSMo required as the measure of damages the amount "at least equal to the amount the private entity or entities would have received for providing such services during that period," *LF p. 124*, and had denied County's requests for discovery of Haulers' expenses associated with generation

cross-appeal, followed.

of those amounts, *LF pp. 128-29*, the court nonetheless declined to award Haulers the \$23 million in lost gross revenues that they sought. Instead, the court found after hearing the evidence at trial that “the amount of Plaintiffs’ damages has been inflated,” *LF p. 159*, and based its award on a 5% profit margin for the \$23 million of revenue that Haulers had told Accountant they would have billed to existing, and predicted future, customers.

POINTS RELIED ON

I. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED IS INAPPLICABLE TO COUNTY DUE TO COUNTY'S SUPERIOR CONSTITUTIONAL GRANT OF LEGISLATIVE POWER WITH RESPECT TO THE MUNICIPAL FUNCTION OF WASTE COLLECTION.

Cases

1. *State ex rel. Shepley v. Gamble*, 280 S.W.2d 656 (Mo. banc 1955)
2. *Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962)
3. *State ex rel. City of Macon v. Belt*, 561 S.W.2d 117 (Mo. banc 1978)
4. *Weber v. St. Louis County*, 342 S.W.3d 318 (Mo. banc 2011)

Constitution

Mo. Const. Art. III, Section 18(c)

II. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED IS VOID FOR

VIOLATION OF MO. CONST. ART. III §23 IF IT PERTAINS TO BUSINESS PROTECTION AND NOT TO ENVIRONMENTAL REGULATION AS STATED IN THE TITLE OF S.B. 54 (2007) AMENDING IT.

Cases

1. *Hammerschmidt v. Boone County*, 877 S.W.2d 98 (Mo. banc 1974)
2. *Natl. Solid Waste Management Assoc. v. Dir. of Dept. of Natural Resources*, 964 S.W.2d 818 (Mo. banc 1998)
3. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000)
4. *Cormack v. Director of Agriculture*, 945 S.W.2d 956 (Mo. 1997)

Constitution

Mo. Const. Art. III, Section 23

III. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED BECAME EFFECTIVE ONLY ON JANUARY 1, 2008 AND DID NOT OPERATE RETROSPECTIVELY TO BAR COUNTY FROM CONTINUED IMPLEMENTATION OF ITS WASTE COLLECTION PROGRAM AS ADOPTED IN 2006.

Cases

1. *Wellner v. Dir. of Revenue*, 16 S.W.3d 352 (Mo. App. 2000)
2. *Doe v. Blunt*, 225 S.W.3d 421 (2007)
3. *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409 (Mo. banc 1974)
4. *State ex rel. Koster v. Olive*, 282 S.W.3d 842 (Mo. banc 2009)

IV. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT RECOVERY FOR BREACH OF IMPLIED-IN-LAW CONTRACT, IN THAT THEY DID NOT PROVE THAT THEY CONFERRED A BENEFIT UPON COUNTY THAT WAS ACCEPTED AND UNJUSTLY RETAINED BY COUNTY.

Cases

1. *Donovan v. Kansas City*, 175 S.W.2d 874 (Mo. 1943)
2. *Investors Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007)
3. *Employers Ins. of Wausau v. Crane Co.*, 904 S.W.2d 460 (Mo. App. 1995)
4. *Karpierz v. Easley*, 68 S.W.3d 565 (Mo. App. 2002)

V. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST

AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT A CLAIM FOR EITHER RESTITUTION OR DAMAGES, IN THAT THE TESTIMONY AND EXHIBITS SUPPORTING THEIR CLAIM ALL WERE PROVIDED BY A HIRED ACCOUNTANT WHO RELIED ONLY ON HEARSAY DATA THAT WAS NOT REASONABLY RELIABLE SO THAT THE TESTIMONY AND EXHIBITS SHOULD HAVE BEEN EXCLUDED PURSUANT TO SECTION 490.065 RSMo.

Cases

1. *Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604 (Mo. banc 2006)
2. *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117 (Mo. banc 1995)
3. *State ex rel. State Highway Commission v. Kimmell*, 435 S.W.2d 354 (Mo. 1968)
4. *State v. Dockery*, 300 S.W.2d 444 (Mo. 1957)

VI. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS WAIVED AND WERE ESTOPPED FROM ASSERTING THEIR RIGHT TO CHALLENGE COUNTY'S WASTE COLLECTION PROGRAM IN THAT HAULERS VOLUNTARILY PARTICIPATED IN THE PROGRAM AND CANNOT CHALLENGE THE PROGRAM'S VALIDITY AFTER HAVING ACCEPTED BENEFITS FROM IT.

Cases

1. *St. Louis Public Service Co. v. City of St. Louis*, 302 S.W.2d 875 (Mo. banc 1957)
2. *State Farm Mutual Automobile Insurance Agency v. Brown*, 776 S.W.2d 384
(Mo. banc 1989)

VII. TRIAL COURT ERRED IN ENTERING JUDGMENT IN THE AMOUNT OF \$1,156,903.90 FOR HAULERS BECAUSE EVIDENCE OF ALLEGED DAMAGES SUBSEQUENT TO DECEMBER 12, 2008 SHOULD HAVE BEEN EXCLUDED, IN THAT HAULERS HAD ACTUAL NOTICE OF COUNTY'S INTENT TO IMPLEMENT A WASTE COLLECTION PROGRAM ON DECEMBER 12, 2006 AND THE TWO-YEAR NOTICE PERIOD ESTABLISHED IN SECTION 260.247 RSMo BEGAN TO RUN ON THAT DATE.

Cases

1. *Heintz v. Woodson*, 758 S.W.2d 452 (Mo. banc 1988)
2. *Weber v. St. Louis County*, 342 S.W.3d 318 (Mo. banc 2011)
3. *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934 (Mo. App. 1984)
4. *Baxley v. Jarred*, 91 S.W.3d 192 (Mo. App. 2002)

ARGUMENT

I. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED IS INAPPLICABLE TO COUNTY DUE TO COUNTY'S SUPERIOR CONSTITUTIONAL GRANT OF LEGISLATIVE POWER WITH RESPECT TO THE MUNICIPAL FUNCTION OF WASTE COLLECTION.

STANDARD OF REVIEW

A request for judgment based on failure to state a cause of action upon which relief can be granted attacks the plaintiff's pleadings and does not involve the weighing of any facts. *See State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

LEGISLATIVE AUTHORITY OVER MUNICIPAL FUNCTIONS

Although the General Assembly has significant power with respect to enactment of legislation, its power is not unlimited. The General Assembly “has the power to enact any law not prohibited by the constitution, and the state constitution . . . is a limitation on legislative power.” *State ex inf. Danforth v. Merrell*, 530 S.W.2d 209, 213 (Mo. banc 1975). Thus the General Assembly may legislate only absent a constitutional prohibition

to the contrary. See *Committee for Educational Equality v. State*, 294 S.W.3d 477, 488 (Mo. banc 2009). “Regardless of legislative intent, it should be obvious that a statute cannot supercede a constitutional provision.” *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d 338, 341 (Mo. banc 1993).

The General Assembly’s legislative power is limited with respect to municipal functions in the unincorporated area of a constitutional charter county. Here, it is irrefutable that 1) Section 18(c) of Article VI of the Missouri Constitution confers upon charter counties (including St. Louis County) superior legislative power with respect to municipal functions; 2) waste collection is a municipal function; and 3) Section 260.247 RSMo impinges on political subdivisions’ power to control waste collection so that its restrictions are therefore inapplicable to charter counties and cannot serve as the basis for any claim against County.

1. County has superior legislative power pertaining to municipal functions.

St. Louis County is a constitutional charter county. *St. Louis County v. City of Manchester*, 360 S.W.2d 638, 639 (Mo. banc 1962). It is beyond dispute that St. Louis County, as a constitutional charter county, may perform functions of a local or municipal nature without interference from the General Assembly:

A county under the special charter provisions of our constitution . . . may perform functions of a local or municipal nature at least in the unincorporated parts of the county. *These are constitutional grants which are not subject to, but take precedence over, the legislative power.*

State ex rel. Shepley v. Gamble, 280 S.W.2d 656, 660 (Mo. banc 1955) (emphasis added).

This superior legislative authority as to municipal functions derives directly and explicitly from Art. VI, Section 18(c) of the Missouri Constitution. *Appendix A15*. Section 18(c) states, clearly and succinctly, that a county's charter "may provide for the vesting and exercise of legislative power pertaining to any and all services of a municipality or political subdivision . . . in the part of the county outside incorporated cities" ⁷ *Id.* In *State ex rel. Shepley v. Gamble*, 280 S.W.2d at 227, the court recognized the extraordinary authority that was thereby conferred upon charters when it observed that "the county charter provisions are wholly unlike others in the constitution."

The court's determination in *Shepley v. Gamble*, that the legislative power with respect to municipal functions had been vested in charter counties by the explicit language of Section 18(c), was itself explicit and dispositive of that issue. The *Shepley* decision alone provides ample support for County's contention that its power to regulate local matters (such as trash collection) takes precedence over State legislative enactments.

But County need not rely only upon *Shepley v. Gamble*. Time after time, this Court has reiterated that County's charter takes precedence over the General Assembly's legislative acts with respect to local matters. *See, e.g., Casper v. Hetlage*, 359 S.W.2d 781 (Mo. 1962) (upholding County zoning ordinances which did not conform to the

⁷ The court may take judicial notice pursuant to Mo. Const. Art. VI, Section 18(j), that County's Charter provides for the exercise of that power by County. *See St. Louis County Charter Section 2.180.22 and .23, Appendix A16.*

procedural requirements dictated for counties by state statute); *St. Louis County v. City of Manchester*, 360 S.W.2d at 641 (“the grant of municipal powers to charter counties under §18 of Art. VI is meaningful and vests rights which **cannot be taken away or impaired** by the general assembly. . . .”) (emphasis added).

Significantly, the breadth of constitutional delegation of police power to charter counties has *expanded* since the Missouri Supreme Court first recognized charter counties’ superior municipal authority in *Shepley v. Gamble*, *Casper v. Hetlage*, and *St. Louis County v. City of Manchester*, *supra*. At the time those cases were decided, Section 18(c) of Article VI of the Constitution enumerated only “public health, police and traffic, building construction, and planning and zoning” as the municipal functions over which charter counties could exercise legislative power.⁸ In 1970, however, Article VI, Section 18(c) of the Missouri Constitution was amended to its present form, to state more broadly that:

The charter may provide for the vesting and exercise of legislative power pertaining to *any and all* services and functions of any municipality or political subdivision, except school districts, in the part of the county outside incorporated cities

(Emphasis added).

Subsequent to this change, courts have continued their uniform recognition of St.

⁸ County requests that the court take judicial notice of Mo. Const. Art. VI, Section 18(c) (1945), as set forth in *Casper v. Hetlage*, 359 S.W.2d at 784. *Appendix A14*.

Louis County's charter authority to legislate with respect to municipal issues, free from the General Assembly's oversight; all matters local are subject to County authority in the unincorporated area. *See Chesterfield Fire Protection District v. St. Louis County*, 645 S.W.2d 367 (Mo. banc 1983) (establishment of a fire standards commission held authorized by Section 18(c)); *K-Mart Corp. v. St. Louis County*, 672 S.W. 2d 127 (Mo. App. 1984) (County's power to provide police protection held to include authority to regulate private security personnel); *Treme v. St. Louis County*, 609 S.W.2d 706, 711 (Mo. App. 1980) (County zoning ordinances took precedence over statutory provisions because "in local matters the County derives its powers from . . . Art. VI, Sec. 18(c) of the Constitution and not from the statutory grant of power. . . ."); *State ex rel. Walmar Investment Co. v. Mueller*, 512 S.W.2d 180, 185 (Mo. App. 1974) (County found to have authority under Section 18(c) to impose building regulations, which "regulations by a municipality are an exercise of the police power"); *State ex rel. St. Louis County v. Campbell*, 498 S.W.2d 833, 836 (Mo. App. 1973) ("It has consistently been held that the power of condemnation is a matter of local concern so that the procedure specified in the charter supersedes the statutes."). *See also Barber v. Jackson County Ethics Commission*, 935 S.W.2d 62, 66 (Mo. App. 1996) (stating that the investigation of ethics violations is a "valid local interest" as to which a charter county may vary from State procedures). At this point, a charter county's superior power with respect to municipal functions is beyond question.

2. Waste collection is a municipal function.

Just as it is indisputable that a constitutional charter county may perform

municipal functions without interference from the General Assembly, so, too, it is impossible to deny that the regulation and disposition of trash, garbage and other waste is a municipal function. A plethora of cases reflects the courts' recognition over the years that trash collection and the disposition of waste are municipal functions.

In *Valley Spring Hog Ranch Co. v. Plagmann*, 220 S.W. 1 (Mo. banc 1920), for example, a garbage collector under contract with the City of Joplin sued to enjoin the collection of garbage by others in violation of the ordinance granting him an exclusive contract. The court upheld the ordinance, specifically rejecting characterization of the contract as a "monopoly" and noting that cities such as Joplin had "broad authority under their police power" to act on behalf of the public health by regulating garbage collection. *Id.*

Consistently therewith, the Supreme Court in *State ex rel. City of Macon v. Belt*, 561 S.W.2d 117 (Mo. banc 1978), reiterated the concept that "the exclusive privilege to collect and dispose of solid waste . . . was 'fairly referable' to the comfort, health and general welfare of the inhabitants of the City . . . and is a valid exercise of the police power." *Id.* at 118. And in *Campbell v. City of Frontenac*, 527 S.W.2d 643, 645 (Mo. App. 1975), the court stated that "[w]e entertain no doubt that a city of the fourth class has the power to reasonably regulate the collection, removal and disposition of garbage accumulating within its limits, either under the police power inherent in sovereignty or under the power conferred by the Missouri Constitution and applicable Statutes." *See also State ex rel. Birk v. City of Jackson*, 907 S.W.2d 181, 185 (Mo. App. 1995) (noting statutory authority of cities to provide for the gathering and disposition of waste).

Most importantly, this Court has recently confirmed that the very Program at issue is within County's constitutional authority under Mo. Const. Art. V, Section 18(c). In *Weber v. St. Louis County*, 342 S.W.3d 318, 322 (Mo. banc 2011), the Court considered several residents' challenge to County's Program and stated that:

[T]he Missouri Constitution and other sections of the county charter grant the County the authority to engage in the trash collection business. Article VI, section 18(c) of the Missouri Constitution grants the County the authority to "exercise ... legislative power pertaining to any and all services and functions of any municipality or political subdivision ... in the part of the county outside incorporated cities." Article II, section 2.180.11 of the County's charter grants the council power to "collect and dispose of ... garbage and refuse, or license and regulate such collection and disposal."

Moreover, the General Assembly has itself consistently treated trash collection as a municipal function. Thus, Section 71.680.1, Chapter 71 RSMo, "Provisions Relative to all Cities and Towns," states that "[i]n addition to their other powers for the protection of the public health, each city . . . may provide for the gathering, handling and disposition of garbage, trash, cinders, refuse matter and municipal waste accumulating in such cities either by itself, or by contract with others" Section 71.690 broadly authorizes cities to "pass all ordinances necessary for the carrying into effect of the powers granted in section 71.680." Indeed, the statute at issue in this case, Section 260.247 RSMo, regulated only cities for twenty years before its recent amendment to include political

subdivisions - signaling the General Assembly's recognition that solid waste services are a municipal function and that regulation thereof would logically be imposed upon cities.

It is, therefore, manifest that St. Louis County possesses the constitutional power under Section 18(c) - superior to that of the General Assembly - to legislate with respect to waste collection, because waste collection is a municipal function as to which County's power under Mo. Const. Section 18(c) is superior to the power of the General Assembly.

3. Section 260.247 RSMo impinges on political subdivisions' power to control waste collection and its restrictions are therefore inapplicable to County.

Section 260.247 RSMo, as amended by S.B. 54 (2007), purports to limit a county's power to regulate waste collection for a two-year period by prohibiting political subdivisions from providing for waste collection until they give existing waste haulers two-year notice of their intent to do so.⁹ The effect of Section 260.247 RSMo is, quite simply, to revoke the power of political subdivisions to control waste collection for a two-year period. As to County, this revocation would be contrary to County's constitutional grant which prohibits the General Assembly not just from taking away, but even from merely **impairing**, the grant of municipal powers conferred upon charter counties by Mo. Const. Art. VI, Section 18(c). *See St. Louis County v. City of*

⁹ The only exception to this rule is if a political subdivision agrees to contract with the existing haulers to continue providing services, on the existing terms, for that same two-year period. *App. pp. 8-9.*

Manchester, 360 S.W.2d at 642.

Notwithstanding County's clear constitutional grant, the Eastern District reversed the trial court's judgment dismissing Haulers' original petition for declaratory relief (which led to the eventual entry of judgment in Haulers' favor by the trial court). The appellate court's failure to recognize as impermissible such an impairment by the General Assembly stemmed from the appellate court's erroneous focus on the presumed *purpose* of Section 260.247 RSMo, which the court stated was to provide sufficient notice to waste haulers to allow them to make necessary business adjustments. The court concluded that this purpose evinced a statewide policy to which even charter counties must adhere. *American Eagle*, 272 S.W.3d at 343, *LF p. 44*.

The appellate court's conclusion about the purpose of Section 260.247 RSMo was irrelevant given the clear, express, unambiguous language of the amended statute itself. "Where the language of the statute is clear, courts must give effect to the language used by the legislature." *State v. Burns*, 978 S.W.2d 759, 761 (Mo. banc 1998). "Once a law has been adopted through legislative enactment and its provisions are express and unambiguous, a court must enforce the law according to its terms, not by what may have been intended by the enactment." *Mo. Natl. Educ. Assoc v. Mo. State Bd. of Education*, 34 S.W.3d 266, 279 (Mo. App. 2000), *citing Pipe Fabricators, Inc. v. Dir. of Revenue*, 654 S.W.2d 74, 76 (Mo. banc 1983).

Here, the legislature expressly enacted a law restricting political subdivisions' ability to control the municipal function of waste collection. The effect of Section 260.247 RSMo as applied to County would be to revoke, for two years, County's

constitutional prerogative to regulate waste collection in St. Louis County. But however laudable the presumed purpose of Section 260.247 RSMo might be, the General Assembly does not have the power to effectuate a statute overriding County's constitutional grant with respect to the municipal function of waste collection. As noted *supra*, "a statute cannot supercede a constitutional provision." *Doe v. Roman Catholic Diocese of Jefferson City*, 862 S.W.2d at 341.

Moreover, any examination of legislative purpose would properly have been directed not to the original statute but to the enactment of S.B. 54 amending it. It was the amendment of Section 260.247 RSMo by S.B. 54 which created the controversy at issue, not the longstanding requirements that had been imposed by Section 260.247 RSMo solely upon cities. There was no evidence in the record from which the court could have drawn any conclusion about the purpose of S.B. 54, except that the General Assembly did not intend to affect then-authorized programs or it would not have postponed the effective date to January 1, 2008. *Exh. B, p. 57*.

Further, courts are required to interpret statutes in a manner consistent with the Constitution rather than in derogation of it. "If a statutory provision can be interpreted in two ways, one constitutional and the other not constitutional, the constitutional construction shall be adopted." *Reproductive Health Services of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 185 S.W.3d 685, 688 (Mo. banc 2006), citing *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993). Interpretation of S.B. 54 as relating to business protection and not to the regulation of waste collection not only contravenes the purpose of the bill as stated in its title ("regulations relating to environmental

regulation”), but causes the bill to be invalid for non-compliance with Mo. Const. Art. III, Section 23. *See Point II, infra.*

But assuming *arguendo* that interpreting S.B. 54 as relating to business protection would pass constitutional muster, the appellate court still erred in concluding that County was bound by the notice provisions of Section 260.247 RSMo as amended, for the reason that the existence of a statewide policy favoring notice to trash collectors would not supersede County’s constitutional grant with respect to the municipal function of trash collection. In suggesting that it would, the appellate court used rationale that was explicitly rejected by this court in *Casper v. Hetlage*, 359 S.W.2d at 781.

In *Casper*, the trial court invalidated a St. Louis County zoning ordinance for failure to comply with Section 64.140 RSMo pertaining to county zoning procedures. After noting both that the County Council had legislative power pertaining to planning and zoning by virtue of Section 18(c) of the Constitution and that the rezoning “fully complied with” applicable Charter and ordinance provisions, *id.* at 789, the Supreme Court considered the challenge that County’s zoning was nonetheless “subject to *the state policy* as set forth in Sections 64.010-64.160. . . .” *Id.* (emphasis added). That argument, that County’s legislative power over a municipal function remains subject to State control under the guise of implicating “state policy,” was rejected by the *Casper* Court:

It is true that zoning regulations are an exercise of the police power of the state and that the exercise of the police power is a governmental function, *nevertheless* a portion of the state's police power may be delegated, and it has been delegated to St. Louis County by Section 18(c) of Article VI of the

Constitution of Missouri 1945.

Id. at 789 (emphasis added).

In stating that “if section 260.247 is ‘within the province of general legislation involving the public policy of the state as a whole,’ then the County is bound by it regardless of its charter status, *American Eagle, LF p. 42* (citation omitted), the Eastern District was relying on an argument specifically rejected by this Court. The function of trash collection being subject to County’s superior legislative power, the existence of statewide policies pertaining to same would not diminish County’s constitutional power. As in *Casper*, County’s ordinance “takes precedence over [the state statute] . . . and . . . is not invalid by reason of any failure of the County Council to comply with the mentioned specific provisions of [the state statute]” *Id.* at 790.¹⁰

¹⁰ The appellate court cited three cases in support of its statement that County was bound by Section 260.247 RSMo to the extent it concerned a matter of state public policy: *State ex rel. St. Louis County v. Edwards*, 589 S.W.2d 283 (Mo.1979); *Flower Valley Shopping Center v. St. Louis County*, 528 S.W.2d 749 (Mo. banc 1975); and *State ex rel. Spink v. Kemp*, 283 S.W.2d 502 (1955). None of these cases are apropos, however. In *Edwards*, the issue was control over juvenile court facilities, which was not a municipal function in that “the duty of controlling juvenile facilities was never placed on the county but is placed on the juvenile court by the Juvenile Code.” 589 S.W.2d at 286. In *Flower Valley*, the court was addressing County’s power under Section 18(b) of Article VI and not Section 18(c) which is at issue here. And in *State ex rel. Spink v. Kemp*, the court

Under the appellate court's reasoning, County's constitutional power could be abrogated by the simple declaration of "statewide public policy" by the General Assembly, potentially leaving very little of County's constitutional power intact. This outcome would be directly contrary to this court's consistent recognition that the constitutional grant of authority to charter counties under Section 18(c) is "meaningful," *St. Louis County v. City of Manchester*, 360 S.W.2d at 642, and "take precedence . . . over the legislative power." *State ex rel. Shepley v. Gamble*, 280 S.W.2d at 660.

For these reasons, the Court should reverse the trial court's judgment in favor of Haulers and instead enter judgment for County based on the inapplicability of Section 260.247 RSMo to charter counties. Because Section 260.247 RSMo is inapplicable to County, violation thereof by County in the implementation of County's waste collection program would not give rise to any claim against County.

addressed the power of a constitutional charter city to control "the state controlled police department," 283 S.W.2d at 514, not a municipal agency. Thus, that case merely confirms the undisputed principle that a charter entity remains "subordinate to the will of the General Assembly insofar as it relates to governmental policy *as distinguished from* matters of local municipal concern." *Id.* at 515 (Emphasis added).

II. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED IS VOID FOR VIOLATION OF MO. CONST. ART. III §23 IF IT PERTAINS TO BUSINESS PROTECTION AND NOT TO ENVIRONMENTAL REGULATION AS STATED IN THE TITLE OF S.B. 54 (2007) AMENDING IT.

STANDARD OF REVIEW

A request for judgment based on failure to state a cause of action upon which relief can be granted attacks the plaintiff's pleadings and does not involve the weighing of any facts. *See State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

S.B. 54 WAS ENACTED IN VIOLATION OF MO. CONST. ART. III §23.

The notice provisions of Section 260.247 RSMo became applicable to political subdivisions by virtue of S.B. 54 (2007), which was enacted by the General Assembly with the following title:

AN ACT

To repeal sections 260.200, 260.211, 260.212, 260.240, 260.247, 260.249, 260.250, 260.330, 260.335, 260.360, 260.470, 260.800, 386.887, 414.420,

444.772, and 643.079, RSMo, and to enact in lieu thereof thirty-nine new sections relating to environmental regulation, with an effective date and penalty provisions.

The Missouri Court of Appeals has opined in this litigation that Section 260.247 RSMo “covers notice and entering the business of trash collection” in fulfillment of “the state policy of protecting private entities engaged in trash collection. . . .” *American Eagle, LF pp. 43-44*. The court concluded, at Haulers’ behest, that the notice provisions therefore had “nothing to do with” trash collection (which *would* be a matter of environmental regulation) but instead had “everything to do with mitigating the effects of a government’s takeover of trash collection on that entity’s business.” *Id.* at 343. Thus, according to the Eastern District, Section 260.247 RSMo does not relate to environmental concerns but to protection of business interests.

If that is the case, then S.B. 54 violated the Missouri Constitution so that the enactment therein of amendments to Section 260.247 RSMo was void. Mo. Const. Art. III, Section 23 mandates that no bill shall contain more than one subject which shall be clearly expressed in its title. *Appendix A20*. This section establishes a mandatory, not directory, limitation on the legislature. *Cormack v. Director of Agriculture*, 945 S.W.2d 956 (Mo. 1997). “The intent and purpose of the framers of this constitutional provision was to limit the subject matter of a bill to *one general subject* and to afford reasonably definite information to the members of the legislature and the people as to the subject matter dealt with by a bill.” *Graff v. Priest*, 201 S.W.2d 945, 952 (Mo. 1947) (emphasis in original).

This section imposes two procedural limitations on the General Assembly's enactment of legislation: (1) a bill cannot contain more than one subject and (2) the subject of the bill must be clearly expressed in its title. *C.C. Dillon Co. v. City of Eureka*, 12 S.W.3d 322 (Mo. 2000). If the Eastern District's interpretation were to be credited, it is clear that S.B.54 (2007) violated both of these limitations.

The "clear title" requirement prevents fraudulent, misleading and improper legislation, by providing that the title of the bill should indicate "in a general way the kind of legislation being enacted." *Fust v. Attorney General*, 947 S.W.2d 424, 429 (Mo. banc 1997). Thus, a bill which by title purports to relate to solid waste management cannot then include provisions to regulate hazardous waste, because the title is not sufficiently inclusive to encompass that topic. *Natl. Solid Waste Management Assoc. v. Dir. of Dept. of Natural Resources*, 964 S.W.2d 818 (Mo. banc 1998). Similarly, S.B. 54, which purports to relate to "environmental regulation" cannot validly venture off into the protection of business entities. And if the phrase "environmental regulation" is read so broadly as to include the unrelated subject of business protectionism, then the phrase is too overinclusive to satisfy the constitutional requirement.

S.B. 54 also fails to satisfy the single-subject requirement of the Constitution. "[T]he words 'one subject' must be broadly read, but not so broadly that the phrase becomes meaningless." *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1974). Thus, a bill amending election laws cannot lawfully include regulation of the adoption of county constitutions. *Id.* And a bill which generally addresses environmental regulation cannot lawfully include regulation of business interests.

Had Section 260.247 RSMo been found to relate to “environmental regulation” by regulating the municipal function of trash collection, then County’s superior legislative authority under Mo. Const. Art. VI, Section 18(c) to regulate that function would have rendered the statutory notice provisions inapplicable to County’s Program. *See American Eagle, LF p. 42*, acknowledging that “if section 260.247 in fact regulates a ‘municipal function,’ serving in effect as a default regulation for political subdivisions which do not have home rule, the County is constitutionally free to exercise legislative power over that function.”

But that did not happen; the appellate court rejected County’s contention that Section 260.247 RSMo related to trash collection and concluded instead that it related to protection of business interests. Protection of business interests was not referenced in the title of S.B. 54 and is not reasonably related to environmental regulation. Accordingly, the amendment of Section 260.247 RSMo in S.B. 54 was unlawful and the notice provisions of Section 260.247 RSMo are void as to County and cannot serve as the basis for County liability to Haulers. Accordingly, the trial court erred in granting Haulers’ Motion for Partial Summary Judgment on liability, denying County’s Motion for Reconsideration and for Judgment on the Pleadings, denying County’s Motion for Judgment at the close of Haulers’ case and entering judgment in Haulers’ favor.

III. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO STATE A CLAIM FOR WHICH RELIEF COULD BE GRANTED IN THAT SECTION 260.247 RSMo (2007) UPON WHICH COUNT II WAS PREMISED BECAME EFFECTIVE ONLY ON JANUARY 1, 2008 AND DID NOT OPERATE RETROSPECTIVELY TO BAR COUNTY FROM CONTINUED IMPLEMENTATION OF ITS WASTE COLLECTION PROGRAM AS ADOPTED IN 2006.

STANDARD OF REVIEW

A request for judgment based on failure to state a cause of action upon which relief can be granted attacks the plaintiff's pleadings and does not involve the weighing of any facts. *See State ex rel. Henley v. Bickel*, 285 S.W.3d 327, 329 (Mo. banc 2009). Issues of law are reviewed *de novo*. *Murrell v. State*, 215 S.W.3d 96, 102 (Mo. banc 2007).

SECTION 260.247RSMo SHOULD NOT BE APPLIED RETROSPECTIVELY.

In granting Haulers' motion for partial summary judgment on their implied-in-law contract claim and then entering final judgment in the amount of \$1,159,903.90, the trial court rejected County's contention that Section 260.247 RSMo, as amended effective January 1, 2008, should not be applied retrospectively to County to create a right of action for damages based on the County's decision in 2006 to implement a waste collection program. County's argument was based on the well-established principle that

substantive statutory provisions “are generally presumed to operate prospectively, ‘unless the legislative intent that they be given retroactive operation clearly appears from the express language of the act or by necessary or unavoidable implication.’” *Dept. of Social Services v. Villa Capri Homes*, 684 S.W.2d 327, 332 (Mo. banc 1985) (citation omitted); *see also Utilicorp United, Inc. v. Dir. of Revenue*, 785 S.W.2d 277, 278 (Mo. banc 1990).

Although the General Assembly is not constitutionally barred from passing laws that operate retrospectively against the state or its political subdivisions, *Savannah R-III School Distr. v. Public School Retirement System of Mo.*, 950 S.W.2d 854, 858 (Mo. banc 1997), the presumption still favors prospective application of substantive statutes: “we will normally apply a law retrospectively only where it is procedural in nature or where it waives the rights of the state and the legislature has provided that it will have retrospective effect.” *Wellner v. Dir. of Revenue*, 16 S.W.3d 352, 354 (Mo. App. 2000). A law is retrospective when “it imposes a new obligation, duty or disability with respect to transactions or considerations already past.” *State ex rel. Koster v. Olive*, 282 S.W.3d 842, 848 (Mo. banc 2009).

Certainly the January 1, 2008 amendment at issue is retrospective if it is interpreted as imposing a new obligation on County’s 2006 enactment of a waste collection program. County’s adoption of an ordinance *requiring* the establishment of waste collection areas and establishing a procedure for the provision of waste collection constituted a public announcement of its intent to provide for waste collection services in

unincorporated St. Louis County.¹¹ *Ordinance 23,023, Exh. A p. 56; Appendix A17*. At that point in 2006, County was free to continue with implementation of its program without any hurdles such as the sending of further notice by certified mail or postponing implementation for two years. The 2008 amendment, if applied to County, would mean that the new obligation of waiting two years before going forward with a waste collection program was being imposed on a transaction already past.

More significantly, application of the 2008 amendment to County's program would, as evidenced by Plaintiffs' petition and ultimate judgment herein, subject County to the risk of substantial damages for noncompliance with notice requirements that were not in existence at the time County would logically have given notice. The obvious time to have given notice, had the requirement then existed, would have been when County enacted an ordinance that announced its intent to establish waste collection areas "by January 15, 2008." *Ordinance 23,023, Exh. A p. 56*. Clearly, County had publicly announced its intent to provide for waste collection areas via the December 12, 2006 ordinance, and Haulers' request for \$23 million "damages" for lack of receipt of a certified letter to that effect would constitute a very substantive and substantial new obligation that was not in place when County announced its intent in 2006.

¹¹ As noted in *Schnuck Markets, Inc. v. City of Bridgeton*, 895 S.W.2d 163, 168 (Mo. App. 1995) (citation omitted), even if people are not actually aware of the enactment of an ordinance, they are "conclusively presumed to know the law and that presumption applies to municipal ordinances."

“The underlying repugnance to the retrospective application of laws is that an act or transaction, to which certain legal effects were ascribed at the time they transpired, should not, without cogent reasons, thereafter be subject to a different set of effects which alter the rights and liabilities of the parties thereto.” *State ex rel. St. Louis-San Francisco Ry. Co. v. Buder*, 515 S.W.2d 409, 411 (Mo. banc 1974). Additionally, “notions of justice and fair play in a particular case are always germane.” *Id.* When County enacted its waste collection program in 2006, County had no obligation to advise existing haulers by certified mail of its decision to begin providing for waste collection services, and then to wait two years before doing so. The notice provisions of Section 260.247 RSMo, if applied to County, would “give to something already done a different effect from that which it had when it transpired,” *Doe v. Blunt*, 225 S.W.3d 421, 422 (2007), and would not satisfy notions of justice and fair play.

Further, there is no basis for concluding that the General Assembly intended for S.B. 54 to apply retrospectively. Far from expressing an intent for the bill to apply retrospectively, the General Assembly in enacting S.B 54 specifically **postponed** the effective date from the “default” effective date of August 28, 2007¹² to January 1, 2008. *Exh. B p. 57*. And even without that specific evidence of the General Assembly’s intent not to apply the new two-year postponement provisions retrospectively, the courts should

¹² Mo. Const. Art. III, Section 29 states that new laws generally become effective no sooner than ninety days after adjournment of the legislative session, which under Section 20(a) is required to occur at midnight on May 30th.

be especially reluctant to give retrospective application to a law which, if Plaintiffs' view prevails, would be a waiver of sovereign immunity for damages based on noncompliance therewith.

In *Wellner v. Dir. of Revenue*, 16 S.W.3d at 352, the court considered the applicability of a statute authorizing the award of attorney fees against the Director of Revenue to a case which had been initiated by the Director prior to effectiveness of that statute. Noting that a statute which allowed the award of attorney fees against a state agency constituted a waiver of sovereign immunity, the court concluded both that the new law pertained to a substantive matter and that, because "[s]tatutes waiving sovereign immunity must be construed strictly," *id.* at 354, it could not be applied retrospectively against the Director of Revenue. *See also State Bd. of Registration for the Healing Arts v. Warren*, 820 S.W.2d 564, 566 (Mo. App. 1991) (statute which eliminated an immunity previously enjoyed by the State was substantive and could not be applied retrospectively). Plaintiffs' efforts to construe Section 260.247 RSMo as amended retrospectively, to create new obligations and a new cause of action, and to waive County's sovereign immunity, are contrary to prior law.

The retrospective application of S.B. 54 to County's act in 2006 of approving an ordinance to begin providing for waste collection services would be inconsistent with the expressed intent of the General Assembly and would adversely impact County's substantive right to go forward with the program as to which no restrictions were applicable when the program was enacted. To the extent Section 260.247 RSMo is deemed applicable even to constitutional charter counties, its amendment as of 2008

should not be applied retrospectively to create a cause of action for damages against County for non-compliance therewith. Instead, judgment should be entered in County's favor on Haulers' claim for damages.

IV. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT RECOVERY FOR BREACH OF IMPLIED-IN-LAW CONTRACT, IN THAT THEY DID NOT PROVE THAT THEY CONFERRED A BENEFIT UPON COUNTY THAT WAS ACCEPTED AND UNJUSTLY RETAINED BY COUNTY.

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

NO EVIDENCE OF IMPLIED-IN-LAW CONTRACT

Count II of Haulers' First Amended Petition, the claim upon which the trial court entered judgment, asserts that County breached an implied-in-law contract requiring County either to give Haulers two-year notice by certified mail or to enter into a two-year contract with Haulers for waste collection services prior to implementing its Program:

43. Pursuant to Mo. Rev. Stat §260.247.2 and 3, to the extent the County (through Howe) sought to expand/commence waste collection services in unincorporated St. Louis County prior to giving two years notice, the County was obligated to use the haulers that were then providing those services and was required to pay those haulers at least as much money as

they were earning before the County chose to expand/commence such services.

44. Thus, §260.247.2 and 3 constitute an implied in law contract between the County and the Plaintiffs for providing waste collection services in St. Louis County to the extent the County wished to do so prior to giving two years notice.
45. The County (and Howe) did not provide two years notice prior to expanding/commencing waste collection services to unincorporated St. Louis County.
46. The County (and Howe) also did not contract with Plaintiffs to provide such services, instead contracting with the Contract Haulers.
47. As such, the County breached the implied in law contract with Plaintiffs.

First Amended Complaint, LF pp. 59-60.

The principal function of an action for implied-in-law contract is to prevent unjust enrichment. *Karpierz v. Easley*, 68 S.W.3d 565, 570 (Mo. App. 2002), *citing* *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257, 263 (Mo. App. 1989). It is essential to a claim for breach of implied-in-law (or “quasi”) contract “that defendant has received a benefit from the plaintiff and that the retention of the benefit by the defendant be inequitable.” *Donovan v. Kansas City*, 175 S.W.2d 874, 884 (Mo. 1943). The elements of a claim for breach of a contract implied in law are set forth in *Employers Ins. of Wausau v. Crane Co.*, 904 S.W.2d 460 (Mo. App. 1995):

Courts generally recognize that the essential elements of quasi-contract or

contract implied in law are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of the fact of such benefit; (3) acceptance and retention by the defendant of that benefit under circumstances in which retention without payment would be inequitable.

Id. at 462, quoting *Ersilon v. Vee-Jay Cement Contracting Co.*, 728 S.W.2d 711, 713 (Mo.App.1987).

Here, Haulers provided no evidence to support any of the three elements required for recovery under implied-in-law contract, either in seeking partial summary judgment on liability or at trial. *LF pp. 71-84; Tr. pp. 8-119*. In fact, Haulers did not even allege the existence of these elements in their First Amended Petition. *LF pp. 47-65*. Yet the trial court granted Haulers summary judgment on their claim for breach of implied-in-law contract based on her decision that she had “found” - when ruling on the sufficiency of Haulers’ allegations in resolving County’s motion to dismiss - that “County was in fact benefited in that it fully implemented its trash collection program without having to pay the existing haulers.” *LF p. 119*.

The court’s finding of liability for breach of implied-in-law contract was wrong for multiple reasons. First and foremost, the court erred in finding that County’s decision to move forward with implementation of its Program constituted the conferral of a benefit on County by Haulers. Haulers provided neither money nor services to County, either before, during or after implementation. Haulers having provided nothing of value to County, there was no benefit to be disgorged by County in deference to the principle that “[t]he remedy for unjust enrichment is **restitution**.” *Blue Cross Health Services, Inc. v.*

Sauer, 500 S.W.2d 72, 75 (Mo. App. 1990) (emphasis added).

Uniformly, implied-in-law contract cases have involved disgorgement of a concrete benefit conferred by the plaintiff. Thus in *Investors Title Co. v. Hammonds*, 217 S.W.3d 288 (Mo. banc 2007), the plaintiff title company was able to recover payments in excess of the recording fees authorized by statute because “the County obtained money from Investors to which it was not entitled [and] the law compels its return.” *Id.* at 296. It was not the statutory violation itself which conferred a benefit, but rather the receipt of fees obtained by violation of the statute. And in *Karpierz v. Easley*, 68 S.W.3d 565, the police department was subject to an action for contract implied in law when it accepted money that had been forfeited by a criminal defendant contrary to statutory procedures - not as punishment for violation of statutory procedures but in order to disgorge wrongfully retained money, because “allowing [the police] to benefit from ignoring the requisite statutory procedures would constitute unjust enrichment.” *Id.* at 571. *See also Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697, 703 (Mo. banc 2008) (holding that a person engaged in the unauthorized practice of law could be forced to disgorge improperly charged fees in an action for money had and received).

There is simply no case law supporting the proposition that breach of a statutory duty in and of itself creates a cause of action for implied-in-law contract, and creation of case law to that effect would be bad public policy. Predication of an implied contract action upon an alleged amorphous benefit which involves no money received by the County and no tangible enhancement of any County property or asset would establish a precedent that would expose governments and their taxpayers to new, unexpected, and

unpredictable risks. Rather, this Court should adhere to the principles set forth in existing law and rule that Haulers' failure to produce any evidence of a tangible benefit conferred by them upon County requires reversal of the trial court's judgment in Haulers' favor and entry of judgment in County's favor instead.¹³

¹³ Nor should Haulers' petition be evaluated for alternative avenues for relief. Having chosen implied contract as their theory for recovery, Haulers cannot now seek alternative recourse because "cases must be submitted and considered on the same theory upon which they were tried below." *Smithpeter v. Wabash Railroad Co.*, 231 S.W.2d 135, 146 (Mo. banc 1950). "It is not the function of the appellate court to serve as advocate for any party to an appeal." *Thummel v. King*, 570 S.W.2d 679, 686 (Mo. banc 1978). And even if Haulers were allowed to suggest an alternative theory for recovery, it would be to no avail because Chapter 260 RSMo does not create either expressly or by implication a private cause of action for damages for breach of a provision therein. *See Shqeir v. Equifax Industry*, 636 S.W.2d 944, 948 (Mo. 1982) (refusing to recognize a private right of action that didn't appear "by clear implication to have been the legislative intent," and finding further that the absence of an express created private right of action was good evidence of legislative intent not to do so). And if such cause of action did exist, County would nonetheless be shielded from damages due to its sovereign immunity under Section 537.600 *et seq.* RSMo; while sovereign immunity might not protect against a claim for contract implied in law, an action sounding in tort would be barred by sovereign immunity. *See Kubley v. Brooks*, 141 S.W.3d 21 (Mo. 2004).

But even were this Court to find that County received a benefit from Haulers when County implemented its Program - without having received any goods or services from Haulers - Haulers' claim would fail for lack of evidence that County's retention of any such benefit was unjust. The requirement that is "most significant" for recovery under contract implied in law "is that the enrichment to the defendant be unjust." *Green Quarries, Inc. v. Raasch*, 676 S.W.2d 261, 264 (Mo. App. 1984). Here, Haulers did not prove (or even plead) that it was unjust for County to proceed with implementation of its Program, which was the only "benefit" deemed by the trial court to have been retained by County.

To the contrary, the evidence was that it would *not* have been unjust for County to retain the benefit of going forward with implementation of its Program. County's Program had been enacted in 2006, before any notice provisions were in existence. By the time the Program was implemented in the first collection area in July of 2008, three different courts had denied Haulers' requests for mandamus relief, *LF pp. 37-38*, and the only court which had had the opportunity to address Haulers' request for declaratory judgment against County had dismissed Haulers' petition. *LF pp. 32-34*. It would be unjust to punish County for relying on the Circuit Court's decision upholding County's Program.

It would be particularly unjust to punish County's reliance on the Circuit Court's favorable decision when it was Haulers' own lack of diligence in pursuing their claim that prevented consideration thereof by a higher court prior to Program implementation. Had Haulers filed for declaratory judgment in June of 2007, when S.B. 54 amending

Section 260.247 RSMo was signed by the governor, *Deft. Exh. B, p. 1*, their challenge could have been decided well before October of 2008.¹⁴ But instead of filing their challenge in June - or July, August, September, October, November, December, January, February, March or April - Haulers waited nearly one year after S.B. 54 had been signed before filing their lawsuit on May 29, 2008, after having realized they would not be awarded any of their bids. They did so knowing that County was very publicly pursuing implementation of its Program via developing and soliciting bids for Program haulers. *LF pp. 54-55, Exh. B to Defts' Statement*. Further, even when they finally filed suit to challenge County's Program, they chose not to seek preliminary injunctive relief to stop Program implementation. *Verified Application for Writ of Mandamus or, in the Alternative, Petition for Declaratory Judgment, LF pp. 18-29*.

Contrary to Haulers' dilatory behavior in pursuing their own claims, County did everything possible to facilitate an expedited resolution of Haulers' challenge to County's Program. Not only did County waive service of Haulers' lawsuit, County prepared and filed its motion to dismiss Haulers' petition a mere fourteen days after the petition was filed, and then filed its reply to Haulers' response in *one day*. *LF pp. 1-2*. The trial court likewise deferred to Haulers' wish for a speedy resolution of their untimely filed lawsuit and ruled on County's motion to dismiss on June 25, 2008, only two days after it was submitted. *LF p. 2*. The fact that Haulers did not file suit in time to obtain an appellate

¹⁴ The appellate decision overturning dismissal of Haulers' petition was issued less than five months after their petition was filed. *LF pp. 1, 35*.

court ruling prior to Program implementation does not render it unjust for County to have proceeded with its Program based on the Circuit Court's validation of same.

Perhaps the most persuasive reason for finding that County was not "unjustly" enriched by Program implementation without statutory notice is the undisputed evidence that all three Haulers had *actual* notice of the Program on December 12, 2006, giving them very nearly the entire prescribed two-year notice period to make any necessary business adjustments in anticipation of the impending Program. Yet despite having had almost two full years to prepare for the coming Program, the testimony of their hired accountant was that Haulers did not use the notice period to mitigate their business losses but instead continued to grow their businesses until the last day they were able to provide services. *Tr. p.24; Pltfs. Exh. 3 Schedule 3; Pltfs. Exh. 4 Schedule 5; Pltfs. Exh. 5 Schedule 5.* Far from making adjustments to accommodate the announced Program, it was the testimony of their only witness that Haulers used their resources to expand the number of customers served in the unincorporated area, at ever-increasing rates - in direct contravention of the Eastern District's stated purpose of the statute.

The fact that Haulers continued to provide the same services after notice of County's Program as they had provided previously corroborates that County did not unjustly retain any benefit at Haulers' expense. Haulers retained full use of their equipment and labor and continued providing services to their unincorporated customers for the nearly two years it took to start the Program, *and thus were able to receive the same fees from their customers which they now seek to obtain from County.*

If the Eastern District was correct in asserting that "[t]he fundamental purpose of

section 260.247 is to provide an entity engaged in waste collecting with sufficient notice to make necessary business adjustments prior to having its services terminated in a given area,” *American Eagle, LF p.43 (citation omitted)*, it is clear from Haulers’ trial evidence that two years was not needed for that purpose because Haulers did not make and would not have made any adjustments at all. Notice of any kind, whether actual or only by certified mail, could have been omitted entirely without consequence to Haulers. The evidence refutes Haulers’ claim for implied-in-law contract, and the trial court’s failure to apply the law correctly to the evidence was an abuse of discretion requiring reversal of judgment for Haulers and entry of judgment in County’s favor instead.

V. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS FAILED TO PROVIDE ANY EVIDENCE TO SUPPORT A CLAIM FOR EITHER RESTITUTION OR DAMAGES, IN THAT THE TESTIMONY AND EXHIBITS SUPPORTING THEIR CLAIM ALL WERE PROVIDED BY A HIRED ACCOUNTANT WHO RELIED ONLY ON HEARSAY DATA THAT WAS NOT REASONABLY RELIABLE SO THAT THE TESTIMONY AND EXHIBITS SHOULD HAVE BEEN EXCLUDED PURSUANT TO SECTION 490.065 RSMo.

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). A trial court's decision to admit or deny expert testimony is generally reviewed for abuse of discretion, *McGuire v. Seltsam*, 138 S.W.3d 718, 720 (Mo. banc 2004), but the trial court's interpretation of Section 490.065 RSMo is subject to *de novo* review. *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. banc 2011).

NO ADMISSIBLE EVIDENCE OF ANY LOSSES BY HAULERS

Haulers faced a two-part burden of proof on their claim for contract implied in law, “the burden of producing (or going forward with) evidence and the burden of

persuasion.” *Kinzenbaw v. Director of Revenue*, 62 S.W.3d 49, 53 (Mo. banc 2001). As noted *supra*, restitution is the remedy for unjust enrichment. To recover under that theory, “[A] plaintiff must present evidence of the amount of the benefit conferred upon the defendant.” *Pitman v. City of Columbia*, 309 S.W.2d 395, 403 (Mo. App. 2010). “The duty to make their case is upon plaintiffs and they ‘must remove it from the field of conjecture and establish it by substantial evidence of probative value, or by inferences reasonably to be drawn from the evidence.’” *Zeigenbein v. Thornsberry*, 401 S.W.2d 389, 393 (Mo. 1966) (citations omitted).

Haulers in this action failed to produce even a scintilla of proof to remove from the field of conjecture and establish by substantial evidence the amount of any benefit conferred by them upon County, and County is entitled to judgment for that reason. There was simply no admissible evidence at all of the value to County of any alleged benefit conferred by Haulers.

The trial court, however, erroneously determined that the measure of damages for Haulers’ implied-in-law contract claim was the amount of revenue Haulers would have received had County entered into a two-year contract with Haulers for services, *LF p. 124*, without any deductions for the expenses they would have incurred in providing those services. *LF pp. 128-129*. But even assuming *arguendo* that the trial court correctly stated the measure of damages, County would still be entitled to judgment because Haulers also failed to prove that they suffered the loss of any revenue as a result of County’s Program.

Not a single owner or employee from Plaintiff Waste Management, from Plaintiff

American Eagle, or from Plaintiff Meridian Waste Industries testified at trial. No one with any direct, firsthand knowledge testified, either live at trial or by the introduction of deposition testimony, to any of the facts underlying Haulers' damages claims. No one with personal knowledge identified the number of customers Haulers claimed to have had when County's Program was announced. There was no testimony by Haulers or anyone with personal knowledge about the number of customers Haulers claimed to have lost during Program implementation, about general customer attrition rates for the three businesses, about charges Haulers had imposed on their lost customers for the provision of services, or about the rate of collection for the payments Haulers claimed they would have been entitled to receive. There was no testimony from Haulers suggesting that they lost any business at all, rather than having reallocated their resources during the nearly two-year period in which they had actual notice of the impending Program. *Tr. pp. 8-119.*

Equally lacking were any business records or other documentary evidence of losses claimed to have been sustained by Haulers. No one from Haulers' businesses introduced or even authenticated any customer or billing records that might have provided support for their \$23 million claim. There were no financials, no income tax statements and no other business records offered into evidence to demonstrate any variation in Haulers' business income during or after implementation of County's Program.

Instead, the entirety of Haulers' damages case consisted of the testimony of a single witness, an accountant retained by Haulers as an expert witness for trial.

Accountant had no firsthand knowledge of any of the facts in issue. Instead, Accountant's testimony merely reiterated and summarized to the court unverified information which he said had been conveyed to him by Haulers about their claimed lost revenues:

Q. I'm asking if you relied on facts that you chose not to verify or that the Plaintiffs refused to let you verify?

A. I relied on facts provided by the client, the Plaintiff here. **I was not engaged to audit or review or compile these facts.**

Tr. p. 73 (emphasis added).

Q. You're telling me what Waste Management told you; that's all you're telling me about rate increases?

A. Correct.

Tr. p. 82.

Q. And when you testified as to rate increases that you used for calculating Meridian's damages, and that would have been Exhibit 4, what rate increases did you use?

A. I used 75 cents.

Q. And can you clarify for us how you determined that was the appropriate number?

A. From the discussions with Chuck Barcom based on what they were going to do --

Tr. pp. 62-63. There was nothing in the record to support the veracity of the second-hand

information summarized by Accountant.

A witness's second-hand summary of someone else's records is hearsay evidence, and a summary of records can only be admitted "provided that the competency of the underlying records is first established and such records are made available to the opposite party for cross-examination purposes." *Healthcare Services of the Ozarks, Inc. v. Copeland*. 198 S.W.3d 604, 616 (Mo. banc 2006) (excluding data summaries compiled from various business records that were not in evidence). "[A] witness may not narrate supposed facts told to him by another, when such evidence is offered to prove the fact thus asserted." *State ex rel. State Highway Commission v. Kimmell*, 435 S.W.2d 354, 357 (Mo. 1968), *citing* 13A C.J.S. Evidence §§192, 193. Accountant's testimony concerning the number of customers supposedly lost by Haulers and of the revenues those customers would have provided to Haulers was nothing but a summary of alleged facts provided to him out of court by Haulers, and was offered by Accountant to prove those exact facts.

Over County's repeated objections, *Tr. pp. 14, 26, 30, 40, 45, 54, 57, 59, 63, 112, 119*, the trial court permitted Accountant to testify based on information narrated to him by Haulers. Accountant's hearsay testimony lacked any indicia of trustworthiness and should therefore have been excluded from evidence in accordance with the rule that "courts exclude hearsay because the out-of-court statement is not subject to cross-examination, is not offered under oath, and is not subject to the fact finder's ability to judge demeanor at the time the statement is made." *Bynote v. National Super Markets, Inc.*, 891 S.W.2d 117, 120 (Mo. banc 1995).

Accountant's testimony in this case was inadmissible for each of the three reasons

given in *Bynote* for the exclusion of hearsay evidence. It was impossible to cross-examine Accountant on the veracity of the information he recited about lost customers and revenues, because he acknowledged having no personal information. *Supra*, *Tr. p.* 73. Accountant also acknowledged that the information had not been provided to him under oath, *Tr. pp.* 91-92, 93. And obviously, the trial court could not judge the demeanor of the persons vouching for the statements, because none of the Haulers testified (even for the limited purpose of authenticating whatever records had been provided to Accountant).

Certainly an expert may base his opinions “in part” upon out-of-court investigation that provides “background material.” *State ex rel. State Highway Commission v. Kimmell*, 435 S.W.2d at 357. But “an expert witness ‘may not under the guise of giving the basis of his opinion lug into evidence that which otherwise is incompetent.’” *Stallings v. Washington University*, 794 S.W.2d 264, 271 (Mo. App. 1990), *citing State v. Dockery*, 300 S.W.2d 444, 452 (Mo. 1957). Here, Accountant did not render expert opinions based on background materials, he just testified to the facts and figures given to him by Haulers and then added them up to give a summary conclusion of Haulers’ alleged damages “related to the loss of revenue associated with the districting.” *Tr. p.* 15. Incompetent hearsay evidence, coupled with simple arithmetic calculations based thereon, was the prime component of Accountant’s testimony:

Q. [L]et’s talk about that you took the word of Chuck Barcom at Meridian Waste Industries that [it] would have raised its rates each year, didn’t you?

A. I did.

Q. And you used that figure in calculating damages for Meridian, did you not?

A. I did.

Q. And you used that figure even though Mr. Barcom refused, after you asked him, to give you backup for that didn't you?

A. The information that he gave me that I relied on is a small business and at his discretion is what he would have done. And it's in my discussions. I have no reason not to believe Chuck Barcom.

Q. So as I said, you used that figure even though he refused to provide you the backup that you requested, isn't that correct?

A. Yes.

Tr. p. 74.

Q. You assumed these rate increases as part of your expert opinion and that was based - that \$900,000 of damages was based solely on Waste Management giving you an Excel file with what they said were their rate increases through that time period?

A. Correct.

Q. And you have no idea who performed that analysis of rate increases that Waste Management gave you?

A. That is correct.

Q. Maybe it was a CPA, maybe it was a secretary, is that correct?

A. I don't know.

Q. Whoever it was it was someone employed by Waste Management wasn't it?

A. Yes.

Q. And Waste Management is the company that has a direct financial interest in the outcome of this litigation, isn't that correct?

A. Yes.

Q. And whether it was a CPA or a secretary, you did not do a single thing to verify those calculations did you?

A. I did not.

Q. And you couldn't have verified the calculations even if you wanted to because you didn't have any of the actual data they used did you?

A. I did not.

Tr. pp. 80-81.

Accountant testified that his only job was "doing a calculation," *Tr. p. 73*, and that he was not concerned about basing his testimony on reliable information:

Q. You're not attesting to it personally. You didn't satisfy the standards on - for attestation engagements, did you?

A. It is not an attestation engagement.

Q. Because if you attested to something you'd have to have reliable information to back it up wouldn't you?

A. If I was to perform an attestation.

Tr. p. 70.

The entirety of Accountant's cross-examination underscored his lack of personal knowledge pertaining to any of the information to which he testified. *Tr. pp. 68-112.*

While it might be reasonable for an accountant to rely on client-provided information to advise that client, it is not reasonable to use unaudited, unsworn client-provided information to advise third parties about that client's business. But that is exactly what Accountant did in testifying to the trial court about Haulers' alleged lost revenues, even though he recognized that Haulers had a financial motive for inflating their damages:

Q. Knowing [Chuck Barcom of Meridian Waste] had a stake in the outcome, you elected to just take his word on the rate increases and to include them as an element of damages?

A. I did include his rate increases in my measure, yes.

Tr. p. 78.

Q. All three Plaintiffs have a financial stake in your opinion of lost revenues don't they?

A. They do.

Q. The higher your opinion of lost revenues based on the information they give you the more they stand to gain, is that right?

A. Yes.

Tr. p. 91.

Whether obtuse or merely naive, Accountant's reliance on hearsay data provided to him by people with a financial stake in the outcome was not reasonable or prudent. Section 490.065.3 RSMo, *Appendix A21*, requires that the data upon which an expert bases his opinion "must be otherwise reasonably reliable." This Court has stated that "[i]n deciding whether the facts and data on which the expert relies are otherwise

reasonably reliable, the circuit court ‘independently assess[es] their reliability.’” *Kivland v. Columbia Orthopaedic Group, LLP*, 331 S.W.3d 299, 311 (Mo. 2011), citing *State Bd. of Registration for Healing Arts v. McDonagh*, 123 S.W.3d 146, 153 (Mo. banc 2003). It was an abuse of discretion for the court to accept as “reliable” the data that was mouthed by Accountant but was in fact a mere regurgitation of Haulers’ unsworn testimony, for which Accountant was nothing more than a conduit.¹⁵ Accountant provided no expertise by serving as the vehicle for placing Haulers’ unsworn testimony before the trial court; any literate third party could have done the same.

Haulers’ total failure to provide any admissible evidence that the data upon which Accountant relied were accurate caused Accountant’s calculations of Haulers’ claimed losses to be worthless, utterly lacking in probative value. An expert’s testimony must be based either on facts and knowledge personally known to or observed by him or upon facts which are supported by **competent** evidence. *66, Inc. v. Crestwood Commons Redevelopment Corp.*, 130 S.W. 3d 573, 592 (Mo. App. 2004) (reversing trial court’s admission of testimony by expert non-lawyer witness as what attorneys’ fees were appropriate). Accountant’s testimony did not meet this standard.

Nor can Haulers complain of any “sandbagging” by County. See *Washington v. Barnes*, 897 S.W.2d 611, 616 (Mo. 1995) (requiring timely objection or motion to strike

¹⁵ It was particularly unreasonable for Accountant to rely on data provided orally by a person who then refused to provide the documents that would supposedly have verified the data. *Tr. p. 74.*

so as not to “delay resolution of problems that might be correctable with a few questions”). County objected to the lack of foundation for Accountant’s hearsay testimony and accessory exhibits both before and during Accountant’s testimony:

Q. Mr. Ficken, were you retained by Plaintiffs in this case to form an opinion as to the lost revenues they sustained?

A. I was.

Q. And what is your opinion of the total lost revenues sustained by each plaintiff in this case?

MS. REDINGTON: Judge, I object to this testimony. There’s no foundation for it. It would be based on documents or evidence that has not been introduced to the Court

THE COURT: I got it. I’m going to overrule your objections With regard to the foundation, I’m going to let him give his opinion. If you don’t come back and lay the foundation I’ll strike his opinion.¹⁶

Tr. pp. 14-15.

Q. Did you consider rate increases in calculating Waste Management’s lost revenues?

¹⁶ Although no evidence was ever elicited to establish the foundation for Accountant’s testimony, the court nonetheless overruled County’s motion to strike Accountant’s testimony both at the close of cross examination, *Tr. p. 112*, and at the close of Accountant’s testimony. *Tr. p. 119*.

A. I did. Rate increases were provided to me by Waste Management.

MS. REDINGTON: Judge, I have an objection again to lack of foundation. This is speculative and I would like to have a continuing objection.

THE COURT: You may.

MS. REDINGTON: Without foundation.

THE COURT: You may. Continuing objection. You may answer.

Tr. p. 54.

MS. REDINGTON: Judge, I object to that being without foundation and total hearsay. He just said *they told me they billed it so I gave it to them*. There's no foundation for that or for any testimony on billing increases - billing fees, excuse me, and so I would like to object.

MS. DUEKER: Your Honor, from a legal standpoint experts are entitled to rely on information that's not necessarily admissible.

THE COURT: Overruled.

MS. REDINGTON: May I have a continuing objection, Judge?

THE COURT: Yes, you may, assuming you can lay the foundation.

Tr. p. 57.

Q. And can you clarify for us how you determined that was the appropriate number?

A. From the discussions with Chuck Barcom based on what they were going to do -

MS. REDINGTON: Judge, I object to any testimony about conversations with

Chuck Barcom. We deposed Meridian Corporation and they did not disclose these conversations and had no information about them. This is unreliable hearsay. It shouldn't serve as the foundation for his testimony.

THE COURT: Overruled.

Tr. p. 63.

THE COURT: So you object to [Plaintiffs' exhibits] 3, 4 and 5, the actual reports?

MS. REDINGTON: Yes, Judge.

THE COURT: And your objection is based on?

MS. REDINGTON: All the opinions and all the facts are based on facts that are not in evidence and are without foundation. It's unreliable hearsay provided to him by people not under oath and with a monetary interest in the outcome of the litigation so it's inherently unreliable.

THE COURT: The Court will overrule those objections.

Tr. pp. 64-65.

In addition to making repeated objections and highlighting Accountant's lack of competence to testify during cross-examination, County specifically moved to strike Accountant's testimony at the time it was concluded. In so moving, County clearly directed the attention of both the court and Haulers to the deficiencies in Haulers' evidence:

MS. HALL: No further questions at this time, Your Honor.

MS. REDINGTON: Judge, I have no questions. I move to strike the testimony.

It's based on facts not in evidence, all based on hearsay and is lacking in foundation and should not be admitted, and I move to exclude it and strike all of his testimony.

THE COURT: The Court is going to overrule you at this time and I will take that objection with the case. You can step down.

Tr. p. 120.

County's objections clearly did not come "too late to give opposing counsel an opportunity to correct any deficiencies in the questions or lay an appropriate foundation for the witness's opinion." *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202, 209 (Mo. banc 1991).¹⁷ Haulers were made aware of the deficiencies in their case, but still chose to forego testifying under oath to the veracity of the information they provided to Accountant or to subject their business records to scrutiny. Their choice was deliberate, and it rendered Accountant's testimony inherently meaningless.

Even though Accountant himself admitted that his opinion was only as solid as the evidence given to him by Haulers, *Tr. p. 90*, still Haulers failed to offer any evidence to

¹⁷ In *Seabaugh*, the defendant first objected to the scientific basis for the expert's testimony in a motion to strike that was made after the witness had been excused. Here, it is evident from the trial transcript that Accountant remained in court for additional examination after County's objection to the receipt of his reports in evidence and after County had twice moved to strike his testimony as being based entirely on unreliable hearsay information. *Tr. pp. 64, 112, 119.*

suggest that the evidence given to Accountant by Haulers *was* solid. Haulers thus proved only that Accountant had an opinion of damages that was a mere calculation *entirely contingent upon the accuracy of the data provided to him by Haulers*; Haulers made no effort to prove the contingency upon which that opinion was premised, that is, the accuracy of the underlying data. Accordingly, Accountant's testimony was inadmissible under Section 065 RSMo because it did not satisfy the statutory requirement that an expert's testimony be based on facts that may reasonably be relied upon. As a result, there was no admissible evidence permitting the trial court to enter judgment for Haulers rather than for County.

VI. TRIAL COURT ERRED IN ENTERING JUDGMENT FOR HAULERS RATHER THAN DEFENDANT ON COUNT II OF HAULERS' FIRST AMENDED PETITION, BECAUSE HAULERS WAIVED AND WERE ESTOPPED FROM ASSERTING THEIR RIGHT TO CHALLENGE COUNTY'S WASTE COLLECTION PROGRAM IN THAT HAULERS VOLUNTARILY PARTICIPATED IN THE PROGRAM AND CANNOT CHALLENGE THE PROGRAM'S VALIDITY AFTER HAVING ACCEPTED BENEFITS FROM IT.

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

HAULERS WAIVED CHALLENGE TO PROGRAM

By affirmative defense, County challenged Haulers' right to pursue their claim for damages because of waiver and/or estoppel:

Defendant is entitled to judgment in that Plaintiffs have waived or are estopped from making any claim of entitlement to damages under Section 260.247 RSMo. by having each voluntarily participated in the program established by Ordinance No. 23,023 by offering suggestions for the program at public forums and by each submitting one or more unsuccessful bids to become Program haulers prior to challenging the program's validity, and cannot now

challenge the program after having accepted benefits thereunder

*Defendant's Third Amended Answer to First Amended Petition, LF p. 138.*¹⁸

Haulers herein clearly and unequivocally chose both to work with County to implement County's Program and then to seek benefits thereunder, beginning with their suggestions on how best to implement the Program and concluding with their submission of bids to become designated haulers under the Program. *LF pp. 90-91.* Only when it became clear that Haulers would not be selected as Program haulers, due to their failure to submit any low bids for the provision of services, did Haulers attempt to stop the Program by filing this lawsuit. But once Haulers decided to forego challenging the Program in favor of actively seeking to provide waste collection services under its auspices, they relinquished their right to question its validity.

"Waiver is founded upon 'the intentional relinquishment of a known right.'" *State Farm Mutual Automobile Insurance Agency v. Brown*, 776 S.W.2d 384, 386-87 (Mo. banc 1989), *quoting Shapiro v. Shapiro*, 701 S.W.2d 205, 206 (Mo.App. 1985). This is a longstanding principle:

The rule is well settled that one voluntarily proceeding under a statute or ordinance, and claiming benefits thereby conferred, will not be heard to question its validity in order to avoid its burdens. The same or similar rules have been applied in litigation involving many different types of instruments,

¹⁸ County specifically pled quasi estoppel, as well as waiver and estoppel, as an affirmative defense. *LF pp. 8-9.*

licenses, or other transactions. The designation used in referring to this rule or doctrine is obviously unimportant. It is frequently called an estoppel.

However, it is akin to the rule against assuming inconsistent positions and it involves the principles of waiver, election, and ratification rather, perhaps, than being limited to the precise principles of equitable estoppel. Regardless of the name of principle designated, the result is clearly the same. It precludes one who accepts the benefits from questioning the validity of the accompanying obligation.

St. Louis Public Service Co. v. City of St. Louis, 302 S.W.2d 875, 879 (Mo. banc 1957).

In *St. Louis Public Service Co.*, a motorbus company challenged the validity of an ordinance which imposed a gross receipts tax upon the transportation of passengers. The company which challenged the ordinance, however, had for many years secured permits to transport passengers by authority of the same ordinance they challenged in the lawsuit. Given that the plaintiff had “repeatedly applied for and received these permits with full knowledge that it would be required to pay the gross receipts tax specified in another section of the ordinance,” 302 S.W.2d at 881, the court would not permit the plaintiff to challenge the tax while using permits obtained under its authority.

Haulers herein each accepted the benefits offered by the Program by participating in the bid process with the hope of becoming the exclusive designated hauler for one or more sizable waste collection areas within unincorporated St. Louis County. Their actions were “so manifestly consistent with and indicative of an intention to renounce a particular right or benefit that no other reasonable explanation of the conduct is possible.”

Guidry v. Charter Communications, Inc., 269 S.W.3d 520, 531 (Mo. App. 2008) (internal citation omitted). Having accepted this benefit, Haulers are now precluded from attacking the Program that produced it, and judgment should accordingly be entered for County.

VII. TRIAL COURT ERRED IN ENTERING JUDGMENT IN THE AMOUNT OF \$1,156,903.90 FOR HAULERS BECAUSE EVIDENCE OF ALLEGED DAMAGES SUBSEQUENT TO DECEMBER 12, 2008 SHOULD HAVE BEEN EXCLUDED, IN THAT HAULERS HAD ACTUAL NOTICE OF COUNTY'S INTENT TO IMPLEMENT A WASTE COLLECTION PROGRAM ON DECEMBER 12, 2006 AND THE TWO-YEAR NOTICE PERIOD ESTABLISHED IN SECTION 260.247 RSMo BEGAN TO RUN ON THAT DATE.

STANDARD OF REVIEW

“[T]he trial court's judgment will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.” *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 815 (Mo. banc 2011), citing *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

HAULERS HAD NEARLY TWO YEARS' ACTUAL NOTICE OF COUNTY'S PROGRAM

As noted in Point V *supra*, the trial court erroneously determined that the measure of damages for Haulers' implied-in-law contract claim was the amount of revenue Haulers would have received had County entered into a two-year contract with Haulers for services. Assuming *arguendo* both that the trial court correctly stated the measure of damages and that Haulers provided admissible evidence of their lost revenues, the trial court's judgment must nonetheless be reversed and the case remanded because the court considered evidence of damages outside the statutory two-year notice period.

This Court has stated that the purpose of Section 260.247 RSMo is to give existing haulers sufficient notice to allow them to make whatever business adjustments are needed prior to being excluded from particular service areas. *Weber v. St. Louis County*, 342 S.W.3d 318, 323 (Mo. banc 2011). Clearly, then, the notice period should begin to run “from the effective date of the notice that the city or political subdivision intends to enter into the business of solid waste collection. . . .” Section 260.247.2 RSMo.

County gave notice of its intent on December 12, 2006, when it adopted Ordinance No. 23,023 directing the establishment of waste collection areas by January 15, 2008. *Sections 607.1300 and .1310, Appendix A17*. Haulers have admitted that they were aware of Ordinance 23,023 the day it was passed, *Exhs. D-1, D-2, D-3*, and that they received further notice of County’s intent to begin providing for waste collection by letter dated January 7, 2007. *Exhs. G-1, G-2, G-3; Tr. pp. 136-37*. Having had actual notice of County’s intent on December 12, 2006, the clock should have begun running for the two-year notice period on that date and any damages would be those accrued prior to December 12, 2008, when the two-year notice period expired. Insofar as waste collection under County’s Program did not begin until October 1, 2008, Haulers were “shorted” of their two-year statutory notice period only by the time between October 1 - December 12, 2008, and that would have been the relevant damages period.¹⁹

The trial court, however, determined otherwise. The court concluded that the fact of Haulers’ actual notice of County’s intent was irrelevant:

¹⁹ As noted *supra*, one of the eight areas began receiving services in July of 2008.

Section 260.247.1, RSMo., does not state that actual notice is sufficient or that actual notice relieves the city or political subdivision of the obligation to provide the private entity or entities with two years notice as mandated by the statute. Rather, “[a]ny city or political subdivision which . . . enters into or expands solid waste collection services into an area where the collection of solid waste is presently being provided by one or more private entities . . . shall notify the private entity or entities or its intent . . . by certified mail.”

(Emphasis added.) If the legislature had intended to relieve governmental entities, like the County, of their obligation to provide two years notice under these circumstances, it could have incorporated such a provision in section 260.247.1, RSMo.

Order/Judgment, LF pp. 125-26. The court determined that the two-year notice period for which damages would be awarded began on April 8, 2008 for one district and in June of 2008 for the other districts (that is, the dates upon which contracts for future collection were awarded).

The court’s decision to ignore Haulers’ actual notice was contrary to law, and caused an award of excess damages that was based on the wrong notice period. The fact that Haulers did not receive a certified letter after having already received actual notice is irrelevant to the damages analysis:

Procedural rules are but the means through which we seek to ensure the fair and orderly resolution of disputes and to attain just results. They are not ends in themselves. For this reason, we do not generally consider noncompliance

with rules or statutory procedures to warrant reversal in the absence of prejudice.

Heintz v. Woodson, 758 S.W.2d 452, 454 (Mo. banc 1988).

The actual notice received by Haulers was superior to notice by certified mail and was more than sufficient to satisfy the notice requirement of Section 260.247 RSMo.²⁰ As noted in *Walkenhorst–Newman v. Montgomery Elevator*, 37 S.W.3d 283, 286-87 (Mo. App. 2000), the sending of a certified letter permits the *presumption* of actual notice, even though the recipient may have chosen to ignore the letter’s contents. When it is undisputed that *actual* notice has been received, “the fact that the notice was not sent by certified mail does not invalidate the notice. . . .” *Baxley v. Jarred*, 91 S.W.3d 192, 205 (Mo. App. 2002) (upholding actual notice to father of mother’s intent to relocate, notwithstanding the statutory requirement that notice be given by certified mail, return receipt requested). “Statutes that impose certain technical requirements for notice should not be strictly enforced where the party seeking enforcement had actual notice and cannot

²⁰ Plaintiffs have argued that the 2006 notice was not “unequivocal,” but a certified letter restating the information contained in the ordinance would not have made County’s intent any more “unequivocal.” The statute requires only notice of “intent” to provide for trash collection; it does not require a firm commitment. A political subdivision might choose to abandon its intent altogether without violating the statute, because nothing in the statute suggests that an unequivocal commitment is required.

show prejudice as a result of the failure to follow the technical requirements.” *Macon-Atlanta State Bank v. Gall*, 666 S.W.2d 934, 940 (Mo. App. 1984). The purpose of using certified mail is to insure actual notice, and it would be pointless to require satisfaction of a formalistic requirement for a certified letter after Haulers had admittedly received actual notice.

Particularly in light of the fact that no notice obligation existed when County first published in 2006 its intent to implement a trash collection program in 2008, Haulers have no reason to complain that they did not receive a certified letter informing them of what they already knew. Plaintiffs had actual notice of County’s intent for the better part of the two-year period, so that awarding them damages for lack of notice during a period in which they did have notice would be to award them a windfall. “The goal of awarding damages is to compensate a party for a legally recognized loss ... [and a] party should be fully compensated for its loss, but not recover a windfall.” *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 184 (Mo. banc 2009) (citation omitted). Here, the trial court’s award of damages amounted to a windfall for each of the three plaintiffs, and the court’s judgment should accordingly be reversed and the case remanded for determination of damages sustained by Haulers between October 1, 2008 and December 12, 2008.

CONCLUSION

Based on the law as set forth in Argument Points I-III herein, it is indisputable that Haulers failed to state a claim for which relief could be granted, and the trial court's decision to enter judgment in Haulers' favor should be reversed with judgment to be entered for County.

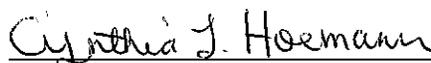
Alternatively, Haulers' failure to provide admissible, credible evidence of contract implied in law or the damages they claim to have sustained requires reversal of the judgment that was entered in their favor and entry of judgment for County.

Alternatively, Haulers' waiver of their challenge to County's waste collection program by participating in same requires reversal of the judgment that was entered in their favor and entry of judgment for County.

Finally (and only if County's preceding points are rejected), the trial court's error in admitting evidence of damages claimed outside the two-year period following County's announcement of its waste collection program, requires reversal of the trial court's judgment and remand for a new trial on damages.

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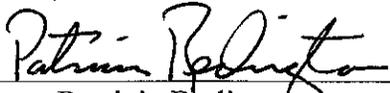

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CERTIFICATE OF COMPLIANCE AND SERVICE

I certify that this brief complies with the type-volume limitation of Rule 84.06(b) of the Missouri Rules of Civil Procedure. This brief was prepared in Microsoft Word 2007 and contains 20,382 words in total. The font is Times New Roman, proportional spacing, 13-point type.

I certify that a copy of this brief was served electronically this 3rd day of January, 2012, to Jane Ducker, Nicole S. Zellweger and Crystal K. Hall, Stinson Morrison Hecker LLP, 7700 Forsyth Blvd., Suite 1100, St. Louis, MO 63105.



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