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RESPONSE TO POINTS RELIED ON

I

The trial court did not error in denying Franklin’s motion for a directed verdict and motion for judgment notwithstanding the verdict because sufficient evidence was presented at trial to find that Franklin himself violated the Missouri Merchandising Practices Act (MMPA), in that direct and circumstantial evidence was offered showing Franklin personally advertised the promotion, was aware of the sale to the Overbeys, and personally profited from the Overbeys’ sale so that it was not necessary to pierce the corporate veil as Franklin was a separate defendant.

Chesus v. Watts, 967 S.W.2d 97 (Mo. App. W.D. 1998)

Wolfersberger v. Miller, 39 S.W.2d 758 (Mo. 1931)

Blakeley v. Bradley, 281 S.W.2d 835 (Mo. 1955)

Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 425 S.E.2d 144 (W. Va. 1992)

RESPONSE TO POINTS RELIED ON

II

The trial court did not error in reducing the punitive damage award to a single-digit multiple of the actual damages because the Due Process Clause of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution provide guideposts to analyze a punitive damage award, in that the punitive damage award against Franklin complies with the guideposts, evidence presented at trial, and an arbitrary amount does not support Franklin's conduct.

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

Kelly v. Bass Pro Outdoor World, LLC, 245 S.W.3d 841(Mo. App. E.D. 2007)

BMW of North America Inc. v. Gore, 517 U.S. 559 (1996)

State Farm Mutual Automobile Insurance v. Campbell, 538 U.S. 408 (2003)

U.S. Con. Art. 14

Mo. Con. Art. I, Sec. 10

RESPONSE TO POINTS RELIED ON

III

The trial court did not abuse its discretion in awarding attorney fees in the amount of \$72,000.00 because the trial court has discretion to award attorney fees, in that the attorney fees awarded were not arbitrary or unreasonable.

Howard v. City of Kansas City, 2011 WL 265309 (Mo. banc January 25, 2011)

Vance Bros., Inc. v. Obermiller Const. Services, Inc., 181 S.W.3d 562 (Mo. banc 2006)

Section 407.025

RESPONSE TO RESPONDENT'S CROSS-APPEAL

POINT I

The trial court did not error in denying Franklin's motion for a directed verdict and motion for judgment notwithstanding the verdict because sufficient evidence was presented at trial to find that Franklin himself violated the Missouri Merchandising Practices Act (MMPA), in that direct and circumstantial evidence was offered showing Franklin personally advertised the promotion, was aware of the sale to the Overbeys, and personally profited from the Overbeys' sale so that it was not necessary to pierce the corporate veil as Franklin was a separate defendant.

A. Standard of Review

The standard of review is the same for an overruled motion for directed verdict or denial of a judgment notwithstanding the verdict. *Klotz v. St. Anthony's Medical Center*, 311 S.W.3d 752, 769 (Mo. banc 2010). A submissible case requires that every essential fact must be supported by substantial evidence. *Id.* On review, the evidence is viewed in the light most favorable to the verdict. *Id.* Reasonable inferences are also viewed in the light most favorable to verdict. *Lasky v. Union Electric Co.*, 936 S.W.2d 797, 801 (Mo. banc 1997). The trial court's decision will only be reversed when "there is a complete absence of probative fact to support the jury's conclusion." *Klotz*, 311 S.W.3d at 769.

B. Sufficient evidence was presented at trial to find Franklin violated the MMPA

There was substantial evidence to support the jury's finding that Franklin was personally liable for violating the MPAA. The Overbeys met their burden by making a submissible case that Franklin violated the MPAA, thus the burden falls on Franklin to show he did not engage in fraudulent activity. *Chesus v. Watts*, 967 S.W.2d 97, 112 (Mo. App. W.D. 1998). Franklin "stands on shaky ground when ... he presents no evidence or explanation for his actions." *Id.* "Much of the evidence can be inferred from the defendant's case" or lack of evidence. *Id.* at 113. A corporate officer can be personally liable for the corporation's fraud when he "participated in, approved of, sanctioned, or ratified" the conduct. *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144, 149 (W. Va. 1992).

A corporate officer is individually liable for the corporation's actions when "he had actual or constructive knowledge of the actionable wrong and participation therein." *Wolfersberger v. Miller*, 39 S.W.2d 758, 764 (Mo. 1931). The officer is also responsible for the conduct of his employees for "every such (fraudulent) wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved." *Id.*

Fraud may be proven by circumstantial evidence, because it "has to be established by a number and variety of circumstances, which, although apparently trivial and unimportant, when considered singly, afford, when combined together, the most

irrefragable and convincing proof of a fraudulent design.” *Chesus*, 967 S.W.2d at 113. Direct evidence rarely establishes fraud. *Id.* “Similar transactions in the course of a continuous, systematic course of dealing” are circumstantial evidence of fraud and admissible. *Blakeley v. Bradley*, 281 S.W.2d 835, 839 (Mo. 1955).

The Overbeys submitted substantial evidence that Franklin violated the MMPA.

Franklin’s own conduct by appearing in television commercials is direct evidence that Franklin had actual knowledge of the fraudulent sale to the Overbeys. Franklin appeared in commercials for National Auto Sales, including a commercial for the Payment for Life program. TR 51-53, 65, 102-106, 223-225; Exhibits 3, 35, 36, 37, 41, and 42; App. A11-15. Franklin represented himself to be the owner of National Auto Sales on at least one occasion. TR 65; Exhibit 42; App. A11. In one commercial for the Payment for Life program, Franklin explicitly explained the program.¹ TR 47; Exhibit 3.

¹ The ad’s message was:

Payment for life membership plan. No matter how high car prices get in the future, you’ll lock in your low monthly payment for the rest of your life. Here’s how. Buy any pre-owned vehicle, at the end of one year bring it back and pick out another. You’ll drive a different vehicle every single year forever....your initial monthly payment will never change and you can cancel your membership whenever you want.

TR 47; Exhibit 3.

In fact, the Overbeys were enticed to go to National Auto Sales after seeing Franklin's commercial. TR 102, 104-106, 223-225. Franklin was not a spokesperson who is being paid to read a script. He is the owner. It is his name on the business. Franklin's personal endorsements in the advertisements are direct evidence, or at a minimum a reasonable inference, that Franklin had personal knowledge of the Payment for Life program and approved the program.

After the Overbeys questioned the Payment for Life program, Ben, an employee of National Auto Sales, said he would call Franklin to address the Overbeys' concerns. In front of the Overbeys, Ben picked up the phone and represented that Franklin was the person on the other end of the phone. The Overbeys reasonably believed that Franklin himself was on the call and was consulted about their transaction and concerns. TR 86, 99. This is circumstantial evidence that Franklin himself had actual knowledge of the Overbeys' purchase of a Suzuki under the Payment for Life program and the concerns and questions the Overbeys raised about the promotion.

Franklin admitted in the Request for Admissions that he was the sole owner of National Auto Sales, TR 41-44, and Department of Revenue records confirmed this, TR 218. This is direct evidence that Franklin was the sole owners of National Auto Sales and it can be reasonably inferred that Franklin had actual or constructive knowledge of National Auto Sales' action, including the fraudulent sale of the Suzuki to the Overbeys.

There was also substantial evidence of a pattern and practice of other claims and complaints of Franklin and National Auto Sales. Four individuals testified about their

similar experiences with National Auto Sales. TR 198-217. Admitted into evidence were thirty-five specific complaints made to the Attorney General's Office about similar conduct the Overbeys experienced and seventy-five other complaints about National Auto Sales made to the Attorney General's Office. TR 130-132; Exhibit 25 and 26; App. A17-18. This "continuous systematic course of dealing" is circumstantial evidence that Franklin engaged in fraudulent activity. It is reasonably inferred that Franklin had actual or constructive knowledge that his business was engaging in a "continuous systematic course of dealing."

The evidence at trial shows Franklin had actual knowledge of the fraudulent sale practices of his business, specifically the fraudulent sale to the Overbeys.

Franklin failed to submit any evidence in own defense. Franklin never appeared at the trial, even when the Overbeys called Franklin as a witness and a representative of National Auto Sales. TR 44-45. Franklin presented no evidence that he had no knowledge of the Payment for Life program or the conduct of his employees. TR 241.

Despite Franklin's passionate insistence in his brief about his non-involvement in the Payment for Life program, the evidence at trial shows otherwise. The evidence is very clear, Franklin had actual and constructive knowledge about the fraudulent conduct of his business. The evidence that Franklin is personally liable: Franklin personally promoted the Payment for Life program, TR 47, Exhibit 3; Franklin knew his employees sold vehicles under the Payment for Life program; Franklin was told of the Overbeys' complaint, TR 98-100; Franklin was the sole owner of National Auto Sales, in fact the

full name of the business was “Chad Franklin National Auto Sales North,” TR 43-44. Franklin knew about the fraudulent scheme. Direct and circumstantial evidence and common sense shows that Franklin knew his business was engaging in fraudulent activity that violated the MMPA and therefore he is personally liable.

The reasonable inference drawn from circumstantial evidence of a pattern and practice of similar instances of fraudulent activity is that a fraud and scheme this big and widespread does not happen without Franklin’s involvement, knowledge, and consent. Franklin’s suggestion that the jury should pay no attention to the man behind the curtain is without merit.

The Overbeys submitted a submissible case to the jury. Each and every essential fact to find Franklin personal liable for violating the MMPA was met. The jury’s verdict must stand.

C. It is not necessary to pierce the corporate veil of National Auto Sales.

Franklin attempts to argue that the corporate veil of National Auto Sales should be pierced to impose personal liability on Franklin. Resp. Br. 68-75. Plaintiffs’ strategy was not a backdoor conviction using a *de facto* piercing the corporate veil argument. Piercing the corporate veil was not a claim submitted to the jury. LF 200-209. Franklin and National Auto Sales were separate defendants, separate jury instructions for Franklin and National Auto Sales’ liability were submitted to the jury, and the jury made separate awards against Franklin and National Auto Sales. LF 16-46, 202-210.

In Count VIII of the petition, Franklin was named a defendant. LF 16-46. In jury instruction numbers 9-11 Franklin was named as a Defendant. LF 205-207. The jury returned a verdict finding Franklin violated the MMPA, and awarded \$1,000,000.00 in punitive damage and \$4,500.00 in actual damages. LF 210, 211-214. Meanwhile National Auto Sales was named a defendant in Count II. LF 29. National Auto Sales' liability was submitted to the jury in instruction number 7 and the jury returned an awarded of \$76,000.00 in actual damages and \$250,000.00 in punitive damages. LF 203, 209.

It is unnecessary to discuss the elements of piercing the corporate veil. That was not an issue in this trial. The issue was whether Franklin personally violated the MMPA by engaging in fraudulent activity. Direct and circumstantial evidence clearly shows that Franklin personally violated the MMPA. The jury found Franklin and National Auto Sales both liable and imposed different amounts of actual and punitive damages. LF 209-214. Franklin was not named a defendant to pierce the corporate veil. He was named a Defendant because of his personal conduct and involvement which violated the MMPA.

D. Conclusion

The Overbeys presented sufficient evidence for the jury to find Franklin personally violated the MMPA. Franklin was a separate defendant in the lawsuit for his own conduct, Franklin was not named a defendant as a means of piercing the corporate veil. Sufficient evidence was submitted to find Franklin was individually liable for his personal violations of the MMPA. Franklin's point one should be denied.

RESPONSE TO RESPONDENT'S CROSS-APPEAL

POINT II

The trial court did not error in reducing the punitive damage award to a single-digit multiple of the actual damages because the Due Process Clause of Article I, Section 10 of the Missouri Constitution and the Fourteenth Amendment of the United States Constitution provide guideposts to analyze a punitive damage award, in that the punitive damage award against Franklin complies with the guideposts, evidence presented at trial, and an arbitrary amount does not support Franklin's conduct.

A. Standard of Review

De novo review is the appropriate standard to review the application of the established guideposts to determine if a punitive damage award violates the Due Process Clause, or the constitutionality of punitive damage. *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408, 418 (2003); *see also Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 811 (Mo. App. W.D. 2008). Franklin bears the burden of proving the punitive damages exceed the constitutional due process standards. *Kelly v. Bass Pro Outdoor World, LLC*, 245 S.W.3d 841, 850 (Mo. App. E.D. 2007).

B. The punitive damage award complies with Due Process.

Due process under the United States and Missouri Constitutions applies to punitive damage awards. *See* U.S. Con. Art. 14; Mo. Con. Art. I, Sec. 10; *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424 (2001). Due process only requires that

“adequate standards and controls” exist to prevent the arbitrary deprivation of property. *Call v. Heard*, 925 S.W.2d 840, 848 (Mo. banc 1996). Punitive damages are to punish or deter conduct and should be awarded when actual damages do not effectively punish or deter the conduct. *State Farm*, 538 U.S. at 419.

The United States Supreme Court has established three guideposts to determine if a punitive damage award violates due process. *State Farm*, 538 U.S. at 418. The three guideposts are: “(1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damage award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” *Id.*

The Due Process Clause does not require a punitive damage award to be reasonable, as Justice Scalia argued

I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against "unfairness"- neither the unfairness of an excessive civil compensatory award, nor the unfairness of an "unreasonable" punitive award. What the Fourteenth Amendment's procedural guarantee assures is an opportunity to contest the reasonableness of a damages judgment in state court; but there is no federal guarantee a damages award actually be reasonable.

BMW of North America Inc. v. Gore, 517 U.S. 559, 599 (1996) (Scalia, J., dissenting).

Courts have not imposed definite ratios which solely determine if a punitive damage award is unconstitutional. *See State Farm*, 538 U.S. at 424-25. The United States Supreme Court has noted that single-digit ratios are more likely to comply with due process, but greater ratios can be constitutional when “particular egregious act has resulted in only a small amount of economic damages.” *Id.* at 545. Justice Kennedy summarized the most important factor in determining a punitive damage award as “the precise award in any case, of course, must be based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiffs.” *Id.* Judge Teitelman echoed this:

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

Scott v. Blue Springs Ford Sales, Inc. 176 S.W.3d 140, 144 (Mo. banc 2005) (Teitelman, J., concurring).

Punitive damages may be reduced in negligence cases when there were infrequent similar occurrences, the possibility of an injury is only due to another’s negligence, or a rule to prevent the injury was not knowingly broken. *Werremeyer v. K.C. Auto Salvage Co., Inc.*, 134 S.W.3d 633, 636 (Mo. banc 2004). This does not apply here because Franklin violated the MMPA, which is not a negligence claim.

Franklin attempts to argue that the trial court “apparently” reduced the punitive damage award to comply with section 510.265,² but this is clearly a misstatement by Franklin. Resp. Br. 81. The trial court was explicitly clear about the reduction of punitive damages, ruling

The jury’s verdict award of One Million Dollars (\$1,000,000.00) punitive damages is reduced by the Court to the statutory maximum of Five Hundred Thousand Dollars (\$500,000.00) as set forth in Section 510.265 RSMo.

LF 303.

Franklin also argues that it is unclear how the amount of actual damages sustained against Franklin was arrived at and whether the amount was an accurate reflection of the actual damages. Resp. Br. 82. At trial, the Overbeys presented evidence that Franklin received over \$4,000.00 in profits from the sale of the Suzuki sold to the Overbeys. TR 195, Exhibit 14, App. A22. The profits included a \$2,000.00 rebate from the loan company, \$500.00 from the Overbeys’ down payment, \$499.00 document fee, \$399.00 from the gap coverage, and \$710.00 from the service contact. TR 42-44, 266; Exhibits 14, 15, 30; App. A21-22. The amount financed for the loan was \$37,191.21. TR 153; Exhibit 7 and 30. During closing argument, the Overbeys argued that Franklin received \$4,000.00 in profits from this sale and \$50,000.00 to \$70,000.00 would be adequate

² All references are to RSMo, Supp. 2008 unless otherwise noted.

reflection of actual damages for the loss suffered. TR 253, 266. The actual damages of \$4,500.00 was the jury's assessment of Franklin's responsibility for the actual damages sustained. The jury was provided with numerous documents and figures concerning the profits, loan amount, and value of the vehicle. The amount of actual damages was the jury's assessment of the actual losses.

The Overbeys cite several cases, including five Missouri cases, where courts have upheld punitive damage awards that exceed the single-digit ratio. *See* App. Br. 50-51. The punitive damage award against Franklin is appropriate compared to *Kelly*, 245 S.W.3d 841. In *Kelly*, a punitive damage award for \$2,800,000.00 was deemed "unconstitutionally excessive" in a wrongful termination case with actual damages were \$4,3000.00 - a ratio of 651 to 1. *Id.* at 851. The actual damages in *Kelly* and against Franklin were approximately the same, but the punitive damages in *Kelly* were three times the punitive damages awarded against Franklin. In this context, the punitive damage award against Franklin is adequate and constitutional.

(1) Reprehensibility

The first guidepost is "the degree of reprehensibility of the defendant's misconduct," is the most important factor. *State Farm*, 538 U.S. at 418-19. The following four factors are to be considered: (1) "the harm caused was physical as opposed to economic;" (2) "the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;" (3) "the target of the conduct had financial vulnerability;" (4) "the conduct involved repeated actions or was an isolated incident;"

(5) and “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *State Farm*, 538 U.S. at 419. Franklin does not argue the application of this guidepost but the legal theory and rationale of the argument. In *Gore*, the Supreme Court emphasized “our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.” 517 U.S. at 577. This supports the finding that a larger punitive damage is more appropriate with repeated conduct.

There are three factors present: financial vulnerability, repeated conduct, and intentional malice, trickery, or deceit. This case is the perfect illustration of why this punitive damage award is appropriate and constitutional. The Overbeys were financially vulnerable and they made it clear that they were concerned about financing the vehicle. TR 51, 109. Franklin’s promotions sought to target the Overbeys who were financially vulnerable because it lured them in on the idea of a new car every six months for only \$45.00. TR 109. Franklin conduct was also repeated. Four other customers testified about their similar experiences with Franklin. TR 195-217. Evidence of seventy-three complaints against Chad Franklin and National Auto Sales, including thirty-five involving similar complaints as the Overbeys, was presented to the jury.³ TR 130-132,

³ Exhibit 23 contained numerous complaints against Franklin, National Auto Sales, and Chad Franklin Suzuki, a Kansas car dealership solely owned by Franklin, which used the same advertising promotions as in the Overbeys’ case. TR 134.

135-136; Exhibits 25 and 26; App. A17-18. The Overbeys were not a one-time occurrence, but something that happened repeatedly. Franklin's promotion also involved trickery or deceit. Franklin personally promoted the Payment for Life program with the promise a new car every six months for only \$43.00 a month.⁴ TR 52-54. Franklin's employees continuously reassured the Overbeys that the program was legitimate and their payments would only around \$43.00 a month. TR 152. Max Overbey signed two documents, a Commitment to Excellence form showing a \$500.00 down payment and monthly payments of \$43.00. TR 229; Exhibit 12; App. A19. Max Overbey also signed a handwritten offer with a monthly payment of \$45.00. TR 152; Exhibit 13; App. A20. Six months after the purchase, Franklin's employees denied knowing anything about the program and the Overbeys payments drastically increased to \$719.00 a month. TR 82. The entire scheme was deceitful and tricked the customers into buying a car with extremely low payments for the first six month and then having the payments increase to an exorbitant amount. Franklin was there to make money, as he made over \$4,000.00 in profits from the Overbeys alone. TR 43, 266. He purposefully tricked and deceived the Overbeys.

⁴ There is a discrepancy in the monthly payment. The advertisement on television represented a \$43.00 monthly payment, TR 51, the employees at the dealership said the monthly payment would be \$49.00, TR 62, and the contracts the Overbeys signed had the monthly payment of \$43.00 and \$45.00, TR 152, 229; Exhibit 12, 13; App. A19-20.

Franklin consistently engaged in business practices using trickery and deceit. Franklin's promotion, which enticed the Overbeys, promised a new car every six months with low monthly payments of \$43.00. TR 51-71. There was also evidence that Franklin engaged in other similar types of promotions or schemes. To make the conduct more egregious, Franklin himself advertised these promotions on television, to entice customers to his business. Evidence of such was submitted to the jury. TR 47, 51-53, 65; Exhibits 3, 35, 36, 37, 41, and 42; App. A11-15.

The fraud that Franklin personally promoted, carried out under his business, and personally benefited from was not a one-time occurrence with the Overbeys. It was a common scheme. He did this numerous times. Unlike *Campbell*, the Overbeys showed evidence that Franklin engaged in similar conduct to support the reprehensibility issue. *State Farm*, 538 U.S. at 424. This is the ideal situation where punitive damages are warranted. In this situation, the jury's verdict of \$1,000,000.00 is constitutional and appropriate.

(2) Disparity between actual harm and punitive damages

The ratio between actual damages and punitive damages does not warrant the punitive damage award unconstitutional. Courts have consistently refused to establish a bright line ratio or strict formula to determine if a punitive damage award is unconstitutional. *State Farm*, 538 U.S. at 242-425; *Scott*, 176 S.W.3d at 144. The United States Supreme Court has emphasized the "measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general

damages recovered.” *State Farm*, 538 U.S. at 426. Judge Teitelman recognized that punitive damages exceeding the single-digit ratio rarely meet the due process standards, but argued that

However, the Court qualified this dicta by stating that in cases involving egregious conduct but a small amount of compensatory damages, ratios greater than a single digit may comport with due process. The Court's refusal to adopt an arbitrary ratio for reviewing punitive damage awards is consistent with the recognition that punitive damages further a State's legitimate interests in punishing wrongful conduct and deterring its repetition.

Scott, 176 S.W.3d at 144 (Teitelman, J., concurring) (*State Farm*, 538 U.S. at 416).

Franklin argues that *Kemp v. American Telephone & Telegraph Co.*, 393 F.3d. 1354, 1363-1365 (11th Cir. 2004) and *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d. 672 (7th Cir. 2003) are distinguishable because the defendants are multi-million or multi-billion dollar corporations, not an individual. Resp. Br. 84. At trial, Franklin did not present any evidence about his net worth, his profits from the sale to the Overbeys, or his profits from the business. TR 44-45. The Overbeys presented evidence at trial that Franklin was the sole owner National Auto Sales. TR 41. In an eighteenth month period surrounding the sale to the Overbeys, National Auto Sales had sales of \$13,715,724.00. TR 240; Exhibit 27; App. A16. Franklin and a corporate representative of National Auto Sales failed to appear at trial. TR 44-45. Franklin had the opportunity to introduce his

net worth, his compensation from National Auto Sales, or his personal profits from the sale to the Overbeys, but he made the conscious and deliberate decision not to. How much Franklin is personally worth was intentionally omitted from evidence by Franklin. Franklin cannot argue a punitive damage award is excessive based on his financial situation when he omitted that evidence from trial. Given the evidence, or lack of evidence from Franklin, the punitive damage award does not seem excessive.

The punitive damage award is constitutional and appropriate given the small amount of actual damages and repeated conduct.

(3) Punitive damage and civil penalties

The third guidepost is the comparison between the punitive damages and civil penalties. The MMPA provides a civil penalty of \$1,000.00 per violation when the Attorney General seeks an injunction prohibiting the conduct. Section 407.100.6. The Attorney General may also obtain a civil penalty of \$2,000.00 per violation when a voluntary compliance is agreed to. Section 407.030.

There were thirty-five other complaints about the same financing promotion the Overbeys are complaining about. TR 134-136. The State has not resolved the injunction even though the injunction has been pending since August of 2008. *See State of Missouri ex rel v. Chad Franklin et al*, 08CY-CV08140.

Franklin's discussion of the portion of the United States Supreme Court argument in *Gore* that a history of complying with statutory regulations warrants a modest punishment is irrelevant and unpersuasive. Resp. Br. 87. Franklin has a history of

violating the MMPA. The Overbeys were not a one-time mistake. It was a pattern. There was no “absence of a history” of failing to comply with the MMPA. Franklin should not be given any break because the State has failed to take action against Franklin’s history of noncompliance with statutory regulations. The conduct still exists regardless of whether he was held responsible by the State. This is one reason why punitive damages are warranted in this case. Nothing has been done by the State and Franklin continued to engage in fraudulent activity which harmed the Overbeys. Franklin should not be rewarded by having his punitive damage award reduced for his history of failing to comply with the law and the State’s refusal to do anything about it.

It is improper to use the civil penalties under the MMPA as a means of evaluating the constitutionality of the Overbeys’ punitive damage award and whether it is appropriate. Franklin has engaged in a history of not complying with the MMPA. Franklin’s long and extensive history of noncompliance should not be subject to the same civil penalties as a one-time violation. Furthermore, the Attorney General’s failure to promptly resolve the injunction and obtain a civil penalty should not affect the Overbeys’ punitive damage award. The Overbeys’ punitive damage award should not be reduced because there is the possibility the Attorney General will be able to favorably resolve the injunction and be awarded civil penalties.

C. Conclusion

The Overbeys' punitive damage award is not unconstitutional. The punitive damage award is appropriate within the guideposts. Franklin's point two should be denied.

RESPONSE TO RESPONDENT'S CROSS-APPEAL

POINT III

The trial court did not abuse its discretion in awarding attorney fees in the amount of \$72,000.00 because the trial court has discretion to award attorney fees, in that the attorney fees awarded were not arbitrary or unreasonable.

A. Standard of Review

The award of attorney fee is reviewed for abuse of discretion. *Howard v. City of Kansas City*, 2011 WL 265309, *16 (Mo. banc January 25, 2011). The trial court “is considered an expert at awarding attorney's fees” and abuses its discretion when the award is arbitrary and unreasonably “against the logic of the circumstances.” *Id.*

B. The attorney fee argument was not preserved for appeal.

Franklin failed to preserve the issue of the attorney fees for appeal. To perverse an issue for appeal, the error must be presented to the trial court. *Vance Bros., Inc. v. Obermiller Const. Services, Inc.*, 181 S.W.3d 562, 564 (Mo. banc 2006). Franklin first raised this issue in his cross motion. Resp. Br. 97-99. Franklin did not present this issue to the trial court, even though he filed Suggestions in Opposition to Plaintiffs’ Motion to Set Aside, Vacate, or Correct First Amended Judgment or Alternative Relief. Supp. LF 37. Attorney fees of \$72,000.00 were awarded in the amended judgment. LF 303. Franklin did not address the amount of attorney fees awarded thus it was waived for appeal. Furthermore, Franklin did not allege plain error.

C. The attorneys fees awarded were reasonable.

The MMPA allows attorney fees to be awarded, at the trial court's discretion, to the prevailing party for the time reasonably expended. Section 407.025.1.

The Overbeys' lawsuit has been ongoing since December 2008. LF 1. The Overbeys' attorney initial requested attorney fees in the amount of \$67,000.00 for a total of 270 hours. LF 215-228. After Franklin filed the motion for new trial and the Overbeys replied to it, an amended motion for attorney fees was filed. Supp. LF II 1-2; App. A1-10.⁵ Franklin was aware of the amended motion for attorney fees, as it was served on him on November 2, 2010. LF 13; Supp. LF II 1-2; App. A1-10. No objection was made as to this by Franklin. LF 236-254. The trial court awarded Overbeys' attorneys \$72,000.00 in attorney fees against National Auto Sales and Franklin. LF 303. The trial court found this amount to be "reasonable and customary." LF 303.

There was an evidentiary basis for the final amount of attorney fees awarded. The Overbeys filed a first amended itemization of attorney fees filed on November 2, 2010. LF 13; Supp. LF II 2-3; App. A1-10. The amended amount of attorney fees was supported by evidence and explained.

⁵ Plaintiffs' First Amended Itemization of Attorneys' Fees was filed with the trial court on November 2, 2010 and inadvertently omitted from the Legal File, but is provided in the Supplemental Legal File II.

Franklin only argues that the attorney fees should be remitted to the amount in the original motion. The attorney fees as awarded by the trial court should be upheld as a proper motion was filed with supporting documentation and the trial court granted the amended amount as “reasonable and customary.” There has been no evidence that the attorney fees, in general or a specific portion of the attorney fees, are arbitrary or unreasonable. The trial court’s award of attorney fees should stand. Franklin’s point three should be denied.

REPLY TO APPELLANTS'

POINT I

The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the constitutional separation of powers prescribed by article II, section 1 of the Missouri Constitution, in that the trial court's reduction of the jury's punitive damage award of \$1,000,000.00, as required by section 510.265, relinquished the judiciary's discretion to remit damages based on the evidence, invaded the providence of the jury to assess damages, and authorized the executive branch to determine if the Overbeys were exempt from the statutory limitation by Franklin being convicted of a felony, thereby making the final punitive damage award inadequate as the award was not based on this particular case but on arbitrary reasons as statutorily mandated.

A. The reduction of punitive damages was based upon section 510.265.

Franklin incorrectly asserts that “the Court did not clearly set forth its rational for that reduction” of punitive damages. Resp. Br. 21. The trial court explicitly ruled that Franklin’s post trial motion for remittitur

is granted in accordance with Section 510.265 RSMo; and the jury’s verdict award of One Million Dollars (\$1,000,000.00) punitive damages is reduced by the Court to the statutory maximum of Five Hundred Thousand Dollars (\$500,000.00) as set forth in Section 510.265 RSMo.

LF 303. The trial court was explicitly clear that the punitive damage award was reduced to comply with section 510.265.

The constitutionality of section 510.265 is not avoided by a favorable resolution of the issues Franklin raises in his cross appeal. As argued in the Overbeys' responses to Franklins cross appeal points, the constitutionality of section 510.265 is still before this Court.

B. Appellants preserved the separation of powers argument for appeal.

The Overbeys properly preserved point one, that section 510.265 violates the separation of powers, for appeal. A constitutional issue is preserved for appeal when the issue is raised at the earliest opportunity, the specific section of the Constitution is identified, the motion for new trial preserves the issue, and the brief covers the issue. *In re H.L.L.*, 179 S.W.3d 894, 897 (Mo. banc 2005). The purpose of a motion for new trial is to “avoid lengthy and complex explanations as to their contentions of error.” *Lohmann By and Through Lohmann v. Norfolk & Western RR Co.*, 948 S.W.2d 659, 667 (Mo. App. W.D. 1997). This Court found an error was preserved when the motion for new trial stated the general subject matter of juror’s responses during voir dire without stating the jurors at issue. *Williams By and Through Wilford v. Barnes Hosp.*, 736 S.W.2d 33, 36 (Mo. banc 1987); *see also, Shields v. Freightliner of Joplin, Inc.*, 2011 WL 723149, *8 (Mo. App. S.D. February 28, 2011).

The Overbeys preserved the argument that section 510.265 violates the separation of powers. The issue was raised after the jury entered a punitive damage award against

Franklin for \$1,000,000.00. LF 273-274. The specific section of the Constitution was addressed. LF 273-274. The matter was preserved in the Overbeys' Objection and Challenge to the Remittitur. LF 272-274. The issue was briefed before this Court. App. Br. 18-29. The issue is the separation of powers. Whether specific arguments were addressed before the trial court is irrelevant. The general issue was raised. This point is preserved.

C. Section 510.265 violates the separation of powers.

Franklin argues that section 510.265 does not violate the separation of powers under *Fust v. Attorney General for Mo.*, 947 S.W.2d 424 (Mo. banc 1997). *Fust* is distinguished from the Overbeys' case. In *Fust*, the issue was whether the State could require a percentage of any punitive damage award go to the State. *Id.* at 427. Here, the issue is whether a punitive damage award exceeding a predetermined amount can automatically be reduced and the reduction specifically excludes arbitrary selected groups. The difference is that in *Fust*, the trial court would be allowed to determine if the evidence supported the punitive damage award and remit the award if necessary, and then fifty percent of the punitive damage award would be awarded to the State. *Id.* Here, the trial court is not allowed to consider the evidence and determine if the punitive damage award is supported by the evidence or the appropriate amount to be remitted. Franklin's reliance on *Fust* is taken out of context to the argument presented by section 510.265.

The Overbeys rely on the Illinois Supreme Court's decisions in *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1080 (Ill. 1997) and *Lebron v. Gottlieb Memorial*

Hospital, 930 N.E.2d 895, 914 (Ill. 2010) for their views on statutory limitations of punitive damages violating the separation of powers, a similar argument that Judge Wolff raised in *Klotz*, 311 S.W.3d at 778. Franklin's reference to *Siegall v. Solomon*, 166 N.E.2d 5, 7-8 (Ill. 1960) and *Smith v. Hill*, 147 N.E.2d 321, 324-325 (Ill. 1958) does not consider the separation of power argument. In *Smith* and *Seigall*, the issue is whether punitive damages may be awarded at all, not a limitation on the amount of damages awarded. *Smith*, 147 N.E.2d at 324-325; *Siegall*, 166 N.E.2d at 8. These cases do not reference anything about a limitation on punitive damages not violating the separation of powers. See *Smith*, 147 N.E.2d at 324-325; *Siegall*, 166 N.E.2d at 8. Franklin's reliance on *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) as an example when Illinois upheld punitive damage limitation is again without merit and a misstatement of the law. *Bernier* concerns the complete prohibition of punitive damages for malpractice claims and whether the statute violates due process, equal protection, or special legislation. *Id.* at 776. The matter before this Court deals with a limitation of punitive awards and whether the limitation violates the right to trial by jury. Franklin's assertion that Illinois has upheld limitation of punitive damages as not violating the separation of powers is an explicit misstatement of the law. Furthermore, all the cases cited by Franklin were distinguished in the *Lebrown* and *Best* opinions. See *Best*, 689 N.E.2d 1057 and *Lebron*, 930 N.E.2d 895.

The MMPA is a statutory cause of action which supplements the common law fraud. *Scott v. Blue Springs Ford Sales, Inc.*, 215 S.W.3d 145, 160 (Mo. App. W.D.

2006). A cause of action may be modified or abolished by a statute. *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. banc 2000). The MMPA allows for punitive damages to be awarded, it does not limit the amount of punitive damages awarded. Section 407.025. The limitation on punitive damages is a general statute that applies to common law and statutory created claims with three exemptions. Section 510.265. Section 510.265 is not a modification of section 407.025, it is a modification of any cause of action. The MMPA is most clearly and logical modified by a statute specifically addressing the issue, such as the specific statute providing for punitive damages in the MMPA. Franklin's argument that the limitation of punitive damages for the MMPA is valid because it is a statutory created claim is without merit and without rational reasoning.

D. Conclusion

The separation of powers argument is preserved for appeal. Section 510.265 clearly violates the constitutional guarantee of the separation of powers.

REPLY TO APPELLANTS'

POINT II

The trial court erred in reducing the Overbeys' punitive damage award pursuant to section 510.265, because section 510.265 violates the Overbeys' right to trial by jury as guaranteed by article I, section 22(a) of the Missouri Constitution, in that the trial court's reduction of the punitive damage award of \$1,000,000.00, as required by section 510.265, prevented the Overbeys from having the jury's determination of punitive damages be the amount awarded, thereby making the final award inadequate as the jury's award of punitive damages was substituted by the legislature's mandated maximum of punitive damages allowed.

Franklin's argument that any reduction of punitive damages under a due process analysis does not violate the right to a trial by jury is misplaced for two reasons. First, any reduction of a punitive damage award that exceeds the statutory limitation in section 510.265 will not be considered because the punitive damage award is automatically reduced. Second, the trial court is to consider the facts and circumstances of the case when reducing a punitive damage award compared to section 510.265 which automatically and arbitrarily reduces the punitive damage award regardless of the facts and circumstances. Franklin's inference that section 510.265 does not violate the right to trial by jury is misplaced and without merit.

The right to a trial by jury “shall remain inviolate.” This guarantees a right, not restricts it. The application of section 510.265 infringes upon a plaintiff’s right to a trial by jury as Judge Teitelman specifically addressed limiting punitive damages in his concurring opinion in *Scott* as:

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

.....

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

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

Section 510.265 violates the Overbeys’ constitutional inviolate right to a trial by jury as the jury’s award and amount of punitive damages was usurped by the legislature’s determination of the maximum amount of punitive damages allowed.

REPLY TO APPELLANTS'

POINT III

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

The right to a trial by jury is a fundamental right which warrants a strict scrutiny review. Franklin inaccurately relies upon previous decisions by this Court. In *Adams By and Through Adams v. Children's Mercy Hosp.*, which upheld caps on non-economic damages, this Court found the plaintiff's assertion that a right to trial by jury as a fundamental right was not supported by case law. 832 S.W.2d 898, 903 (Mo. banc 1992). In *Fust*, which upheld the State receiving fifty percent of punitive damage awards, did not address the issue of a fundamental right under an equal protection

analysis. 947 S.W.2d at 432. The Overbeys provide supporting authority from this Court that the right to a trial by jury is a fundamental right. *See* App. Br. 35. The proper analysis is the strict scrutiny standard of review advanced in the Overbeys' initial brief.

Section 510.265's exemptions to the statutory limitation on punitive damages do not have a compelling state interest or a rational basis.

Excluding the State of Missouri in all punitive damages cases has no compelling state interest or rational basis. There is no *per se* rule that when the State is pursuing a punitive damage award the conduct at issue is extremely egregious to warrant higher punitive damages or that the punitive damage award will actually benefit the citizens. Franklin's violation of the MMPA is a perfect illustration on why this exception is not sound. The State filed suit against Franklin four months before the Overbeys brought their lawsuit. *See State of Missouri ex rel v. Chad Franklin et al*, 08CY-CV08140, *Max E. Overbey v. Chad Franklin National Auto et al*, 08CY-CV12286. The State filed an injunction and cannot recover punitive damages, section 407.100, but the Overbeys can recover punitive damages at the trial court's discretion, section 407.025. When the MMPA allows an individual to bring a lawsuit for same conduct as the State, why should the individual be limited as to the amount of punitive damages recovered?

While the United States Supreme Court has ruled that injuries to nonparties cannot be used for punitive damage purposes, *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007), it has also ruled that repeated actions is a factor as to the reprehensibility of the defendant's misconduct, *State Farm*, 538 U.S. at 419. In arguing for punitive damages,

the Overbeys did not argue that Franklin should be punished for his conduct towards others. TR 255. The Overbeys argued that a punitive damage award should account for Franklin's profits. TR 255. The punitive damage instruction specifically instructed the jury that they "must not include damages for harm to others who are not parties to this case." LF 207. It is presumed that the jury follows the jury instructions. *State v. Whitfield*, 107 S.W.3d 253, 263 (Mo. banc 2003). The punitive damage award against Franklin does not account for every party harmed. There is no compelling state interest or rational basis to exclude the State of Missouri.

The exemption for a felony conviction has no compelling state interest or rational basis. There is no *per se* rule that a felony conviction makes conduct more egregious to warrant a higher punitive damage award. Conduct that warrants a large punitive damage does not necessarily correspond with a felony crime. Numerous factors can influence whether a felony exists including: whether a statute creates a crime and whether it is a felony or misdemeanor; whether sufficient evidence exists to find the defendant guilty of a felony beyond a reasonable doubt; and whether the charge was filed within the statute of limitations. A civil plaintiff has no influence over a criminal case. Whether charges are filed and how the case is disposed of is a matter within the sole discretion of the prosecuting attorney. A good defense attorney may effectively negotiate for a misdemeanor disposition in plea negotiations to protect his client in a civil lawsuit. There is no compelling state interest to try a civil plaintiff's punitive damage award to a criminal conviction, the civil and criminal matter are inherently different matters and

gives the prosecuting attorney and criminal defense attorney the power to determine if section 510.265 statutory exemption applies.

Franklin's argument for the housing discrimination exception illustrates how the MMPA should be treated like housing discrimination claims. Franklin argues that housing discrimination victims meets the economic regulation. Resp. Br. 41. The reasons advanced by Franklin for the housing discrimination victims are the same reasons which apply to the MMPA. MMPA victims also have low actual damages and limiting punitive damages would make it difficult for victims to find legal representation and defendant would have little incentive to comply with the law. The same interest in economic regulations that applies to housing discrimination victims applies to MMPA victims. This exception alone shows how section 510.265 violates the Overbeys' right to equal protection as claimant under the MMPA automatically have a statutory limitation on punitive damages.

Section 510.265 is subject to a strict scrutiny standard of review. There is no compelling state reason for the exemptions to exist. The exemptions in section 510.265 violate the Overbeys right to equal protection. There is no compelling reason why the exemptions of section 510.265 should apply in this matter.

REPLY TO APPELLANTS'

POINT IV

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

The Overbeys preserved the argument of special legislation for appeal. A constitutional issue is preserved for appeal when the issue is raised at the earliest opportunity, the specific section of the Constitution is identified, the motion for new trial preserves the issue, and the brief covers the issue. *In re H.L.L.*, 179 S.W.3d at 897. The purpose of a motion for new trial is to “avoid lengthy and complex explanations as to their contentions of error.” *Lohmann By and Through Lohmann*, 948 S.W.2d at 667. This Court found an error was preserved when the motion for new trial stated the general subject matter of juror’s responses during voir dire without stating the jurors at issue. *Williams By and Through Wilford*, 736 S.W.2d at 36; *see also Shields*, 2011 WL 723149, *8. In the Overbeys’ Objection and Challenge to Remittitur, the Overbeys identify the three classes singled out. *See* LF 279. This point is preserved.

Franklin incorrectly represents the authority cited. *Jackson County v. State* states a statute is “facially special if it is based on close-ended characteristics” and is presumed unconstitutional. 207 S.W.3d 608, 611 (Mo. banc 2006). The burden is on the party defending the law and must show “substantial justification” for the treatment. *Id.* The burden is on Franklin, not the Overbeys, to show the section 510.265 has “substantial justification” to treat the three classes differently. This is not what Franklin asserts in his brief.

Furthermore, Franklin gives no authority to support his assertion that “this court must apply the same standard as the equal protection analysis.” Resp. Br. 45. The Overbeys provide multiple authorities which sets for the appropriate standards and applications necessary for a special law challenge. *See* App. Br. 40-41.

Franklin’s attempt to misrepresent the Overbeys’ position is again plain wrong. As outlined in the Overbeys’ brief, the Overbeys argue that the State exemption is a special legislation because individuals acting as special attorney generals are not exempt from the statutory limitation of punitive damages.

Franklin’s assertion that the Overbeys cited one authority to support their position is absurd. The Overbeys’ brief clearly shows multiple authorities and arguments were raised. App. Br. 40-45.

Section 510.265 violates the prohibition against special legislation.

REPLY TO APPELLANTS'

POINT V

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

The Overbeys' fifth point on appeal is that section 510.265 is unconstitutional as denying due process because section 510.265 ignores the due process analysis on awards which exceed the statutory maximum. The Overbeys' argument is that section 510.265 unconstitutional denies a due process analysis of a punitive damage award. The Overbeys only argue that the appropriateness of any punitive damage award should be determined by a due process analysis, not a statutory limitation as imposed by section 510.265. The Overbeys' argument is not that they are entitled to any amount of damages that are awarded by a jury, but they are entitled to a due process analysis of the punitive damage awarded by the jury and not arbitrary limited by section 510.265. *See* Appellants' Response to Respondent's Point II for the Overbeys due process argument.

REPLY TO APPELLANTS'

POINT VI

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

As private attorney generals, the Overbeys should be afforded the statutory exemption for the State under section 510.265.

This Court has acknowledged private citizens using the MMPA to act as “private attorney generals” because “that government cannot do everything and that some requirements of the Act can best be enforced by those most directly involved.” *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 769 (Mo. banc 2007) (quoting *Stiffelman v. Abrams*, 655 S.W.2d 522, 530 (Mo. banc 1983)). The MMPA is unique in that it provides the State and a private citizen to pursue similar causes of action for the same conduct. Few, if any, other statutes allow the State and a private citizen to sue the same defendant for the same conduct. It seems inherently unfair for the legislature to allow similar causes of actions for the same conduct, and only allow the private citizen to receive punitive damages, but then limit the punitive damage award. If the legislature is going to allow a private citizen to act as a private attorney general, it should be allowed all the benefits that the State would have.

Alternatively, section 510.265 should not apply to the MMPA because the MMPA section awarding punitive damages conflicts with section 510.265. Statutory construction requires this Court to give section 510.265 its plain and ordinary meaning. *South Metro. Fire Protection Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo. banc 2009). When two statutes conflict and cannot be harmonized, statutory construction requires the specific statute to prevail over the general statute and be the exception to the rule. *Id.* However, "rules of statutory construction cannot be rigidly applied. Most often, for every rule suggesting one resolution, another rule exists that suggests the contrary." *Id.* (referencing Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 VAND. L.REV. 395, 401-06 (1950)).

Here sections 510.265, 407.025, and 407.100 conflict regarding punitive damages under the MMPA. Section 407.025 allows private citizens to bring a MMPA claim and recover punitive damages. Section 407.100 allows the Attorney General to bring an injunction under the MMPA but cannot receive punitive damages. Section 510.265 limits a punitive damage award in excess of \$500,000.00 except when the State is a party. Reading these three sections together, they cannot be harmonized. The general statute of section 510.265 limits punitive damages under the MMPA to \$500,000.00; however the specific statute of section 407.025 providing punitive damages under a MMPA claims does not limit the amount of punitive damages for private citizens. Since section 407.025 is the only provision of the MMPA which allows for punitive damages and does not limit

the amount of punitive damages, it is the specific statute which must prevail under statutory construction.

The Overbeys should be afforded the State exemption under section 510.265 or section 510.265 should not be applied as it conflicts with the specific statute awarding punitive damages under the MMPA.

REPLY TO APPELLANTS'

POINT VII

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

The Overbeys have demonstrated that plain error is appropriate to review point seven, involving the violation of the right to open courts. Rule 84.13(c) allows plain error when “manifest injustice or miscarriage of justice” resulted from a substantial right not preserved.

The Overbeys have argued numerous substantial rights have been affected by the application of section 510.265. A fundamental right is any right “explicitly or implicitly guaranteed by the Constitution.” *In re Marriage of Woodson*, 92 S.W.3d 780, 784 (Mo. banc 2003). The Overbeys right to open courts has been infringed upon and is substantial right that the Missouri Constitution provides for. Art. 1, Sec. 14. Throughout the brief, the Overbeys have argued the infringement upon substantial rights such as the separation of powers, right to trial by jury, equal protection, special legislation, and due process. All

of these rights have been denied or restricted by section 510.265 limiting the amount of punitive damages.

Plain error review is warranted as section 510.265 violates the Overbeys' constitutional right to open access to the courts in that their substantial rights have been affected.

CONCLUSION

For the reasons set forth herein the Overbeys respectfully submit that this Court declare section 510.265 unconstitutional and reverse the decision of the trial court, which reduced the punitive damage award from \$1,000,000.00 to \$500,000.00 and remand the case to the circuit court for reinstatement of the full jury award of \$1,000,000.00 punitive damages in favor of the Overbeys; in the alternative that the Overbeys be considered private attorney generals acting on behalf of the state of Missouri so therefore they fall within the exception allowed the state of Missouri under section 510.265; or make a caselaw exemption for claims under the MMPA for punitive damages with no limitation. The Overbeys also respectfully submit that this Court to deny Franklin's points one and two as there was punitive damage award against Franklin was supported by sufficient evidence and does not violate Due Process, and point three about the attorney fees as it was not preserved for appeal.

Respectfully submitted,

NOLAND LAW FIRM, LLC

34 Westwoods Drive

Liberty, Missouri 64068

Telephone: 816-781-5055

Fax: 816-781-5216

Email: doug@nolandlawfirm.com

By: _____

Douglass F. Noland. #28635

Thomas K. Mendel #59530

ATTORNEYS FOR APPELLANTS

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Reply Brief contains the information required by Rule 55.03 and complies with the limitations of Rule 84.06(b). Relying upon the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this Brief is 10,934 and has been prepared using Microsoft Word in 13 pt. Times New Roman font, and includes a CD ROM which has been scanned for viruses by a Symantec anti-virus program and been found to be virus free.

DOUGLASS F. NOLAND

CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2011, two copies of the Reply Brief of Appellants Estate of Max E. Overbey, Deceased and Glenna J. Overbey, two copies of the Appendix, and one CD ROM containing the Reply Brief was hand-delivered to:

Kevin D. Case, Esq.

Patric S. Linden, Esq.

Case & Roberts, P.C.

Two Pershing Square

2300 Main Street, Suite 900

Kansas City, MO 64108

ATTORNEYS FOR RESPONDENT

DOUGLASS F. NOLAND